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**PASTE ON INSIDE OF FRONT COVER OF VOL. 212 S. W.**

**State Report Citation of Cases in the SOUTHWESTERN REPORTER, VOL. 212.**

The left-hand column shows the page of this volume on which a case begins, and opposite at the right is shown where same case is to be found in the State Report.

Illustration: The case of *Payne v. State*, is in S. W. Rep., vol. 212, p. 161. This table shows that the same case is reported in "85 Tex. Cr. R. 288."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
1.....	278 Mo. 138	113.....	184 Ky. 342	390.....	201 Mo. App. 239	511.....	85 Tex. Cr. R. 299	873.....	278 Mo. 350
5.....	Mo. 115	115.....	184 Ky. 529	393.....	201 Mo. App. 490	514 to 559.....	Tex. Civ. A.	875.....	278 Mo. 324
8.....	Mo. 117	117.....	184 Ky. 447	399.....	201 Mo. App. 418	561.....	Mo. App.	876.....	278 Mo. 277
11.....	Mo. 119	119.....	184 Ky. 477	404.....	Mo. App. 563*	565.....	Mo. App.	877.....	278 Mo. 436
19.....	202 Mo. App. 459	121.....	184 Ky. 396	411.....	201 Mo. App. 352	568.....	Mo. App.	878.....	Mo.
22.....	Mo. App. 123	123.....	184 Ky. 359	417.....	141 Tenn. 481	568.....	139 Ark. 605	880.....	Mo.
26.....	201 Mo. App. 316	127.....	184 Ky. 523	421.....	184 Ky. 571	567.....	138 Ark. 465	881.....	278 Mo. 403
30.....	202 Mo. App. 509	130.....	184 Ky. 533	422.....	184 Ky. 381	569.....	184 Ky. 727	883.....	278 Mo. 305
34.....	201 Mo. App. 436	131.....	184 Ky. 498	423.....	184 Ky. 466	570.....	184 Ky. 591	884.....	278 Mo. 257
38.....	Mo. App. 142	142.....	184 Ky. 354	428.....	184 Ky. 461	573.....	184 Ky. 548	887.....	Mo.
39.....	Mo. App. 145	145.....	184 Ky. 312	430.....	184 Ky. 429	579.....	184 Ky. 481	889.....	Mo.
41.....	Mo. App. 147	147.....	109 Tex. 452	434.....	184 Ky. 540	580.....	184 Ky. 664	890.....	Mo.
43.....	201 Mo. App. 457	151 to 160.....	Tex.	437.....	184 Ky. 437	583.....	184 Ky. 609	891.....	Mo.
46.....	Mo. App. 161	85 Tex. Cr. R. 288	440.....	184 Ky. 679	586.....	184 Ky. 700	893.....	278 Mo. 263	
48.....	Mo. App. 163	85 Tex. Cr. R. 282	442.....	184 Ky. 638	587.....	184 Ky. 559	896.....	278 Mo. 416	
53.....	Mo. App. 166	85 Tex. Cr. R. 338	453.....	184 Ky. 417	593.....	184 Ky. 587	898.....	Mo. App.	
55.....	201 Mo. App. 408	167.....	85 Tex. Cr. R. 340	456.....	184 Ky. 411	595.....	184 Ky. 455	899.....	Mo. App.
58.....	Mo. App. 168	85 Tex. Cr. R. 297	459.....	184 Ky. 451	597.....	184 Ky. 606	904.....	Mo. App.	
60.....	201 Mo. App. 400	169.....	85 Tex. Cr. R. 343	461.....	184 Ky. 684	600.....	184 Ky. 600	905.....	Mo. App.
61.....	Mo. App. 171	85 Tex. Cr. R. 279	463.....	184 Ky. 598	602.....	184 Ky. 582	908.....	184 Ky. 830	
65.....	Mo. App. 172	85 Tex. Cr. R. 304	464.....	109 Tex. 527	606.....	184 Ky. 694	909.....	184 Ky. 704	
68.....	Mo. App. 173	85 Tex. Cr. R. 334	468.....	109 Tex. 536	608.....	109 Tex. 481	911.....	184 Ky. 722	
71.....	Mo. App. 175 to 394.....	Tex. Civ. A.	469.....	109 Tex. 540	621.....	109 Tex. 510	913.....	184 Ky. 674	
73.....	Mo. App. 205	128 Ark. 500	470.....	Tex.	630.....	109 Tex. 543	915.....	184 Ky. 670	
77.....	128 Ark. 381	308.....	138 Ark. 449	471.....	Tex.	633 to 656.....	Tex.	917.....	184 Ky. 735
80.....	128 Ark. 563	310.....	138 Ark. 442	477.....	110 Tex. 577	658.....	85 Tex. Cr. R. 375	919.....	184 Ky. 739
83.....	128 Ark. 606	318.....	138 Ark. 534	480.....	Tex.	660.....	85 Tex. Cr. R. 355	920.....	184 Ky. 732
84.....	128 Ark. 594	317.....	138 Ark. 483	483.....	Tex.	661.....	85 Tex. Cr. R. 368	921.....	184 Ky. 708
87.....	129 Ark. 29	319.....	138 Ark. 517	489.....	Tex.	663.....	85 Tex. Cr. R. 371	923.....	184 Ky. 600
88.....	129 Ark. 32	325.....	138 Ark. 489	494.....	85 Tex. Cr. R. 292	664 to 845.....	Tex. Civ. A.	925.....	184 Ky. 739
89.....	128 Ark. 613	328.....	138 Ark. 454	497.....	85 Tex. Cr. R. 378	849.....	Mo.	930.....	109 Tex. 552
90.....	129 Ark. 4	330.....	138 Ark. 508	498.....	85 Tex. Cr. R. 409	849.....	Mo.	931.....	109 Tex. 550
93.....	129 Ark. 13	333.....	138 Ark. 497	499.....	85 Tex. Cr. R. 361	851.....	Mo.	932.....	Tex.
94.....	128 Ark. 602	334.....	138 Ark. 471	500.....	85 Tex. Cr. R. 364	851.....	Mo.	932.....	110 Tex. 1
95.....	129 Ark. 16	339.....	278 Mo. 119	501.....	85 Tex. Cr. R. 366	853.....	278 Mo. 177	933 to 950.....	Tex.
99.....	129 Ark. 26	345.....	Mo.	502.....	85 Tex. Cr. R. 373	859.....	278 Mo. 326	952.....	85 Tex. Cr. R. 399
100.....	141 Tenn. 469	348.....	278 Mo. 99	503.....	85 Tex. Cr. R. 391	861.....	Mo.	954.....	85 Tex. Cr. R. 403
101.....	141 Tenn. 474	353.....	Mo.	504.....	85 Tex. Cr. R. 342	864.....	Mo.	954.....	85 Tex. Cr. R. 394
104.....	184 Ky. 367	357.....	Mo.	504.....	85 Tex. Cr. R. 168	865.....	278 Mo. 232	956.....	85 Tex. Cr. R. 397
105.....	184 Ky. 375	369.....	201 Mo. App. 287	505.....	85 Tex. Cr. R. 376	867.....	Mo.	957.....	85 Tex. Cr. R. 310
108.....	184 Ky. 424	378.....	201 Mo. App. 443	507.....	85 Tex. Cr. R. 377	869.....	Mo.	959 to 988.....	Tex. Civ. A.
110.....	184 Ky. 517	384.....	Mo. App.	509.....	85 Tex. Cr. R. 367	871.....	278 Mo. 290	991.....	Mo.

\*Not reported in State Reports.

† Not reported in full in Official Reports; reported in full in the Southwestern Reporter.

[End of Table.]






















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GEORGE D. REYNOLDS, PRESIDING JUDGE.  
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### **MISSOURI (Continued).**

**The Kansas City Court of Appeals.**  
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# CASES REPORTED

	Page		Page
Acker, Ex parte (Tex. Cr. App.).....	500	Bland Lumber & Building Co. v. Galveston,	
Adams, Horn v. (Ky.).....	108	H. & S. A. R. Co. (Tex. Civ. App.).....	750
Aiken, Natt v. (Mo. App.).....	58	Blanton v. Forrest City Mfg. Co. (Ark.)..	330
Alexander v. Lewis (Ky.).....	440	Bock v. Fellman Dry Goods Co. (Tex.	
Alexander, Walker v. (Tex. Civ. App.)....	713	Com. App.).....	633
Allen v. Pollard (Tex.).....	468	Bollin, Wells Fargo & Co. Exp. v. (Tex.	
Allen v. Traylor (Tex. Com. App.).....	945	Civ. App.).....	283
Allen v. Vineyard (Tex. Civ. App.).....	266	Bonatz v. State (Tex. Cr. App.).....	494
American Indemnity Co. v. Zyloni (Tex.		Bookman, Wyss v. (Tex. Civ. App.).....	297
Civ. App.).....	183	Bowman v. Oakley (Tex. Civ. App.).....	549
American Nat. Assur. Co., Roberts v. (Mo.		Bowman v. Ragsdale (Ark.).....	566
App.).....	390	Brading, Pierce-Fordice Oil Ass'n v. (Tex.	
Anderson, Clayton & Co., Gulf, C. & S. F.		Civ. App.).....	707
R. Co. v. (Tex. Civ. App.).....	814	Branum, International Travelers' Ass'n v.	
Anderson Electric Car Co. v. Savings		(Tex.).....	630
Trust Co. (Mo. App.).....	60	Briscoe, Rouss v. (Tex. Civ. App.).....	756
Angelina & N. R. R. Co. v. Railroad Com-		Broocks v. Moss (Tex. Com. App.).....	153
mission of Texas (Tex. Civ. App.).....	703	Brooks, Ex parte (Tex. Cr. App.).....	956
Apple, Loundin v. (Mo.).....	891	Broughton, St. Louis, B. & M. R. Co. v.	
Argeropoulos v. Kansas City Rys. Co.		(Tex. Civ. App.).....	664
(Mo. App.).....	360	Brown v. Fleming (Tex. Com. App.).....	483
Armstrong, McKneely v. (Tex. Civ. App.)..	175	Brown, McClintic v. (Tex. Civ. App.).....	540
Armstrong, Roberts v. (Tex. Civ. App.)..	227	Brown v. Missouri, K. & T. R. Co. (Mo.	
Arno Co-op. Irr. Co. v. Pugh (Tex. Com.		App.).....	26
App.).....	470	Bryant, Meisberg v. (Ky.).....	600
Atchison, T. & S. F. R. Co., Danciger v.		Buckeye Cotton Oil Co., Smith v. (Ark.)...	88
(Mo.).....	5	Buie, Lee v. (Tex. Civ. App.).....	230
Atchison, T. & S. F. R. Co., Strother v.		Burchill v. Hermanneyer (Tex. Civ. App.)..	767
(Mo. App.).....	404	Burkett v. Chestnutt (Tex. Civ. App.).....	271
		Burkhalter v. State (Tex. Cr. App.).....	163
		Burrows, Grant v. (Ark.).....	95
Bailey v. Bailey (Ky.).....	505	Buzan v. Kansas City Rys. Co. (Mo. App.)..	905
Bailey v. Waddy (Ky.).....	459		
Bailey, Wolfe v. (Ky.).....	579	Campbell, Marshall v. (Tex. Civ. App.)... 723	
Ball v. McDuffie (Tex. Civ. App.).....	844	Campbell, Western Union Tel. Co. v.	
Barbee, Larue v. (Ky.).....	142	(Tex. Civ. App.).....	720
Barbee v. Lundy (Tex. Civ. App.).....	257	Campbell v. Wylie (Tex. Civ. App.).....	980
Barber v. State (Tex. Civ. App.).....	292	Carey, Missouri Pac. R. Co. v. (Ark.)....	80
Barcus, O'Brien v. (Tex. Com. App.).....	941	Cassady, Dempsey v. (Ky.).....	573
Barnes, State v. (Tenn.).....	100	Cassville & W. R. Co., Sebree v. (Mo.)... 11	
Barnett v. Prussian Nat. Ins. Co. (Tex.		Caudil v. Wagoner (Ky.).....	422
Civ. App.).....	839	Cavender v. B. Johnson & Son (Mo. App.) 53	
Barnett, Water, Light & Ice Co. of Weath-		Cavitt v. Beall Hardware & Implement Co.	
erford v. (Tex. Civ. App.).....	236	(Tex. Com. App.).....	483
Barrow v. Murray (Tex. Civ. App.).....	178	Cawthon v. Houston (Tex. Civ. App.).....	796
Barry v. State (Tex. Civ. App.).....	304	Chaney v. Glasscock County (Tex. Civ.	
Barton, Cox v. (Tex. Com. App.).....	652	App.).....	534
Barton, Rhodes v. (Ark.).....	333	Chesapeake & O. R. Co., May v. (Ky.)... 131	
Bauss v. Bauss (Tex. Civ. App.).....	965	Chestnutt, Burkett v. (Tex. Civ. App.)... 271	
Beall Hardware & Implement Co., Cavitt		Chicago, B. & Q. R. Co., Rigz v. (Mo.)... 878	
v. (Tex. Com. App.).....	483	Chicago, M. & G. R. Co. v. Stahr (Ky.)... 115	
Beaumont Cotton Oil Mill Co., C. R. Garner		Chicago Pneumatic Tool Co., Weil v. (Ark.)	318
& Co. v. (Tex. Civ. App.).....	690	Christian Moerlein Brewing Co., Crisp v.	
Beaumont, S. L. & W. R. Co., Moyer v.		(Tex. Civ. App.).....	531
(Tex. Com. App.).....	471	Christmas, Hodges v. (Tex. Civ. App.)... 825	
Belcher, Land Mortg. Co. v. Taylor (Tex.		C. H. Robinson Co. v. Hudgins Produce	
Com. App.).....	647	Co. (Ark.).....	305
Benavides v. State (Tex. Cr. App.).....	658	Churchill, Missouri, K. & T. R. Co. of Tex-	
Bennett, Nunan v. (Ky.).....	570	as v. (Tex. Com. App.).....	155
Berger, Wall & Stabe Co. v. (Tex. Civ.		Citizens' State Bank, Southern Surety Co.	
App.).....	975	v. (Tex. Civ. App.).....	556
Berrian v. State (Tex. Cr. App.).....	509	City of Dallas v. Shows (Tex. Com. App.)	633
Berry v. Sedalia (Mo. App.).....	34	City of Ft. Worth v. Weisler (Tex. Civ.	
Bickel v. Henry Bickel Co. (Ky.).....	602	App.).....	280
Bickel Co., Bickel v. (Ky.).....	602	City of Houston, Cawthon v. (Tex. Civ.	
Bigham v. Stamps (Tex. Civ. App.).....	775	App.).....	796
Big Sandy Oil & Gas Development Co.,		City of Houston, Houston Electric Co. v.	
Key v. (Tex. Civ. App.).....	300	(Tex. Civ. App.).....	198
Bird v. Bird (Tex. Civ. App.).....	253	City of Newport, Schmidt v. (Ky.).....	113
Bird v. Bird (Tex. Civ. App.).....	257	City of St. Joseph, Wegenska v. (Mo. App.)	71
B. Johnson & Son, Cavender v. (Mo. App.)	53	City of St. Louis, Kuenzel v. (Mo.).....	876
Black v. Southern Film Service (Tex. Civ.		City of St. Louis v. Schuttenberg (Mo.)...	864
App.).....	295	City of St. Louis, Shanahan v. (Mo.).....	851
Blakeney, Kelly v. (Tex. Com. App.).....	651		

	Page		Page
City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co. (Mo.).....	887	Downing v. La Shot (Mo. App.).....	30
City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co. (Mo.).....	889	Dudderar, Nichols & Shepard Co. v. (Ky.)	923
City of Sedalia, Berry v. (Mo. App.).....	34	Dunn v. Jackson (Tex. Civ. App.).....	959
City of Webster Groves to Use of McMahon v. Reber (Mo. App.).....	38	Dunn v. State (Tex. Cr. App.).....	511
Clark v. Scott (Tex. Civ. App.).....	728	D'Yarmett, Hinton v. (Tex. Civ. App.).....	518
Clark v. Taylor (Tex. Civ. App.).....	231	Dyer, West v. (Mo.).....	880
Clark, Texas Co-op. Inv. Co. v. (Tex. Civ. App.).....	245	Early-Foster Co. v. El Campo Rice Milling Co. (Tex. Civ. App.).....	964
Claycomb, Meredith v. (Mo.).....	861	Eason v. Eason (Tex. Civ. App.).....	972
Cleburne County, Doniphan Lumber Co. v. (Ark.).....	308	East Coast Oil Co., S. A., State Nat. Bank v. (Tex.).....	621
Cleveland Jewish Orphan Asylum, Hughes v. (Ky.).....	428	Eaton v. Tomlinson (Mo.).....	865
Close, Spacey v. (Ky.).....	127	Edwards v. Harris (Ark.).....	89
Closs, Templeman v. (Tex. Civ. App.).....	187	Edwards v. Roberts (Tex. Civ. App.).....	673
Collins v. Pecos & N. T. R. Co. (Tex. Com. App.).....	477	E. H. Taylor, Jr., & Sons, Greene v. (Ky.)	925
Combs, Standifer v. (Ky.).....	921	El Campo Rice Milling Co., Early-Foster Co. v. (Tex. Civ. App.).....	964
Commercial Sec. Co. v. Hull (Tex. Civ. App.).....	986	Elliott, State v. (Tex. Civ. App.).....	695
Commonwealth, De Witt v. (Ky.).....	437	Elasberry Drainage Dist v. Winkelmeyer (Mo.).....	893
Commonwealth, Gravitt v. (Ky.).....	430	E. L. Witt & Sons v. Stith (Tex. Civ. App.).....	673
Commonwealth v. Metcalfe (Ky.).....	434	Emberline v. State (Tex. Cr. App.).....	952
Commonwealth, Ray v. (Ky.).....	908	Ennis-Hanly-Blackburn Coffee Co. v. Olin (Mo. App.).....	561
Conn, Kirby v. (Tex.).....	469	Ervin, Texas & Pacific Coal Co. v. (Tex. Civ. App.).....	234
Conran, State ex rel. and to Use of Fenn v. (Mo.).....	869	Evans v. McKay (Tex. Civ. App.).....	680
Consolidated School Dist. No. 3, Tp. 30, R. 23, Greene County, Wadlow v. (Mo. App.).....	904	Evans v. Wells (Ark.).....	328
Continental State Bank, Sweetwater Ice & Cold Storage Co. v. (Tex. Civ. App.)..	740	Eversole, Krypton Coal Co. v. (Ky.).....	421
Cook, Klotz v. (Ky.).....	917	Fahring, White v. (Tex. Civ. App.).....	193
Cook, Urban v. (Tex. Com. App.).....	160	Faulkner's Adm'r v. Louisville & N. R. Co. (Ky.).....	130
Cooper v. Hinman (Tex. Civ. App.).....	972	Faust, Hicks v. (Tex.).....	608
Cooper v. Johnson County (Tex. Civ. App.)	528	Federal Coal Co., Greene v. (Ky.).....	580
Cooper v. Rush (Ark.).....	94	Fellman Dry Goods Co., Bock v. (Tex. Com. App.).....	635
Coots, Ex parte (Tex. Cr. App.).....	173	Ferguson, State v. (Mo.).....	339
Coughenour v. Hutchings (Mo.).....	875	Fidelity & Casualty Co. of New York, Newell v. (Mo.).....	991
Cox v. Barton (Tex. Com. App.).....	652	First Nat. Bank v. Todd (Tex. Civ. App.)	219
Cox, Good Roads Machinery Co. v. (Ark.)	87	First Presbyterian Church of Stockton, Rutledge v. (Mo.).....	859
Cox, Swift & Co. v. (Ark.).....	83	First State Bank, Szanto v. (Tex. Civ. App.).....	971
Crawford v. Staples (Ky.).....	119	Fischl, Sykes v. (Tex. Civ. App.).....	217
C. R. Garner & Co. v. Beaumont Cotton Oil Mill Co. (Tex. Civ. App.).....	690	Fish v. Fish (Ky.).....	586
Crisp v. Christian Moerlein Brewing Co. (Tex. Civ. App.).....	531	Fitzgerald, Gentry v. (Mo. App.).....	39
Critten v. New (Mo. App.).....	46	Flattery v. Miller (Tex.).....	932
Crosby v. State (Tex. Cr. App.).....	168	Fleming, Brown v. (Tex. Com. App.).....	483
Crump, Texas Electric R. Co. v. (Tex. Civ. App.).....	827	Fleming, Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.).....	233
Cumberland R. Co. v. Girdner (Ky.).....	105	Fleming, Pennington v. (Tex. Civ. App.)	303
Currie v. Glasscock County (Tex. Civ. App.).....	533	Fletcher v. Johnson (Ky.).....	573
Dallas Power & Light Co., Stemmons v. (Tex. Civ. App.).....	222	Foege v. Woestendiek (Mo. App.).....	411
Danciger v. Atchison, T. & S. F. R. Co. (Mo.).....	5	Fogle v. Kaster (Mo. App.).....	565
Daniel v. Shaver (Ky.).....	913	Forrest City Mfg. Co., Blanton v. (Ark.)	330
Davenport, Williams v. (Tex. Civ. App.)...	675	Ft. Worth & D. C. R. Co. v. Speer (Tex. Civ. App.).....	762
Davis v. Geiger (Mo. App.).....	384	Ft. Worth & R. G. R. Co. v. Fleming (Tex. Civ. App.).....	233
Davis v. Greenlee (Mo. App.).....	22	Ft. Worth & R. G. R. Co. v. Jones (Tex. Civ. App.).....	552
Davis, Kirby Lumber Co. v. (Tex. Civ. App.).....	831	Free v. Maxwell (Ark.).....	325
Davis, United States Fidelity & Guaranty Co. v. (Tex. Civ. App.).....	239	Freeman v. W. B. Walker & Sons (Tex. Com. App.).....	637
Dempsey v. Cassady (Ky.).....	573	Freeman v. W. B. Walker & Sons (Tex. Com. App.).....	639
Devine Independent School Dist. v. Koehler (Tex. Civ. App.).....	238	Freeport Town Site Co. v. S. H. Hudgins & Sons (Tex. Civ. App.).....	287
Dew Bros., Sugarland R. Co. v. (Tex. Civ. App.).....	190	Fromme v. State (Tex. Cr. App.).....	501
De Witt v. Commonwealth (Ky.).....	437	Galizio, Rosen v. (Ky.).....	104
Dickerson v. State (Tex. Cr. App.).....	497	Galveston, H. & S. A. R. Co., Jeff Bland Lumber & Building Co. v. (Tex. Civ. App.).....	750
Dickerson v. Tri-County Drainage Dist. (Ark.).....	334	Galveston, H. & S. A. R. Co., Stevens v. (Tex. Com. App.).....	639
Doniphan Lumber Co. v. Cleburne County (Ark.).....	308	Gardner v. State (Tex. Cr. App.).....	169
Donner v. Whitecotton (Mo. App.).....	378	Gardner, Warren Oil & Gas Co. v. (Ky.)	456
		Garner & Co. v. Beaumont Cotton Oil Mill Co. (Tex. Civ. App.).....	690



# CASES REPORTED (212 S.W.)

ix

	Page		Page
Geiger, Davis v. (Mo. App.).....	384	Houston Electric Co. v. Houston (Tex. Civ. App.).....	198
Gentry v. Fitzgerald (Mo. App.).....	39	Houston Ice & Brewing Co. v. Harlan (Tex. Civ. App.).....	779
Gibson v. Hempstead County (Ark.)....	99	Houston Oil Co. of Texas v. Jordan (Tex. Civ. App.).....	544
Giles v. Michigan Cent. R. Co. (Mo.)....	873	Houston Oil Co. of Texas v. W. R. Pickering Lumber Co. (Tex. Civ. App.).....	802
Gill & Sons Co., Reed v. (Mo. App.)....	43	Houston & T. C. R. Co. v. Reichardt & Schulte Co. (Tex. Civ. App.).....	208
Gilliam, Jones v. (Tex.).....	930	Howard v. Stearns Coal & Lumber Co. (Ky.).....	463
Gillilan v. Gillilan (Mo.).....	348	Howard, Texas Pac. Coal & Oil Co. v. (Tex. Civ. App.).....	735
Girdner, Cumberland R. Co. v. (Ky.)....	105	Hudgins Produce Co., C. H. Robinson Co. v. (Ark.).....	305
Glasscock County, Chaney v. (Tex. Civ. App.).....	534	Hudgins & Sons, Freeport Town Site Co. v. (Tex. Civ. App.).....	287
Glasscock County, Currie v. (Tex. Civ. App.).....	533	Huff v. Woosley (Ky.).....	597
Goodman v. State (Tex. Cr. App.).....	171	Hughes v. Cleveland Jewish Orphan Asylum (Ky.).....	428
Good Roads Machinery Co. v. Cox (Ark.)	87	Hughes, Mudge v. (Tex. Civ. App.).....	819
Gough v. Jones (Tex. Com. App.).....	943	Hull, Commercial Sec. Co. v. (Tex. Civ. App.).....	986
Grace v. Missouri, K. & T. R. Co. (Mo. App.).....	41	Hume, Northcutt v. (Tex. Com. App.)....	157
Grant v. Burrows (Ark.).....	95	Hunnicke v. Meramec Quarry Co. (Mo.)..	345
Gravitt v. Commonwealth (Ky.).....	480	Hunsucker, Sanger Bros. v. (Tex. Civ. App.).....	514
Green, Producers' Oil Co. v. (Tex. Civ. App.).....	68	Hurst v. Southern R. Co. in Kentucky (Ky.).....	461
Green, Simpson v. (Tex. Civ. App.).....	263	Hutchings, Coughenour v. (Mo.).....	876
Green v. Strother (Mo. App.).....	399	Illinois Bankers' Life Ass'n, Miller v. (Ark.).....	310
Greene v. E. H. Taylor, Jr., & Sons (Ky.)	925	Independent Order of Puritans v. Lockhart (Tex. Civ. App.).....	550
Greene v. Federal Coal Co. (Ky.).....	580	International Travelers' Ass'n v. Branum (Tex.).....	630
Greenlee, Davis v. (Mo. App.).....	22	International Travelers' Ass'n v. Powell (Tex.).....	931
Greenwood, Vauter v. (Tex. Civ. App.)..	269	Irvin Development Co., Ohio Valley Oil & Gas Co. v. (Ky.).....	110
Griffin, State v. (Mo.).....	877	Irwin v. Moore (Tex. Civ. App.).....	710
Griffin v. State (Tex. Cr. App.).....	499	Jackson, Dunn v. (Tex. Civ. App.).....	959
Griswold, Merchants' Life Ins. Co. v. (Tex. Civ. App.).....	807	Jackson, Holton v. (Ky.).....	587
Grubb v. McAfee (Tex.).....	464	Jackson, State v. (Tex. Civ. App.).....	718
Guderian, Rowe v. (Tex. Civ. App.).....	960	Janko, Western Union Tel. Co. v. (Tex. Civ. App.).....	243
Gulf, C. & S. F. R. Co. v. Anderson, Clayton & Co. (Tex. Civ. App.).....	814	Jeff Bland Lumber & Building Co. v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.).....	750
Gulf, C. & S. F. R. Co., Hicks v. (Tex. Civ. App.).....	840	Jefferson v. State (Tex. Cr. App.).....	505
Gulf, C. & S. F. R. Co. v. State (Tex. Civ. App.).....	845	Jennings v. Jennings (Tex. Civ. App.)....	772
Gulf & I. R. Co. of Texas v. Stephenson (Tex. Civ. App.).....	215	J. H. Russell & Son, Rio Grande & E. F. R. Co. v. (Tex. Civ. App.).....	530
Gunnell, Lowther-Kantman Oil & Coal Co. v. (Ky.).....	593	John E. Morrison & Co. v. Murff (Tex. Civ. App.).....	212
Guthrie, McKinsey v. (Mo. App.).....	563	John Gill & Sons Co., Reed v. (Mo. App.)	43
Hamburger v. Hirsch (Mo. App.).....	49	Johnson, Fletcher v. (Ky.).....	573
Haner, Milliken v., two cases (Ky.).....	905	Johnson County, Cooper v. (Tex. Civ. App.).....	528
Hardin v. Horn (Ky.).....	578	Johnson & Son, Cavender v. (Mo. App.)..	53
Harlan, Houston Ice & Brewing Co. v. (Tex. Civ. App.).....	779	Jones, Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.).....	552
Harrell, Parker v. (Tex. Civ. App.).....	542	Jones v. Gilliam (Tex.).....	930
Harris, Edwards v. (Ark.).....	89	Jones, Gough v. (Tex. Com. App.).....	943
Harris, Travelers' Ins. Co. v. (Tex. Com. App.).....	983	Jordan, Houston Oil Co. of Texas v. (Tex. Civ. App.).....	544
Harrison v. Perry (Ky.).....	911	Kansas City Breweries Co. v. Markowitz (Mo.).....	849
Hart-Parr Co. v. Krizan & Maier (Tex. Civ. App.).....	835	Kansas City Light & Power Co., Woods v. (Mo. App.).....	899
Haupt, Michaelis v. (Tex. Civ. App.).....	274	Kansas City Rys. Co., Argeropoulos v. (Mo. App.).....	369
Haynes, Western Union Tel. Co. v. (Tex. Civ. App.).....	260	Kansas City Rys. Co., Buzan v. (Mo. App.).....	905
Haynie v. Stovall (Tex. Civ. App.).....	792	Kaster, Fogle v. (Mo. App.).....	565
Heard v. Vineyard (Tex. Com. App.)....	489	Keeton v. Tipton (Ky.).....	909
Helfer, Messer v. (Mo.).....	806	Kelly v. Blakeney (Tex. Com. App.)....	631
Hempstead County, Gibson v. (Ark.)....	99	Kemper v. Long (Mo.).....	871
Hency Bickel Co., Bickel v. (Ky.).....	602	Key v. Big Sandy Oil & Gas Development Co. (Tex. Civ. App.).....	300
Hendricks, Tripplett v. (Tex. Civ. App.)	754	Kilpatrick v. Robert (Mo.).....	884
Hendrix v. Lewis (Ky.).....	569		
Hermesmeier, Burchill v. (Tex. Civ. App.)	767		
Hicks v. Faust (Tex.).....	608		
Hicks v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.).....	840		
Hilton v. Universal Const. Co. (Mo.)....	867		
Hinnan, Cooper v. (Tex. Civ. App.).....	972		
Hinton v. D'Yarmett (Tex. Civ. App.)....	518		
Hirsch, Hamburger v. (Mo. App.).....	49		
Hoagland Wagon Co. v. London Guarantee & Accident Co. (Mo. App.).....	393		
Hodges v. Christmas (Tex. Civ. App.)....	825		
Hollinger, Ilano Granite & Marble Co. v. (Tex. Com. App.).....	151		
Hollman v. State (Tex. Cr. App.).....	663		
Holton v. Jackson (Ky.).....	587		
Horn v. Adams (Ky.).....	108		
Horn, Hardin v. (Ky.).....	573		

	Page		Page
Kindrix v. State (Ark.).....	84	Miller v. Powers (Ky.).....	453
Kirby v. Conn (Tex.).....	469	Miller v. Tallent (Mo. App.).....	73
Kirby Lumber Co. v. Davis (Tex. Civ. App.).....	881	Milliken v. Haner, two cases (Ky.).....	605
Klene, State ex rel. Clark v. (Mo. App.).....	55	Mississippi, A. & W. R. Co., State v. (Ark.).....	317
Klotz v. Cook (Ky.).....	917	Missouri, K. & T. R. Co., Brown v. (Mo. App.).....	26
Kochler, Devine Independent School Dist. v. (Tex. Civ. App.).....	288	Missouri, K. & T. R. Co., Grace v. (Mo. App.).....	41
Kraft & Madero, Rio Grande, E. P. & S. F. R. Co. v. (Tex. Civ. App.).....	981	Missouri, K. & T. R. Co. of Texas v. Churchill (Tex. Com. App.).....	155
Krizan & Maler, Hart-Parr Co. v. (Tex. Civ. App.).....	885	Missouri, K. & T. R. Co. of Texas, Moose v. (Tex. Com. App.).....	645
Kuenzel v. St. Louis (Mo.).....	876	Missouri Pac. R. Co. v. Carey (Ark.).....	80
Krypton Coal Co. v. Eversole (Ky.).....	421	Moerlein Brewing Co., Criap v. (Tex. Civ. App.).....	531
Lamb Const. Co., Slinkard v. (Mo. App.)..	61	Moore, Irwin v. (Tex. Civ. App.).....	710
Lancaster v. Schreiner (Mo. App.).....	19	Moore, Smith v. (Tex. Civ. App.).....	988
Larue v. Barbee (Ky.).....	142	Moose v. Missouri, K. & T. R. Co. of Texas (Tex. Com. App.).....	645
Lasater v. Ramirez (Tex. Com. App.).....	935	Morrison & Co. v. Murff (Tex. Civ. App.).....	212
La Shot, Downing v. (Mo. App.).....	80	Moss, Brooks v. (Tex. Com. App.).....	153
Lee v. Buie (Tex. Civ. App.).....	230	Moye v. Beaumont, S. L. & W. R. Co. (Tex. Com. App.).....	471
Leonard, Stark v. (Tex. Civ. App.).....	671	Mudge v. Hughes (Tex. Civ. App.).....	819
Lewis, Alexander v. (Ky.).....	440	Murff, John E. Morrison & Co. v. (Tex. Civ. App.).....	212
Lewis, Hendrix v. (Ky.).....	509	Murray, Barrow v. (Tex. Civ. App.).....	178
Liles, State v. (Tex. Civ. App.).....	517	National Life & Accident Ins. Co., Scales v. (Mo.).....	8
Bindholm, Temple Hill Development Co. v. (Tex. Civ. App.).....	984	Nations v. Miller (Tex. Civ. App.).....	742
Llano Granite & Marble Co. v. Hollinger (Tex. Com. App.).....	151	Natt v. Aiken (Mo. App.).....	58
Lockhart, Independent Order of Puritans v. (Tex. Civ. App.).....	559	Nelson v. State (Ark.).....	93
London Guarantee & Accident Co., Hoagland Wagon Co. v. (Mo. App.).....	393	New, Critten v. (Mo. App.).....	46
Long, Kemper v. (Mo.).....	871	Newell v. Fidelity & Casualty Co. of New York (Mo.).....	991
Loomis, McBride v. (Tex. Com. App.).....	480	Nichols & Shepard Co. v. Dudderar (Ky.).....	923
Lopez v. State (Tex. Cr. App.).....	954	Nix, Ex parte (Tex. Cr. App.).....	507
Lorillard Co. v. Scott (Ky.).....	145	Norheutt v. Hume (Tex. Com. App.).....	157
Louisville & N. R. Co., Faulkner's Adm'r v. (Ky.).....	130	North Kansas City Development Co., Produce Exch. Bank v. (Mo. App.).....	698
Louisville & N. R. Co. v. Staebler (Ky.)..	919	North Texas Trust Co., Witherspoon-McMullen Live Stock Commission Co. v. (Tex. Civ. App.).....	278
Louisville & N. R. Co., Terhune v. (Ky.)..	915	Nunan v. Bennett (Ky.).....	570
Loundin v. Apple (Mo.).....	891	Oakley, Bowman v. (Tex. Civ. App.)....	549
Lowther-Kaufman Oil & Coal Co. v. Gunnell (Ky.).....	698	O'Brien v. Barcus (Tex. Com. App.).....	941
Lundy, Barbee v. (Tex. Civ. App.).....	257	Odell v. Metropolitan St. R. Co. (Mo.)..	849
McAfee, Grubb v. (Tex.).....	464	Ohio Valley Oil & Gas Co. v. Irvin Development Co. (Ky.).....	110
McAuley, Teich v. (Tex. Civ. App.).....	979	Olin, Ennis-Hanly-Blackburn Coffee Co. v. (Mo. App.).....	561
McBride v. Loomis (Tex. Com. App.).....	480	Oliver v. Southern Trust Co. (Ark.).....	77
McClintic v. Brown (Tex. Civ. App.).....	540	Ozark Cooperage & Lumber Co. of New Jersey, Walker v. (Mo.).....	881
McConnell v. State (Tex. Cr. App.).....	498	Paducah Tel. Co., Roaring Springs Town Site Co. v. (Tex.).....	147
McDuffie, Ball v. (Tex. Civ. App.).....	844	Park v. Rich (Tex. Com. App.).....	947
McKay, Evans (Tex. Civ. App.).....	680	Parker v. Harrell (Tex. Civ. App.).....	542
Mackay Telegraph-Cable Co. v. Proctor (Tex. Civ. App.).....	547	Payne v. State (Tex. Cr. App.).....	161
McKinsey v. Guthrie (Mo. App.).....	543	Pecos & N. T. R. Co., Collins v. (Tex. Com. App.).....	477
McKneely v. Armstrong (Tex. Civ. App.)..	175	Pecos & N. T. R. Co., Railroad Commission of Texas v. (Tex. Civ. App.).....	535
Markowitz, Kansas City Breweries Co. v. (Mo.).....	849	Pennington v. Fleming (Tex. Civ. App.)..	303
Marshall v. Campbell (Tex. Civ. App.).....	723	Perry, Harrison v. (Ky.).....	911
Matlock, West Texas Bank & Trust Co. v. (Tex. Com. App.).....	987	Phelps v. Stoner's Adm'r (Ky.).....	423
Maxwell, Free v. (Ark.).....	325	Phillips v. Williamson (Ky.).....	121
May v. Chesapeake & O. R. Co. (Ky.).....	131	Pickering Lumber Co., Houston Oil Co. of Texas v. (Tex. Civ. App.).....	802
Meadors v. Sherrill (Tex. Civ. App.).....	546	Pierce-Fordice Oil Ass'n v. Brading (Tex. Civ. App.).....	707
Meisberg v. Bryant (Ky.).....	600	P. Lorillard Co. v. Scott (Ky.).....	145
Meramec Quarry Co., Hunicke v. (Mo.)....	345	Pollard, Allen v. (Tex.).....	468
Merchant, Schaff v. (Tex. Civ. App.).....	970	Ponder v. State (Tenn.).....	417
Merchants' Life Ins. Co. v. Griswold (Tex. Civ. App.).....	807	Potter, Venters v. (Ky.).....	117
Meredith v. Claycomb (Mo.).....	861	Powell, International Travelers' Ass'n v. (Tex.).....	931
Messer v. Helfer (Mo.).....	898	Powers, Miller v. (Ky.).....	453
Metcalfe, Commonwealth v. (Ky.).....	434	Prewitt v. Wilborn (Ky.).....	442
Methodist Episcopal Church, South, of Paducah, Walsh v. (Tex. Com. App.).....	950	Proctor, Mackay Telegraph-Cable Co. v. (Tex. Civ. App.).....	547
Metropolitan St. R. Co., Odell v. (Mo.)....	849	Producers' Oil Co. v. Green (Tex. Civ. App.).....	68
Metz, Rauch v. (Mo.).....	353		
Metz, Rauch v. (Mo.).....	357		
Meyer v. State, two cases (Tex. Cr. App.)..	504		
Michaelis v. Haupt (Tex. Civ. App.).....	274		
Michigan Cent. R. Co., Giles v. (Mo.)....	873		
Miller, Flattery v. (Tex.).....	932		
Miller v. Illinois Bankers' Life Ass'n (Ark.).....	310		
Miller, Nations v. (Tex. Civ. App.).....	742		

# CASES REPORTED

(212 S.W.)

xi

	Page		Page
Produce Exch. Bank v. North Kansas City Development Co. (Mo. App.).....	898	Shepherd's Estate, State v. (Tenn.).....	101
Prudential Ins. Co. of America v. Eagen (Ky.).....	123	Sherbley, Texas & Pacific Coal Co. v. (Tex. Civ. App.).....	758
Prussian Nat. Ins. Co., Barnett v. (Tex. Civ. App.).....	339	Sherill, Meadors v. (Tex. Civ. App.).....	546
Pugh, Arno Co-op. Irr. Co. v. (Tex. Com. App.).....	470	S. H. Hudgins & Sons, Freeport Town Site Co. v. (Tex. Civ. App.).....	287
Rabe v. State (Tex. Cr. App.).....	502	Shoemaker, State ex rel. Ridge v. (Mo.)...	1
Ragen, Prudential Ins. Co. of America v. (Ky.).....	123	Short, Union Cent. Life Ins. Co. v. (Tex. Civ. App.).....	225
Ragsdale, Bowman v. (Ark.).....	566	Shows, City of Dallas v. (Tex. Com. App.)	633
Railroad Commission of Texas, Angelina & N. R. R. Co. v. (Tex. Civ. App.).....	703	Shull, Trapp v. (Mo.).....	883
Railroad Commission of Texas v. Pecos & N. T. R. Co. (Tex. Civ. App.).....	535	Sibley v. Robison (Tex.).....	932
Ramirez, Lasater v. (Tex. Com. App.).....	935	Simpson v. Green (Tex. Civ. App.).....	203
Rauch v. Metz (Mo.).....	353	Slade v. State (Tex. Cr. App.).....	661
Rauch v. Metz (Mo.).....	357	Slinkard v. Lamb Const. Co. (Mo. App.)	61
Ray v. Commonwealth (Ky.).....	908	Skillern v. White River Levee Dist. (Ark.)	90
Reber, City of Webster Groves to use of McMahon v. (Mo. App.).....	38	Smith v. Buckeye Cotton Oil Co. (Ark.)..	88
Reed v. John Gill & Sons Co. (Mo. App.)	43	Smith v. Moore (Tex. Civ. App.).....	988
Reichardt & Schulte Co., Houston & T. C. R. Co. v. (Tex. Civ. App.).....	203	Smith v. State (Tex. Cr. App.).....	660
Rhodes v. Barton (Ark.).....	333	Smith, Tutt v. (Ky.).....	920
Rich, Park v. (Tex. Com. App.).....	947	Southern Film Service, Black v. (Tex. Civ. App.).....	295
Richardson v. Terry (Tex. Civ. App.).....	523	Southern R. Co. in Kentucky, Hurst v. (Ky.).....	461
Rigg v. Chicago, B. & Q. R. Co. (Mo.)...	878	Southern Surety Co. v. Citizens' State Bank (Tex. Civ. App.).....	556
Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero (Tex. Civ. App.).....	981	Southern Trust Co., Oliver v. (Ark.)....	77
Rio Grande & E. P. R. Co. v. J. H. Russell & Son (Tex. Civ. App.).....	530	Southwestern Portland Cement Co. v. Schwartz (Tex. Civ. App.).....	977
Roaring Springs Town Site Co. v. Paducah Tel. Co. (Tex.).....	147	Spacey v. Close (Ky.).....	127
Robert, Kilpatrick v. (Mo.).....	884	Spanell, Ex parte (Tex. Cr. App.).....	172
Roberts v. American Nat. Assur. Soc. (Mo. App.).....	390	Sparkman v. Stout (Tex. Civ. App.).....	528
Roberts v. Armstrong (Tex. Civ. App.)...	227	Speer, Ft. Worth & D. C. R. Co. v. (Tex. Civ. App.).....	762
Roberts, Edwards v. (Tex. Civ. App.).....	673	Staebler, Louisville & N. R. Co. v. (Ky.)	919
Rodgers v. State (Tex. Cr. App.).....	166	Stahr, Chicago, M. & G. R. Co. v. (Ky.)...	115
Robinson Co. v. Hudgins Produce Co. (Ark.).....	305	Stamps, Bigham v. (Tex. Civ. App.).....	775
Robison, Sibley v. (Tex.).....	932	Standifer v. Combs (Ky.).....	921
Rosen v. Galizio (Ky.).....	104	Standifer v. State (Tex. Cr. App.).....	954
Ross v. State (Tex. Cr. App.).....	167	Staples, Crawford v. (Ky.).....	119
Rouss v. Briacoe (Tex. Civ. App.).....	756	Stark v. Leonard (Tex. Civ. App.).....	677
Rowden v. Rowden (Tex. Civ. App.).....	302	State, Barber v. (Tex. Civ. App.).....	292
Rowe v. Guderian (Tex. Civ. App.).....	960	State v. Barnes (Tenn.).....	100
Ruecking Const. Co., City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. (Mo.).....	887	State, Barry v. (Tex. Civ. App.).....	304
Ruecking Const. Co., City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. (Mo.).....	889	State, Benavides v. (Tex. Cr. App.).....	658
Rupert v. Swindle (Tex. Civ. App.).....	671	State, Berrian v. (Tex. Cr. App.).....	506
Rush, Cooper v. (Ark.).....	94	State, Bonatz v. (Tex. Cr. App.).....	494
Russell & Son, Rio Grande & E. P. R. Co. v. (Tex. Civ. App.).....	530	State, Burkhalter v. (Tex. Cr. App.).....	163
Rutledge v. First Presbyterian Church of Stockton (Mo.).....	859	State, Crosby v. (Tex. Cr. App.).....	168
St. Louis, B. & M. R. Co. v. Broughton (Tex. Civ. App.).....	664	State, Dickerson v. (Tex. Cr. App.).....	497
St. Louis, S. F. & T. R. Co. v. Whatley (Tex. Civ. App.).....	968	State, Dunn v. (Tex. Cr. App.).....	511
Sanger Bros. v. Hunsucker (Tex. Civ. App.).....	514	State v. Elliott (Tex. Civ. App.).....	695
Sauer v. Taylor's Ex'r (Ky.).....	583	State, Emberline v. (Tex. Cr. App.).....	952
Savings Trust Co., Anderson Electric Car Co. v. (Mo. App.).....	60	State v. Ferguson (Mo.).....	339
Scales v. National Life & Accident Ins. Co. (Mo.).....	8	State, Fromme v. (Tex. Cr. App.).....	501
Schaff v. Merchant (Tex. Civ. App.).....	970	State, Gardner v. (Tex. Cr. App.).....	169
Schall v. United Rys. Co. of St. Louis (Mo.)	890	State, Goodman v. (Tex. Cr. App.).....	171
Schmidt v. Newport (Ky.).....	113	State v. Griffin (Mo.).....	877
Schreiner, Lancaster v. (Mo. App.).....	19	State, Griffin v. (Tex. Cr. App.).....	499
Schuttenberg, City of St. Louis v. (Mo.)...	864	State, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	845
Schwartz, Southwestern Portland Cement Co. v. (Tex. Civ. App.).....	977	State, Hollman v. (Tex. Cr. App.).....	668
Scott, Clark v. (Tex. Civ. App.).....	728	State v. Jackson (Tex. Civ. App.).....	718
Scott, P. Lorillard Co. v. (Ky.).....	145	State, Jefferson v. (Tex. Cr. App.).....	505
Sebree v. Cassville & W. R. Co. (Mo.)...	11	State, Kindrix v. (Ark.).....	84
Shanahan v. St. Louis (Mo.).....	851	State v. Liles (Tex. Civ. App.).....	517
Shaver, Daniel v. (Ky.).....	913	State, Lopez v. (Tex. Cr. App.).....	954
		State, McConnell v. (Tex. Cr. App.).....	498
		State, Meyer v., two cases (Tex. Cr. App.)	504
		State v. Mississippi, A. & W. R. Co. (Ark.)	317
		State, Nelson v. (Ark.).....	93
		State, Payne v. (Tex. Cr. App.).....	181
		State, Ponder v. (Tenn.).....	417
		State, Rabe v. (Tex. Cr. App.).....	502
		State, Rodgers v. (Tex. Cr. App.).....	166
		State, Ross v. (Tex. Cr. App.).....	167
		State v. Shepherd's Estate (Tenn.).....	101
		State, Slade v. (Tex. Cr. App.).....	661
		State, Smith v. (Tex. Cr. App.).....	660
		State, Standifer v. (Tex. Cr. App.).....	954
		State v. Stewart (Mo.).....	853
		State, Torrence v. (Tex. Cr. App.).....	957
		State, Wales v. (Tex. Cr. App.).....	503
		State, Walker v. (Ark.).....	319
		State, Webb v. (Ark.).....	567

	Page		Page
State ex rel. and to Use of Fenn v. Conran (Mo.)	869	Van Velzer, Stryker v. (Tex. Civ. App.)	674
State ex rel. Clark v. Klene (Mo. App.)	55	Vauter v. Greenwood (Tex. Civ. App.)	269
State ex rel. Ridge v. Shoemaker (Mo.)	1	Venters v. Potter (Ky.)	117
State Nat. Bank v. East Coast Oil Co., S. A. (Tex.)	621	Vineyard, Allen v. (Tex. Civ. App.)	266
Stearns Coal & Lumber Co., Howard v. (Ky.)	463	Vineyard, Heard v. (Tex. Com. App.)	489
Stemmons v. Dallas Power & Light Co. (Tex. Civ. App.)	222	Waddy, Bailey v. (Ky.)	459
Stephenson, Gulf & I. R. Co. of Texas v. (Tex. Civ. App.)	215	Wadlow v. Consolidated School Dist. No. 3, Tp. 30, R. 23, Greene County (Mo. App.)	904
Stevens v. Galveston, H. & S. A. R. Co. (Tex. Com. App.)	639	Wagoner, Caudil v. (Ky.)	422
Stewart, State v. (Mo.)	853	Wales v. State (Tex. Cr. App.)	503
Stith, E. L. Witt & Sons v. (Tex. Civ. App.)	673	Walker v. Alexander (Tex. Civ. App.)	713
Stoner's Adm'r, Phelps v. (Ky.)	423	Walker v. Ozark Cooperage & Lumber Co. of New Jersey (Mo.)	881
Stout, Sparkman v. Tex. Civ. App.)	526	Walker v. State (Ark.)	319
Stovall, Haynie (Tex. Civ. App.)	792	Walker v. Willmore (Tex. Com. App.)	655
Strother v. Atchison, T. & S. F. R. Co. (Mo. App.)	404	Walker & Sons, Freeman v. (Tex. Com. App.)	637
Strother, Green v. (Mo. App.)	399	Walker & Sons, Freeman v. (Tex. Com. App.)	639
Stryker v. Van Velzer (Tex. Civ. App.)	674	Wall & Stabe Co. v. Berger (Tex. Civ. App.)	975
Stutzman, Ward v. (Mo. App.)	65	Walsh v. Methodist Episcopal Church, South, of Paducah (Tex. Com. App.)	950
Sugarland R. Co. v. Dew Bros. (Tex. Civ. App.)	190	Ward v. Stutzman (Mo. App.)	65
Sweetwater Ice & Cold Storage Co. v. Continental State Bank (Tex. Civ. App.)	740	Warren Oil & Gas Co. v. Gardner (Ky.)	450
Swift & Co. v. Cox (Ark.)	83	Water, Light & Ice Co. of Weatherford v. Barnett (Tex. Civ. App.)	236
Swindle, Rupert v. (Tex. Civ. App.)	671	W. B. Walker & Sons, Freeman v. (Tex. Com. App.)	637
Sykes v. Fischl (Tex. Civ. App.)	217	W. B. Walker & Sons, Freeman v. (Tex. Com. App.)	639
Szanto v. First State Bank (Tex. Civ. App.)	971	W. C. Belcher Land Mortg. Co. v. Taylor (Tex. Com. App.)	647
Tallent, Miller v. (Mo. App.)	73	Webb v. State (Ark.)	567
Taylor, Clark v. (Tex. Civ. App.)	231	Wegenka v. St. Joseph (Mo. App.)	71
Taylor, W. C. Belcher Land Mortg. Co. v. (Tex. Com. App.)	647	Weil v. Chicago Pneumatic Tool Co. (Ark.)	313
Taylor v. White (Tex. Com. App.)	656	Weisler, City of Ft. Worth v. (Tex. Civ. App.)	280
Taylor, Jr., & Sons, Greene v. (Ky.)	925	Wells, Evans v. (Ark.)	328
Taylor's Ex'r, Sauer v. (Ky.)	583	Wells Fargo & Co. Exp. v. Bollin (Tex. Civ. App.)	283
Teasdale, Traders' Nat. Bank v. (Mo.)	851	West v. Dyer (Mo.)	880
Teich v. McAuley (Tex. Civ. App.)	979	West Texas Bank & Trust Co. v. Matlock (Tex. Com. App.)	937
Temple Hill Development Co. v. Lindholm (Tex. Civ. App.)	984	Western Union Tel. Co. v. Campbell (Tex. Civ. App.)	720
Templeman v. Closs (Tex. Civ. App.)	187	Western Union Tel. Co. v. Haynes (Tex. Civ. App.)	260
Terhune v. Louisville & N. R. Co. (Ky.)	915	Western Union Tel. Co. v. Janko (Tex. Civ. App.)	243
Terry, Richardson v. (Tex. Civ. App.)	523	Whatley, St. Louis, S. F. & T. R. Co. v. (Tex. Civ. App.)	968
Texas Bitulithic Co., Wooten v. (Tex. Civ. App.)	248	White v. Fahring (Tex. Civ. App.)	193
Texas Co-op. Inv. Co. v. Clark (Tex. Civ. App.)	245	White, Taylor v. (Tex. Com. App.)	656
Texas Electric R. Co. v. Crump (Tex. Civ. App.)	827	Whitcotton, Donner v. (Mo. App.)	378
Texas Pac. Coal & Oil Co. v. Howard (Tex. Civ. App.)	735	White River Levee Dist., Skillern v. (Ark.)	90
Texas & Pacific Coal Co. v. Ervin (Tex. Civ. App.)	234	Wilborn, Prewitt v. (Ky.)	442
Texas & Pacific Coal Co. v. Sherbley (Tex. Civ. App.)	758	Williams v. Davenport (Tex. Civ. App.)	675
Tipton, Keeton v. (Ky.)	909	Williamson, Phillips v. (Ky.)	121
Todd, First Nat. Bank v. (Tex. Civ. App.)	219	Willmore, Walker v. (Tex. Com. App.)	655
Tomlinson, Ecton v. (Mo.)	865	Winkelmeyer, Elsberry Drainage Dist. v. (Mo.)	893
Torrence v. State (Tex. Cr. App.)	957	Witherspoon-McMullen Live Stock Commission Co. v. North Texas Trust Co. (Tex. Civ. App.)	278
Traders' Nat. Bank v. Teasdale (Mo.)	851	Witt & Sons v. Stith (Tex. Civ. App.)	673
Trapp v. Shull (Mo.)	883	Woestendiek, Foege v. (Mo. App.)	411
Travelers' Ins. Co. v. Harris (Tex. Com. App.)	933	Wolfe v. Bailey (Ky.)	579
Traylor, Allen v. (Tex. Com. App.)	945	Woods v. Kansas City Light & Power Co. (Mo. App.)	899
Tri-County Drainage Dist., Dickerson v. (Ark.)	334	Woosley, Huff v. (Ky.)	597
Tripplett v. Hendricks (Tex. Civ. App.)	754	Wooten v. Texas Bitulithic Co. (Tex. Civ. App.)	248
Tutt v. Smith (Ky.)	920	W. R. Pickering Lumber Co., Houston Oil Co. of Texas v. (Tex. Civ. App.)	802
Union Cent. Life Ins. Co. v. Short (Tex. Civ. App.)	225	Wylie, Campbell v. (Tex. Civ. App.)	980
United Rys. Co. of St. Louis, Schall v. (Mo.)	890	Wyss v. Bookman (Tex. Civ. App.)	297
United States Fidelity & Guaranty Co. v. Davis (Tex. Civ. App.)	239		
Universal Const. Co., Hilton v. (Mo.)	867	Zyloni, American Indemnity Co. v. (Tex. Civ. App.)	183
Urban v. Cook (Tex. Com. App.)	160		

# THE SOUTHWESTERN REPORTER VOLUME 212

**STATE ex rel. RIDGE v. SHOEMAKER et al.** (No. 19860.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

**1. CLERKS OF COURTS §75 — INTEREST ON FUND DEPOSITED WITH COURT—SUFFICIENCY OF EVIDENCE.**

In action against circuit clerk and his bondsman for interest on fund deposited with clerk upon order of court, evidence *held* conclusive that clerk did not loan any portion of the fund nor receive interest thereon.

**2. CLERKS OF COURTS §70—FUNDS DEPOSITED WITH CLERK—DEPOSIT IN BANKS.**

Circuit clerk has the right to deposit funds deposited with him under order of court with banks in his name as clerk.

**3. CLERKS OF COURTS §70 — INTEREST ON FUND—LIABILITY OF CLERK.**

Circuit clerk who has custody of fund deposited with clerk under order of court, and who does not loan the money or receive interest thereon, is not liable for interest on the fund, in view of Rev. St. 1909, §§ 4557-4559.

**4. CLERKS OF COURTS §70 — DEPOSIT OF FUNDS—BENEFIT FROM BANK—RIGHT OF RECOVERY.**

If circuit clerk receives a benefit from banks by reason of improper arrangements as to deposit of funds, a party who has deposited money in court, pending litigation, under court's order, is not entitled to recover the benefit; such right being exclusively in the state, under Rev. St. 1909, § 4558.

Bond, C. J., dissenting.

**Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.**

Action by the State of Missouri, on the relation of Thomas S. Ridge, against James B. Shoemaker and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Respondent James B. Shoemaker was elected circuit clerk of Jackson county, Mo., at the general election in November, 1910, and took charge of that office on January 3, 1911, having, on December 19, 1910, given an official bond with his correspondent, the Globe Surety Company, as surety, in the sum of \$40,000, conditioned as required by law.

This action was brought by relator against said respondents on above bond, and is based on alleged breaches thereof as follows, to wit: First. That respondent Shoemaker had the beneficial use of a certain deposit, hereafter mentioned, from January 6, 1911, to December 23, 1914, on which relator was entitled to recover interest by reason of the fact that respondent Shoemaker, by agreeing to deposit and depositing this fund in the Commerce Trust Company and another financial institution, obtained a benefit in the sum of \$560, being the aggregate of the premiums paid to his correspondent for becoming and remaining a surety on his official bond, and also obtained free exchange and protest fees. Relator likewise claims, on account of said alleged breach, interest on said \$560 for the time aforesaid at the rate of 6 per cent. per annum, compounding annually. Second. That respondent Shoemaker failed and refused to accumulate interest on this fund "for the benefit of relator under the offered arrangements aforesaid with said First National Bank, but permitted the same to remain in the said Commerce Trust Company for nearly four years without any benefit accruing to said fund, or to any one except himself and the said trust company."

The alleged arrangements aforesaid with the First National Bank are set out in paragraph 3 of the second amended petition, which alleges in substance that this fund had previously been deposited by Oscar Hochland, Shoemaker's predecessor in office, with said First National Bank, and that before this money was turned over to Shoemaker, as successor of said Hochland, the attorney for Tpeau had made arrangements with said First National Bank, by which the latter would pay 3 per cent. per annum on said fund, for the benefit of the fund, if said Shoemaker would permit said arrangement, and that said Shoemaker refused to accede to said arrangements, and deposited the same on an open current checking account to his credit as clerk, in said Commerce Trust Company; that the same remained there for the period aforesaid; and that no interest was accumulated thereon for the benefit of the fund.

The fund referred to in petition is a part of \$68,200 deposited by one Tebeau, who was plaintiff in an action brought by him against relator, as defendant, to compel the specific performance of a contract, for the conveyance of real estate, and the amount above mentioned was the sum which the circuit court of Jackson county, Mo., by its decree of April 11, 1910, required Tebeau to deposit into the registry of said court, as a condition precedent to Tebeau being decreed the relief of specific performance prayed for in his petition. This deposit was made at the time of the entry of the decree. The cause was entitled "George Tebeau, Plaintiff, v. Thomas S. Ridge and Effie S. Ridge, Defendants." The latter appealed the case to the Supreme Court, and it is reported in 261 Mo. at page 547, 170 S. W. 871, L. R. A. 1915C, 367. The judgment below was affirmed in banc, but the amount was reduced on account of the contingent dower of the wife of Ridge. Thereafter, and on December 23, 1914, the circuit court of Jackson county aforesaid made and entered of record its final decree in accordance with the opinion of the court in banc, by requiring respondent Shoemaker to pay this relator the sum of \$65,337, and the remainder of said deposit to said plaintiff Tebeau. Ridge made no demand upon the clerk for interest at the time, and never made any demand therefor at any time prior to the time of service of notice on February 16, 1915, upon respondent Shoemaker for interest.

The fund in controversy was deposited by Oscar Hochland, as clerk aforesaid, under an arrangement made by the attorney for Tebeau, with the First National Bank, and made solely for the benefit of Tebeau. That bank agreed to pay Tebeau interest at the rate of 2 per cent. per annum on the amount thereof. Shortly after the election of Mr. Shoemaker, Sen. Cooper, acting for Tebeau, approached respondent Shoemaker and requested him to keep the Tebeau money on deposit with said First National Bank, advising him that he had some talk with Mr. Swinney, president of that bank, about paying some interest to Tebeau on the money. Thereupon Shoemaker advised him that he expected to do his business with the Commerce Trust Company and the National Bank of the Republic. He also advised him that he could not place official funds on time certificates of deposit, and that it would be necessary for him to carry the same in a general account. He further advised Sen. Cooper that he could not receive any interest and that he had no objection to Mr. Cooper making arrangements with the Commerce Trust Company, whereby Tebeau should receive interest. Sen. Cooper had several conversations about the matter, and in one of them respondent Shoemaker advised him that he would have nothing to do with the

payment of interest on this money to Tebeau, and that he was carrying the money with the Commerce Trust Company on open account, and that, whatever arrangement he wanted to make, he would have to make himself; that he had no objection to Sen. Cooper's making whatever arrangement he could with that institution.

Sen. Cooper testified that in his conversation with Mr. Swinney, of the First National Bank, and with Mr. Kemper, of the Commerce Trust Company, and with respondent Shoemaker, about the matter, he was undertaking to get interest for Tebeau, and not for Ridge, and so stated to all of them.

Respondent Shoemaker assigned, as a reason for keeping the money on deposit in the Commerce Trust Company and in the National Bank of the Republic, the fact that the officers of these institutions were his particular friends. He further testified that there was no understanding that the Commerce Trust Company and the National Bank of the Republic were to pay for his bond, and that the taking care of the same was not pursuant to any previous understanding or arrangement. He further testified that he never received one cent of interest personally from any Kansas City Bank on any personal or other account.

When Hochland turned over the funds in his hands, as clerk, to respondent Shoemaker, the latter received altogether the sum of \$161,337.48, and did not receive any of the Tebeau deposit as such, or, as he expressed it, "just received so much money." This amount was divided up between the Commerce Trust Company and the National Bank of the Republic. All of the various checks whereby Hochland paid the same were drawn upon the First National Bank, in which Hochland had kept all of his funds. The sum received by Shoemaker from Hochland was in no wise segregated when the same was received by Shoemaker or when deposited with the two banks aforesaid.

Mr. W. T. Kemper, president of the Commerce Trust Company, testified that the premiums on the surety bond, which was given prior to the time that Shoemaker became clerk, were paid by the National Bank of the Republic and the Commerce Trust Company, and these payments were made at his suggestion. He stated further that he had suggested to Mr. Huttig that he thought, inasmuch as Mr. Shoemaker had told him he was going to give the two banks his deposit, it would be a nice thing for them to pay the premium on the bond for him. He testified that the furnishing of the bond by his bank and Mr. Huttig's bank was merely a voluntary matter without any suggestion or requirement on the part of Mr. Shoemaker, and that there was no condition attached to the paying of the premiums on the bond, that the money should be put in the two

banks, and that nothing was said upon that subject. Mr. Kemper stated that the Commerce Trust Company paid interest on some checking accounts, but did not pay interest on many of them.

Mr. Huttig testified there was no suggestion or arrangement with Mr. Shoemaker about the deposit made in his bank, and that Mr. Shoemaker simply "brought us over a deposit"; that no interest was paid to Mr. Shoemaker on the deposit, and that he received no benefit in consideration of his keeping the deposit there.

There was some evidence tending to show that exchange was charged Shoemaker by the Commerce Trust Company, but Shoemaker said this was of no benefit to him as he would have taxed same against the parties who sent him checks. Protest fees were charged on Shoemaker's account several times, but he declined to pay the same. The accounts in both of the above banks were kept in Shoemaker's name as clerk of the circuit court.

At the time the money was paid over to relator Ridge, nothing was said about interest. Neither relator, nor any party to said suit, in which the deposits had been made, ever suggested that the court make an order directing that the money in the hands of the clerk be loaned out. There is no testimony in the case tending to show that respondent Shoemaker ever received any interest from either of said banks on the respective deposits made with them.

At the close of the evidence, the trial court entered judgment in due form in favor of defendants. Relator filed his motion for a new trial in due time, which was overruled, and the cause duly appealed by him to this court.

Johnson & Lucas, of Kansas City, for appellant.

Elijah Robinson, of Kansas City, for respondent Shoemaker.

James E. Goodrich, of Kansas City, for respondent Globe Surety Co.

RAILEY, C. (after stating the facts as above). This case was tried without a jury and judgment rendered for defendants. The motion for a new trial contains but a single assignment of error, as follows:

"That the finding and the judgment are contrary to the law and to the evidence."

1. It is contended by relator that he is entitled to recover of defendants interest from January 6, 1911, to December 23, 1914, on \$65.337.

The above sum was adjudged to be due from Tebeau to relator herein by the circuit court on last-mentioned date, without interest, and said sum was paid to him at that time by defendant Shoemaker.

[1] In the suit for specific performance

(261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367) brought by Tebeau against Ridge, there was paid into court by Tebeau, under an order of the circuit court, \$68,200, while Oscar Hochland was clerk of said court. The last-mentioned amount was reduced by the court in banc, and the circuit court, under the mandate of this court, found that there was due relator the above sum of \$65,337, which was paid to him by Shoemaker, as aforesaid. The evidence is conclusive that Shoemaker did not loan any portion of above fund, nor did he ever receive any interest from any source upon any part of same. It must have been manifest to defendant Ridge and Tebeau, when the above case was appealed to the Supreme Court, that some time would elapse before the case could be reached and disposed of here on its merits. If the parties to said action had desired said funds loaned, pending said litigation, they should have applied to the court for an order authorizing the loaning of same. They were bound to know, as a matter of law, that the clerk, without such authority, was not authorized to loan said fund.

Section 4557, R. S. 1909, reads as follows:

"No officer appointed or elected by virtue of the Constitution of this state, or any law thereof, \* \* \* shall loan out, with or without interest, any money or valuable security received by him, \* \* \* by virtue of his office, agency or service, or under color or pretense thereof; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than two years or by a fine of not less than five hundred dollars."

As the parties to the original litigation declined to obtain an order from the court for the loaning of such fund, and as the above statute absolutely forbade the clerk to loan the same or to receive interest thereon, upon what principle of law can it be contended that relator is entitled to interest on said fund?

In support of his contention, appellant cites the following authorities: Snyder v. Cowan, 120 Mo. 389, 25 S. W. 382; Railway Co. v. Clark, 121 Mo. loc. cit. 187, 25 S. W. 192, 906, 26 L. R. A. 751; Railway Co. v. Fowler, 142 Mo. loc. cit. 687, 44 S. W. 771; Bassett v. Kinney, 24 Conn. 267, 63 Am. Dec. 161.

In Snyder v. Cowan, supra, the defendant had in his hands certain funds which had been paid to him as damages due the plaintiff in a condemnation proceeding in the circuit court. The defendant loaned the money in his hands and actually received therefor interest thereon to the amount of \$723.50. Plaintiff sought to recover from the clerk the above sum, and was successful in maintaining his action therefor.

It will be observed that, in the above case, no mention is made of the criminal statutes relating to the duty of the clerk in respect

to such funds held by him as a public officer. In said cause, there was paid into the hands of the clerk for the benefit of the landowner, \$14,910. "Thereafter the defendant deposited the money in the bank, and for the use thereof received in the way of interest the amount here in controversy, \$723.50, which plaintiff claims was received by defendant on his (plaintiff's) money as and for his use and benefit."

On page 396 of 120 Mo., on page 384 of 25 S. W., Judge Burgess, in discussing the question, said:

"Then, when the money had been paid into court by it for plaintiff and no exceptions had been filed by the railroad company to the report of the commissioners, the money thus paid in was his, and he had the right to demand and receive it from the clerk at any time he chose. \* \* \* To whom, then, did it belong? Not the railroad company, nor the clerk, but as a matter of course it belonged to the plaintiff for whose use and benefit it was paid into court."

On page 396 of 120 Mo., on page 384 of 25 S. W., Judge Burgess, in quoting from Bassett v. Kinney, 24 Conn. 287, 63 Am. Dec. 161, used the following language:

"Defendant was under no obligation to place the funds deposited with him as clerk of the court upon interest. 'Had he locked them up in his chest, or merely deposited them in the bank for safe-keeping, and received no compensation for the use of them, he would not have been accountable for interest. But having placed them where they drew interest, that interest must be considered as having the same ownership as the principal which produced the interest.' Bassett v. Kinney, supra. As the principal sum was the plaintiff's, it follows that the interest earned by it is his also."

We do not consider this case any authority for the recovery of interest by plaintiff upon the fund in controversy here. In the case before us, the clerk had on hand at all times sufficient funds to pay the relator the full amount of his demand when called upon to do so. On the day judgment was rendered in favor of relator for the \$85,337, the same was paid to him by the defendant Shoemaker. The money deposited by Tebeau was never loaned by Shoemaker at any time, as heretofore stated, nor did he ever receive any interest thereon. If he had received from the banks in which the deposits were made interest on the funds aforesaid, then the authority above mentioned might be considered as relevant under such circumstances as are detailed in the Snyder-Cowan Case.

In Railway Co. v. Clark, 121 Mo. loc. cit. 187, 25 S. W. 192, 906, 26 L. R. A. 751, the same question arose as in the Snyder-Cowan Case. Judge Macfarlane, in behalf of the court, on page 187 of 121 Mo., on page 196 of 25 S. W. (26 L. R. A. 751), said:

"It appears from the judgment of the court that the money paid to the clerk for defendants has, by order of the court, been loaned part of

the time. *Defendants being entitled to the money would be entitled also to what has been earned and added thereto by way of interest, but not to interest on the amount assessed by the jury.*" (Italics ours.)

The principle announced in this decision is in accord with the law as declared in the Snyder-Cowan Case, supra.

The case of Railway Co. v. Fowler, 142 Mo. 670, 44 S. W. 771, follows the rule announced in the Snyder-Cowan Case, supra, and only allows interest where the fund in controversy has been loaned or deposited by the clerk and interest actually received by him for the use of same.

[2, 3] We do not find anything in either of the cases relied upon, which authorizes the recovery of interest on the fund in controversy here. The defendant Shoemaker, under the law as enunciated by this court, had the right to deposit the moneys received by him from Hochland in the banks aforesaid in his name as clerk. State v. Rubey, 77 Mo. loc. cit. 620, 621. As heretofore suggested, he kept on hand sufficient funds at all times to meet the demand of relator in case the latter should elect to accept the money deposited in his behalf. The relator having taken no steps to have the fund loaned, and the clerk having received no interest thereon, we are not favorably impressed with the claim made that relator is entitled to recover interest on the funds held by the clerk under such circumstances.

2. It is claimed by appellant that, as the Commerce Trust Company and the National Bank of the Republic paid to the defendant surety company \$560 as premiums for the execution of Shoemaker's official bond, relator is entitled to recover the amount thus paid, on the theory that the clerk received the benefit by reason of the deposit of said funds with the banking institutions aforesaid.

[4] Having reached the conclusion heretofore that no part of the funds belonging to relator were loaned, and as he received all that was due him promptly on the day of the rendition of the judgment in his behalf, we are at a loss to understand why he should be permitted to recover the above sum when the clerk was forbidden to loan the money belonging to him, and which he had not sought to have loaned during the litigation. If the clerk received the benefit by reason of an alleged improper arrangement made with these banks, as above mentioned, the right to recover, on account of such acts, rests alone with the state.

Section 4558, R. S. 1909, reads as follows:

"If any officer, agent or servant mentioned in section 4557 shall make any contract or agreement with any person or body corporate, by which such officer, agent or servant is to derive any benefit or advantage from the deposit with such person or body corporate of any moneys or valuable securities held by such officer, agent or



servant, by virtue of his office, agency or service, or under color or pretense thereof, such contract shall, as to such officer, agent or servant, be utterly null and void, *but the person or body corporate making such contract or agreement shall be liable to the state in an action for the recovery of all such benefit or advantage as would, by the terms of such contract or agreement, have accrued to the officer, agent or servant; and payment to the officer, agent or servant shall not protect the person or body corporate against the action brought by the state.* (Italics ours.)

Assuming for the purposes of the case that the \$560 paid by the above banks was a benefit, and improperly received by defendant Shoemaker, yet "it was not received as interest on the fund held by him belonging to relator," and under the expressed provisions of section 4558, R. S. 1909, supra, the state alone was given the right to recover from the banks the amount received by the defendant Shoemaker as a benefit on account of the deposit made by him as clerk of all the funds in his hands. The succeeding section, however, in express terms, provides the remedy against the clerk on account of his action, if wrongful, in receiving a benefit in violation of the law. Section 4559, R. S. 1909, reads as follows:

"Any officer, agent or servant mentioned in section 4557 who shall make any contract or agreement such as is described in the preceding section, or who shall receive any benefit or advantage for the deposit of any money or valuable security held by him as such officer, agent or servant, or over which he may have supervision, care or control by virtue of such office, agency or service, shall, upon conviction thereof, be punished by imprisonment in the penitentiary not less than two years or by fine not less than five hundred dollars."

This section provides the remedy against the clerk for improperly receiving a benefit on account of funds in his hands loaned to the banks. If he was guilty of a violation of law in receiving a benefit, suffice it to say that no right of action has been given relator to recover therefor. The latter received every dollar that was due him on the very day the judgment was rendered in his behalf. No money belonging to him had been loaned by the clerk, and no interest paid therefor. The clerk was prohibited by the statutes aforesaid from loaning relator's funds, without an order of court authorizing same. We are therefore clearly of the opinion that relator is not entitled to recover any interest on the funds aforesaid, nor has he any legal right to recover the \$560 alleged to have been received by defendant Shoemaker as a benefit under the circumstances aforesaid.

3. Other questions are presented and discussed in the briefs of counsel; but, in view of what has been said in the preceding propo-

sitions, we deem it unnecessary to consider the same.

We are of the opinion that the conclusion reached by the trial court is correct, and that the judgment on the record before us was for the right parties. It is, accordingly, affirmed.

PER CURIAM. The foregoing opinion in division is adopted by the court in banc.

All concur, except BOND, C. J., who dissents.

WOODSON, J., absent.

DANCIGER et al. v. ATCHISON, T. & S. F. RY. CO. (No. 19508.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

INDIANS ~~§~~35—SHIPMENT OF LIQUOR INTO INDIAN TERRITORY—SEIZURE AND DESTRUCTION—AUTHORITY.

Under Rev. St. U. S. § 2140 (U. S. Comp. St. § 4141), an officer of the United States had no right to destroy at a point in Kansas intoxicating liquors which had been seized from custody of railroad, on ground they were to be shipped into adjacent Indian territory, without a valid order of court authorizing him so to do; but his seizure, if he had reason to suspect or was informed the liquor was about to be introduced into Indian territory, may have been valid, despite its subsequent illegal destruction.

Bond, C. J., and Walker, J., dissenting.

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Joseph Danciger and others against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiffs, defendant appealed to the Court of Appeals, which reversed, and certified the case to the Supreme Court (179 S. W. 800). Affirmed.

Plaintiffs, as partners, doing business under the firm name and style of "Danciger Bros. and Harvest King Distilling Company," filed in a justice court, in Kansas City, Mo., a petition, in six counts, against defendant, as a common carrier, on account of its alleged failure to deliver certain liquors intrusted to its care, etc. No answer or other pleading was filed by defendant, in either the justice or circuit court.

Plaintiffs sue for the loss of six shipments of intoxicating liquor from Kansas City, Mo., to Caney, Kan. Each shipment was under a separate contract. Those in counts 1 and 2 provided that the goods were shipped to the

order of Dandiger Bros., with a provision in the first contract that the carrier should "notify Raymond Edwards," and in the second that it should "notify Tom Brown." In the other four contracts, the goods were consigned directly to the respective persons named therein, with no provision requiring the carrier to notify any one. All the contracts provided that the carrier should hold the goods a certain number of days after arrival at destination, and, if not accepted in that time, they were to be returned to shipper. In the first three contracts this period was 10 days, and in the last three it was 15 days. In the first two contracts, those in which the goods were sent to shipper's order, the surrender of the original bill of lading, properly indorsed, was required before delivery. The conditions on the back of all of them provided that the carrier should be liable for any loss of the goods, except that "caused by the act of God, the public enemy, quarantine, the authority of law," etc. All of the shipments were transported without delay, and reached Caney the next day after they were shipped.

Caney, Kans., is located within half a mile or three-quarters of a mile of the "Indian country" in Oklahoma. The United States laws for the suppression of the liquor traffic among Indians and in the Indian country were very stringent, and the government was actively engaged in the enforcement thereof. On the evening of August 22, 1912, a deputy special officer of the United States Indian Service, engaged in the suppression of the liquor traffic, discovered the liquor covered by the shipments in question, together with a large number of other liquor shipments, in the wareroom of defendant's station at Caney. He informed the station agent that he was a United States officer, told him the business he was engaged in, and asked the agent if he knew the consignees of the liquor, where it was destined, and whether or not it was going into prohibition country in Oklahoma. The agent, not knowing any of the consignees or persons to be notified, nor where they lived, told the officer he did not know where the liquor was going. Thereupon the officer demanded that he hold the liquor until investigation could be made as to its intended destination. The agent asked for his credentials, and the officer showed him his appointment and commission, and served written notice on him directing the agent to hold all liquors in his possession until further notice from the officer. The sheriff of Montgomery county, Kan., had been called by the above officer to assist in making the investigation in regard to said liquors.

Thomas E. Sisson, the government officer above mentioned, was not present at the trial; but his deposition, taken by defendant, was read in behalf of plaintiffs. Among other things he testified that on August 22,

1912, he asked defendant's agent (Trower) in charge of the goods for the freight bills; that he thereafter wrote "confiscated" on the originals and took the copies; that he kept the bills for that portion that was "confiscated." Thereupon the agent wired his superintendent that he had been served with notice by above officer (giving his name, as well as the number, date, and signature on his commission) to hold all intoxicating liquor until further notice, and asked for quick advice. At 8:55 on the morning of August 23, 1912, the agent received a telegram from the superintendent, which asked if the order applied to all "booze" on hand, regardless of territory into which the same was going, and closed by saying: "Handle as per officer's orders until advised."

On the morning of August 22, 1912, the United States officer appeared at the Caney station, in connection with the sheriff aforesaid, and the two officials went into the ware-room, looking over the various liquor shipments that were there, package by package. They took the numbers, went over the names of the consignees, or persons to whom notification was required, with particular reference to whether the parties to whom the liquor was sent lived in the Indian country of Oklahoma or in Kansas. The evidence tends to show that all packages of liquor found by the officers destined for the Indian country were checked and separated from the liquor intended for parties living in Kansas; that the United States officer got two wagons and hauled away the liquor said to be destined for the Indian country; that the liquor going to those who resided in Kansas was not molested; that after the United States officer had taken the liquor out of the depot, and away from the defendant's premises, he destroyed it in the state of Kansas.

Such other facts as may be necessary will be considered later.

The case was tried by the court without a jury and without instructions. On December 5, 1914, the court found in favor of plaintiffs as to each count, specifying the amount, and rendered judgment for the total sum of \$559.27. Defendant, in due time, filed its motion for a new trial, which was overruled, and the cause duly appealed by it to the Kansas City Court of Appeals. The latter, in an opinion by Judge Trimble, in which all the members of said court concurred, reversed the judgment of the trial court, and certified the case to this court on account of a different conclusion having been reached, as to some of the questions of law involved, by the Springfield Court of Appeals, in *Fehrenbach Wine Co. v. Atchison, Topeka & Santa Fé Ry. Co.*, 182 Mo. App. 1, 167 S. W. 631.

The opinion of Judge Trimble in the case at bar is reported in 179 S. W. at page 800 and following.

Thomas R. Morrow, George J. Mersereau, and John H. Lathrop, all of Kansas City, for appellant.

Ringolsky & Friedman and Harry L. Jacobs, all of Kansas City, for respondents.

RAILEY, C. (after stating the facts, as above). 1. The main controversy in this case arises over the construction which should be placed upon section 2140 of the Revised Statutes of the United States (U. S. Comp. St. § 4141), which reads as follows:

"If any \* \* \* subagent \* \* \* has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor \* \* \* into the Indian country in violation of law, such \* \* \* subagent \* \* \* may cause the \* \* \* packages, \* \* \* of such person to be searched; and if any such liquor is found therein, the same, \* \* \* and also the \* \* \* packages, \* \* \* of such person, shall be seized and delivered to the proper officer," etc.

In *Fehrenbach Wine & Liquor Co. v. Atchison, Topeka & Santa Fé Ry. Co.*, 182 Mo. App. 1, 167 S. W. 631, and following, the Springfield Court of Appeals had under consideration substantially the same facts as are presented in the case at bar. Judge Sturgis, delivered the opinion of the court, and in construing section 2140 of the federal law, *supra*, cited, with approval and in support of the conclusion reached by him, the cases of *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 531, *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471, and *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201. On pages 6 and 7 of 182 Mo. App., on page 632 of 167 S. W., in referring to the facts, he said:

"The evidence shows that the town of Caney is in the state of Kansas, but near the border between that state and the part of Oklahoma which is defined as Indian country and protected from intoxicants by said act of Congress. There is abundant evidence in the record to show that the liquor in controversy was intended to be taken across the line into the Indian country in violation of law, and that the consignees would have so used it, had it not been seized and destroyed before its delivery to them. The evidence shows that a duly commissioned officer of the United States exhibited his commission as such officer to defendant's agent having charge of its freight house and this liquor at Caney, Kan., and thereupon took possession of the liquor in question, removed it from such freight house, wrote the word 'Confiscated' on the freight bills, and thereupon destroyed the liquor. The defendant's agent neither acquiesced in nor resisted the taking of the liquor in the manner above stated."

The defendant in the above case admitted its receipt of the liquor and its failure to deliver same, but sought to justify such failure by reason of the facts aforesaid. Judge Sturgis, on page 7 of 182 Mo. App.,

on page 632 of 167 S. W., in dealing with defendant's contention, said:

"The defendant must fail in this defense, notwithstanding these facts, for the reason that any and all authority conferred by section 2140 of the United States statutes is confined to acts performed in the Indian country. The act of Congress in question does not authorize a federal officer to seize and destroy spirituous liquors in the state of Kansas, however near it may be to the prohibited line of the Indian country. The officer's jurisdiction in this respect is territorial and confined to the Indian country." (Italics ours.)

In other words, it is held by the Springfield Court of Appeals, in the above cause, that although the United States officer at Caney had good reason to believe, and did believe, that the liquor stored at defendant's warehouse at that place was about to be taken into the Indian country, and would be so introduced unless taken into the possession of said officer, yet he would have no right to take possession of same in Kansas, and turn it over to the proper officer, to be proceeded against by libel in the proper court and forfeited, one-half to the informer and the other half to the use of the United States, as contemplated by said section 2140.

It is clear, from reading said section, that the officer had no right to destroy the goods while at Caney, Kan., without a valid order of court authorizing him so to do; but his seizure of the goods, if the evidence warranted it, may have been valid, although the destruction of same was without authority of law.

Judge Trimble, in his opinion in this case (179 S. W. loc. cit. 803), clearly states our view of the law in respect to this matter, as follows:

"Hence the question comes down to the authority of the officer to take the goods from the depot. We think the distinction between the officer's right to take the goods and his right to destroy them upon his own responsibility, without waiting for a judgment of condemnation, should be carefully preserved. His act of destroying the goods was his own act, with which the agent had nothing to do. It was accomplished after he had taken the goods from the agent's possession. So that, if he had authority to seize the goods, the defendant should not be held liable, even though the officer had no authority to thereafter destroy them."

Judge Trimble, after reviewing and distinguishing the cases cited by Judge Sturgis from the one at bar, on page 805, said:

"So that we have been cited to no case holding that, where the liquor is stored near the line of forbidden territory, consigned to persons who live and operate therein, as the officer testified they did, and by reason of his experience with them before, and his knowledge of their operations, he had reason to suspect that the liquor was about to be introduced into the forbidden district, he has no authority to seize, but is powerless to move until after the intending law-

breaker, under cover of the night or some other favorable opportunity, has succeeded in getting it into the district and scattering it among his thirsty patrons. If the statute means that the officer cannot seize until after it is in forbidden territory, then what is the use or meaning of the words 'is about to introduce,' in the statute? If he can only act within the forbidden territory, then he can never seize any liquor that is 'about to be introduced,' since then it has already been introduced."

The views of Judge Trimble, in respect to above matters, when based upon sufficient evidence, meets with our approval as to the right of the officer to seize, but not destroy, liquor stored at Caney, Kan., and which is about to be introduced into the Indian country in violation of section 2140, supra.

2. The case was tried by the court without a jury and without instructions. The trial court found the issues in favor of plaintiffs and rendered its judgment accordingly. If there was substantial evidence offered by respondents sufficient to make a prima facie case in their behalf, the finding and judgment below is binding upon this court, unless error was committed in respect to the admission or rejection of testimony. *Walker v. Roberts*, 204 S. W. loc. cit. 18; *Roloson v. Riggs*, 274 Mo. loc. cit. 528, 203 S. W. 973; *In re Lankford's Estate*, 272 Mo. 1, 197 S. W. 147; *January v. Harrison*, 199 S. W. loc. cit. 937; *Nicholson v. Wright et al.*, 196 S. W. 1118; *City of St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 196 S. W. loc. cit. 770; *Coulson v. La Plant*, 196 S. W. loc. cit. 1146; *Truitt v. Bender*, 193 S. W. 839; *Kille v. Gooch*, 184 S. W. loc. cit. 1160; *Buford v. Moore*, 177 S. W. loc. cit. 872; *Abeles v. Pillman*, 261 Mo. loc. cit. 376, 168 S. W. 1180; *Slicer v. Owens*, 241 Mo. loc. cit. 323, 145 S. W. 428; *Minor v. Burton*, 228 Mo. loc. cit. 564, 128 S. W. 964.

The plaintiffs in this case offered substantial testimony tending to show that the goods in controversy were delivered to defendant as a common carrier at Kansas City, Mo.; that they were transported by appellant without delay and reached Caney, Kan., their destination; that they were not delivered to the consignees as provided in the contracts of shipment, but, without the knowledge or consent of plaintiffs, were delivered to a third party who destroyed the same in the state of Kansas. Defendant sought to overcome the prima facie case thus made by plaintiffs, and offered evidence tending to show that its agent was justified in turning over the goods to the United States officer who destroyed the same.

It was the province of the trial court to determine this question. It may not have been satisfied with the proof offered. It may have concluded that defendant's agent, in charge of the goods, was guilty of negligence and derelict in his duty in failing to

notify the consignors, on August 22, 1912, as to the action then taken by the United States officer, in order that they might protect their interests by an appropriate action to recover possession of the goods. The trial court may have concluded that the agent, while not required to resist the officer, if the latter were acting in the line of his duty, should have requested the officer to hold the goods, in order that he might notify the consignors and give them an opportunity to relieve him from responsibility, and assert in court their title to the property, if they desired to do so. In the absence of instructions, we cannot declare, as a matter of law, what view the trial court took in passing upon the facts.

As heretofore suggested, plaintiffs adduced at the trial substantial evidence and made a prima facie case. Regardless of the views entertained by us as to the facts, and as to the merits of the defense interposed by defendant, we are concluded by the judgment of the trial court in respect to these matters.

We accordingly affirm the judgment below.

PER CURIAM. The foregoing opinion in division is adopted by court in banc.

WILLIAMS, J., concurs.

FARIS, BLAIR and GRAVES, JJ., concur in paragraph 1 and result.

BOND, C. J., and WALKER, J., dissent.

WOODSON, J., absent.

#### SCALES v. NATIONAL LIFE & ACCIDENT INS. CO. (No. 19888.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

#### 1. INSURANCE — 455 — DEATH BY "ACCIDENT" — SUICIDE — INSANITY.

Death by suicide of an insane person is death by "accident."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

#### 2. INSURANCE — 455 — DEATH BY "ACCIDENT" — SUICIDE — SANITY.

Intentional self-destruction by a sane person is not an accident.

#### 3. INSURANCE — 646(7) — PRESUMPTIONS — SANITY — SUICIDE.

Insured, committing suicide, is presumed to have been sane at the time of suicide.

#### 4. INSURANCE — 455 — ACCIDENT — SUICIDE BY SANE PERSON.

Under Rev. St. 1909, § 6945, which takes away the defense to a policy of suicide, the insurer is not liable, under a policy insuring against death by accident, in case of death of insured by suicide while sane.

# 5. COURTS — 97(6) — STATE COURTS — STATUTES — FEDERAL DECISIONS.

In the construction of a Missouri statute, where no federal question arises, Missouri courts are not bound by an opinion of the Supreme Court of the United States.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Maggie Scales against the National Life & Accident Insurance Company. From judgment for plaintiff, defendant appeals, and case was certified by the Court of Appeals (186 S. W. 948). Reversed and remanded, with directions.

Plaintiff recovered judgment for \$700 and interest on a life and accident policy issued by defendant to William C. Scales, in which this plaintiff, his widow, is the beneficiary. Defendant appealed to the Springfield Court of Appeals, where, in an opinion by Farrington, J., reported in 186 S. W. 948, the judgment was reversed, and the cause remanded, with directions to enter judgment for \$140. But that court, deeming its opinion in conflict with that of the St. Louis Court of Appeals in *Applegate v. Travelers' Insurance Co.*, 153 Mo. App. 63, 132 S. W. 2, certified the cause to this court.

The policy was dated December 9, 1909, and provided for payments as follows:

(1) In case of death by accident \$700.

(2) In case of death from disease or poison, or from self-inflicted injuries, one-fifth of the amount above named.

There are no other provisions in the policy that affect the issues here involved.

It is conceded that the insured committed suicide by drinking carbolic acid, a poison, on October 17, 1914, and that notice and proof of death were duly made and given. There is no evidence in the cause as to whether the insured was sane or insane at the time he drank the deadly potion. The trial was before the court without a jury. The defendant asked the following declaration of law, which was refused:

"The court declares the law to be that, if it believes and finds from the evidence that death resulted to the insured, W. C. Scales, caused by taking carbolic acid, a poison, intentionally, then it will make a finding in favor of the plaintiff, to wit, \$140, together with interest thereon at the rate of 6 per cent. per annum from October 17, 1914, to date."

The only point here involved is the propriety of the refusal of that instruction.

The case of *Newell v. Fidelity and Casualty Co.*, 212 S. W. 991, which was argued in this court on the same day on which this case was argued, and which involved the same question, has been considered in connection with this case, and we have availed ourselves of the able and exhaustive briefs of counsel in both the cases.

Patterson & Patterson and George Pepperdine, all of Springfield, for appellant.

E. D. Merritt, of Springfield, for respondent.

Holland, Rutledge & Lashly, of St. Louis, amici curiæ.

ROY, C. (after stating the facts as above).  
I. There are some clear and undisputed rules of law which should be borne in mind in the consideration of this case:

[1] 1. A policy of insurance against death by accident covers a death by suicide by a person who is at the time insane. In other words, death by suicide of an insane person is death by accident. *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740. That proposition is conceded by both parties herein.

[2] 2. Intentional self-destruction by a sane man is not an accident. In *Lovelace v. Travelers' Protective Ass'n*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638, it was held that a voluntary death is not a death by accident. A long line of authorities is there cited.

In *Young v. Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557, the *Lovelace* Case was cited, and it was held that a death is accidental when it "is not the natural or probable consequence of the means which produced it."

[3] 3. On the question as to whether the insured was sane or insane at the time of committing suicide, the presumption is in favor of his sanity, and the burden of proof is upon the one affirming the contrary. *Blackstone v. Ins. Co.*, 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; *Mutual Life Ins. Co. v. Leubrie*, 71 Fed. 844, 18 C. C. A. 832; *Insurance Co. v. Rodel*, 95 U. S. 232, 24 L. Ed. 433; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; *Reynolds v. Maryland Casualty Co.*, 274 Mo. 83, 201 S. W. 1128.

It necessarily follows that the insured in this case is presumed to have been of sound mind when he killed himself.

[4] We think the "suicide statute" is clear, so far at least as the point here involved is concerned. Here it is:

Sec. 6945. "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

That statute does not put into the policy a single obligation other than those mentioned in the policy. It merely takes out of

the policy the defense of suicide as to the obligations mentioned in that policy.

Without embarrassing ourselves just here with a consideration of any of the decided cases, we will apply the statute to this policy and see how and to what extent it affects it. The policy contains the following obligations on the part of the insurer:

(1) To pay \$700 in case of death by accident. That includes death by suicide by an insane person, and does not include death by suicide by a sane person.

(2) To pay \$140 in case of death by disease or poison or by self-inflicted injuries. Let it be conceded here, without deciding, that death by self-inflicted injuries includes death by suicide whether the insured was sane or insane.

Has the plaintiff here any cause of action under the first or accident clause of the policy? If the insured had been insane when he drank the poison, the suicide would have been an accidental death covered by that accident clause and the defense of suicide would have been taken out of the policy by the statute. But the plaintiff here has not that kind of a case. Indeed, she has no case at all under that accident clause, for the death here was not by accident. Though there is no obligation written in this policy under which plaintiff, under the facts of this case, can recover more than \$140, yet she claims that the statute puts such obligation into the policy. This court is thereby asked to inflate the statute with something not thought of by the Legislature, and to thereby inflate the policy with an obligation not mentioned therein. Though death from disease, undesired and shunned, is not an accident, yet respondent claims that, by reason of the statute, self-destruction, though voluntarily and deliberately done by a sane person, is an accident.

The vital point in this case is whether, under the statute, a policy of insurance against death by accident makes the company liable in case of the death of the insured by suicide while sane. That point so far as we can discover, was not raised or discussed in any of the cases cited by respondent, not even in this case in the Court of Appeals. It was first raised after the case reached this court.

In *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948, it was agreed by the parties that the insured came to his death from "external, violent, and accidental means." It was also conceded that he committed suicide. In other words, it was conceded that it was a death by accident. The court there correctly held that an accidental death by suicide was covered by the accident policy, and that the statute applied and took away the defense of suicide. It did not hold or intimate that a suicide by a sane person was an accident or was covered

by an accident policy. It did not touch the question now under consideration, because such a question could not arise under the agreed facts of that case.

In *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, *Knights Templar, etc., v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139, *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. 63, 132 S. W. 2, and in *Brunswick v. Ins. Co.*, 195 Mo. App. 651, 187 S. W. 802, the vital point now under consideration was not discussed or decided. The plain truth is that courts and counsel in all those cases proceeded on the theory that, under the *Logan Case*, suicide by a sane person was an accident covered by an accident policy, an assumption absolutely without any foundation, as we have seen.

II. Counsel for respondent in the *Newell Case* say:

"This court, the Supreme Court of the United States, and our Courts of Appeals have held unequivocally and emphatically that the statute applies to policies such as the one in suit, and the courts' construction thereof has become a part of every policy since written."

[5] In answer to that assertion we say that this court has never held that a suicide by a sane person was an accident covered by the accident clause of a policy. If our Courts of Appeals and the Supreme Court of the United States have been led to assume that the *Logan Case* so decided, we are not bound by their assumption. In the construction of a Missouri statute, where no federal question arises, this court is not bound by an opinion of the Supreme Court of the United States. *State ex rel. v. Trammel*, 106 Mo. 510, loc. cit. 517, 17 S. W. 502.

During all these years since the decision of the *Logan Case* no one who has taken out an accident policy in this state has had any right to suppose that this court would, under any circumstances, go beyond the *Logan Case* in the construction of our statute.

As the plaintiff, under the facts as shown, cannot recover more than \$140, it becomes unnecessary for us to pass on the question so thoroughly and ably discussed by the Court of Appeals.

The judgment is reversed and the cause is remanded, with directions to proceed in accordance with the views herein expressed.

PER CURIAM. The foregoing divisional opinion is adopted by the court in banc.

WALKER, J., concurs.

FARIS, BLAIR, WILLIAMS, and GRAVES, JJ., concur in result for reasons stated in *Brunswick v. Standard Acc. Ins. Co.*, No. 19764, 213 S. W. 45.

BONI, C. J., not sitting.

WOODSON, J., absent.

SEBREE v. CASSVILLE & W. R. CO.  
(No. 19571.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

1. CORPORATIONS  $\S$ 312(6) — FORECLOSURE  
SALES—RIGHT OF OFFICER TO PURCHASE.

Stockholders, who were officers, bondholders, and creditors of a railroad corporation had same right as any creditor or stranger to bid for property of corporation at a foreclosure sale, where corporation had not been under their control for some time, having been in the hands of a receiver, and the stock owned by them was valueless and did not enter into purchase price.

2. CORPORATIONS  $\S$ 482(8) — FORECLOSURE  
PROCEEDING—EFFECT OF CONFIRMATION OF  
SALE.

Where a court having jurisdiction over subject-matter of a foreclosure proceeding against a corporation and all persons interested confirms a sale, neither inadequacy of price nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the sale.

3. CORPORATIONS  $\S$ 482(8) — FORECLOSURE  
SALES—VALIDITY—ESTOPPEL.

Where a creditor of a corporation was present at a foreclosure sale and bid on property, made no protest against sale, filed no exceptions to report of commissioner, interposed no objections to confirmation of report, received his distributive share of the proceeds of the sale, and retained the same, he was estopped from complaining a year later that sale was void by reason of fact that purchasers were stockholders; there being no claim of fraud.

4. CORPORATIONS  $\S$ 579(2)—REORGANIZATION  
—RIGHTS OF CREDITORS—PROPERTY.

In contemplation of law, shares of stock in a corporation represent the property thereof, and, where at a judicial sale part of the stock is put in as part of a reorganization consideration, it is equivalent to transfer to new corporation of a part of tangible property of old corporation, in so far as creditors are concerned.

Appeal from Circuit Court, Bates County; O. A. Calvird, Judge.

Bill by G. M. Sebree against the Cassville & Western Railroad Company. Judgment for plaintiff, and defendant appealed. Transferred from the Court of Appeals. Reversed and remanded, with directions.

This is a creditor's bill filed by plaintiff in the circuit court of Barry county, Mo., on July 15, 1914. At the instance of plaintiff, the venue was changed, and the cause tried in the circuit court of Bates county, Mo. Plaintiff seeks to charge the property formerly owned by the Cassville & Western Railway Company, which it is claimed the

defendant now holds, with the payment of his judgment for \$8,769.95, together with 6 per cent. interest thereon from August 29, 1913.

It appears from the record that on the 1st day of June, 1911, the Cassville & Western Railway Company, a corporation organized under the laws of Missouri, issued \$100,000 of bonds, secured by a deed of trust on all its property, being 4½ miles of railroad in Barry county, Mo. At the date of this issue, the majority stockholders of the railway company were S. M. Mitchell, W. T. Ayres, and O. H. Orendorf, who were also directors, and who were president, secretary, and vice president, respectively, of said company. The bonds were not sold, but part of them were used as hereafter mentioned. On June 29, 1911, said railway company also made its promissory notes, payable one year after date, and placed its bonds as collateral to said notes, as follows:

Name.	Note.	Collateral Bonds.
F. B. Taber.....	\$10,000 00	\$30,000
Geo. L. Sands.....	6,000 00	12,000
O. H. Orendorf.....	10,000 00	10,000
N. B. Allen.....	6,000 00	12,000
F. C. Ellis.....	4,000 00	8,000
Geo. M. Sebree.....	2,500 00	5,000
S. M. Mitchell.....	1,300 00	1,500
St. Louis & San Francisco Railroad Co.....	3,000 00	3,000
Wesco Supply Co.....	1,291 25	1,500
Skinner Engine Co.....	432 85	500

So that on June 29, 1911, said railway company was indebted about \$44,500, evidenced by above notes, and the total of the bonds placed as collateral to secure the same was \$83,500. Afterwards, in March, 1912, Taber, Mitchell, and Ayres loaned said railway company \$400 each, taking notes secured by \$1,000 bonds each, and plaintiff loaned it \$250, taking note secured by \$500 bonds. In addition to the bonds held as collateral, there were \$11,000 in bonds, which were acquired outright by plaintiff, Allen, Sands, Taber, S. M. Mitchell, and Ellis, so that the total amount of bonds disposed of by the railway company, and placed as collateral, amounted to \$98,000.

The above notes having matured on June 29, 1912, there was brought, on July 15, 1912, by this plaintiff as attorney for O. H. Orendorf, in the United States District Court, a bill of complaint against said Cassville & Western Railway Company and others, as defendants, for the appointment of a receiver.

Plaintiff had been the attorney for said railway company from May 1, 1911, and had drafted the mortgage securing the above bonds. At the time of filing said bill for the receiver, and for some time prior thereto, said railway company was hopelessly insolvent, and in a bankrupt condition. This was known to plaintiff and other creditors, and

he was insisting upon a receiver being appointed. The property of said railway company had been depreciating rapidly; its revenues were insufficient to pay the running expenses, taxes, and other charges against the same. On July 16, 1912, the plaintiff procured his own appointment as receiver for said railway company, qualified as such, and held this position until after the sale of said property by the commissioner, when he was succeeded by Mr. Taber. He had the management and control of the property during his receivership, and knew that it was constantly losing money instead of being a paying enterprise. He received for his services as receiver of said company the sum of \$1,800.

On February 10, 1913, the Conqueror Trust Company, of Joplin, Mo., having become trustee in said bond mortgage, filed its supplemental bill for foreclosure of said mortgage, in the case brought by Orendorf, supra, which was thereafter continued in the names of O. H. Orendorf and Conqueror Trust Company, as plaintiffs, against Cassville & Western Railway Company, Mercantile Trust Company, George L. Sands, C. F. Ellis, F. B. Taber, W. D. Ayres, S. M. Mitchell, G. M. Sebree, Wesco Supply Company, and St. Louis & San Francisco Railway Company. The supplemental bill sets out fully the indebtedness of said railway company, and disclosed its insolvency and inability to pay its debts. In said action of foreclosure all of the holders of outstanding bonds, issued by said railway company and described in said mortgage, amounting in face value to \$98,000, were made parties thereto. Each several defendant and bondholder appeared to said action, filed answer therein, confessed the truth of the allegations of said supplemental bill, and prayed the federal court to enter a decree of foreclosure in accordance with the prayer of said bill.

On February 12, 1913, said cause was reached for hearing before the above court, all parties in interest being present in person or by counsel, including the plaintiff herein, and said court entered its final foreclosure decree, ordering said property covered by said bond mortgage to be sold by F. W. Kelsey, who was appointed commissioner to sell same, at the depot of the Cassville & Western Railway Company, at Barry county, Mo., upon due notice as required by said decree. The minimum price fixed by the decree for which said property could be sold was originally \$45,000, after testimony had been heard in respect to the value of same.

Pursuant to said decree, the commissioner aforesaid duly advertised said property for sale on May 17, 1913, at the depot aforesaid, and offered the same for sale at such place, on said date, but no bids were offered therefor. On May 21, 1913, the original decree was modified by the court so as to authorize

the sale of said property at the minimum price of \$30,000.

Plaintiff and other bondholders were present on May 17, 1913, when the property was offered for sale under the minimum price of \$45,000, but made no bid for same. When the court heard evidence as to the value of property and fixed the minimum price at \$45,000, the plaintiff and his witnesses contended that said property was worth \$50,000 or \$60,000, while the contention of Mitchell and others placed the property as low as \$25,000. All the parties in interest were before the court, by letter or otherwise, when the minimum price for the sale of the property was fixed at \$30,000, and the sale directed to be made as in the previous order. There was a readvertisement by the commissioner, and on June 30, 1913, the property of said railway company was again offered for sale at the depot aforesaid.

Mr. C. M. Robeson was present at said last sale, representing the majority of the bondholders of said railway company, and buying in their behalf. Mr. Garrett was likewise present at the instance of plaintiff. Robeson and Garrett were competitive bidders at said sale, and the property was finally knocked off to Robeson, as the highest bidder, for the bondholders aforesaid. The plaintiff was present at said sale, and had requested Mr. Garrett to attend same. The property was sold to Robeson, as aforesaid, for \$31,050, to be paid for in accordance with the terms and conditions of the decree of foreclosure. He paid to said commissioner \$14,500, in cash, as part of said purchase money, and turned over to the latter \$81,500 in amount of said bonds, out of a total outstanding issue of \$98,000. This was a compliance with the decree of foreclosure.

The commissioner in his report of sale recited, among other things, that C. M. Robeson, representing the majority of the bondholders, had bought said property for the above sum, and that he had paid therefor the \$14,500 in cash, and turned over to him said \$81,000 in amount of bonds.

From all the facts and circumstances in the case, we are satisfied that plaintiff *knew*, before said report of the commissioner was approved, that Robeson had bought in said property at the sale for the majority of the bondholders of said railway company. He also had full knowledge of the confirmation of the report of said commissioner. Plaintiff offered no objection to the sale as made by commissioner, was present when said property was sold, filed no exception to the report of said commissioner, and took no steps whatever to set aside said sale. On the contrary, he accepted his distributive share of the proceeds of the sale.

On page 10 of his brief respondent says:

"The plaintiff received only his pro rata share of the \$31,050 at the foreclosure sale,



which, after deducting court costs, allowances, etc., amounts to 22 cents on the dollar, and which left unpaid the plaintiff a balance of \$7,450."

It is clear from the evidence that O. B. Robeson bought the property of said railway company at said sale for O. H. Orendorf, C. M. Mitchell, and W. T. Ayres, as bondholders of said company, and that they controlled and put up, or caused to be put up, the \$81,000 in amount of bonds as part of the purchase price of said property. Plaintiff's position in respect to the sale is better expressed by his testimony in relation to this subject, as follows:

"Q. You knew the road had been purchased by the bondholders, didn't you? A. Yes; I didn't think there was anything wrong about the bondholders purchasing the road; I wouldn't have objected if they did.

"Q. If they hadn't been stockholders also; you object to their right to purchase? A. I object to these managing officers of the road buying it in for themselves and putting that price down as cheap as they could; they ought to have made it bring as much as they could."

The suit brought by plaintiff in behalf of Orendorf for the appointment of receiver was filed July 15, 1912. The supplemental bill of the Conqueror Trust Company, asking for the foreclosure of the bond mortgage, was filed February 10, 1913. The property in controversy was sold by the commissioner on June 30, 1913. The present suit was filed July 15, 1914.

In speaking of the suit brought by plaintiff on July 15, 1912, respondent, at page 8 of his brief, says:

"Before this suit was instituted, Mitchell and Ayres had purchased the Allen note and security, and on December 5, 1912, Mitchell and Ayres also purchased from F. B. Taber his railway notes and collateral bonds."

In speaking of Mitchell, Ayres, and Orendorf, respondent, in said brief, at pages 9 and 10, says:

"Second. At the date of the foreclosure sale they, with Mr. Sands and Mr. Ellis, were creditors of said railway company to the amount of about \$43,800, and to secure which they held as collateral bonds of said railway company aggregating \$81,000.

"Third. They agreed with Mr. Sands to pay his claim in full, and also to pay Mr. Ellis in full by giving him stock in the new company."

It appears from the record that Sands and Ellis were also creditors of the railway company, but, as shown by S. M. Mitchell's evidence, prior to the sale he had promised to take care of Sands and pay his debt in full, regardless of what the property sold for. He also agreed to give Ellis an interest in the property after they obtained possession of it, so that these two creditors took no interest in the foreclosure proceeding, and

did not draw their dividend of 22 per cent., but, as shown by the order of the Public Service Commission, Mr. Sands is to be paid in full from the proceeds of the bonds of the defendant company, and Mr. Ellis is to have stock in the new company to the amount of his claim.

It is uncontroverted that Mitchell, Ayres, and Orendorf paid the bid of \$31,050, which was made by their agent, C. M. Robeson, and that they deposited \$81,000 in bonds which were held by the three purchasers with Sands and Ellis.

Taber operated the road as receiver until March, 1914, when it was turned over to defendant by order of the district court.

The trial court found the issues for the plaintiff, and entered a judgment in his behalf, decreeing that the property of said railway company was in possession of defendant, and that the latter was liable for plaintiff's debt and costs, which the court found to be \$7,450. The decree provided that said sum should be satisfied out of the property of said railway company, and that a lien for said sum, with 6 per cent. interest and costs, should inure to the benefit of plaintiff. The court found against defendant on the defensive matters set up in this answer. The latter in due time filed its motion for a new trial, which was overruled, and an appeal was granted to the Kansas City Court of Appeals. The latter transferred the case to this court for want of jurisdiction, and appellant's motion to retransfer to the Court of Appeals was overruled.

Such other matters, if any, as may be necessary, will be considered in the opinion.

H. C. Clark, of Jefferson, and O. L. Cravens, of Neosha, for appellant.

W. J. Orr, of Springfield, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. Did S. M. Mitchell, W. T. Ayres and O. H. Orendorf have the legal right to buy the property of the Cassville & Western Railway Company at the foreclosure sale of June 30, 1913, as bondholders and creditors of said company, through C. M. Robeson as their agent? They owned a majority of the stock of said company, and were directors as well as chief officers of same, when plaintiff, Sebree, was appointed receiver for said railway company on July 16, 1912. The railway company was insolvent, when plaintiff became receiver, and had been in that condition some time prior to his appointment. He took charge of the road as receiver, and through his manager continued to operate the same at a loss, until the property was sold to Robeson as agent for above parties. Mitchell, Ayres, and Orendorf had no further control over the road after Sebree was appointed receiver. As the railway company was hopelessly insolvent and its prop-

erty had been taken out of their hands as stockholders, directors, and officers, by plaintiff as receiver under the order of the court, of what further value was their stock as an investment, after a foreclosure sale of the property had been ordered? They did, however, have an interest in the property as creditors and bondholders, and through Robeson as their agent purchased the property *solely as bondholders and creditors*. Their stock, under the circumstances aforesaid, was of no practical value, did not enter into the purchase price of the property at the foreclosure sale; did not confer upon either of said parties any rights or privileges whatever in the defendant company, and in fact was not worth at the date of said sale the paper upon which the stock was written or printed. The evidence, taken as a whole, satisfies us that plaintiff was invited to join with Mitchell and other bondholders in the purchase of said property under a foreclosure sale, and that he declined the offer. He makes no complaint here that he was denied the privilege of joining with other bondholders and creditors in the purchase of same, nor does it appear that he had any desire to do so. We are of the opinion that the foregoing inquiry should be answered in the affirmative. There is not the slightest evidence in the record before us of any collusion, or fraud, upon the part of Robeson, Mitchell, Ayres, Orendorf, or any of the bondholders or stockholders in the railway company. The sale was conducted openly and fairly under the foreclosure decree of the federal court. The plaintiff was present with his friend Garrett when the sale was made, and it is fair to assume that the latter bid upon the property at the instance of respondent, who was then a creditor, and in the control and management of the property, under an order of the court, which appointed him as receiver. No one questioned his right as a creditor to purchase the property at the sale. We can conceive of no good reason, in either law or morals, which should have excluded above parties, as bondholders and creditors of the railway company, from purchasing said property and acquiring at said sale the title thereto free from prior incumbrances, or other debts. Under the law they had the same right as creditors and bondholders to bid as any independent purchaser might have done. *Kitchen v. St. L., K. C. & N. Ry. Co.*, 69 Mo. 224; *Dillinger v. Kelley*, 84 Mo. loc. cit. 564, 565; *Briant v. Jackson*, 99 Mo. loc. cit. 591, 592, 13 S. W. 91; *Walcott v. Hand*, 122 Mo. 621, 27 S. W. 331; *Thorp v. Miller*, 137 Mo. loc. cit. 239, 240, 38 S. W. 929; *Walker v. Mills*, 210 Mo. loc. cit. 689, 109 S. W. 44; *McQuitty v. Wilhite*, 218 Mo. loc. cit. 594, 117 S. W. 730, 131 Am. St. Rep. 561; *Jones, Corp. Bonds & Mtgs.* (3d Ed.) § 655; *Lucas v. Friant*, 111 Mich. 426, 69 N. W. 735; *Twin-Lick Oil Co. v. Marbury*, 91 U.

S. 587, 23 L. Ed. 328; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *In re Burr Mfg. & Supply Co.*, 217 Fed. loc. cit. 20, 133 C. O. A. 126; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Harts v. Brown*, 77 Ill. 226; 3 Cook, Corps. (6th Ed.) § 886, p. 3191; 3 Clark & Mar. Priv. Corps. § 763.

The *insolvency* of the Cassville & Western Railway Company was not occasioned by any wrongful acts of the above stockholders and officers. Mitchell was opposed to putting the property into the hands of a receiver. The latter was appointed at the instance of *plaintiff*, who was the attorney and a *creditor* of said company. The *foreclosure sale* was not procured through any acts of Mitchell, Ayres, or Orendorf. On the contrary, the sale was ordered, pursuant to the supplemental bill for foreclosure, filed by the trustee in the mortgage, on the theory that the company was insolvent. Plaintiff, and other creditors in answering said bill, conceded the above facts to be true, and the decree of foreclosure was entered accordingly. Mitchell, Ayres, and Orendorf had no duty to perform at the sale. They had no control over the property at that time. They acted in good faith, without any fraud or collusion, in buying the property as creditors and bondholders of said company. Under the foregoing circumstances, these gentlemen had the same right to purchase the property at said sale as would have been accorded to a stranger.

[2] II. The United States District Court had jurisdiction over the subject-matter of the foreclosure proceedings, and likewise had jurisdiction over the persons of plaintiff and all others interested in said action. The plaintiff, who was then a creditor of the company, was likewise the receiver and in possession of said property. He produced witnesses before the above court to prove that the reasonable value of said property was in excess of \$50,000, while Mitchell, Ayres, and Orendorf offered testimony tending to show that said property was not reasonably worth more than \$25,000. The court, after taking the matter under advisement, fixed the *minimum* price at which the property should be sold at \$45,000. It was advertised and offered for sale by the commissioner with the upset price fixed as above, and no one bid on the property, although plaintiff, Robeson, and others were present. The commissioner reported the above facts to the court, the latter modified the decree by fixing the minimum price at which the property should be sold at \$30,000, and the commissioner was directed to readvertise and sell the property as indicated in the previous order, subject to above upset price.

It became necessary for the federal court to ascertain and determine the *reasonable*

value of said property in making its order for sale. It *judicially* determined upon full inquiry that \$30,000 was the *reasonable* value of same, and authorized the commissioner to sell it, at that price, if no higher bid could be obtained. No effort was made by plaintiff, or any one else, to have the court *increase* the upset price in excess of \$30,000. The property had been offered for sale by the commissioner, with the minimum price at which it should be sold fixed at \$45,000, without bidders. With full knowledge of all the facts, the court confirmed the sale to Robeson as aforesaid, without objection upon the part of any one. The action of the federal court in fixing \$30,000 as a *reasonable value* of the property, and its *confirmation* of the sale to Robeson, as agent for the majority bondholders, at \$31,050 cannot be called in question in this collateral proceeding. *Fitzgerald v. De Soto Special Road District*, 195 S. W. loc. cit. 696, 697; *Summers et al. v. Cordell et al.*, 187 S. W. 5; *State ex rel. v. Evans*, 240 Mo. 121, 145 S. W. 48; *State ex rel. v. Cass County Court*, 137 Mo. App. loc. cit. 708, 119 S. W. 1010; *State v. Edwards*, 192 Mo. App. loc. cit. 416, 182 S. W. 816; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 19, 133 C. C. A. 126; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391.

In the *Morrison-Burnette Case*, *supra*, Judge Sanborn, at page 624 of 154 Fed., at page 398 of 83 C. C. A., states the law applicable to above facts with great force and clearness as follows:

"But there is a marked and radical distinction between the situations, the rights of the parties, and the established practice before and after the confirmation of the sale. The purchaser bids with full notice that the sale to him is subject to confirmation by the court, and that there is a power granted and a duty imposed upon the judicial tribunal when it comes to decide whether or not the sale shall be confirmed to so exercise its judicial power as to secure for the owners of the property the largest practical returns. He is aware that his rights as a purchaser are subject to the rational exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids."

After citing an array of authorities in support of his announcement of the law (at page 625 of 154 Fed., at page 399 of 83 C. C. A.), he continues as follows:

"This rule is so firmly established that it is no longer debatable, and the cogent and all-sufficient reason for it is that judicial sales would become farces, and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices, when they thought the purchase a fortunate one, and thus secure the profits in that event, and leave the buyer to suffer the losses if the property depreciated in value or the purchaser was unwise."

In *re Burr Mfg. & Supply Co.*, 217 Fed. loc. cit. 21, 133 C. C. A. 131, Judge Rogers, in considering this question said:

"After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

In *Fitzgerald v. De Soto Special Road District*, 195 S. W. loc. cit. 697, our court in banc said:

"Where the court had jurisdiction over the subject-matter and person of plaintiff, as in this case, and where the record affirmatively recites the facts necessary to confer jurisdiction, the judgment of said court, in respect to such matter, is not only conclusive in a collateral proceeding like this, but would be equally so in a direct proceeding in equity to set aside the judgment, unless it appears that fraud was practiced in the very act of obtaining the judgment."

Many authorities are cited in support of above principle.

There is nothing in the evidence to indicate that Mitchell, Ayres, or Orendorf were guilty of any wrongful acts in dealing with said property or in purchasing the same through their agent at the sale. As heretofore suggested, their stock was then, for all practical purposes, valueless; they were only officers in name, without any legal right to manage and control the property. The federal court having *confirmed* the sale to Mitchell, Ayres, and Orendorf without objection from plaintiff or any one else, we are of the opinion that respondent in this action is concluded by the order of the court in the foreclosure decree in fixing \$30,000 as a *reasonable* price for which said property might be sold, in the absence of a better bid. This is true, *regardless* of the estimated value placed upon the property after it was purchased by the defendant company.

[3] III. Plaintiff was present at the sale, made no objection thereto at the time, saw the report of the commissioner, stating that it had been sold for \$31,050 to Robeson, and must have known that the order of the court

confirming said sale recited that C. M. Robeson, representing the majority of the bondholders, had purchased the property for above amount, and likewise recited that he had paid therefor \$14,500 in cash, and \$81,000 in amount of the bonds of said company, etc. The \$81,000 in amount of bonds is set out in the commissioner's report of sale, and the bonds are described therein. Plaintiff testified that he knew who the bondholders were.

In other words, plaintiff was present when his friend Garrett was bidding on the property, made no protest against the sale, filed no exceptions to the report of the commissioner, interposed no objections to the confirmation of said report, received his distributive share of said \$31,050, retained the same to date of trial, and, so far as we are advised, has never offered to return it. He made no effort to prevent the property from passing into the hands of defendant. He waited until July 15, 1914, to bring this suit, although the sale had taken place on June 30, 1913.

With the foregoing facts confronting him, in this collateral proceeding, we are of the opinion that plaintiff, both by his acquiescence and the doctrine of equitable estoppel, is not entitled to maintain this action. *State ex rel. v. Citizens' State Bank*, 274 Mo. 60, 202 S. W. loc. cit. 386, 387, and cases cited; *State v. Ellison*, 191 S. W. loc. cit. 51, 52; *Lyon v. City of St. Louis*, 178 S. W. loc. cit. 97, 98, and cases cited; *St. Joseph v. Railroad Co.*, 268 Mo. loc. cit. 55, 56, 186 S. W. 1080; *Town of Montevallo v. School District*, 268 Mo. 217, 186 S. W. 1078; *Troll v. St. Louis*, 257 Mo. loc. cit. 659, 168 S. W. 167; *Railroad v. Second St. Imp. Co.*, 256 Mo. 386, 166 S. W. 296; *Hector v. Mann*, 225 Mo. 228, 124 S. W. 1109; *Proctor v. Nance*, 220 Mo. loc. cit. 116, 119 S. W. 409, 182 Am. St. Rep. 555; *Railroad v. Bridge Co.*, 215 Mo. loc. cit. 296 and following, 114 S. W. 1084; *Austin v. Loring*, 63 Mo. 19; *Hereford v. Bank*, 53 Mo. 330; *Dutcher v. Hill*, 29 Mo. loc. cit. 274, 77 Am. Dec. 572.

Numerous questions are discussed in appellant's brief; but, in view of respondent's frank statement of his contention, we are relieved from considering many of the points argued. Respondent in his brief, at pages 43, 44, says:

"Much is said in learned counsel's voluminous brief about this being an attack on the decree and sale had in the federal court. Nothing could be farther from the true situation. This proceeding does not directly nor indirectly attack the proceedings in that court. It is not claimed or intimated in the pleadings here on the part of the plaintiff that the decree rendered by the federal court, foreclosing the mortgage under which the sale was had, was void, or even voidable here or elsewhere. We state here and now that this decree is valid and binding upon every one, whether parties to that suit or not, because

it was a foreclosure of a valid mortgage by a court having jurisdiction in that behalf.

"The world had the right to bid at the sale under that decree of foreclosure, including Mitchell, Ayres, and Orendorf, who did in truth and in fact buy this property. The sale was valid, but, being the property of the old company before the sale, and being purchased by the men who composed that company and now held by them under a new name, remains subject to the details of the old company."

Respondent in his brief has cited and quoted from a number of cases in support of his contention, but mainly relies on *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, *Louisville Trust Co. v. Louisville Ry. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, and *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117. A large portion of his brief is made up from elaborate quotations taken from the *Boyd Case*, supra, and it is evidently considered as the leading authority upon which he relies.

At the outset, it may be well to observe that four of the Justices of the United States Supreme Court, in the *Boyd Case*, dissented from the majority opinion of Mr. Justice Lamar, and expressed their views of the case in a dissenting opinion by Mr. Justice Lurton. The facts are extremely complicated, run through a long period of time, cover different phases of litigation, and deal with many questions which are not pertinent to the issues before us. Suit was brought by Boyd in the state court of Washington against the *Cœur D'Alene Railway & Navigation Company*, a Montana corporation, authorized to do business in Idaho, hereafter referred to as the *Navigation Company*; the *Northern Pacific Railroad Company* created by act of Congress, designated in the litigation as *Railroad Company*, and the *Northern Pacific Railway Company*, a Wisconsin corporation ([C. C.] 170 Fed. 781), referred to as *Railway Company*. The case was transferred to the federal Circuit Court, and tried before Judge Whitson, who rendered a decree in favor of Boyd (170 Fed. 779). The case was appealed to the federal Court of Appeals, where the judgment of the Circuit Court was affirmed (177 Fed. 804, 101 C. C. A. 18). As laches in suing was charged against Boyd, large portions of the opinions in above reports, as well as the opinion in 228 U. S. supra, were taken up in refuting this charge, and showing that Boyd was guilty of no negligence in this respect. It appears from the opinion of Mr. Justice Lamar (228 U. S. 498, 33 Sup. Ct. 554, 57 L. Ed. 931) that Boyd's judgment against the *Navigation Company* was rendered in 1890, in an action begun in 1887, in a court of the territory of Idaho; that after he had established his title to the judgment and revived it in 1906 for \$71,278, there was nothing on which an execution could be levied, because,

in the meantime, all of the property of the Navigation Company had been sold under foreclosure. He thereupon brought this suit, claiming that the Railroad Company was liable in equity as for a diversion of \$465,000 of bonds, belonging to the Navigation Company, but used by the Railroad Company in payment of 5,100 shares of stock bought from Corbin in 1888, a majority of which stock was owned by Corbin, the president of said Navigation Company. On August 1, 1888, Corbin, in his individual capacity, entered into a written contract with the Railroad Company, in which he undertook to have the Navigation Company issue \$825,000 of bonds, \$360,000 of which were to be retained to retire those then outstanding. He also agreed to cause the Navigation Company to lease its property for 999 years to the Railroad Company, which, in turn, was to guarantee the payment of the principal and interest of the bonds. The contract further recited that, in consideration of the execution of the lease and guaranty, Corbin would transfer to the Northern Pacific (Railroad Company) 5,100 fully paid and nonassessable shares of the capital stock of the Navigation Company. The agreement was promptly carried into effect. 228 U. S. 499, 33 Sup. Ct. 554, 57 L. Ed. 931. A resolution was passed by the directors of the Navigation Company, authorizing the issue of \$825,000 of bonds for properly constructing, completing, and equipping the road. The 999-year lease was made, and Corbin transferred his stock. Shortly afterwards, the Trust Company, named in the mortgage, issued to Corbin, president, or order, \$465,000 of the new bonds. They were not used for completing or equipping the road, paying the debts, or other corporate purposes, and although the Railroad Company was then the holder of a majority of the stock, in charge of the business and litigation of the Navigation Company, no steps were taken to trace or recover them. On December 17, 1889, the Railroad Company bought from Corbin 4,400 shares of the Navigation Company's stock, and on December 24, 1889, bought 500 shares from Charles H. Head & Co., whereby it became the *stockholder* of said Navigation Company. (C. C.) 170 Fed. 786. The District Court, the Court of Appeals, and the Supreme Court (228 U. S. 500, 33 Sup. Ct. 554, 57 L. Ed. 931), all find that the Railroad Company combined with Corbin in diverting \$465,000 of the assets of the Navigation Company, and thereby made itself liable for the payment of same to the Navigation Company, and remained so liable until the funds were restored to the true owner (228 U. S. 500, 33 Sup. Ct. 554, 57 L. Ed. 931). Mr. Justice Lamar, in 228 U. S. at page 501, 33 Sup. Ct. at page 559 (57 L. Ed. 931) said:

"Although this diversion of \$465,000 of bonds in 1888 made the Northern Pacific liable, in

equity, for the payment of Boyd's judgment for \$71,278, recovered in 1896 and revived in 1906, yet his right was apparently not enforceable, because in 1896 all of the property of the Northern Pacific Railroad had been sold under foreclosure to the newly created Northern Pacific Railway Company. He thereupon brought this suit against the mortgagor and purchaser, seeking to subject the property bought to the payment of this liability. He claimed that the foreclosure sale was void because made in pursuance of an illegal plan of reorganization, between bondholders and *stockholders* of the railroad, in which, though no provision was made for the payment of unsecured creditors, the *stockholders retained their interest by receiving an equal number of shares in the new railway.*" (Italics ours.)

This is one of the strong distinguishing features between the Boyd Case and the one at bar. Here Mitchell, Ayres, Orendorf, made no use of their stock in the purchase of the Cassville & Western Railway Company, nor in the reorganization plan adopted by them. They were to receive no stock in the defendant company in exchange for their stock in the old company. On the contrary, their stock was treated as worthless. *They paid the full purchase price of \$31,050 for the property, and the sale to them was confirmed, without objection from the plaintiff.*

In the Boyd Case, the parties in interest, composed of *stockholders, bondholders, etc.*, of the Northern Pacific Railroad Company, and others, formed what they denominated "the plan for independent reorganization of the property." (C. C.) 170 Fed. 789. Upon the completion of the reorganization, the managers in behalf of the syndicate were to deliver to each depositor of one share (\$100) of preferred stock of the old company, \$50 in new preferred stock trust certificate, and \$50 in new common stock trust certificates in consideration of the payment of \$10 per share, and to deliver to each depositor of \$100 of old common stock one share of like par value of new common stock trust certificates in consideration of the payment of 15 per share. (C. C.) 170 Fed. 789. Judge Whitson, in 170 Fed. 802, points out very clearly the difference between the Boyd Case and the one before us as follows:

"It is not denied that if the mortgage liens had been foreclosed by an adversary proceeding in the usual way for the enforcement of such demands, and the property had been bidden in by the holders thereof and without connivance or collusion with *stockholders*, complainant would have no standing."

[4] In the reorganization agreement under which the Northern Pacific Railway Company acquired the property of the Northern Pacific Railroad Company, it contained the recital that the property to be purchased was agreed to be "of the full value of \$345,000, payable in fully paid nonassessable stock and the prior lien and general lien bonds to

be executed and delivered as hereinafter provided." 228 U. S. 507, 508, 33 Sup. Ct. 561, 57 L. Ed. 931. Mr. Justice Lamar, at page 508 of 228 U. S., at page 561 of 33 Sup. Ct. (57 L. Ed. 931), says:

"If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

In contemplation of law, the shares of stock, in a corporation, represent the property thereof. It therefore appearing that part of the stock of the old company was put in as a part of the reorganization consideration, it was equivalent to the transfer to the new corporation of a part of the tangible property of the old corporation which creditors were entitled to have applied to the payment of their debts. Without pursuing this branch of the inquiry further, we find nothing wrong with the plan of reorganization in the case before us, nor does it appear that any of the stock in the Cassville & Western Railway Company was exchanged for stock or an interest in the defendant company. On the contrary, the stock of the old company was valueless, and was not considered in the purchase of the property, or in the plan for reorganization.

(2) The case at bar is clearly distinguished from the Boyd Case for another reason. The defendants in the above case pleaded that Boyd was concluded by the suit which Patton had brought to set aside the foreclosure sale, as a creditor, in which he was raising the same question contended for by Boyd, and that as Patton was defeated and took no appeal, it was conclusive as to Boyd and other creditors. The majority opinion of the United States Supreme Court in the Boyd Case, at pages 505, 506, of 228 U. S., at pages 560, 561, of 33 Sup. Ct., 57 L. Ed. 931, said:

"But, inasmuch as Boyd was not a party to the record, that decree was not binding upon him as res adjudicata, and the opinion, not being controlling authority, cannot be followed, in view of the principles declared in Chicago, R. I. & P. R. R. v. Howard, 7 Wall. 392 [19 L. Ed. 117]; Louisville Trust Co. v. Louisville

R. R., 174 U. S. 674 [19 Sup. Ct. 827, 43 L. Ed. 1130]. In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by adversary proceeding in which it would have been to the interest of the stockholders to interpose every valid defense. If after a trial a sale was ordered, they were still interested in making the property bring its value, so as to leave a surplus for themselves as ultimate owners. Even after sale they could have opposed its confirmation if the bids had been chilled, or other reason existed to prevent its approval. In the present case all these tests and safeguards were withdrawn."

It is evident from what is said in the above opinion that if Boyd, like the plaintiff here, had been a party to the foreclosure proceedings, had been present at the sale, had been instrumental in bringing it about, made no objection thereto, filed no exceptions to the report of the commissioner, interposed no objection to the confirmation of the sale, accepted his distributive share of the proceeds thereof, and made no objection to the order of the court transferring the property of the old company to the new, the decree would not, in our opinion, have gone in his favor.

V. We have read and fully considered respondent's brief, as well as all the authorities cited therein. We have also read with interest the brief of appellant, and have examined many of the authorities cited therein. It would serve no good purpose to prolong this discussion. We have not been able to find any well-considered case which would warrant a recovery upon the part of plaintiff under such facts as are discussed in the record before us. We are of the opinion that the trial court should have found the issues in favor of appellant. We accordingly reverse and remand the cause, with directions to the lower court to dismiss plaintiff's bill and enter a judgment in favor of defendant.

BROWN, C., concurs.

PER CURIAM. The foregoing divisional opinion is adopted by the court in banc.

WALKER, FARIS, WILLIAMS, and GRAVES, JJ., concur.

BOND, C. J., and BLAIR, J., not sitting.

WOODSON, J., absent.

LANCASTER et al. v. SCHREINER.  
(No. 2440.)

(Springfield Court of Appeals. Missouri. May 9, 1919.)

## 1. CARRIERS ⇐26—RATES—INTERSTATE COMMERCE.

Where a shipper delivered an interstate shipment of goods to a carrier and directed it to be sent over a route having an established through charge, the initial carrier was charged with the duty to make necessary notations on the waybill, and the shipper had the right to assume compliance with that duty, and he was not responsible for any misrouting.

## 2. CARRIERS ⇐26 — ACTION TO RECOVER CHARGES—PRESUMPTIONS.

In an action by a carrier to recover charges, where neither the bill of lading nor the waybill issued by the initial carrier was introduced in evidence, it must be presumed that they designated the routing of the shipment as stated in a receipt issued by such carrier to the shipper, especially in view of Interstate Commerce Act, § 20 (U. S. Comp. St. §§ 8604a, 8604aa), providing a penalty for issuing a false bill of lading.

## 3. CARRIERS ⇐26 — CONNECTING CARRIERS—MISROUTING—INNOCENT PARTIES.

A connecting carrier receiving a shipment of goods which was not routed over its line will be charged with knowledge that it was aiding in misrouting the shipment, where the bill of lading and waybill designated the proper route.

## 4. CARRIERS ⇐26 — ESTABLISHED RATES — CONTRACTS.

An interstate carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates, and the shipper must make good any deficiency not collected, regardless of the cause, freight rates established by the approval of the Interstate Commerce Commission dominating every shipment and contract, and this rule applies to a through rate made up of the sum of local rates of connecting carriers.

## 5. CARRIERS ⇐26 — RATES — SELECTION OF ROUTE.

Where a shipper delivers goods to a carrier, he is entitled to have the goods sent over the cheapest route, and that without even making a selection.

## 6. CARRIERS ⇐26—MISROUTING—ESTABLISHED THROUGH RATES.

In case an interstate shipment of freight is misrouted so that the shipper or consignee is compelled to pay a larger amount of freight charges than the established through rate, the carrier or carriers, whether initial or connecting, which are guilty of the misrouting must stand the loss, and cannot collect the excess charges caused by the misrouting, and, if paid by the shipper or consignee, must refund the overcharge, especially in view of Interstate Commerce Rule 214, § (d), relating to misrouting shipments.

## 7. CARRIERS ⇐26—LIABILITY OF CARRIER—RELATION OF CONNECTING CARRIERS.

Where shipper ascertained through rate and designated the proper route and paid the correct amount of charges for the through shipment, the initial carrier was responsible for the through shipment, though part of the route was over a connecting carrier, the connecting carrier becoming in a measure at least the agent of the initial carrier to complete the shipment, and there was such contractual relation between the two carriers that the connecting carrier could hold the initial carrier for its lawful share of freight charges.

## 8. CARRIERS ⇐26 — INTERSTATE CARRIERS—FREIGHT CHARGES—ACTIONS.

The spirit of the Interstate Commerce Act with the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) is to treat connecting lines of transportation as one line so far as the shipper is concerned, and to compel the different companies forming a through route to deal as a unit with the shipper, and to then adjust all differences as to individual liability among themselves, and thus, where a shipment was misrouted and the proper charges were paid to the terminal carrier, such terminal carrier should not be allowed to sue the shipper for the local established charges over the actual route of the shipment, but should be required to settle the matter with the other carriers, because to collect the money from the shipper would be to collect money for the benefit of an offending carrier, money which must again be returned to the shipper by the offending carrier.

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Suit by J. L. Lancaster and Pearl Wight, receivers of the Texas & Pacific Railway Company, against George W. Schreiner. Judgment for defendant, and plaintiffs appeal. Affirmed.

Edwin L. Moore, of Lamar, for appellants.  
H. W. Timmonds, of Lamar, for respondent.

STURGIS, P. J. This is a suit to recover from the shipper an alleged balance due for freight charges on a shipment of hay from Golden City, Mo., to New Orleans, La. The trial court denied plaintiff's right to recover, and it appeals.

The facts are not disputed. The defendant delivered to the St. Louis & San Francisco Railroad, hereafter called the Frisco, at Golden City, Mo., two carloads of hay for shipment to Leonhardt Company, consignee, at New Orleans. The defendant shipper made inquiry of the station agent at Golden City, and ascertained that there was in force a through tariff rate, duly approved by the Interstate Commerce Commission, of 31 cents per hundred pounds from Golden City to New Orleans. This through route was via Frisco Railroad to Wister, Okl., thence via Chicago, Rock Island & Pacific Railway, hereafter called the Rock Island, to Alexandria, thence

via Louisiana Railroad & Navigation Company, hereafter called the L. R. & N. Co. to New Orleans. The defendant designated this route of shipment, and received from the initial carrier, the Frisco Railroad, a receipt showing the goods to be shipped, consigned to Leonhardt Company, "destination, New Orleans, Route L. R. & N. at Shreveport, shipper's routing." Instead of shipping the hay over the route so designated the shipment was made by the Frisco Railroad to Memphis, Tenn., thence via the Rock Island Railroad to Alexandria, La., and thence via the Texas & Pacific Railroad, plaintiff here, to New Orleans. The plaintiff railroad as terminal carrier delivered the hay to the consignee at New Orleans, and collected the amount of the approved through tariff rate of 31 cents per hundred, amounting to \$157.14. More than a year thereafter the plaintiff brought this suit, alleging that the freight charges due on this hay "as shown by the authorized tariffs then in effect and on file with the Interstate Commerce Commission amounted to \$288.93, which defendant promised and agreed to pay; that defendant has paid the sum of \$157.14, leaving a balance due of \$131.79, which defendant owes, but has refused to pay."

This claim arises solely from the fact that the hay in question was misrouted. The Frisco Railway carried it to Memphis, Tenn., instead of Wister, Okl. It was delivered to the Rock Island at Memphis instead of at Wister. The Rock Island delivered it to the Texas Pacific at Alexandria instead of to the L. R. & N. at that point or at Shreveport. There seems not to have been any approved through tariff rate from Golden City, Mo., to New Orleans over the route the hay was actually shipped, and the rate now demanded of defendant is the deficiency in the sum of the duly approved local rates, to wit, from Golden City via Frisco to Memphis, 19 cents, from Memphis to Alexandria via Rock Island, 23 cents, and from Alexandria to New Orleans via Texas & Pacific, 15 cents, making a total of 57 cents per hundred-weight instead of the through rate of 31 cents via the Shreveport route. The correctness and due approval by the Interstate Commerce Commission of these various local rates over the route the hay was actually shipped, as well as the through rate of 31 cents had the hay been shipped via the route designated by the shipper, are not disputed.

This defendant, the shipper, had nothing to do with the actual shipment of the hay after delivering it to the initial carrier and designating the proper routing. No explanation is offered as to why the hay was misrouted by the Frisco Railroad in carrying it via Memphis rather than via Wister; the two routes being wholly divergent. There is nothing to show that either the shipper or consignee had any knowledge or means of knowledge of the hay having been shipped

via Memphis and the Texas & Pacific Railroad instead of via Wister and the L. R. & N. Company. The plaintiff road is not a part of the through route designated by the shipper over which the established through rate applied, and no explanation is offered as to why this hay was delivered by the Rock Island to plaintiff at Alexandria instead of to the L. R. & N., the properly designated route, at that point even after being shipped to that point via Memphis instead of Wister. There was clearly a misrouting of the shipment both by the Frisco road in carrying it via Memphis and by the Rock Island in delivering it to the Texas & Pacific at Alexandria instead of to the L. R. & N.

[1-3] Nor is it shown that plaintiff is innocent in this respect. It is not so claimed in the pleadings. Neither the bill of lading nor the waybill issued by the initial carrier is in evidence, but defendant put in evidence a receipt issued to him by such carrier which sets forth the terms of shipment, and states that a bill of lading has been issued. The form and substance of this receipt are like the usual bill of lading, and such receipt states that the route is "via L. R. & N. at Shreveport," and that same is the "shipper's routing." Section 20 of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa) requires the initial carrier to issue a bill of lading, and provides a penalty for issuing a false bill of lading. We should not assume that the bill of lading for this hay, or what is more important the waybill used by the carriers, contained a different routing than that designated by the shipper and contained in the receipt. As said in *St. Louis S. W. R. Co. v. Spring River Stone Co.*, 236 U. S. 718, 722, 35 Sup. Ct. 456, 458, 59 L. Ed. 805, 809, in reference to the contents of waybills used by carriers:

"In the circumstances the initial carrier was charged with the duty of making these notations; and for the purposes of this suit the shipper might assume compliance with that duty—he was not required to establish actual performance."

The shipper had no control over this shipment after delivering it to the initial carrier, and did not know and had no means of knowing, or of controlling if he did know, the route over which the shipment was actually made. He designated the proper route, and there his duty and responsibility ended. If, as we must presume, the bill of lading and waybill designated the routing of this shipment, as did the receipt issued, as "Route L. R. & N. at Shreveport," then plaintiff knew that it was aiding in misrouting the shipment on its receiving it at Alexandria. *Drake v. Railroad*, 125 Tenn. 627, 148 S. W. 214, where it is said:

"It was negligence on its part not to know of that agreement before it received the goods. It was within its legal right to insist upon a showing from its codefendants of their author-



ity to offer the goods to it for transportation. A common carrier is not bound to accept for transportation goods from any person other than the owner, or the duly authorized agent of the owner."

It is also significant that the plaintiff collected on delivering the shipment, not the sum of the local rates over the route actually traveled, but the proper through rate via the through route, showing that it had knowledge of the through rate either from the bill of lading and waybill or from the published through rate over a route of which its own line was not a part.

[4] The plaintiff relies on the proposition that this shipment actually moved over the Frisco to Memphis, over the Rock Island to Alexandria, and thence over plaintiff's road to New Orleans, the combined local rates over which route amount to 57 cents per hundredweight, and that under the law it has no option to collect a lesser rate. It invokes the doctrine, so well established as not to be debatable, that a carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates, and that the shipper must make good any deficiency not collected regardless of the cause. Freight rates are established by the approval of the Interstate Commerce Commission, and, when so duly established, dominate every shipment and contract therefor, and therein there can be neither variableness nor shadow of turning. 1 Roberts, Federal Liabilities of Carriers, §§ 257, 203; Judson on Interstate Commerce (3d Ed.) § 368; Railway Co. v. Stone Co., 169 Mo. App. 109, 124, 133, 154 S. W. 465; Bush v. Keystone Driller Co., 190 Mo. App. 152, 199 S. W. 597; New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515; Texas & Pacific Ry. Co. v. Mugg & Dryden, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Central Railroad Co. v. Mauser, 241 Pa. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92. This rule applies to a through rate made up of the sum of local rates of connecting carriers. 1 Roberts, Fed. Liability of Carriers, §§ 273, 274.

[5] In the present case, however, the shipper or consignee has paid the full amount of the duly established rate for this shipment. He is in no way claiming any deduction from or variation of such established rate. On the contrary, the plaintiff is seeking to compel the shipper to pay a higher rate than the established rate merely because the shipment was actually and wrongfully sent over a longer and different route than that selected by the shipper, and to which cheaper route he was entitled even without making a selection. Judson on Interstate Commerce (3d Ed.) § 375; Spreckels Bros. Commercial Co. v. Railroad, 18 Interst. Com. Com'n, 190.

[6] It is equally well established that, in case a shipment of freight is misrouted so

that the shipper or consignee is compelled to pay a larger amount of freight charges than the established through rate, the carrier or carriers, whether initial or connecting, which are guilty of the misrouting must sustain the loss, and if paid by the shipper or consignee must refund the overcharge. The offending carrier must alone bear such loss without the right of exacting or receiving contribution. Noble v. Jonesboro, Lake City & Eastern Ry., 20 Interst. Com. Com'n, 520; Lord & Bushnell Co. v. Mississippi Central Railroad, 22 Interst. Com. Com'n, 463; Hennepin Paper Co. v. Northern Pacific Railway, 12 Interst. Com. Com'n, 535; Cressey & Co. v. Railroad, 18 Interst. Com. Com'n, 132; Grand Rapids Plaster Co. v. Railroad, 15 Interst. Com. Com'n, 68.

The plaintiff put in evidence here a ruling adopted by Interstate Commission Rule 214, § (d), which reads:

"If a carrier's agent misroutes a shipment and thus causes extra expense to the shipper over and above the lawful charges via another available route of the class designated by shipper—that is, all rail or rail and water—over which such agent had applicable rates which he could lawfully use, and responsibility for agent's error is admitted by the carrier, such carrier may, as to shipments moving subsequent to March 18, 1907, adjust the overcharge so caused by refunding to shipper the difference between the lawful charges via the route over which shipment moves and what would have been the lawful charges on same shipment at the same time via the cheaper available route of the class designated which could have been lawfully used. Such refund must in no case exceed the actual difference between the lawful charge via the different routes as specified, and must in every instance be paid in full by the carrier whose agent caused such overcharge and must not be shared in by or divided with any other carrier, corporation, firm or person."

It is obvious, therefore, that no carrier itself guilty of a misrouting can collect from the shipper the excess charges caused thereby, and there is a basis for the trial court's holding here that the plaintiff is not innocent in this respect.

[7, 8] The plaintiff here concedes that if defendant is compelled to pay the excess sued for in this case he can recover the same against the carrier or carriers guilty of misrouting this shipment. Its contention is that, on account of the rigid conditions of the Interstate Commerce Act, the plaintiff must sue for and defendant must pay the amount of the combined local rates of the route over which the shipment was actually sent, though by no fault of the shipper, and the shipper must then in turn sue for and recover the excess which he is thus forced to pay from the offending carrier. We see no reason, however, why the plaintiff, if it has not retained its own charges in full, as to which we are not advised, should not itself sue such offending carrier to adjust such difference.

If plaintiff is guiltless in the premises and is entitled to its full compensation for transporting in good faith this hay from Alexandria to New Orleans, we know of no reason why it did not retain such amount from the amount collected from the consignee. In this suit plaintiff is not only seeking to collect from the shipper, who is without fault and has paid all that is justly due, its own charge, but also the charges alleged to be due the other two carriers, one or both of whom are clearly guilty of misrouting the shipment and thereby causing the excess which plaintiff sues to recover. Why should plaintiff be allowed to recover from defendant for the benefit of the offending carrier the very amount which such offending carrier must refund to defendant? We see no reason for two suits where only one, if any, is needed. The case is the same as if the shipper on ascertaining the through rate and designating the proper route had paid the initial carrier the correct amount of charges for the through shipment. The initial carrier would then be responsible for the through shipment, though part of the route was over a connecting carrier. The connecting carrier becomes in a measure at least the agent of the initial carrier to complete the shipment (1 Roberts, Federal Liabilities of Carriers, § 333; Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 58 L. Ed. 516), and there is such contractual relation between the two carriers that the connecting carrier could hold the initial carrier for its lawful share of freight charges. The spirit of the Interstate Commerce Act with the Carmack Amendment (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) is to treat connecting lines as one line so far as the shipper is concerned and to compel the different companies forming a through route to deal as a unit with the shipper and to then adjust all differences as to individual liability among themselves. The wisdom and fairness of this course has been demonstrated and is obvious. We see no reason, therefore, why plaintiff, if anything is yet due it, should not look to the initial or preceding carrier for any redress due it rather than to seek to collect from defendant for the benefit of the offending carrier money which must be again returned to the defendant.

We decline to hold that plaintiff should recover under the facts here, and in doing so are in no way encroaching on the rule that the shipper must pay and the carrier collect the established rate, and that such rate cannot be varied or departed from by any manner of indirection or subterfuge. We think this holding accords with what the court held in *St. Louis Southwestern Rail-*

*way Co. v. Spring River Stone Co.*, 236 U. S. 718, 35 Sup. Ct. 456, 59 L. Ed. 806, that, where the shipper has in good faith paid the full established rate, then the carrier cannot collect from him a greater amount because of some dereliction of its own duty in making the shipment.

We have carefully considered the case of *Louisiana R. & N. Co. v. Holly*, 127 La. 615, 53 South. 882, where the facts are for the most part similar to those here. In that case, however, the shipper had not designated the route of shipment, and only claimed that there was a through route over which the initial carrier might have sent the shipment at a lesser rate. Nor was there a basis for a finding in that case that plaintiff was not innocent of the misrouting. We are not, however, altogether satisfied with the reasoning of that case.

The judgment here we think is for the right party, and is affirmed.

BRADLEY and FARRINGTON, JJ.,  
concur.

#### DAVIS v. GREENLEE et al. (No. 2484.)

(Springfield Court of Appeals. Missouri. May 9, 1919.)

#### 1. BROKERS ⇐86(1)—ACTION FOR COMMISSIONS—EVIDENCE.

In action by broker against purchasers of land, *held*, there was substantial evidence that defendants agreed to pay, in addition to taxes on the land, plaintiff's commission.

#### 2. FRAUDS, STATUTE OF ⇐129(5)—EXECUTED CONTRACT.

Although contract for sale of land was oral, if deed was delivered and accepted and part payment made by purchaser in accordance with the contract, the statute of frauds would not be involved.

#### 3. TRIAL ⇐156(3)—DEMURRER TO EVIDENCE.

Demurrer to the evidence admits the truthfulness of every fact which the evidence tends to prove, as well as every reasonable inference deducible therefrom.

#### 4. COMPROMISE AND SETTLEMENT ⇐5(2)—DISPUTED CLAIM.

Where there is a dispute as to how much is owing under a conceded contract or agreement, and the debtor offers a certain amount in settlement, which the creditor accepts, the creditor is precluded from further complaint.

#### 5. COMPROMISE AND SETTLEMENT ⇐2 — AMOUNT ACCEPTED.

Where defendants claimed they owed plaintiff nothing, a payment to him of a certain amount due his principal, which was paid to plaintiff as a matter of accommodation, with the consent of the principal, *held* not a compromise.

Appeal from Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Action by O. H. Davis against F. A. Greenlee and another. From judgment for plaintiff, defendants appeal. Affirmed.

Ward & Reeves, of Caruthersville, for appellants.

Mayes & Gossom, of Caruthersville, for respondent.

BRADLEY, J. Plaintiff, a real estate broker, sued to recover an alleged balance on a commission in the sale of real estate. The trial below was had before the court and a jury, resulting in a verdict and judgment for the plaintiff, and from this judgment defendants have appealed.

Plaintiff, in substance, charges that he had a contract in writing with J. E. and J. W. Cohoon, partners, whereby the Cohoons employed him to sell 880 acres of land in Pemiscot county, Mo., and that he was to receive as commission all over \$18,000, plus the taxes for 1917, that he could get for the land; that the defendants agreed to take the land at \$19,360, which included plaintiff's commission of \$1,360 and to pay the taxes for the year 1917; that, in pursuance of this agreement with the defendants, he caused the Cohoons to execute a good and sufficient warranty deed and furnished abstract showing merchantable title, and delivered these to defendants; and that they paid to the Cohoons \$9,000 in cash and \$9,000 in notes, and the taxes for the year 1917, amounting to \$740.93, and paid plaintiff on his commission \$619.07, but failed and refused to pay the balance of his commission, amounting to \$740.93.

Defendants, answering, admit that they purchased the land described in the petition from or through plaintiff, but allege that plaintiff represented that he was the agent for the Cohoons and as such offered to sell said land to defendants at \$22 per acre and to furnish abstract showing good merchantable title, and that one half of the purchase price was to be paid in cash and the other half in two notes secured by deed of trust on the land; and that they bought on that basis; and deny that they were to pay \$22 an acre plus the taxes. Further answering, defendants allege:

"That the defendants never knew and never heard of the proposition that they, the defendants, were to pay the taxes for the year 1917, until after the deal was consummated, the abstract made, and title accepted, and then the plaintiff informed them that the owners of said land, Cohoon Bros., were requesting the defendants to pay the taxes for the year 1917, and then and there the defendants told the plaintiff that they had purchased the land for \$22 an acre, and would not pay the taxes for Cohoon Bros. for 1917 on said land, or at any other time. That thereafter the plaintiff agreed to do this,

and acquiesced in it and closed the trade and delivered to them the warranty deed of the Cohoon Bros., and accepted the payment of \$22 an acre, and the deal was finally closed and consummated; and the defendants here and now plead that they have well and fully carried out their contract, purchased said land, and paid the full contract price therefor, and there is nothing whatever due by them to the plaintiff."

The reply was a general denial.

There is no difference as to the sale price, except as to the taxes. Plaintiff claims that defendants were to pay \$19,360 plus the taxes of \$740.93 (which would be \$22 per acre plus the taxes); and defendants claim that they were to pay \$22 an acre, but deny that they were to pay the taxes. The verdict of the jury was for the exact amount of the taxes.

The record discloses that a controversy came up, before the deeds were delivered, about the taxes, plaintiff insisting that the agreement was that the defendants were to pay the taxes, and defendants denying this. Of the circumstances on the day the deal was finally consummated and deed, trust deed, and notes delivered, plaintiff on cross-examination says:

"He (Greenlee) figured up the amount due on this land at \$22 per acre, and gave me his check for \$600 (the exact amount of check was \$620.87, \$1.80 of which was for revenue stamps), and then I objected and told him that I would only accept that as part payment; that he would have to pay it if the law would allow it. I delivered the deed and accepted the money. I told him that he would have to do it according to law; that, if he would not pay, he would have to suffer for it hereafter, for according to the contract he was to pay me \$1,360. I wanted him to pay the taxes on this land for 1917, and he never denied it until after he got the deed and deed of trust. I brought them to him and delivered them, but they were all signed up."

On direct examination of this same occasion as we understand it, plaintiff said:

"I demanded the balance of my commission at that time. I told him I had been fraudulently and wrongfully cheated out of \$700 and put in a position where I could not help myself; that I had agreed to make the deal direct for \$18,000, and the papers had all been signed up, and I was not known and had no way of defending myself, and I had to accept that as part pay and let the deal go through. I did not accept that as full compensation and so informed him in his own house. I informed him at that time that I was going to sue him for the balance of my commission."

At the close of all the evidence, defendants asked an instruction in the nature of a demurrer, which was refused. On behalf of plaintiff, the court instructed the jury that if they believed from the evidence that the Cohoons entered into a contract with plaintiff whereby it was agreed that plaintiff would sell the land, that they would give him as commission all in excess of \$18,000 and

the taxes, and that plaintiff procured and negotiated a sale to defendants, and that defendants agreed to pay \$19,360 and the taxes for 1917, and that defendants in money and notes paid \$18,000 to Cohoons, and agreed to pay \$1,360 to plaintiff, and that defendants had paid plaintiff \$619.07 thereon, but had failed and refused to pay the balance, then the verdict should be for the plaintiff in the sum of \$740.93. Defendants requested, and the court gave, four instructions on their behalf, the substance of which are: (1) That the burden of proof was upon the plaintiff, and, unless the jury found from the preponderance of the evidence that the defendants in purchasing the land agreed to pay the taxes for the year 1917, then the verdict would be for the defendants. (2) That if the jury found that plaintiff represented to the defendants that he (plaintiff) was the agent of the Cohoons to sell the land, and that he agreed with the defendants to sell them the land at \$22 an acre, and furnish an abstract showing a good merchantable title, and that the defendants accepted the said proposition and paid the full sum of \$22 an acre, and have received a deed for the land, then the verdict should be for the defendants. (3) That if the jury found that the plaintiff sold to the defendants the lands in question, and at the time of the consummation of the deal a dispute arose between the plaintiff and defendants as to whether or not defendants were to pay the taxes for the year 1917, that plaintiff claimed that defendants were to pay the taxes, and defendants claimed that they were not to pay the taxes; and further find that plaintiff and defendants closed the deal upon the basis contended for by the defendants, and that the defendants did not agree to pay the taxes, but plaintiff closed the deal and delivered the deed, accepted the balance of the purchase money—then plaintiff cannot recover, and the verdict should be for the defendants. (4) The court instructed the jury that the defendants were not bound by the contract between plaintiff and Cohoons.

[1] There is some complaint about plaintiff's instruction, but we think that the questions are in the demurrer. By the demurrer two questions are presented: (1) Was there any substantial evidence tending to establish that defendants agreed to pay plaintiff's commission of \$1,360? (2) If there be sufficient evidence tending to establish the contract as alleged to take to the jury that issue, may the statute of frauds (section 2783, R. S. 1909) be invoked to defeat recovery? Plaintiff charges in his petition "that on the — day of September, 1917, plaintiff sold said above-described land to the defendants for the price and sum of \$19,360, and defendants to pay the taxes assessed against said land for the year 1917 on the following terms and conditions," one of which conditions plaintiff alleges was that defendants were "to pay plain-

tiff cash in hand the sum of thirteen hundred and sixty dollars \* \* \* for his services in selling said land." Plaintiff bottoms his cause upon the alleged agreement that defendants were to pay him \$1,360, the amount of his commission as determined by the contract he had with the Cohoons. Facing the issues squarely, plaintiff says in his brief:

"The only essential fact in dispute in this case relates to the alleged agreement on the part of defendants to pay the taxes on the land in question in addition to the purchase price thereof, and to pay plaintiff the commission due him for selling the land."

In addition to some convincing circumstances, two disinterested witnesses corroborate plaintiff that defendants agreed to take the land at \$22 per acre and pay the taxes. If this be true, then defendants agreed to pay \$19,360 and the taxes, which would, measured by plaintiff's agreement with the Cohoons, give plaintiff \$1,360 commission. A few days prior to the final consummation of the deal, plaintiff was at Blytheville, Ark., where defendant Greenlee resided, and plaintiff and Greenlee had a talk about the deal, and of this conversation plaintiff says:

"I went to Mr. Greenlee and told him the deal was ready, Mr. Cohoon says it will be closed up, and the deed and the deed of trust on the land will be in the Bank of Blytheville. I walked over to the bank with Mr. Greenlee, no question at all about the tax business, and called for these papers from Mr. Wilhite. He said they had never come; said he didn't have any papers from Cohoon Brothers. So we turned and walked out. I says; 'Possibly he has been delayed. They will come to-night or in the morning. I am going back, and you can deposit my commission to my credit in the bank without my being here at the final signing up of the deal.' He said he would. He said he would put it to my credit, my commission, and he knew at that time what my commission was. That was the understanding; he was to put my commission to my credit in the bank."

It seems that the Cohoons were getting a bit out of line and were about to go back on plaintiff after he had the deal all but closed, and, to make sure of his commission, plaintiff requested defendants to give him a check to cover the taxes and the cash payment of \$9,000, so plaintiff could show he had a buyer meeting the conditions in his contract with the Cohoons. Defendants, on March 19, 1918, made three checks payable to the Cohoons; one for \$740.93, to cover taxes, and the other two for \$4,500 each. On March 20, 1918, plaintiff returned with the deed, and the deal was closed, and defendants then gave their check for the \$620.87 payable to plaintiff, covering \$619.07 on his commission, and \$1.80 revenue stamps. We think that, in view of the fact as established by plaintiff that defendants promised to deposit the commission, when they then knew the amount, which they knew was commission, that such tends to

corroborate plaintiff in his contention that defendants were to pay his commission. After defendants had rested, plaintiff was recalled, and this occurred:

"Q. Did Mr. Greenlee agree to pay you the amount of the purchase price over and above the amount he paid Cohoon Bros., as your commission? (Objection as repetition. Objection sustained)."

Plaintiff had already testified, when speaking of the conversation with defendant Greenlee, that according to the contract the defendants were to pay him \$1,360. We hold that under the whole record here there was evidence of a substantial character tending to establish the contract as alleged that defendants agreed to pay plaintiff's commission of \$1,360.

[2] The second question raised by the demurrer and urged by appellants is of more serious import, as we view the situation. Plaintiff's agreement with defendants whereby they were to take the land was oral, and there was no sufficient memorandum in writing to bind defendants as to that agreement, if they saw fit not to keep it, and learned counsel for plaintiff do not make any claim that there is such sufficient memorandum. Defendants contend in effect, first, that when they refused to pay \$22 per acre, and the taxes, and plaintiff, though protesting, consented, the result was tantamount to a new contract or agreement, and that they (the defendants) paid the full consideration stipulated in this new arrangement, and have therefore acquitted themselves from further liability under any view. But the facts are, according to plaintiff, that when he returned on March 20, 1918, with the deed, he delivered the deed, and defendant Greenlee accepted it. According to the contract as urged by plaintiff, defendants agreed to pay plaintiff \$1,360 as commission. If this be true, then the statute of frauds would not be involved, and there is no question of a new contract. Defendants concede that if they promised to pay the commission the statute of frauds would not be involved. They only invoke the statute on the theory that they were not bound to take the land, and, not being bound to take the land, they were not bound to pay the commission. This is true if they had refused to take the land. But the fact confronts defendants that they did take the land, and, according to the contract as established, they promised to pay the commission. Further checks for \$9,740.93 had been delivered in part payment on March 19th, the day before the deed was delivered, and for aught

that appears these checks may have already been delivered to the Cohoons, and cashed.

[3-5] We have viewed plaintiff's case so far from the standpoint of the demurrer which admitted the truthfulness of every fact which the evidence tended to prove as well as every reasonable inference deducible therefrom. *First National Bank v. Simpson*, 152 Mo. 638, 54 S. W. 506; *Independence Electric Co. v. Farley Bros.*, 192 S. W. 129. Another question, however, arises: Did plaintiff close the door to recovery when he accepted the \$619.07? Plaintiff's case is necessarily founded upon the alleged contract that defendants agreed to pay him \$1,360. There was certainly a dispute,—and an honest one, it must be conceded—between plaintiff and defendants. Defendants were contending that they did not owe plaintiff anything, and that what they paid him was merely diverted from the original consideration for the land as a mere accommodation to plaintiff. There was certainly a bona fide controversy as to what the "contract" between plaintiff and defendants really was as to the payment of plaintiff's commission; but there was no dispute about how much defendants owed plaintiff. If there had been a dispute as to "how much" was owing plaintiff under a conceded contract or agreement, and defendants had offered so much in settlement of a bona fide disputed claim, and plaintiff accepted this, he is and ought to be precluded from further complaint. The rule is well settled in this state that where there is an honest dispute and an offer in settlement is made, and accepted, such is an accord and satisfaction, and closes the door to further redress. *Bartley v. Pictorial Review Co.*, 188 Mo. App. loc. cit. 644, 176 S. W. 489; *School Board v. Hull*, 72 Mo. App. 406; *Andrews v. Contracting Co.*, 100 Mo. App. 599, 75 S. W. 178; *Cornelius v. Rosen*, 111 Mo. App. 619, 86 S. W. 500; *Knapp v. Syrup Co.*, 137 Mo. App. 472, 119 S. W. 38; *Goodloe v. Packing Co.*, 145 Mo. App. 574, 122 S. W. 771. But the rule does not fit in here. If the contract existed as plaintiff claimed, then defendants owed him \$1,360, and, if as defendants claimed, they owed plaintiff nothing. Defendants did not pay the \$619.07 as a compromise. It was not paid as such, nor accepted as such. It was paid by defendants as a payment to the Cohoons according to their theory, and was paid directly to plaintiff as a matter of accommodation. Plaintiff credited this on his demand and sued for the balance.

The judgment below is affirmed.

STURGIS, P. J., and FARRINGTON, J., concur.

**BROWN v. MISSOURI, K. & T. RY. CO.**  
(No. 15365.)

(St. Louis Court of Appeals. Missouri. April 8, 1919. Rehearing Denied April 24, 1919.)

**1. MASTER AND SERVANT ⇨286(15)—INJURY TO SERVANT—RAILROAD TRACKS—CLEARANCE BETWEEN BLUFFS AND TRACKS—QUESTIONS FOR JURY.**

Whether or not railroad company was negligent in leaving bluff along its right of way with a clearance of only 20 to 24 inches between the engine tank and the bluff, which struck engineer inspecting a hot box, was a question for the jury.

**2. APPEAL AND ERROR ⇨927(7)—REVIEW—REFUSAL TO DIRECT VERDICT.**

In determining whether trial court properly refused to direct a verdict for defendant, plaintiff is entitled to every reasonable inference arising from his own testimony aided by any evidence adduced by defendant, which may help to make out plaintiff's case.

**3. MASTER AND SERVANT ⇨113(1)—INJURY TO SERVANT—SAFE PLACE FOR TRAINMEN—BLUFFS NEAR TRACKS.**

A railroad company is required to use ordinary care to provide a reasonably safe place for its trainmen, and is liable for injuries resulting from its failure to use such care by permitting bluffs so near tracks that trainmen on the outside of moving cars or engines in performing their duties are struck by them.

**4. MASTER AND SERVANT ⇨289(32) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

Where a locomotive engineer assumed the customary position for an engineer examining a hot box, when he was injured by a bluff near the track, the question of his contributory negligence was for the jury.

**5. NEGLIGENCE ⇨101 — FEDERAL EMPLOYERS' LIABILITY LAW—CONTRIBUTORY NEGLIGENCE—DAMAGES.**

Contributory negligence is not a bar to recovery for the wrongful death of a locomotive engineer, under Employers' Liability Act Cong. April 22, 1908 (U. S. Comp. St. §§ 8657-8665), but only diminishes the damages.

**6. MASTER AND SERVANT ⇨210(1)—INJURY TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.**

A locomotive engineer does not assume the risk of injury from the negligent failure of the railroad company to use ordinary care to furnish him a safe place to work.

**7. MASTER AND SERVANT ⇨286(15)—INJURIES TO SERVANT—BLUFFS NEAR RAILROAD TRACK—QUESTIONS FOR JURY.**

In an action for the death of a locomotive engineer struck by a bluff near the track, evidence of defendant's rule notifying trainmen of danger from structures near the track, does not warrant a peremptory instruction for defendant, particularly where the rule does not mention bluffs.

**8. APPEAL AND ERROR ⇨1050(1)—HARMLESS ERROR — EVIDENCE — UNOBJECTED TO IN CHIEF—REBUTTAL.**

Where a matter was testified to without objection in chief, the admission of the same testimony on rebuttal over objection will not be held prejudicial error.

**9. APPEAL AND ERROR ⇨1060(1)—HARMLESS ERROR—STATEMENT OF COUNSEL.**

Statement of counsel, in action for injuries to employé, that plaintiff could not afford to call defendant employés as witnesses because they would lose their jobs, held not prejudicial, in view of plaintiff's counsel's admission that there was no such evidence.

Appeal from St. Louis Circuit Court; Leo S. Rasseleur, Judge.

Action by Rose M. Brown, administratrix of the estate of Andrew G. Brown, deceased, against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. W. Jamison, of St. Louis, for appellant. Leahy, Saunders & Barth, of St. Louis, for respondent.

**BECKER, J.** This is an action by Rose M. Brown, administratrix of the estate of Andrew G. Brown, deceased, to recover damages from the Missouri, Kansas & Texas Railway Company for the death of the said Andrew G. Brown, an employé of the defendant company, caused by its alleged negligence.

While in charge of a locomotive engine of the defendant company, and while engaged in drawing a train in interstate commerce, one of the tank boxes on the tender of the locomotive ran hot, and said Brown, while standing on the ladder or steps leading down from the gangway that formed the fore part of the tender, inspecting said tank box, came in contact with the stone projecting from an embankment along the said right of way of said railroad and was knocked from his engine, inflicting injuries upon him which resulted in his death. From a verdict in favor of plaintiff in the sum of \$2,500, defendant appeals.

The grounds of negligence in plaintiff's petition relied on for a recovery are, in substance: First, that owing to insufficiency and lack of repair and attention on the part of the defendant, the locomotive developed a condition known as a hot box in one of the journals. Second, that while plaintiff's decedent was making an examination of the hot box, he "grasped the handrail of the engine and tender and leaned out in order to enable him to obtain a view of the side of the engine, and while so leaning out he came in contact with a stone projecting from the embankment along the right of way of said defendant," throwing him from the engine and so injuring him as to result in his death.

Third, that the defendant permitted its right of way, at the point where plaintiff's decedent was injured, to be left in a dangerous and unsafe condition by reason of the wall or embankment along which the defendant's tracks were laid at this point, being left in such close proximity to the rails as to endanger the life or limb of the servants of the defendant while in the discharge of their duties in the operation of the locomotive and train.

Defendant's answer admitted that Brown met with injuries resulting in his death, while in its employ as an engineer, and while operating a train, and at a time when said train was rapidly moving at about 40 or 50 miles an hour, by the deceased coming in contact with a natural barrier or bluff located parallel to defendant's railway tracks. The answer contained a plea of contributory negligence, and a further answer that the deceased, in the performance of his duties, had passed said barrier and bluffs while operating defendant's locomotive as an engineer in "the daytime and nighttime" for a period of many years next prior to the date of his injuries, and that he was familiar with the location of both defendant's tracks and the bluff or point referred to, and that with such knowledge the deceased was guilty of negligence in placing himself in a position of peril on said ladder, whereby he fully assumed the risks and dangers incident to his position. The answer also sets up the plea that the deceased violated one of the defendant's rules advising employes that there were obstructions on the defendant's right of way along its tracks that would not clear a man riding on the side of the car, by which all employes were required to take notice and protect themselves from injuries in passing such obstructions, and that the deceased was injured as a result of the violation of that rule. The reply was conventional.

The essential facts disclosed by the evidence adduced on behalf of the plaintiff may be stated as follows:

The deceased was 52 years old, and on November 4, 1914, the day on which he met with his injuries which resulted in his death, was earning from \$175 to \$190 per month. He was the husband of Rose M. Brown, who is the administratrix of his estate. He had been in the employ of the defendant company as an engineer for about 14 years, and for many years prior thereto had worked for the company in other capacities.

On the day in question, Brown was making his run from New Franklin to St. Louis, Mo., a distance of 183 miles, drawing one of defendant's fast passenger trains. The locomotive assigned him for that run was what is known as a ten-wheel type engine, weighing 137½ tons, has an open cab, and the tank on the tender connected to the engine was 9 feet 7 inches in width, while the gauge between defendant's tracks was 4 feet 8½

inches. The journal box of the front wheel on the left side of the tank, or fireman's side of the engine, had on several occasions prior to the day in question been reported as running hot, and the very day before, this particular tank box having been reported as running hot, was examined and repacked, but during the trip of November 4th the journal box again ran hot so that the deceased, when he stopped the train at McBain, connected a rubber hose to a valve in the tank and kept a small stream of water running into the said box. This method of treating a box which is inclined to overheat is referred to by various witnesses as the "Keeley Cure."

There is testimony that Brown kept up the "Keeley Cure" from McBain up to milepost 115, the point at which he met with his injuries. Brown examined the box at McBain, again at North Jefferson, and also at Mokane. The tracks of the defendant company east of Mokane run parallel with the Missouri river and close up to a series of bluffs. Some few minutes after the train had left Mokane, Brown walked from his seat in the cab to the gangway between the engine and tender, stepped down onto the steps leading from the gangway, holding the handrail of the tender in one hand and the handrail of the engine in the other, evidently for the purpose of inspecting the tank box, and while in that position he was struck between the hips and shoulders by a projecting rock in the bluffs and knocked off the engine, meeting with injuries from which he died the following day. This occurred about 9 miles east of Mokane, and according to the testimony the distance or clearance from the side of the tank to the projecting rock in the bluffs, at the point where Brown was struck, was 20 to 24 inches.

One Blackmer, a witness for the plaintiff, testified he was one of the defendant's engineers and had charge of the engine in question on its trip the previous day, from St. Louis to New Franklin, and that it had been necessary for him to use water on the journal in the same tank box on that trip; that he had reported the box as running hot.

James E. Hayes testified for plaintiff that he was a locomotive engineer for the Missouri Pacific Railway Company; that he had 18 years' experience as such, and that he had been given the assignment of engineer for pulling many of the special trains for his road, and that he was familiar with the rules as to obstructions and clearances in operating railroads; that the clearances on the Missouri Pacific, which paralleled the defendant's road on the other side of the Missouri river for a distance of 85 miles, also running along at the foot of bluffs the same as the defendant's road, were not less than 5 feet on its main line; that, while a hot box was not necessarily dangerous if given proper attention, it is a matter that requires constant watching, and that there

was only one way to watch a tank box, and that was to get down on the side of the tank steps and look underneath; that the tank on engines of this type protruded out from the frame and the truck box about 18 to 22 inches, so that it would be necessary to get down on the steps of the tank in order to look underneath to examine the tank box; that a man making such an inspection would have to squat down, which would project his body out toward the bluffs slightly; that you could see the end of the tank box from the cab of certain engines, but it would be impossible to see the entire box; that, when the box was running warm and the "Keeley Cure" had been applied, it was necessary to watch it frequently in order to be sure that the water kept flowing; that frequently sediment or rust on the inside of the tank would stop up the valve leading from the tank to the hose and would stop the flow of water, which might result in the journal running red hot and cause serious trouble; that he had frequently himself made an inspection of a hot box in the same manner on the Missouri Pacific road, running along bluffs, even at 40 miles per hour.

W. P. Smith, one of plaintiff's witnesses, testified he was a railroad engineer and had some 22 years' experience on the Southern Pacific, Mexican Central, Ft. Worth and Rio Grande, Atchison, Topeka & Santa Fé, Baltimore & Ohio, and Texas Pacific; that he had examined the engine that had been driven by Brown at the time of the accident; that the tank projected about 20 inches from the truck box; that he had experience with many hot boxes; that the usual method of treatment was to apply the "Keeley Cure"; that a hot box as well as the "Keeley Cure" needed watching all the time; that the only way to watch it would be to get down onto the steps beside the tank and look at it while the engine was running; and that that was the usual and customary method of inspecting a hot box on a passenger engine when the train was in motion. He also testified that more or less scale, moss, and other sediment collected in the tank, and quite frequently the hose used for the "Keeley Cure" would choke up, and if the water was shut off the journal might become tremendously hot and would be liable to break off, causing a wreck; that the safety of the passengers had to be considered; and that the "Keeley Cure" should be looked at every three or four minutes. He further testified that, on the roads that he had worked, the clearance would "possibly be from 5 to 7 feet from the side of the cab."

The conductor in charge of the train, C. R. Campbell, testified that he had observed Brown putting some oil on the box at Mokane after he had delivered his orders to him; that he had noticed that the journal in that box had been running warm and that sometimes they "ran a little water on it"; that

he had seen Brown, as well as other engineers of the road, working over that box; that he had examined the spot where Brown had been knocked from the engine and found the rock projecting at that point between 20 inches to 2 feet from the side of the tank of the engine, and that the rock was about 4 or 5 inches from the ground; that where Brown was knocked off the engine there is a curve in the tracks.

Dick Snell testified he was the fireman on the engine with Brown on the day of the accident; that the box in question was running hot; that at North Jefferson Brown turned a little water on it, which was kept running up to the time Brown was knocked off the engine; that this box had been running warm for a "trip or two"; that he saw Brown get down off of his seat and cross the deck of the engine, and that when he turned his head a minute later he saw Brown standing on the steps of the tank looking toward the tank box; that as he was thus standing on the steps he was knocked off by the projection from the bluffs; that the distance from the point of the bluffs which struck Brown to the outside of the tank was probably 20 inches.

There is also testimony that, when Brown stopped the train at the water tank at Mokane, Brown called the attention of the roundhouse foreman to the tank box, and that the roundhouse foreman took a packing iron and shoved the packing back and put some oil into the box.

In light of the assignments of error it will not be necessary to set forth defendant's testimony.

[1, 2] I. The main point raised by appellant is that the trial court erred in refusing to give defendant's requested peremptory instruction in the nature of a demurrer at the close of the case, it being contended that plaintiff failed to prove negligence on the part of the defendant.

To this we cannot agree. There was plaintiff's witness Hayes, who was permitted to testify, without objection, that he was familiar with the rules as to projections and clearances in operating railroads, and that the clearances on the Missouri Pacific, running parallel with the defendant's road on the opposite side of the Missouri river, between the bluffs and the side of the engine, were not less than five feet. Also, the testimony of plaintiff's witness Smith, an engineer of some 22 years' experience on such roads as the Southern Pacific, Mexican Central, Ft. Worth & Rio Grande, Atchison, Topeka & Santa Fé, Baltimore & Ohio, and Texas Pacific, in which we note the following questions and answers:

"Are you familiar with clearness on railroads, bluff clearances and other clearances? A. Well, I have never taken any actual measurements of them. On the roads I have worked on, the clearness would possibly be from five to sev-



en feet. Q. From what? A. From the side of the cab."

That testimony, when taken in connection with the further testimony of both Hayes and Smith to the effect that the proper manner of inspecting a truck box that is either running hot or is being given the "Keeley Cure" is for the engineer to get onto the steps, on the forward end of the tender, and look down at the box in the manner that plaintiff's decedent concededly was doing in this case at the time he was knocked off the engine, we take it makes it a question for the jury as to whether or not the defendant was guilty of negligence in leaving the embankment or bluff along its right of way at the point in question so close to its tracks that there was a clearance of but 20 to 24 inches between the side of the tank and the bluffs. To hold otherwise would be to declare, as a matter of law, that Brown had no right, in the proper exercise of his duties, to examine the hot box in the manner used by him while the train was in motion, which could not be done in light of Hayes' and Smith's testimony. While it is true that plaintiff's testimony on these matters was directly in conflict with that of defendant's witnesses, as to the question of the customary and usual manner of examining a hot box while the train was in motion, such testimony cannot be considered in determining whether the court properly refused to direct a verdict for the defendant, as plaintiff is entitled to every reasonable inference arising from her own testimony as well as in addition to any evidence which may have been adduced by the defendant which will help to make out plaintiff's case. *Hall v. Mfg. Co. & C. Co.*, 260 Mo. 351, 168 S. W. 927, Ann. Cas. 1916C, 375; *Stauffer v. Met. St. Ry. Co.*, 243 Mo. loc. cit. 316, 147 S. W. 1032.

[3] In light of the testimony, therefore, that hot boxes were of not infrequent occurrence, and that, when a box began to show signs of running hot, it was the usual and customary thing to apply what has been termed the "Keeley Cure," the process by which water is taken from a valve in the tank through a small hose and discharged into the top of the hot box, and that, by reason of the danger of the flow of the water through the small tube being stopped because of sediment in the bottom of the tank, it was necessary and due precaution for the safety of the passengers required that the engineer inspect and keep under observation the flow of water into the box, and see to it that it did not stop and thus permit the journal to become superheated and thereby risk the journal breaking and causing a wreck; that the only practical manner for an inspection of a hot box being subjected to the water treatment is for the engineer to step down on the steps between the tank and the engine and look at the box, and that

plaintiff was in the act of inspecting a box that was running hot, which he was subjecting to the "Keeley Cure," when he was knocked off by a projecting rock from a bluff that was but 20 to 24 inches in the clear from the side of the tank, when taken together with the further testimony that on other roads in the country the clearances between bluffs and the side of the tank was about 5 feet, made a case which in our judgment the trial judge properly submitted to the jury.

Defendant company is required, the same as any other employer, to use ordinary care to provide a reasonably safe place to work for its employes considering the character of their work, and is liable for injuries resulting from its failure to use such care. *Cincinnati, N. O. & T. P. Ry. Co. v. Hall*, 243 Fed. 76, 155 C. C. A. 606. And railroad companies will not be held to have exercised ordinary care to provide reasonably safe conditions for their employes to do their work when they permit standpipes, telegraph poles, fences, buildings, and other structures to be maintained so close to their tracks that employes being on the outside of their moving cars or engines, in the performance of their duties, are crushed by them. *Fish v. Ry. Co.*, 263 Mo. 106, 172 S. W. 340, Ann. Cas. 1916B, 147; *George v. Ry. Co.*, 225 Mo. 364, 125 S. W. 196; *Charlton v. Ry. Co.*, 200 Mo. 413, 98 S. W. 529; *Murphy v. Ry. Co.*, 115 Mo. 111, 21 S. W. 862.

[4-6] II. Learned counsel for appellant urgently urges the point that Brown met with his injuries because of the "extraordinary and unusual position in which he placed himself down on the side of the engine near the ground as it was approaching and was passing along the curve by the bluffs. He assumed the risk of that situation."

In view of the testimony for plaintiff that this position which Brown assumed was the usual and customary position for an engineer to take in examining a hot box on a tender that was being given the water treatment, the question of plaintiff's contributory negligence was properly submitted to the jury. This being an action under the federal statutes, under Acts of Congress of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665), contributory negligence is not a bar to recovery for injuries to a servant, but only to diminish the damages awarded by the jury in proportion to the amount of negligence attributable to the injured employe. If Brown met with his injuries, which resulted in his death, by the negligent failure of the defendant to use ordinary care to furnish him a safe place in which to work, Brown cannot be held to have assumed the risk of injury resulting from such negligence. *Williams v. Pryor*, 272 Mo. 613, 200 S. W. 53; *Fish v. Ry. Co.*, supra.

[7] III. Defendant's rules which were introduced in evidence to the effect that all employes were notified that there were coal

shoots, platforms, and other structures located on the main lines and on sidings, also structures and platforms belonging to private corporations and persons located on industrial sidings and spurs that will not clear a man riding on the side of cars, and that all employes must protect themselves from injury in passing such structures, is not sufficient to warrant a peremptory instruction to the jury in this case to find for the defendant, and we rule that under the facts in this case it was, nevertheless, a question for the jury as to whether or not the defendant was negligent in exercising ordinary care to furnish plaintiff a safe place to work. Furthermore, the rule relied upon by defendant which calls specific attention to certain coal shoots, platforms, and other structures makes no mention of the fact that the bluffs anywhere along its line were so near the tracks that they would not clear a man riding on the side of a car or engine in the performance of his duty. The employé may rightfully assume, in the absence of notice to the contrary, that his employer has used reasonable care in furnishing him a safe place for the carrying on of his duties in the line of his employment.

[8] IV. Appellant contends that Hayes, an engineer on the Missouri Pacific Railroad, when testifying as a witness for plaintiff, should not have been permitted to give his impressions of the clearances where that company's line of railroad paralleled the defendant's tracks on the other side of the Missouri river.

It is sufficient to dispose of this point to state that the record shows that the defendant made no objection when Hayes was on the stand for the first time and gave testimony on this point. While it is true that an objection was made when Hayes was recalled in rebuttal, this objection, however, we hold came too late. The matter having been testified to without objection in chief, the admission of the same testimony on rebuttal over objection will not be held prejudicial error. *Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 395, 10 Am. St. Rep. 298; *McPherson v. Andes*, 75 Mo. App. 204.

[9] V. One of the counsel for plaintiff, in his argument to the jury, made a statement to the effect that plaintiff could not afford to call employes of the defendant to testify as witnesses, "because they would have lost their jobs if they had," whereupon counsel for defendant objected in the following language:

"I object to that and ask that counsel be reprimanded for making that statement, that those employes would lose their jobs if they testified for the plaintiff."

Thereupon the court stated:

"There is no such testimony in the record." Counsel for Plaintiff: "There is no such tes-

timony, but the fact remains that it is legitimate argument and the conduct of Mr. Snell on the stand makes it proper for me to make that statement." Counsel for Defendant: "I except to the failure of the court to sufficiently reprimand counsel for that statement."

It will be noted that the exception to sufficiently reprimand adverts only to the first statement of counsel for plaintiff to which, upon objection being made, the court stated: "There is no such testimony in the record." The statement following that admonition on the part of the court was not objected to. In light of the record in this case we are unable to rule that the action of the court, in view of the statement of counsel for plaintiff, was such as could have prejudiced defendant in the eyes of the jury, and therefore rule this point against appellant.

VI. Complaint is also made of the action of the trial court in refusing three instructions requested by the defendant.

We have examined each of said instructions thus refused, and it sufficiently appears from what we have already stated in this opinion that the court properly refused each of such instructions. A reading of all the instructions in the case shows that the court gave nine instructions for the defendant, in which the learned trial judge carefully narrowed the issues in the case to conform to the evidence, and such instructions fully and fairly covered the case.

Finding no prejudicial error in the record, the judgment is affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

#### DOWNING v. LA SHOT et al. (No. 2461.)

(Springfield Court of Appeals. Missouri.  
May 9, 1919.)

#### 1. LANDLORD AND TENANT §291(6½)—UNLAWFUL DETAINER—JURISDICTION.

An unlawful detainer case must originate in the justice court, and the circuit court has only appellate jurisdiction.

#### 2. LANDLORD AND TENANT §291(18)—UNLAWFUL DETAINER—APPEAL—TIME—"DURING TERM"—"VACATION."

Under Rev. St. 1909, § 7705, as to appeal in unlawful detainer, a judgment, rendered during a temporary adjournment or recess of the circuit court from December 8th to January 10th, following, was rendered "during the term" of the circuit court, and not "in vacation," and therefore appeal therein was returnable within six days after judgment rendered in justice court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, During Term; Vacation.]

**8. TIME  $\Leftrightarrow$ 10(9)—UNLAWFUL DETAINER—APPEAL.**

Under Rev. St. 1909, §§ 7705, 8057, subd. 4, where judgment in unlawful detainer was rendered in justice court December 27, 1915, in order for the justice to have had the authority to grant appeal therefrom, the affidavit for appeal and appeal bond must have been filed with him on or before the 1st day of the following January, which was a Saturday.

**4. LANDLORD AND TENANT  $\Leftrightarrow$ 288—UNLAWFUL DETAINER—CODE.**

The law governing forcible entry and detainer is a code unto itself, and its mandatory requirements must be strictly observed.

**5. LANDLORD AND TENANT  $\Leftrightarrow$ 291(18)—UNLAWFUL DETAINER—APPEAL.**

Where in unlawful detainer case appeal bond was not filed in time, the mere fact that the justice recited in his docket that the appeal was granted did not make it an appeal; his authority being limited by the statute which did not authorize appeal, except where bond is filed in time.

**6. LANDLORD AND TENANT  $\Leftrightarrow$ 291(18)—UNLAWFUL DETAINER—APPEAL.**

Where plaintiff's appeal bond in unlawful detainer case was not filed in time, the fact that defendant appeared and tried out the pretended appeal in the circuit court made no difference, because an appearance under such circumstances will not confer jurisdiction.

**7. JUSTICES OF THE PEACE  $\Leftrightarrow$ 191(1)—APPEAL BOND—LIABILITY.**

Where appeal in unlawful detainer case was not taken within the time required by Rev. St. 1909, § 7705, the appeal bond therein was void, and did not bind the sureties thereon, although they signed it voluntarily.

Error to Circuit Court, Pemiscot County; Sterling H. McCarty, Judge.

Suit by Bettie Downing against Eva La Shot and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

B. A. McKay, of Caruthersville, for plaintiffs in error.

W. W. Corbett, of Caruthersville, for defendant in error.

BRADLEY, J. This is a suit on a bond given by defendant, Eva La Shot, on appeal from a judgment in a justice of the peace court in an unlawful detainer case. Below, a trial, before the court without a jury, resulted in a judgment in favor of plaintiff and against the sureties on the appeal bond. Being unsuccessful in a motion for a new trial, the defendant sureties bring the cause to this court by writ of error.

Plaintiff below is defendant in error here, defendants below are plaintiffs in error here, but for convenience parties will be referred to as originally styled. The original cause

which gave rise to the case at bar was tried before a justice of the peace in Pemiscot county on the 27th day of December, 1915. The trial resulted in a judgment in favor of plaintiff and against Eva La Shot for possession of the premises sued for, monthly rents and costs. On December 31, 1915, defendant in the unlawful detainer case, Eva La Shot, filed with the justice her affidavit for appeal to the circuit court, and on that date the justice noted in his docket that the appeal was granted; and on the 4th day of January, 1916, a bond was filed with the justice, and approved. The transcript of the justice was filed with the clerk of the circuit court January 6, 1916. The November term, 1915, of the circuit court was in session on December 8, 1915, at which time it adjourned to January 10, 1916. The defendant sureties contend that, since the bond sued on in the instant case was not filed with the justice within six days after the rendition of the judgment in the unlawful detainer case, and transcript of the justice filed with the clerk of the circuit court within six days after the rendition of said judgment in the justice court, the bond is a nullity and void, and that they are not therefore liable thereon.

Section 7705, R. S. 1909, dealing with unlawful detainer appeals, provides that when the judgment of the justice is rendered during the vacation of the circuit court, the appeal therefrom shall be returnable to the first day of the next term; but if the judgment in the justice court be rendered during a term of the circuit court, the appeal is then returnable within six days. This question arises on the facts here: Was the judgment in the justice court rendered "during the term" of the circuit court or "in vacation"? If the judgment in the justice court was rendered during the term of the circuit court, then the appeal from the justice court was returnable within six days; if, on the other hand, the judgment in the justice court was rendered during the vacation of the circuit court, then the appeal was returnable to the next term of the circuit court.

In Hadley v. Bernero, 97 Mo. App. 314, 71 S. W. 451, the St. Louis Court of Appeals, discussing an unlawful detainer appeal, said:

"As to the meaning of the sections of the statutes bearing on this question, we think they use the word 'term' to signify the entire period from the first day of a term as fixed by law to its final close, and the word 'vacation' to signify the period between the adjournment of any term and the beginning of another, not merely an interval when the court is not in session from having adjourned for more than a day, but not to court in course. Brayman v. Whitcomb, 134 Mass. 526; Bronson v. Schulten, 104 U. S. loc. cit. 415 [26 L. Ed. 797]; State v. Derkum, 27 Mo. App. (K. C.) 628. By this construction, a temporary adjournment of the St. Louis circuit court would not have relieved

the appellants of the duty to perfect their appeal from the judgment of the justice of the peace if given in term time, inside of six days after its rendition."

While the decision in *Hadley v. Bernero*, supra, was not determined wholly by the construction quoted, yet that point was in issue, and the court gave its construction of the statute in question. In *Warner v. Donahue*, 99 Mo. App. 37, 72 S. W. 492, an unlawful detainer appeal, the court discusses this same question. There the court says:

"A term of court has been defined to signify the period from the first day of the term fixed by law until court is adjourned to the next court in course, and the word 'vacation' has been held to mean the period between the day on which a term of court is adjourned to the next court in course, or until the day of the beginning of another term, and not the mere interval when for any reason the court is not in session and is adjourned over for more than a day. *State v. Derkum*, 27 Mo. App. (K. C.) 628; *Hadley v. Bernero*, 97 Mo. App. 314 [71 S. W. 451]; *Bronson v. Schulten*, 104 U. S. loc. cit. 416 [26 L. Ed. 797]; *Brayman v. Whitcomb*, 134 Mass. 525. Under these authorities we hold that the month of December was embraced in the September term, 1901, of the St. Louis county circuit court, and the appeal from the justice's court was taken during a term of the circuit court."

In *State v. Derkum*, 27 Mo. App. 628, the Kansas City Court of Appeals, construing sections 1762 and 1769, R. S. 1879, now sections 5057, 5064, R. S. 1909, relative to filing informations during term time and in vacation, held that the words "in vacation" as used in those sections has reference to the vacation between the terms of the court, and not to the interim or recess of the court during any term. *Hadley v. Bernero* and *Warner v. Donahue*, supra, are the only cases we find dealing directly with the language "during the vacation of the circuit court" and "during the term of such court" as used in section 7705, R. S. 1909, relative to unlawful detainer appeals. *State v. Derkum*, supra, is analogous, but construes a different statute.

On the other hand, we find the Supreme Court in *Lumber Co. v. Keener*, 217 Mo. 522, 117 S. W. 42, in construing section 3494, R. S. 1879, now section 1770, R. S. 1909, relative to the meaning of a provision in that section that the court in which a suit is brought, or in vacation the clerk thereof, shall make an order of publication to non-resident defendants. The Supreme Court in the *Keener* Case held that, where the circuit court of Stoddard county adjourned on March 20, until June 16, 1884, the interim being within the statutory period of a single term, that, nevertheless, the clerk of the court under the provisions of what is now section 1770, R. S. 1909, had authority to issue an order of publication; that is, that

during that interim the circuit court was "in vacation" so far as that term is used in what is now section 1770, R. S. 1909. But one of the controlling features of the *Keener* Case was an act of the Legislature. Laws 1883, p. 112. The act of 1883, supra, was amendatory of section 3128, R. S. 1879, relative to the construction of statutes, and added a new provision to the section. This amendment was general, and provided that whenever any act is authorized to be done by, or any power given to, a court or judge thereof in vacation, the words "in vacation" shall be construed to include any adjournment of the court for more than one day. This section was again amended in 1885 (Laws 1885, p. 190) by adding a new provision as to the powers of a clerk "in vacation." In *Lumber Co. v. Keener*, supra, reference is made to *Hadley v. Bernero* and *Warner v. Donahue*, supra, and also *State v. Derkum*, supra, but these cases were not overruled.

[1] The object and purpose of making an appeal in an unlawful detainer case returnable within six days was to obviate delay. *American Brass Mfg. Co. v. Philippt*, 103 Mo. App. loc. cit. 53, 77 S. W. 475, 765. An unlawful detainer case must originate in the justice court, and the circuit court has only appellate jurisdiction. *Karicofe v. Schwanner*, 196 Mo. App. 568, 196 S. W. 46. The object to be attained was to make such appeal returnable as soon as possible. If an appeal in an unlawful detainer case is taken during the recess of the circuit court, and such, perforce, makes the appeal returnable to the next term of the circuit court, then delay will necessarily result. If the circuit court is merely adjourned to a certain time, but not to court in course, and an unlawful detainer appeal is taken during the interim, and is made returnable to that term of the circuit court, then it would be for determination during that term, and delay obviated, and the purpose of the statute achieved. Suppose A. had sued B. in Pemiscot county in unlawful detainer, and the cause was tried, and appeal taken on December 10, 1915. The circuit court was then in recess. If that means "in vacation," then this appeal would not be returnable until the next regular term of the circuit court. Then suppose C. had sued D. in the same county in unlawful detainer, and this cause is tried in the justice court and appeal taken January 10, 1916. This appeal would have been, without question, returnable within six days, because the circuit court was then in session at regular term. In this situation we would have an appeal taken on January 10, 1916, in the same county and to the same court returnable at a date earlier than an appeal of the same kind and character taken a month prior.

[2] We do not believe that such a construction of section 7705 would be reason-

able, or would express the intention of the Legislature. The context of the law should be observed in arriving at the legislative intent; and when we read section 7705, having in mind that its purpose was to obviate delay, we can reach no other conclusion than that the appeal in the unlawful detainer case giving rise to the case at bar was returnable within six days after the judgment in the justice court. *St. Louis & San Francisco Railway Co. v. Gracy*, 128 Mo. 472, 20 S. W. 579; *Ross v. Railroad*, 111 Mo. 18, 19 S. W. 541.

Having reached the conclusion that the unlawful detainer appeal was returnable within six days from the rendition of the judgment in the justice court, the question then arises: What effect did the failure to file the bond with the justice and the transcript with the clerk of the circuit court within the time prescribed by the statute after the rendition of the judgment in the justice court have on the liability of the defendant sureties in the case at bar?

[3-6] Under section 7705, R. S. 1909, no appeal shall be allowed unless three things within the proper time be done, to wit: (1) The appeal must be applied for; (2) affidavit must be filed with the justice; (3) satisfactory appeal bond must be filed with the justice. All these steps are essential before any appeal can be granted. In order for the justice to have had the power and authority to grant the appeal, the affidavit therefor and the bond must have been filed with him on or before the 1st day of January, 1916. *Karicofe v. Schwaner*, 196 Mo. App. loc. cit. 568, 196 S. W. 46; section 8057, R. S. 1909, subdivision 4. The transcript may be filed in the circuit court on or before the return day (section 7716, R. S. 1909), but not so with the affidavit and bond for the appeal. The application and affidavit for the appeal were filed December 31, 1915, and were filed in time; but the bond was not filed until January 4, 1916, or three days after the time had expired in which a bond could lawfully be filed. Other statutes dealing with appeals from judgments in justice of the peace courts do not alter the situation, because the law governing forcible entry and unlawful detainer cases is a code unto itself, and its mandatory requirements must be rigidly observed. *Purcell v. Merrick*, 172 Mo. App. 412, 158 S. W. 478. The mere fact that the justice recited in his docket that the appeal was granted on December 31, 1915, does not necessarily make it a lawful and valid appeal, or make it an appeal at all. The justice had no authority to do anything except what the statute authorized, and the statute did not authorize an appeal except that a bond be filed in time. The bond was not filed in time, and therefore there was no appeal taken. The fact that the defendant in the unlawful detainer case appeared and tried out the pretended appeal in the circuit

court makes no difference, because an appearance under such circumstances will not confer jurisdiction. *Karicofe v. Schwaner*, supra, 196 Mo. App. loc. cit. 568, 196 S. W. 46, and cases there cited.

[7] Notwithstanding the fact that there was no appeal, are the defendant sureties liable because they voluntarily signed the appeal bond? We say no. In 4 C. J. § 3349, the general rule is stated thus:

"Where no appeal can lawfully be taken in a given case, a bond given for no other purpose than the taking of such an appeal is wholly without consideration, and therefore void. Where there is no order allowing an appeal or stay in proceedings, and such order is necessary to effectuate the appeal or stay, the appeal bond is void. If the appeal is not taken within the time provided by law, the court acquires no jurisdiction, and the appeal bond is void. Where appellant fails to file a transcript of the case in the appellate court within the time prescribed by law, it has been held that the appeal has no existence, and consequently there is no consideration for, and no liability on, the appeal bond."

In support of the above-quoted text, *Garnet v. Rodgers*, 52 Mo. 145, and *Hessey v. Heitkamp*, 9 Mo. App. 36, are cited. The *Garnet Case* involved the validity of an appeal bond from a justice of the peace court. *Garnet* had obtained a judgment by default against *Rodgers* on an account. *Rodgers* undertook to appeal, and filed his affidavit and bond therefor. The justice granted the appeal. In the circuit court *Garnet* on motion caused dismissal of the appeal on the ground that no motion had ever been made before the justice to set aside the judgment by default before said appeal was taken. The statute then provided that no appeal should be taken from a judgment by default in a justice court unless, within ten days after the rendition of such judgment, application be made to the justice, by the party aggrieved, to have the same set aside. The sureties on the appeal bond in the *Garnet Case* were urging that they were not liable because the justice could not lawfully grant an appeal until the statute with reference to setting aside a judgment by default had been complied with. The Supreme Court held the sureties on that bond not liable and the bond void. In the course of the opinion the court said:

"It will be seen from this statute that the justice has no authority to grant an appeal from a judgment by default, unless application to set said default aside has been made within ten days after the rendition of the judgment, and the same refused. Until this is done, no authority is given to grant the appeal, or take the recognizance which forms a part thereof. It has been held by this court that an appeal taken without such application is void, and will give the circuit court to which the cause is attempted to be taken no jurisdiction of the cause."

In support of the conclusion reached in the Garnet Case, the court cites *Barnett & Ivers v. Lynch*, 8 Mo. 869, and *Adams et al. v. Wilson*, 10 Mo. 341. The Supreme Court in the Garnet Case, speaking of the Wilson Case, says:

"The recognizances sued on in that case were executed, and the supposed appeals taken, more than ten days after the rendition of the judgments by the justice, and after the time expired fixed by law for taking or granting an appeal. Judge Scott, who rendered the judgment of the court in that case, used this language: 'The law requires recognizances to be entered into before the justice who tries the cause, and within ten days from the day of the trial or from the refusal to set aside a judgment of nonsuit. If these requisites are not complied with, it will be a good cause for dismissing the appeal. The justice should see that they are conformed to; otherwise he must know that the appeal can avail nothing. After the expiration of the ten days, the officer has no right to take a recognizance. \* \* \* These recognizances are not like official bonds and instruments of that character, concerning which it has been held that, though the requisites of the law under which they are taken be not complied with, yet, being voluntary and not against the policy or provisions of any law, they are obligatory. If a recognizance is not taken within the time required by law, the very purpose for which it is entered into may be defeated.'"

In *Hessey v. Heitkamp*, supra, the validity of an appeal bond is involved, growing out of a suit where plaintiff Hessey, sued one Allison before a justice of the peace under the Landlord and Tenant Act for possession and accrued rent. Judgment was rendered for plaintiff, and defendant took an appeal, with Heitkamp as a surety on the appeal bond. The circuit court affirmed the judgment of the justice, but added nothing for the continued occupancy of the tenant during the pendency of the appeal. Execution was issued, and the amount of the judgment was collected. The appeal bond contained a condition for the payment of "all rents that have or may accrue."

The proceedings in the justice court referred to in *Hessey v. Heitkamp*, supra, were in that case held to be void for certain reasons stated in the opinion. Notwithstanding the proceedings in the justice court, it was apparently urged that the sureties were nevertheless obligated on the appeal bond, as a voluntary obligation. The court in disposing of the case said:

"It might be held, upon grounds apparently satisfactory, that, notwithstanding the insufficiency of those proceedings, for the reasons stated, the recognizance might be binding on the defendant as a voluntary obligation. But the Supreme Court has long since settled the law, and this court has uniformly followed its rulings to that effect, that the recognizance is void for every purpose, and of no obligatory force whatever upon the sureties, when the

appeal is not properly taken from the judgment of the justice, or, which is the same thing in effect, when the circuit court has acquired no proper jurisdiction of the cause"—citing *Adams et al. v. Wilson*, *Garnet v. Rodgers*, supra, and *Moore v. Damon*, 4 Mo. App. 111.

In *Moore v. Damon*, supra, it is held that an appeal taken from a judgment of a justice of the peace not taken in time is no appeal at all, and the appeal bond taken in such case is void. See, also, to the same force and effect, *Graves v. Railroad*, 18 Mo. App. 647; *Julian, Adm'r, v. Rogers*, 87 Mo. 229; *Brown v. Railroad*, 85 Mo. 123.

It is our conclusion that there was no valid appeal from the justice of the peace court in the unlawful detainer case, and that the act of the justice in granting the appeal under facts was coram non iudice and void. There being no appeal, the bond given therein was void and not binding on the sureties thereon, and defendants' demurrer should have been sustained.

The judgment below is reversed, and cause remanded, with directions to enter judgment for defendant sureties.

STURGIS, P. J., and FARRINGTON, J., concur.

#### BERRY v. CITY OF SEDALIA. (No. 13214.)

(Kansas City Court of Appeals. Missouri. April 7, 1919.)

##### 1. MUNICIPAL CORPORATIONS $\S$ 768(1)—INJURIES ON STREET—SMOOTH OR SLICK PAVEMENT.

A city was liable for maintaining its brick paved street at a crossing in so smooth and slippery a condition that a pedestrian fell.

##### 2. MUNICIPAL CORPORATIONS $\S$ 768(2)—INJURIES ON STREET—DEFECTIVE PLAN OF IMPROVEMENT.

If injury results to a pedestrian on a cross walk from a danger inherent in the adopted plan, the city is not liable, but it is if the danger has arisen from negligent construction or maintenance of the plan.

##### 3. MUNICIPAL CORPORATIONS $\S$ 816(1)—INJURIES ON STREET—PETITION—NATURE OF DEFECT.

In a pedestrian's action for injuries against a city, allegations in the petition held not to make the slope of the street, for which the city was not liable, a part of its alleged negligent acts, which were its permitting the brick pavement to become by wear so slick and slippery as to be apt to cause a fall.

##### 4. MUNICIPAL CORPORATIONS $\S$ 768(4)—INJURIES ON STREET—CONSTRUCTION AND MAINTENANCE OF PAVEMENT.

A city was not liable for planning its streets so as to have a proper slope from the crown to the gutters; yet, having constructed a pavement

on such slope, in maintaining it the city was under duty, in view of the slope, to see that the surface did not become so smooth and slippery as to render it dangerous to pedestrians.

5. MUNICIPAL CORPORATIONS  $\S$  819(4) — INJURIES ON STREETS — EVIDENCE — CAUSE OF INJURY.

In a pedestrian's action against a city for injuries in slipping on a street pavement, evidence held not to show that plaintiff was injured by reason of the plan in providing the slope in the street from crown to gutters.

6. MUNICIPAL CORPORATIONS  $\S$  822(5) — INJURIES ON STREETS — PETITION — INSTRUCTION.

In an action against a city for injuries to a pedestrian when she slipped on a brick-paved street constructed with a dangerously smooth and slippery surface, which also became such by wear thereafter, instruction held not erroneous as submitting disjunctively the matters of original construction of the pavement and subsequent wear, which were alleged conjunctively by the petition.

7. MUNICIPAL CORPORATIONS  $\S$  822(2) — INJURIES ON STREET — INSTRUCTION.

In an action against a city for injuries to a pedestrian when she slipped on a slick street pavement at a crossing, instruction held not erroneous as submitting the slope of the street from crown to gutter as part of the city's negligence.

8. MUNICIPAL CORPORATIONS  $\S$  822(2) — INJURIES ON STREET — INSTRUCTIONS.

In such action instruction that greater diligence on the city's part is required in looking after the condition of a street or crossing where much traveled than where little used held proper, especially in connection with another instruction that all the city was bound to do was to exercise the care of an ordinarily prudent person.

9. TRIAL  $\S$  258(4) — INSTRUCTIONS — EXCLUDING ISSUES.

In an action for injuries to pedestrian falling on a slippery street crossing pavement alleged to have been constructed in its slippery condition and to have become slippery by wear, instructions confining plaintiff's right to recover to the pavement having been worn so smooth and slick that it was unsafe for pedestrians held properly refused.

10. TRIAL  $\S$  194(16) — INSTRUCTIONS — PROVINCE OF JURY.

In action for injuries to pedestrian falling on slippery pavement, instruction that it was duty of city to construct and maintain pavement in reasonably smooth condition, and that by reason of pavement being smooth it may be slippery, is not negligence on part of city, held properly refused as substantially a demurrer to the evidence.

11. MUNICIPAL CORPORATIONS  $\S$  822(2) — INJURIES ON STREET — INSTRUCTION.

In such action the city's requested instruction held properly refused as offered, and properly modified to limit plaintiff's right to recover, on account of smoothness and slickness of the

pavement, to smoothness and slickness brought about or suffered to continue as defined in another instruction.

Appeal from Circuit Court, Pettis County; N. B. Davis, Judge.

Suit by Elizabeth Jane Berry against the City of Sedalia. Judgment for plaintiff, and defendant appeals. Affirmed.

R. S. Robertson, of Sedalia, for appellant.  
C. C. Kelly and G. W. Barnet, both of Sedalia, for respondent.

BLAND, J. This is a suit for personal injuries. Plaintiff having recovered a verdict and judgment in the sum of \$750, defendant has appealed. The facts show that plaintiff, a woman 71 years of age, was crossing Third street in Sedalia, Mo., from north to south on the west side of Ohio avenue. She crossed that portion of the street used by pedestrians generally for crossing. She reached a point near the south curb line of Third Street when she discovered her daughter in the rear. Thereupon plaintiff started back north, reaching a point about 6 or 7 feet from the north curb line of Third street, when she slipped and fell, sustaining the injuries sued for.

As grounds of negligence the petition alleged that—

"The paving aforesaid on and near the west side of said Ohio avenue and across said Third street was on the 2d day of September, 1916, in a dangerous and defective condition, in that the bricks of said pavement were, as originally put in and by wear thereafter and by reason of their slope, so smooth and slippery as to render them dangerous to persons traveling upon them either on foot, on horseback, or in vehicles."

One of the defenses pleaded was that the street at the point of the accident was constructed with a slope from the center to the gutter for the purpose of having the water drain from the center of the street to each side thereof; that the paving of the street "with the crown or center higher than the sides is the proper and customary way of making and constructing brick pavements, and was made in accordance with the plan adopted by the city council of Sedalia, Mo., for paving said street."

The evidence shows that the street at the point of the accident was constructed, as alleged in the answer, with the crown or center higher than the sides and with a gradual slope toward the curbs. The material used in the pavement was vitrified brick, which had been laid some years before the accident. The only defect in the pavement was that it had been originally constructed extremely smooth and slippery, or had become so by constant wear. There was a one-way street car track in the center of the street, com-

posed of two rails. From the north rail of the track to the curb was 13 feet. Between these two points there was a fall of 12 inches. This crossing on Ohio avenue was the most traveled point of any street of the city of Sedalia. The testimony was that the point where plaintiff fell was very slick; a witness saying: "I don't know how I can qualify 'very.' It was very much slicker than the rest of the street west of where plaintiff fell." One witness testified: "It had been gradually getting slicker all the time. I expect thousands of people go over that street every day, and it is just the constant wear—the result of constant wear; there are no people walking over the other part of the street except that; there is no other part of the street used so very much." Many persons had slipped and fallen at the same place previously, and there was evidence that "it was a very common occurrence \* \* \* to see somebody fall on that street there." One witness testified that he himself had slipped and fallen at the same place. Some time after the accident the city placed a coating of asphalt over the crossing.

[1] Defendant urges that its demurrer to the evidence should have been sustained; defendant claiming that cities are under the duty to construct their pavements and sidewalks to present a smooth and even surface, and that they are not liable for injury to persons slipping thereon. It may be conceded that cities should construct and maintain smooth and even-surfaced streets and sidewalks, but this does not authorize such cities to construct or permit the surface of their much-used streets and sidewalks to become so slick as to be dangerous to persons using the same. The evidence in this case shows that the place where plaintiff fell was so extremely slick as to be highly dangerous to pedestrians, and we think there is no question but that the city was liable for maintaining its street in such condition under the circumstances. *Cromarty v. City of Boston*, 127 Mass. 329, 34 Am. Rep. 381; *O'Brien v. St. Paul*, 116 Minn. 249, 133 N. W. 981, Ann. Cas. 1913A, 668; *Lyon v. City*, 9 Ind. App. 27, 35 N. E. 128.

Defendant makes the point that its demurrer to the evidence should have been sustained for the reason that defendant claims that the petition fails to state a cause of action in that, as defendant says, the petition bases plaintiff's right to recover upon the slope of the street and the condition of the pavement as originally put in under a general governmental plan; that the evidence likewise shows plaintiff was injured by reason of a defect in such a plan, and that, as the construction of the street with the crown or center higher than the gutter was in accordance with this general plan of the city, the city is not liable.

[2] Of course, it is well settled that the

city has a right in its governmental capacity to adopt a general plan of street improvement, and if the injury results from a danger inherent in the adopted plan, the city is not liable, but it is equally established that, if the danger has arisen from the negligent construction or maintenance of the plan, the city is liable. *Birkblimer v. City of Sedalia*, 200 S. W. 298; *Gallagher v. Tipton*, 133 Mo. App. 557, 118 S. W. 674; *Ely v. St. Louis*, 131 Mo. 723, 81 S. W. 168; *Trippensee v. Jefferson City*, 174 Mo. App. 727-729, 161 S. W. 303; *Hays v. City*, 159 Mo. App. 431, 141 S. W. 3; *Nelson v. Kansas City*, 170 Mo. App. 542, 157 S. W. 94.

[3, 4] We do not construe the allegation of the petition as making the slope of the street, for which defendant was not liable, a part of the alleged negligent acts of the defendant. The negligence alleged in the petition is that the bricks were originally put in in such a smooth and slippery condition as to render them dangerous, and that they thereafter were by continued wear made smooth and slippery so as to render them dangerous; that such smoothness and slipperiness, both at the time of the construction of the street and at the time of the injury, was dangerous on account of the slope existing in the street upon which the bricks were placed. While defendant would not be liable for planning the street so as to have a slope to the sides, yet, when it constructed the pavement and thereafter maintained it, the city was under the duty, in view of the condition present, that is, the slope, to see that the surface did not become so smooth and slippery as to render it dangerous to persons traveling upon the street.

[5] Certainly we cannot say as a matter of law that the evidence shows that plaintiff was injured by reason of the plan of the city in providing the slope in the street. There was no evidence that it was a plan of the city to construct or maintain a slick pavement such as to render the street dangerous to pedestrians. Defendant's engineer testified that the slope of the street was constructed with reference to a general plan, but there was no evidence in the record that the general plan included a dangerously smooth surface, and we cannot assume that as a part of the plan of constructing its streets the city in its governmental capacity intended a plan that included a paved surface dangerously slick to pedestrians. In fact, we may presume to the contrary.

[6] Defendant complains that the court erred in giving plaintiff's instruction No. 1. This instruction, which directed a verdict for plaintiff, told the jury that—

"If you find and believe from the evidence that at the time plaintiff alleges she was injured the bricks in said crossing at the point where she was injured were, as originally put in, or by reason of wear thereafter, so smooth and slippery that, taken in connection with



their slope, said crossing was unsafe or dangerous for pedestrians, and if you find that such condition existed when said crossing was originally constructed or had existed for such a length of time before plaintiff's injury that the officers of the city in charge of its streets could, by the exercise of reasonable diligence, have discovered the condition of such crossing and had a reasonable time thereafter to correct such condition before plaintiff fell thereon, if she did fall, and if you further find and believe from the evidence that on or about the 2d day of September, 1916, the plaintiff slipped and fell upon said crossing on account of such smooth and slippery condition, if any, of said bricks, taken in connection with the slope thereof," etc.

Defendant claims that the petition alleges the original construction and the wear conjunctively, and that in plaintiff's instruction No. 1 the two were submitted disjunctively; that is to say, the petition alleges that the original construction, combined with the wear upon the street thereafter, constituted the negligence pleaded, while the instruction permitted plaintiff to recover if the pavement was originally put in in a dangerously slippery and smooth condition or it became dangerously smooth and slippery thereafter by wear. We see no merit in this contention. It would require a strained construction of the petition to say that it alleges other than that the pavement was dangerously smooth and slippery at the time it was constructed and likewise dangerously smooth and slippery by wear thereafter. In either event plaintiff was entitled to recover, and the instruction so told the jury.

[7] Defendant complains that this instruction is also erroneous for the reason that, if the bricks were dangerously smooth when first put in, the defendant is not liable; defendant claiming that the construction of the pavement was a part of a plan of the city. We have already ruled against this contention of the defendant in connection with another point. We do not think that the instruction submits the slope as a part of the negligence of the defendant.

[8] Defendant contends that plaintiff's instruction No. 2 was erroneous. Said instruction is as follows:

"The court instructs the jury that greater diligence on the part of the defendant is required in looking after the condition of a street or crossing where such street or crossing is much traveled than where it is little used."

This instruction is approved in the case of *Miller v. Town of Canton*, 112 Mo. App. 322, loc. cit. 329, 330, 87 S. W. 96. In addition, instruction No. D told the jury that—

"All that the city is bound to do is to exercise the care for maintaining its sidewalks and streets in the reasonably safe condition that an ordinarily prudent person would exercise, and if the city used such care in the construction and maintenance that an ordinarily prudent person would exercise, then your verdict must be for the defendant."

Taking the two instructions together, there is no question but that the jury could understand nothing but that the city was required to use ordinary care only, in view of all the circumstances.

[9] Defendant complains of the refusal of the court to give defendant's instructions Nos. 4 and 5. These instructions were properly refused because they confine plaintiff's right to recover to the pavement being worn so smooth and slick that it was unsafe for people while traveling thereon, when plaintiff was entitled to recover even if the jury believed that it had not been worn dangerously smooth and slick, but was dangerously smooth and slick when originally constructed. The court gave instruction No. C in substantially the same form as defendant's offered instruction No. 5, but amended the latter so that plaintiff might recover if the pavement was originally put in in a dangerously smooth and slick condition.

[10] Defendant's instruction No. 6 was properly refused because it told the jury that it was the duty of the city "to construct and maintain its pavements and streets in a reasonably smooth condition, and the mere fact that by reason of the same being smooth it may be more or less slippery is not negligence on the part of the city." This was substantially a demurrer to the evidence, and was properly refused.

[11] The court properly refused defendant's instruction No. 7. This instruction told the jury that the "city was not an insurer of the safety of pedestrians, and the mere fact that the pavement in question may have been somewhat smooth and slick, and that plaintiff was injured by reason of such smoothness and slickness does not entitle plaintiff to recover in this case, but all the city is bound to do is to exercise" ordinary care under the circumstances. The court refused this instruction and gave it in substantially the same form, except it told the jury that plaintiff was not entitled to recover on account of the smoothness and slickness "unless said smoothness and slickness was brought about or suffered to continue, as defined in other instructions." The court properly refused the instruction as offered, and was right in giving it in amended form.

The judgment is affirmed.

All concur.

**CITY OF WEBSTER GROVES, to Use of  
McMAHON, v. REBER et al.  
(No. 15802.)**

(St. Louis Court of Appeals. Missouri. April 8, 1919. Rehearing Denied April 24, 1919.)

**1. MUNICIPAL CORPORATIONS. ~~C=~~485(5)—IMPROVEMENTS—ACTION OF TAX BILL—PRIMA FACIE CASE.**

In action on tax bills, contractor established prima facie case by introducing in evidence the tax bills described in the petition.

**2. MUNICIPAL CORPORATIONS ~~C=~~331 — IMPROVEMENTS—PUBLICATION OF NOTICE FOR BIDS—COMPLIANCE WITH ORDINANCE.**

Insertion of notices for bids for sewer contract in only one newspaper, with second notice appearing only 12 days before day set for letting of bids, and with both notices appearing on page of paper devoted exclusively to news of another town, did not comply with ordinance requiring notices to appear "in proper and appropriate newspapers by at least two insertions to appear at least 15 days prior to opening of bids."

**3. MUNICIPAL CORPORATIONS ~~C=~~341 — IMPROVEMENTS — CONTRACTS — INSUFFICIENT PUBLICATION OF NOTICE FOR BIDS.**

Sewer contract entered into by city of the fourth class pursuant to special ordinance under authority conferred by Rev. St. 1909, §§ 9384 and 9385, after insufficient compliance with requirements of ordinance as to publication of notice for bids, was not legally authorized, though such statutes did not require solicitation of bids or letting of contract to lowest bidder.

**4. MUNICIPAL CORPORATIONS ~~C=~~445 — IMPROVEMENTS—VALIDITY OF TAX BILLS.**

Tax bills issued for work done under a sewer contract not legally authorized are void.

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

"Not to be officially published."

Action by the City of Webster Groves, to the use of John F. McMahon, against Margaret M. Reber and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rodgers & Koerner, of St. Louis, for appellant.

Charles S. Reber, of St. Louis, for respondents.

BECKER, J. This is an appeal by plaintiff below from a judgment of the circuit court of the city of St. Louis in favor of defendants upon certain tax bills issued for the work of constructing sewers in sewer districts Nos. 1 and 2 in the city of Webster Groves, St. Louis county, Mo.

The petition is in three counts, in the usual form. The amended answer is a general denial, coupled with a special plea to each count that the tax bills are void for the rea-

son that no common standard was furnished the bidders, in that the time for the performance of the work was not fixed in the specifications, and in that each bidder was permitted to fix his own time, and in that no information was given to bidders regarding the grade or depth of the proposed sewers. The reply was a general denial.

[1] Plaintiff made its prima facie case by introducing in evidence the tax bills described in the petition. The defendants thereupon introduced testimony tending to show the invalidity of the tax bills for various reasons.

The trial court sustained two of the objections urged against the validity of the tax bills, holding that they were void for the reason that a mandatory provision of the law had been violated, in that the notice to bidders had not been published for the requisite length of time prior to the date set for the opening of the bids, and on the ground that there was no common standard set up for the proposed bidders, in that by the published notice bidders were required to make their bid on a prescribed form which contained the statement that "each bidder will state the time required to complete the entire work," thus creating different bases for the various bids and depriving the scheme for the letting of the work of the essential element, that there must be one common standard for all bidders. Judgment was thereupon entered for the defendants on each of the counts of plaintiff's petition. In due course plaintiff appeals.

The tax bills under consideration are district sewer bills of the city of Webster Groves, St. Louis county, Mo., a city of the fourth class, and issued under authority conferred by sections 9384 and 9385, Revised Statutes of Missouri 1909. It will be noted that, while the statutes are silent as to any requirement that cities of the fourth class, in constructing sewers, must solicit bids and let the contract to the lowest bidder, in the present instance the board of aldermen, by special ordinances which determined upon the construction of the sewers, specifically provided that—

*"The city clerk is hereby directed to advertise in proper and appropriate newspapers, by at least two insertions to appear at least fifteen days prior to the opening of the bids, that sealed bids and proposals for the construction of said district sewer, as aforesaid, will be received by him up to the fourth day of November, 1907, at eight o'clock p. m., to be then opened in the presence of the mayor and the board of aldermen in the city hall, the work to be awarded thereupon by resolution or ordinance of said board of aldermen to the lowest and best bidder, the right being reserved to reject any or all bids." (Italics ours.)*

It appears that the city clerk did not place the notice in "newspapers," but did

place the notice in one newspaper published in Webster Groves, namely, the "St. Louis County Sentinel," on October 19th, and again on October 23, 1907. So that the second insertion was but twelve days prior to the date set for the letting of the bids. It further appears that both the notices appeared in the St. Louis County Sentinel on a page thereof which was a "subdivision or rather department headed, 'Maplewood Bulletin,' a Progressive Department in a Progressive Newspaper, Maplewood, Missouri." On the left-hand side of this page on which the notice appeared, in a space five inches square, appeared the following:

"This page in the future will be devoted to Maplewood, the busiest industrial hive in St. Louis county."

While the notice for the acceptance of bids for the construction of the sewers thus appeared on the "Maplewood Bulletin" page, the report of the board of aldermen of the city of Webster Groves, however, appeared upon the first page of the said St. Louis County Sentinel. John F. McMahon, to whose use this suit is brought, was the sole and only bidder, and his bid was identical with the estimate of the city engineer with reference to each item contained in the specifications. And thereupon and thereafter the Board of Aldermen of the city of Webster Groves, by ordinance, authorized the mayor and the city clerk to enter into a written contract with McMahon to construct said sewers.

Appellant seriously contends that since the statute provides the manner in which the board of aldermen, in cities of the fourth class, shall proceed, the board of aldermen cannot, by ordinance or otherwise, bind itself to do more than the statute requires, and in support of this argument quotes the following language from the case of Webb City v. Aylor, 163 Mo. App. 155, loc. cit. 163, 147 S. W. 214, 216, to wit:

"If the council proceeds as directed by the statute, it will be within its jurisdiction, even though it may not proceed in compliance with its own ordinances. State ex rel. v. Gordon, 217 Mo. 103, 116 S. W. 1006; State ex inf. v. Kansas City, 238 Mo. 163, 184 S. W. 1007."

But in a recent case it has been specifically held that where the charter or statutory provisions do not require a city to advertise for bids for the construction of sewers, nor that the work shall be let to the lowest and best bidder, yet, if there be no statutory prohibition with reference to such city advertising for bids or from letting the work to the lowest and best bidder, it is within the sound judgment of such city whether advertising for bids for the construction of sewers and the letting of the work to the lowest and best bidder should be required, and that where a city had by ordinances provided for the advertising for bids, and that the work should be let to the lowest and best

bidder, such requirements are mandatory and must be complied with. "The city having advertised for bids, and proposed to let the work to the lowest and best bidder as provided for by said ordinance, it had no authority to ignore the ordinance and let the contract and have the work done as though it had never been enacted. The ordinance was valid and binding until repealed in proper manner." Thrasher v. City of Kirksville (Mo. Sup.) 204 S. W. 804, 805, and cases cited.

[2-4] In light of this authority and in view of all the facts in the case, we must rule that there was not a fair compliance with the requirements of the ordinances with reference to the advertisement for bids, and therefore the contract was not legally authorized. It follows that the tax bills issued for the work done under such contracts are void.

Finding the tax bills void for the reason above assigned, it is unnecessary to consider the various other points raised against them, several of which may not be without merit.

The judgment is affirmed.

REYNOLDS, P. J., and ALLEN, J., concur.

#### GENTRY v. FITZGERALD. (No. 13063.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

##### 1. LANDLORD AND TENANT §27(6)—EXECUTION OF LEASE—OMISSION OF DESCRIPTION—EVIDENCE.

Evidence held to show that description was omitted on one or both of duplicate leases by inadvertence or oversight on part of lessor.

##### 2. ALTERATION OF INSTRUMENTS §12—EXECUTION OF LEASE—SIGNING OF BLANK LEASE—IMPLIED AUTHORITY.

Lessee, by signing blank lease, impliedly authorized the lessor to fill the blank so as to make lease perfect according to its nature and intended use.

##### 3. FRAUDS, STATUTE OF §129(4)—LEASE—ACTION FOR BREACH—POSSESSION.

Where lessor performed lease by putting lessee in possession, lessee, after remaining in possession for part of term, cannot defeat liability for the remainder of term on ground that description in lease was insufficient to satisfy statute of frauds.

##### 4. LANDLORD AND TENANT §115(2)—LEASE—OMISSION OF DESCRIPTION—MONTH TO MONTH TENANCY.

Where description was inadvertently omitted from a lease signed by lessee, and under which lessee took possession, the lease was not of the character contemplated by Rev. St. 1909, § 7883, converting parol tenancies of city property into a renting from month to month.

Appeal from Circuit Court, Pettis County; Hopkins B. Shain, Judge.

"Not to be officially published."

Suit by R. H. Gentry against T. J. Fitzgerald. Judgment for plaintiff, and defendant appeals. Affirmed.

W. D. Steele and A. L. Shortridge, both of Sedalla, for appellant.

W. D. O'Bannon and R. A. Higdon, both of Sedalla, for respondent.

TRIMBLE, J. Plaintiff brought suit in a justice court on a written lease to recover rent agreed to be paid therein at the rate of \$25 per month in advance. As originally brought, the suit was for the remainder of the term after the lessee had moved out and refused to pay longer. After judgment by default was rendered, the defendant appealed to the circuit court, where, upon objection that plaintiff could not sue for the rent to accrue after the institution of the suit, the claim was amended so as to ask only for the installments of rent due on the 15th days of April, May, and June, 1916; the suit having been brought on June 24th of that year.

At the conclusion of the evidence, the court gave the jury a peremptory instruction to find for plaintiff in the sum of \$75, which being done, judgment was rendered thereon, and defendant appealed.

Plaintiff introduced a written lease dated January 5, 1916, for one year from and after January 15, 1916, stipulating for the payment of rent for the term at the rate of \$25 per month payable on the 15th of each month in advance. It was agreed that defendant paid the rent up to April 15, 1916, and, after giving 30 days' notice of intention to terminate the tenancy, moved out on April 14th.

The lease, signed by both parties and introduced by plaintiff, described the property as follows: "East upper flat 908 West 3rd St."

No other description was given to indicate where the property was.

According to the evidence on both sides, lease forms were signed by both parties in duplicate, plaintiff keeping one and defendant the other, and the defendant moved in and took possession of the east upper flat located at 908 West Third street in the city of Sedalla, Mo., and paid the rent up to the 15th of April, and then, after giving notice as aforesaid, moved out and refused to pay longer.

According to plaintiff's evidence, the description as hereinabove quoted was written into the lease form of the one he retained at the time it was signed by the defendant, and plaintiff thought it was written into the duplicate kept by defendant, but it was not.

According to defendant's testimony, no de-

scription of any kind was written into either one of them at the time they were signed, and that he did not authorize the plaintiff to fill in the description. But there is no evidence that it was not to be filled out, and when defendant was asked, "How did it happen that it (the description) was left out?" he answered, "I really don't know."

With the exception of the description of the premises, the lease as signed by the parties was complete in every respect, specifying minutely the terms thereof, the length of the term, the day it was to begin, and the day it was to end. Defendant contends that, even if the description was in the lease when signed, it was not sufficient to describe the property so as to satisfy the statute of frauds; but that, according to his evidence, the lease forms, when signed contained no description whatever.

[1, 2] Defendant's evidence that he did not know why the description of the real estate was left out shows that, if it was omitted from one or both of the duplicate leases, it was a mere inadvertence or oversight on the part of the lessor at least, and the signing of the lease in blank was an implied authority to fill the blank so as to make it perfect according to its nature and intended use. *Jenkins Sons Music Co. v. Johnson*, 175 Mo. App. 355, 359, 162 S. W. 308; 13 *Corpus Juris*, 308; *Field v. Stagg*, 52 Mo. 534, 541, 14 *Am. Rep.* 435; *Otis v. Browning*, 59 Mo. App. 326, 331.

Whether, then, the description as above was in the original when signed and was inadvertently omitted to be also copied into the duplicate, or whether it was neglected to be inserted in either until after the signature when it was put in the original, makes no material difference. The description that appears therein related to the property that was being leased, the insertion thereof was in strict accord with the terms and purposes of the instrument, and without it the execution thereof could have no purpose.

[3, 4] Granting that the description as shown above is insufficient to satisfy the statute of frauds when a cause of action is attempted to be based upon a contract that is wholly unperformed, yet that principle has no application where, as in this case, the contract has been fully performed by the owner or lessor by putting the lessee in possession and he remaining in possession thereunder so long as he would. In such circumstances—and about these there is no dispute—the defendant cannot use the statute as a shield or defense. *Bless v. Jenkins*, 129 Mo. 647, 657, 658, 31 S. W. 938; *Chenoweth v. Pacific Express Co.*, 93 Mo. App. 185, 190-194. Even if the description was inadvertently left out of both the original and duplicate lease, yet there is no question that possession of the property was taken under the instrument that was signed and not under any verbal letting whatever; and the fact, if it be a

fact, that, through some inadvertence, the description was not inserted in the blank space for that purpose, did not convert the letting into a parol lease, when possession had been given and taken under the written instrument. It was not such a letting as is contemplated by section 7883, which converts parol tenancies of city property into a renting from month to month, termination of which can be effected by giving 80 days' notice. Said section deals with "contracts or agreements" for leasing property in cities "not made in writing, signed by parties thereto, or their agents." Notwithstanding the defects in the written instruments, the leasing thereunder, followed by possession of the premises, was not of the character contemplated by section 7883.

The judgment is affirmed.

All concur.

GRACE et al. v. MISSOURI, K. & T. RY. CO. (No. 13213.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

**1. RAILROADS §114(2) — CONSTRUCTION OF EMBANKMENT—FLOODING OF FARM LANDS—EVIDENCE—PRIOR FLOODS.**

In action under Rev. St. 1909, § 3150, against a railroad company for flooding lands due to construction of an embankment without sufficient openings, evidence of floods in other years having broken through the embankment was admissible to show that the embankment was an obstruction.

**2. TRIAL §182, 183(4)—ARGUMENT OF COUNSEL—WITHDRAWAL—INSTRUCTION TO DISREGARD.**

In an action against a railroad company for damages from a flood caused by an embankment, the improper remark of plaintiff's counsel, "They think these corporations are above the law," was cured by court's direction to refrain from that line of argument and withdrawal of remarks by counsel.

**3. APPEAL AND ERROR §302(4) — MOTION FOR NEW TRIAL—OBJECTION TO INSTRUCTIONS—GENERAL AND INDEFINITE.**

Objections to the giving and refusal of instructions were not properly preserved in a motion for new trial by merely stating that error was committed "in giving to the jury illegal and erroneous instructions for and on behalf of plaintiffs," and that error was committed "in refusing to give to jury legal and proper instructions requested by defendant."

**4. DAMAGES §40(4) — FLOODING LANDS—LOSS OF PROFITS.**

In an action under Rev. St. 1909, § 3150, against a railroad company flooding farm land by an embankment, it was proper to prove plaintiff's loss by showing that he had taken stock to pasture at a fixed price per head, and

that, owing to the flooding, the pasture soured, so that he was unable to pasture the stock, and lost such income.

**5. EVIDENCE §118(7)—FLOODING OF FARM LANDS—DAMAGES—MEASURE.**

In an action against a railroad company for the flooding of lands caused by defendant's negligent construction and maintenance of embankments, in determining the value of wheat destroyed it was proper to admit in evidence the price of wheat after the harvest of that year in estimating the damages.

Appeal from Circuit Court, Henry County; C. A. Calvird, Judge.

"Not to be officially published."

Action by W. O. Grace and another against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs, and defendant appeals. Judgment affirmed.

J. W. Jamison, of St. Louis, for appellant.  
W. E. Owen and Parks & Son, all of Clinton, for respondents.

ELLISON, P. J. Plaintiffs' action is based on section 3150, R. S. 1909, wherein they charge in their petition that defendant built an embankment from 6 to 10 feet high and more than a mile in length, upon which it laid its track across plaintiffs' farm lands, without constructing suitable openings across the right of way and roadbed, and without constructing suitable ditches or drains along the side of the roadbed, connecting with other ditches, drains, or water courses, so as to afford sufficient outlet to drain and carry off the waters which were obstructed by such embankment. They recovered judgment in the trial court.

Plaintiff Grace owned a large farm, the greater part of which was situated in the Grand river bottom in Henry county. Plaintiff Foley was his tenant with an interest in the crops growing on the farm which in the year 1912 were partly injured and partly destroyed by waters which plaintiffs claim were obstructed by defendant's embankment built without sufficient openings as above stated. The embankment was along the south and east boundary of the farm.

A slough or natural course of drainage ran from the northwest in a south or southeastern course through the farm. At the point where the right of way crossed this slough the embankment ceased, and a trestle was constructed to the width of 150 feet at the top, narrowing to 50 feet at the bottom, and the embankment resumed thence to a second trestle of about the same size near a quarter of a mile further on, and thence to a bridge over Grand river, and thence again resumed. The hills on either side rising from the river bottom gradually approached the stream until at a place 10 miles or

more down the river they were approximately only 200 yards apart. This place was called "the Narrows." It was shown that within the memory of witnesses overflow and surface water had followed this slough or natural course for more than 50 years.

In June, 1912, Grand river overflowed at points north or northwest, sending the waters down to the railroad embankment so that they spread out over plaintiffs' land, submerging their crops of corn, wheat, and pasturage entirely at some places and partially at others; the result being that they were in great part destroyed. It is plaintiffs' claim that the embankment was not sufficiently provided with openings to let the water through with reasonable freedom that it might take its natural course so as to find its way again into Grand river, in consequence of which it backed up and spread out over the farm. Defendant insists that this claim is in the face of natural law, and is against the physical facts, and should have been disallowed, as a matter of law, by the trial court.

Surveys were made and experts heard. The general rise or elevation was taken, as well as the depressions and elevations at specific places, together with the depth of the water at certain parts and the extent to which it came up on the corn and the wheat. This character of evidence came from witnesses for either side. There are, however, certain established facts which we think demonstrate that the trial court properly refused defendant's demurrer. Of course, if the record showed that the overflow would have destroyed plaintiffs' crops, even though there had been no embankment, no blame could attach to defendant, and plaintiffs should attribute their loss to misfortune without right to relief. We reject the suggestion that "the Narrows," 10 or 12 miles below, could have been the obstruction which held the waters until they came back over plaintiffs' crops. We do this because it is unreasonable and that such supposition is against conclusive evidence to the contrary. It was shown that the water was 2 or 3 feet higher on the farm side of the embankment than on the lower side, and that at other overflows the pressure and struggle of the water to get by and follow its natural course had been so great as to suddenly break through the embankment with a roar that was heard by neighbors in their houses in the vicinity; and shortly thereafter relief was had at places by a total, and at other places by a partial, uncovering of the crops which had been submerged.

Connected with the fact that plaintiffs conceded that a ditch had been dug along the roadbed on the farm side down and into Grand river, defendant undertakes to draw conclusions defeating plaintiffs' case. While the case on plaintiffs' part, including the pe-

tition, shows that the natural drainage, together with ditches and Grand river, would carry off the waters, yet it is clear that this is based on there being sufficient opening in the roadbed embankment to let the water through and follow its course thence on.

Defendant's point, that it was not bound to make openings where there is no connecting outlet or drainage course on the lower side, is not based on facts disclosed in the evidence.

The argument in this cause on defendant's part has gone at great length into much detail. We do not speak of this in complaint, but to show that it is impossible, within the limits of an opinion, to follow specifically the different suggestions which have been urged. We therefore pass to certain objections taken at the trial.

[1] It is contended that the court erred in admitting evidence of the floods in other years having broken through the embankment. We think it was entirely proper to do so. It was most convincing proof that the water did not back up from the lower side of the embankment. It was a demonstration that the water was seeking its natural flow by bursting through its obstruction. The propriety of such evidence seems not to have been questioned in *Hayes v. Railroad*, 177 Mo. App. 201, 207, 162 S. W. 266.

[2] In his argument to the jury one of plaintiffs' counsel, in referring to counsel for defendant, said, "They think that these corporations are above the law." On objection the remark was withdrawn by plaintiffs' counsel, and the court directed him to refrain from that line of argument. If the remark had been that "they think that this defendant," or that "they think that this corporation is above the law," it might not have been out of place in the course of argument. The expression "these corporations" looks much like an appeal to prejudice. But certainly any possible ill effect was cured by what followed.

[3] Objection was made to the giving of instructions for plaintiff and refusal of others offered by defendant. These objections were not properly preserved in the motion for new trial, which merely stated that error was committed "in giving to the jury illegal and erroneous instructions for and on behalf of plaintiffs," and that error was committed "in refusing to give to the jury legal and proper instructions requested by defendant." It has been repeatedly ruled that this was too general and indefinite. *Wynne v. Undertaking Co.*, 274 Mo. 593, 204 S. W. 15; *Disinfecting Co. v. Bates Co.*, 273 Mo. 300, 201 S. W. 92; *State v. Rowe*, 271 Mo. 88, 94, 196 S. W. 7.

[4] It seems that plaintiff Foley had taken 170 head of stock in on pasture at a certain price per head, and that he lost this when the pasture was destroyed and remain-

ed "squared" and otherwise injured so that stock would not eat it. Defendant objected to his proving in this way his loss of profits by his not being able to continue to pasture it. We think it was proper, and that the ruling in *Couch v. Railroad*, 252 Mo. 34, 158 S. W. 347, 46 L. R. A. (N. S.) 555, and *Stackman v. Railroad*, 178 Mo. App. 375, 165 S. W. 1122, are not applicable. The direct effect of throwing the stock off the pasture was to cause the loss of his income which was being received at the time the act was committed.

[5] Nor was there error in admitting evidence of the price of wheat after harvest in the year 1912. Defendant says the true measure of damage was the value of the wheat standing in the field as it was when destroyed, as decided in *Hunt v. Railroad*, 126 Mo. App. 261, 108 S. W. 133. But the price of wheat when harvested was certainly an important thing to know in estimating the damage.

Finally defendant cites the recent case of *Goll v. Railroad*, 271 Mo. 665, 197 S. W. 244, as an authority showing that plaintiff has no cause of action. That case is not applicable to this. There an embankment was made on the railway land south of the Missouri river, which had the effect of throwing overflow water onto plaintiffs' land on the north side of that river (271 Mo. 665, 197 S. W. 246), while here overflow water from Grand river was obstructed and dammed in its natural course and drainage which would lead it back into that river, thereby causing water to be thrown over plaintiffs' fields which otherwise would have continued its course through the slough or drainage beyond plaintiffs' land.

We are satisfied the case was properly tried, and the judgment will be affirmed.

All concur.

# REED v. JOHN GILL & SONS CO. (No. 13038.)

(Kansas City Court of Appeals. Missouri.  
Dec. 2, 1918. On Rehearing,  
May 5, 1919.)

## 1. RELEASE ¶27 — INJURY TO SERVANT— MASTER'S ADOPTION OF RELEASE TAKEN BY STRANGER.

A servant is bound by a release of claim for personal injuries, though it was taken by a stranger, who paid the consideration, where the employer has adopted it as his own.

## 2. RELEASE ¶24(2)—RESCISSION—TENDER OF CONSIDERATION.

An injured servant, seeking rescission of a release for fraud, must tender the consideration received within reasonable time after he knows that the employer is the one to whom tender is to be made.

## On Rehearing.

### 3. RELEASE ¶57(2)—INJURIES TO SERVANT— SETTING ASIDE RELEASE—EVIDENCE—SUFFICIENCY.

In a servant's action for injuries, in which he sought rescission of a release, evidence of fraud held insufficient for setting aside settlement.

### 4. RELEASE ¶24(2)—TENDER OF CONSIDERATION BEFORE INSTITUTING SUIT.

Where one has executed a release of a claim for injuries, knowing that it is such, he must, in order to maintain suit for the injuries tender the consideration received before the suit is instituted, and a tender made six months after suit is properly refused.

### 5. APPEAL AND ERROR ¶590—MOTION FOR REHEARING — CONSIDERATION OF SUPPLE- MENTAL ABSTRACT.

A supplemental abstract, filed after the original opinion and at the time of filing of motion for rehearing, may be considered upon the rehearing.

### 6. RELEASE ¶24(2)—INJURY TO SERVANT— RESCISSION—EXCUSE FOR NOT MAKING TEN- DER.

A servant, seeking rescission of a release of the master's liability for injuries, is not relieved from tendering before suit the consideration received, because it was paid by an insurer having an interest in upholding the release, but not a party to the suit.

Appeal from Circuit Court, Cole County;  
Jack G. Slate, Judge.

Action by Peter A. Reed against the John Gill & Sons Company. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

A. T. Dumm, of Jefferson City, for appellant.

Glendy B. Arnold, of St. Louis, for respondent.

BLAND, J. Plaintiff brought this suit, alleging in his petition that while working upon the new State Capitol at Jefferson City, Mo., and in the employ of the defendant, he was injured by the carelessness and negligence of defendant's servants and employees.

The answer, among other things, alleges that after plaintiff's injury he executed to defendant for a consideration of \$452.45, which was paid to plaintiff, a full release or acquittance from the cause of action set out in his petition. In his reply plaintiff alleges that said release was procured through fraud. The reply further states that the consideration for the release was paid by the Aetna Insurance Company, and not by the defendant, but whether the same was paid for the account of the defendant plaintiff had no knowledge, and "in taking said release and paying the consideration therefor said insurance company was acting un-

der and by virtue of some contract between it and the defendant, the terms of which are unknown to plaintiff." Plaintiff further states that, acting upon the belief that defendant was entitled to the consideration for the release, plaintiff's counsel offered to tender the defendant such consideration, with interest, but defendant failed and refused to accept the same, and that any tender to defendant before the institution of the action would have been an "idle and useless ceremony."

There was a verdict and judgment in favor of the plaintiff in the sum of \$4,075, and defendant has appealed.

[1] There is no evidence whatever that plaintiff tendered to any one at any time the consideration for the release. While the release itself recites that the consideration was paid by the defendant, there is no evidence that it was so paid, but defendant itself proved that the consideration was paid by the Aetna Insurance Company. The release recites that it discharges defendant from liability. There is no evidence whatever of the relationship between the Aetna Insurance Company and the defendant. The agent of the Aetna Insurance Company, who negotiated and settled the case, stated that he had charge of the liability department of the insurance company, but whether the defendant had liability insurance with the insurance company is not shown.

The case was tried and submitted to the jury by plaintiff on the theory that the release discharged defendant, unless it was procured by fraud. The pleadings, evidence, and the theory upon which this case was tried present a situation where the Aetna Insurance Company acted in a capacity of something more than a mere volunteer or stranger, for the reason that plaintiff in his reply stated that the insurance company was acting under and by virtue of some contract between it and the defendant, the terms of which were unknown to plaintiff. But, assuming that the insurance company was acting only as a volunteer or stranger to plaintiff and defendant, nevertheless plaintiff and defendant are bound by the terms of said release, for the reason that the contract was made for the benefit of the defendant, and in its answer defendant adopts said release. By such adoption, in contemplation of the law, it made the release its own (*Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *City of St. Louis v. Von Puhl*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *St. Louis v. Wright Contracting Co.*, 202 Mo. 451, 101 S. W. 6), and after the contract or release was adopted by the defendant it could not be rescinded by the plaintiff and the insurance company (*Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 707, 53 L. R. A. 753; *Gilbert v. Sander-*

*son*, 56 Iowa, 349, 9 N. W. 208, 41 Am. Rep. 103).

[2] As the release was made for the benefit of the defendant, and the latter adopted it as its own by the allegations contained in its answer, and as plaintiff and the insurance company could not thereafter rescind the release, the defendant, after having adopted the release, was in a position to insist upon its terms, and is entitled to all of the benefits growing out of it. If the release was not procured by fraud, then it was binding upon plaintiff, and could be used as effectually by defendant in any suit attempted to be prosecuted by plaintiff as if the release had been originally negotiated and executed by and between plaintiff and defendant. This being a fact, it seems apparent to us that, if plaintiff desired to rescind the release on account of fraud, it was his duty to tender to this defendant, after he had become aware of the fact that defendant had adopted the release, the consideration paid therefor. Plaintiff not having tendered the consideration of the release within a reasonable time, or in fact at all, but having gone to trial without making any tender, or showing that a tender was useless, because, if made, it would have been refused, after he knew that this defendant was the one to whom tender was to be made, is not entitled to a rescission of the release, but, by his conduct, has ratified the release, including the fraud. *Long v. International Vending Machine Co.*, 158 Mo. App. 662, 139 S. W. 819; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970; *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, 102 S. W. 642; *Moss v. King*, 212 Mo. 587, 111 S. W. 589; *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788; *Bayer v. Milan*, 199 S. W. 712.

This is a law case, and it is not sufficient that an offer of the money be made in the pleadings. *Hancock v. Blackwell*, 189 Mo. loc. cit. 453, 41 S. W. 206; *Whelan v. Rellly*, 61 Mo. loc. cit. 569.

The judgment is reversed.

All concur.

On Rehearing.

TRIMBLE, J. A rehearing and reconsideration of this cause makes us less disposed than ever to change the result reached in the original opinion.

[3] The fraud charged in obtaining the settlement is that Dr. Enloe, who attended plaintiff upon and for a time after his injury, thereby secured plaintiff's confidence in his skill and learning as a surgeon and in his integrity as a man, and knowingly and falsely stated to the plaintiff that his injuries were not permanent, and that he would shortly recover from his then weakened condition, and that plaintiff, relying upon such statements and believing them to be true, executed the release. The reply charges



that Dr. Enloe did this, "being anxious of having his bill for medical services to plaintiff satisfied," and of aiding said insurance company to bring about in their behalf a highly beneficial settlement and compromise of plaintiff's said causes of action, and acting in the interests of said insurance company and the defendant." Plaintiff was hurt on June 22, 1916, and was treated for a time at Jefferson City, but left there for St. Louis. The settlement was executed September 12, 1916, and was made up of items agreed upon in correspondence between plaintiff's then attorney, Mr. Cook, who, upon taking up the question of damages with the defendant, learned that the Aetna Insurance Company "were the insurers," and thereupon entered into negotiations with the insurance company. The statements charged to have been made by Dr. Enloe—which the latter denies as do all the others, except plaintiff—at the time the release was executed, and when the statements are claimed to have been made, took place at the Aetna Insurance Company's place of business in St. Louis, where plaintiff and the doctor met for the first time in six weeks after the doctor had last seen plaintiff, and no examination of the plaintiff was then made. Plaintiff was in full possession of his senses, knew he was executing a release for all injuries and their results, and knew that he was not well at the time and had not yet recovered. Plaintiff's condition was not the result of some other injury of which he was ignorant, but of which the doctor knew, and concealed from him, but arose simply from the fact that he had not, or has not yet, fully recovered from the injuries known to have been received. The evidence did not disclose any agency existing between Dr. Enloe and the defendant, or the insurance company. Indeed, the only affirmative evidence as to why Dr. Enloe met plaintiff in St. Louis and was present at the settlement was that he did so in response to a request from Mr. Cook, who could not be present, and that the doctor went to St. Louis primarily to take a patient to the hospital there.

The charge that the doctor was acting as the agent for either the defendant or the insurance company rests rather upon suspicion than upon any well-defined evidence to support it. While the claim is that Dr. Enloe was the defendant's surgeon in the erection of the Capitol, the proof went no further than to show that when an injury occurred there, if the doctor was the first physician on the ground, he got the case, and in this case at least charged the patient for his services. The statements claimed to have been made were in reference to plaintiff's present condition and the probable outcome thereof in the future. As to his present condition, plaintiff knew better about that, as as to how he felt, than could any

physician, who had not seen him for six weeks, and who had made no examination. So that it appears to the writer that there is exceedingly slight ground for the setting aside of the formal settlement, knowingly entered into after lengthy negotiations concerning the items constituting the same. *Anderson v. Meyer Bros. Drug Co.*, 149 Mo. App. 554, 573-575, 130 S. W. 829; *Grim v. Crim*, 162 Mo. 544, 552, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521; *Thompson v. Kansas City, etc., R. Co.*, 142 Mo. App. 284, 125 S. W. 1199; *Carroll v. United Railway Co.*, 157 Mo. App. 247, 267, 137 S. W. 308; *Homuth v. Metropolitan St. Ry.*, 129 Mo. 629, 648, 81 S. W. 908; *Lomax v. Southwest Missouri, etc., R. Co.*, 119 Mo. App. 192, 198, 95 S. W. 845; *Nelson v. Minneapolis St. R. Co.*, 61 Minn. 167, 68 N. W. 436; *Atchison, T. & S. F. R. Co. v. Bennett*, 68 Kan. 781, 66 Pac. 1018; *Bisphan's Equity*, § 215; 2 *Pgm. Eq. Jur.* (3d Ed.) §§ 890, 894.

[4, 5] But, aside from and waiving all this, there is another reason which disposes of plaintiff's right to recover in this case, and that is he did not put himself in a position to disavow the settlement by returning, or offering to return, the fruits of the settlement before instituting the suit. The general rule is that, in cases where the plaintiff has executed a release, knowing that it is such, he must, in order to be in a position to maintain his suit, tender the money received on the settlement before the suit is instituted. *Carroll v. United Railways Co.*, 157 Mo. App. 247, 298, 137 S. W. 303; *Kingman v. Ellis*, 125 Mo. App. 692, 103 S. W. 127; *Boehm v. American Patriots*, 172 Mo. App. 104, 154 S. W. 448; *Althoff v. St. Louis Transit Co.*, 204 Mo. 166, 102 S. W. 642; *Raid v. St. Louis, etc., R. Co.* (Sup.) 137 S. W. 15; *Putnam v. Boyer*, 173 Mo. App. 394, 398, 158 S. W. 861; *Loveless v. Cumard Mining Co.*, 201 S. W. 375.

The plaintiff did not, before bringing the suit, make a tender to any one, either to the insurance company or to the defendant. By a supplemental abstract, filed after the original opinion was handed down, and at the time the motion for rehearing was filed, it appears that one of plaintiff's counsel sought out the defendant's president and informed him he had come, representing the plaintiff, to make a tender of the amount received on the release, and reached in his pocket to get the money, but upon the president replying either "I will not take it," or "I can't take it," he does not know which, the attorney bade him good-bye and left. This, however, was long after the institution of the suit—some six months or more—and the authorities all hold that this will not do; nor will the fact that the tender was refused after suit was brought be evidence that the tender would have been unavailing, had it been made before the institution of suit. We mention this supplemental ab-

tract to show that we have considered it, as we think we have a right to do, on this hearing, under the recent decision of the Supreme Court in the case of *Starr v. Penfield* (Sup.) 205 S. W. 541.

[6] The fact that in this case the insurance company paid the money does not relieve the plaintiff of the necessity of placing himself in a situation to claim a rescission by making a tender. The plaintiff contends that as he did not know the exact terms of the contract, or relationship existing between the defendant and the insurance company, he did not know whom to tender the money to. He could at least have tendered it to the one from whom he received it. In case it was refused, he could then have tendered it to the defendant, or deposited it in court, and in that event he would not have been in the position of holding onto the benefits of the settlement and at the same time disavowing its effect. But he made no prior tender to any one, nor did he make any attempt to ascertain to whom he should tender the money before bringing suit.

It seems to us that, even though the consideration for the release was paid by the insurance company, yet the plaintiff must be held to have known that the insurance company was acting for and in behalf of the defendant, even if it may be deemed to have been also acting for itself. The release recites that the consideration thereof was paid by defendant, and it was the basis of action against the defendant that was released.

The case should be disposed of the same as if the defendant itself had obtained and paid for the release. Only by giving up the advantages of the release, or offering to do so, could the plaintiff place himself in a position to say it was rescinded, and thus avoid its effect. The fact that the insurance company had an additional interest, peculiar to itself, in upholding the release, and therefore the release could not be set aside as to it in a suit to which it was not a party, ought not to change the rule as to the necessity of a tender prior to the bringing of suit. The release was clearly for the benefit of the defendant, even if it was also in the interest of the insurance company; and hence the former is entitled to claim the benefit of its advantages, and to assert that the plaintiff is not in a position to disavow it, as much as the Insurance Company.

We think that, to avoid complications, the case, as to the necessity for prior tender, should be regarded as solely between plaintiff and defendant, as it is, and without regard to any other party not a party to the suit, nor bound by any judgment rendered with reference to the release; for, if it can be said that as the insurance company has an additional interest peculiar to

itself in upholding the release, and that since it is not a party to the suit, therefore the release can be neither set aside herein nor treated as a bar to recovery, and consequently no tender is necessary to avoid its effect, then it would seem to follow that section 1812, R. S. 1900, would not apply to the circumstances of this case. If that be so, then plaintiff should have followed the procedure in effect before the statute was passed, and brought a suit in equity to rescind and cancel the release. We do not think that, in disposing of the case between the plaintiff and defendant, the rights of the insurance company should be regarded or taken into consideration; but the case should be disposed of in the same manner, and according to the same principles, as if no one other than the plaintiff and defendant had anything to do with the release.

The judgment is reversed.

All concur.

CRITTEN et al. v. NEW et al. (No. 13222.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS  $\S$  38—  
CONSOLIDATION—SUBMISSION OF TWO PROPOSITIONS.

Two separate propositions could not be submitted, but where the voters were voting only on proposition of consolidating school districts, other question submitted, as to location or selection of site for schoolhouse of district when consolidated, not being matter within jurisdiction of annual meetings of old district to pass on, but for voters of new district, consolidation of districts was not invalidated by submission of the two separate propositions.

2. SCHOOLS AND SCHOOL DISTRICTS  $\S$  50—  
CONSOLIDATION OF DISTRICTS—MEETING—  
NOTICE—STATUTE.

First meeting of resident voters of newly created consolidated school district held not invalid, because 9 days' and not 15 days' notice was given; Rev. St. 1908,  $\S$  10843, merely requiring the meeting to be held within 15 days after formation of the district, and the only notice required being reasonable notice.

3. SCHOOLS AND SCHOOL DISTRICTS  $\S$  50—  
CONSOLIDATED DISTRICT—MEETING OF VOTERS—ERROR IN NOTICE.

Notice of first meeting of voters of consolidated school district held not invalid, because in one place one of the old districts was referred to as No. 65, instead of 69, a mere clerical error.

4. SCHOOLS AND SCHOOL DISTRICTS  $\S$  68—  
CONSOLIDATED DISTRICT—INDEFINITENESS.

Selection of site by voters for schoolhouse of consolidated district held not invalid for indefiniteness and uncertainty; the record of the meeting with reference to the site reading: "Voted for sites; the site on top of the hill on

the N. W. forty acres of James Critten's farm carried."

Appeal from Circuit Court, Daviess County; Arch B. Davis, Judge.

"Not to be officially published."

Suit by James Critten and others against John New and others. From a judgment dissolving a temporary injunction, plaintiffs appeal. Affirmed.

Dudley, Selby & Brandom, of Gallatin, for appellants.

John C. Leopard, of Gallatin, for respondents.

TRIMBLE, J. This suit, brought by two taxpayers, is a controversy over the legality of the consolidation of two contiguous school districts into one new district, and the selection of a site for the schoolhouse of said new district. It involves both of these features, though the suit does not seek to have the consolidation annulled, but only to enjoin the directors of the consolidated district from moving either one or both of the schoolhouses of the former districts to the site decided upon, and attempted to be selected, by the new. While it is alleged that the new or consolidated district was not legally formed, and that the new district and the board of directors thereof have no legal existence, yet we interpret the case, especially in view of the uncontradicted and conceded evidence as to the result of the vote in each district and the unquestioned qualifications of those participating therein, as one having solely to do with the legality of the site chosen for the schoolhouse of the new district; the alleged imperfection in the proceedings to consolidate, now relied upon, being urged simply as one of the reasons for the invalidity of the selection of the new site. The trial court heard the evidence and dissolved the temporary injunction, and plaintiffs have appealed.

There can be no question now raised over the interest of plaintiffs in the subject-matter of the suit, nor of their consequent right to maintain same, since the answer admits all of these things, and they also appear in the evidence. At the annual school meetings in districts Nos. 69 and 84 (districts lying side by side), held in the respective schoolhouses of said districts on Tuesday April 2, 1918, the day named for such meeting by section 10844, R. S. 1909, the matter of consolidation was voted upon and carried in each district, under the provisions of section 10837, R. S. 1909. Thereafter, on April 16, 1918, within 15 days after the formation of said new district, the resident voters thereof assembled and held their first meeting pursuant to section 10843, R. S. 1909. At this meeting the defendants, the directors of the newly created district, were elected, and a site for the lo-

cation of the schoolhouse thereof was chosen.

[1] The first contention of appellants is that the consolidation of the two districts, decided upon at the annual meetings of the two districts on April 2, 1918, was not legally done, for the reason that two propositions were submitted at one and the same time and on the same ballot, and the voters were not left free to express their preference for or against each proposition singly. It is well settled that two separate and distinct propositions cannot be united in one submission, so as to permit one expression of the vote to answer both propositions; the reason being that the voters are not left free to express their choice on each proposition, but may be thereby induced to vote for both propositions, whereas they would not have done so if the questions had been submitted singly. *State ex rel. v. Allen*, 186 Mo. 673, 85 S. W. 531; *State ex rel. v. Wilder*, 217 Mo. 261, 270, 116 S. W. 1687; *State ex rel. v. Gordon*, 208 Mo. 321, 327, 133 S. W. 88. We do not think, however, that the circumstances of this case bring it within the rule above mentioned.

The matters referred to, and upon which plaintiffs rely to constitute two propositions, are: (1) The question of whether the districts should be consolidated; (2) the location or selection of a site for the schoolhouse of the district when consolidated. But the question of the selection of a site for the schoolhouse of the newly created district was not a matter within the jurisdiction or power of the annual meetings of the two old districts to pass upon. That was for the voters of the new district to decide after the district had been formed, and this was clearly recognized and understood by the voters at the meetings, and they knew that no action of said annual meetings as to the selection of a site for the schoolhouse of the new district could be legally binding upon the new district, but would be advisory only, or was at best merely an expression of the voters' preference as to where the schoolhouse should be. Hence the voters at said annual meetings of the two old districts were not in reality voting upon two propositions at one and the same time, but were voting only upon one, namely, the consolidation of the two districts. As the two meetings of the old districts were wholly without power to select a schoolhouse site for the new one, the voters were not voting upon two propositions, nor were they hampered in the expression of their will in regard to the one proposition over which they had jurisdiction. Each voter could vote for or against that proposition, without regard to what his desires were as to the choice of a site, since the vote on that question would amount to nothing. Indeed, strictly speaking, the selection of a site was not before the two annual meetings of the old districts, and what plaintiffs

claim to be two propositions was simply one, namely, Should the two districts be consolidated into one district, with the school to be located in the center of the district and on the public highway? No particular site was submitted, and the question up to each voter, and which he was called upon to answer, was in effect this: Do you favor the consolidation of the two old districts into a new one, the schoolhouse of the latter to be centrally located and on the public road? And there were only 3 votes in one district and 4 votes in the other against the consolidation. We do not see how the provision that the schoolhouse, if the consolidation was effected, should be centrally located and on a public road, rendered the proposition to consolidate, or the vote thereon, invalid, especially when that is the location which the statute favors. Paragraph 11 of section 10845, R. S. 1909. This we say, without regard to the question of whether it is possible to dissolve the new district in a proceeding of this kind, concerning which we express no opinion. We merely hold that the selection of site for the new schoolhouse is not rendered ineffective on the ground that the consolidation was improperly accomplished. The consolidation was not rendered illegal by the submission of two propositions in one. State ex rel. v. Gordon, 231 Mo. 547, 133 S. W. 44; State ex rel. v. Gordon, 223 Mo. 1, 122 S. W. 1008.

[2] It is next urged that the first meeting of the resident voters of the newly created district was invalid, for the reason that 15 days' notice thereof was not given. Section 10843, R. S. 1909, providing for said meeting, requires the meeting to be held, within 15 days after the formation of the district, at some central point in the district "such point to be designated by notices posted in at least five public places," etc. But it will be observed that the statute does not specify the length of time the notice shall be given. Since the statute requires it to be held "within" 15 days after consolidation, we cannot see how it can be contended that there must be 15 days' notice of this meeting, as is required in the case of annual meetings in districts where there is no schoolhouse. Section 10844, R. S. 1909. It is true section 10843, relative to the first meeting of newly created districts, says:

"Such meeting, when assembled, shall be invested with the same powers and be conducted as prescribed for the first annual district meeting held under the provisions of this chapter."

But this relates rather to the way the meeting shall be conducted after it has met, and its powers when assembled, than to the notice necessary to be given in order to hold it. Section 10845, R. S. 1909, in its tenth subdivision, gives to the annual meeting power—

"to determine, in districts newly formed, or wherein no school house site has yet been selected, the location thereof, notice having been given in the manner provided by law."

At the time State ex rel. v. Edwards, 151 Mo. 472, 479, 52 S. W. 373, was decided, this tenth subdivision read:

"Notice having been given fifteen days previous by posting handbills in at least five public places in said district, that this matter would be submitted to said meeting." Section 7979, R. S. 1889; section 9750, R. S. 1899.

No notice of a selection of site was given in the Edwards Case.

Since, therefore, section 10843 does not specify the length of time notice shall be given, but only that notice shall be given by posting notices signed by two resident freeholders in said district (which was done), and that the meeting shall be held "within" 15 days after the consolidation, we are constrained to hold that if notice is given in the manner prescribed by statute, the only time required by the statute is reasonable time. In this case it was 9 days. There is no claim that this was unreasonably short, or that it was not sufficient to notify the voters. Indeed, the evidence is the other way; and since the meeting had the same powers as the annual meeting, it had the power to select a site, since in the notices of the meeting, as required by section 10843, it was stated that one of the matters of business to be transacted would be "to select schoolhouse site."

[3] Neither do we think the notices of the first meeting of the consolidated district were rendered invalid because in one place one of the old districts is referred to as No. 65, instead of 69. This was a mere clerical error. The two old districts of 84 and 69 had already been consolidated, and the notices otherwise clearly showed on their faces that they called for a first meeting of the newly created district formed by the consolidation of the two old districts at the annual meetings held April 2, 1918.

[4] The final contention is that the selection of a site at the meeting of April 16, 1918, was invalid for the reason that no site was selected with sufficient definiteness and certainty by the voters. The record of the meeting with reference to site is as follows:

"Voted for sites; the site on top of the hill on the N. W. forty acres of James Critten's farm carried."

This was followed by a statement of the number of votes for and against. In dealing with matters of this character, involving the acts of the voters in the organization and management of their own school districts, care must be observed not to require a too strict and technical compliance with requirements, or to demand as perfectly prepared papers and records in relation thereto as in

the case of other proceedings not entitled to be treated so liberally, and in view of the common good. State ex rel. v. Job, 205 Mo. 1, 34, 103 S. W. 493; State ex rel. v. Gordon, 231 Mo. 547, 577, 133 S. W. 44. On the other hand, the proceedings must not be so imperfect that it is uncertain just what was done at the meeting, or that the selection made cannot be definitely ascertained. Now, under certain circumstances, the "site on top of the hill on the N. W. forty acres of James Critten's farm" might be perfectly definite, at least definite enough to enable the directors to locate it; and that seems to be all that is required. Livesay v. Whitney, 107 Mo. App. 475, 479, 81 S. W. 640. But it would depend upon the facts, the surroundings and topography of the ground, whether such designation was definite or not. Plaintiffs introduced no evidence showing any difficulty or confusion arising from this source. The evidence on both sides shows that the Critten 40 has a public road running along the west side of it; that the meeting first voted on a site on the west side of this road, and then the meeting chose the site just across and on the east side of the road; and that all parties understood and knew the site under consideration was on top of the hill on the east side of the road. There was not shown to be more than one hill on the 40, and, while the hill that was there was a ridge that extended from the road east entirely across the 40, gradually widening and rising slightly as it went east, still this did not introduce any confusion, nor lead to any misunderstanding as to what would reasonably and naturally come under the designation of the "top of the hill," where used in reference to the location of a schoolhouse which every one wanted on the public road. The evidence on both sides shows that all at the meeting understood where the site under consideration was; and, as stated, there is no evidence to give foundation to the idea that the board of directors would have any difficulty in locating the place.

The judgment is affirmed.

All concur.

**HAMBURGER et al. v. HIRSCH et al.**  
(No. 15420.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted April 7, 1919.  
Opinion Filed May 6, 1919.)

**1. FRAUDS, STATUTE OF §152(1)—PLEADING—DENIAL OF CONTRACT.**

Where answer sets up contract and reply takes issue therewith as to such contract, the statute of frauds, though not specially pleaded, is available to plaintiff.

**2. ESTOPPEL. §103—ESTOPPEL IN PAIS—AVAILABILITY.**

The defense of estoppel in pais may be made at law, though it is properly a doctrine of equity originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights.

**3. FRAUDS, STATUTE OF §144—OPTION TO TERMINATE LEASE—PAROL EXTENSION—ESTOPPEL.**

Where lease gave lessees option of terminating lease at certain date by giving lessors notice within certain time, and lessors, upon request, gave lessees a parol extension of time within which to give notice, and lessees, relying upon such extension, did not give the notice until after the date prescribed by the lease, lessors were estopped from asserting that parol agreement to extend time was unenforceable under statute of frauds (Rev. St. 1909, § 2783.)

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

"Not to be officially published."

Action by Solomon Hamburger and others against Ralph Hirsch and others. Verdict for defendants. Plaintiffs' motion for new trial sustained, and defendants appeal. Reversed and remanded, with directions.

Henry H. Furth, of St. Louis, for appellants.

Greensfelder & Levi, of St. Louis, for respondents.

**Statement.**

REYNOLDS, P. J. This is an action to recover rent for an unexpired term under a written lease, the lease executed between the parties demising to the defendants certain premises on the second floor of a building in St. Louis for a term commencing February 1st, 1911, and ending December 31st, 1915, subject, however, to the terms of another lease under which plaintiffs held the premises, by the original lease the rental being fixed at \$780 per annum, or \$65 per month, the installments payable in advance each month. By a subsequent agreement between the parties, and in consideration of increased space, the rental was changed from \$65 to \$75 a month. The lease contains this clause:

"The lessee is hereby given the option to cancel this lease as of the 31st day of January, 1913, provided it gives to the lessor written notice of its desire to cancel said lease on or before the 15th day of November, 1912, and if such notice is given by the lessee to the lessor, said lease shall then and thereby be terminated as of the 31st day of January, 1913, otherwise said lease shall remain in full force and effect for the full period thereof.

"If such notice is not given by the lessee to the lessor as herein provided, then said lease shall remain and be in full force and effect for a period terminating the 31st day of December, 1915."

It is averred in the answer that after the execution of the lease, and in the month of September, 1912, defendants (lessees) proposed to plaintiffs (lessors) to extend the option of terminating the lease from November 15th, 1912, the time provided in the lease, to the following month of December, to which proposition of the lessees, it is averred, plaintiffs then and there agreed, and it is averred that it was thereupon understood by and between the parties to the lease that the lessees would not exercise the option given them in the lease on or before November 15th, 1912, but would defer exercising said option until the month of December, 1912, and that the lessees, in consideration of the consent of the plaintiffs (lessors) to extend the term of the option, refrained from exercising the option to terminate the lease within the time named therein, that is to say, on or before November 15th, 1912, and thereafter, in the month of December, 1912, the lessees duly gave notice to the lessors of the intention of the former to terminate the lease as of January 31st, 1913, and the lease thereupon terminated, as it is averred, on that date. It is averred in the answer that this modification of the lease was not in writing and the lease as modified was not in writing and no note or memorandum of the parol modification or of the lease as modified by parol was made, signed by the parties to be charged therewith or by any person thereto by them lawfully authorized. It is further averred, in substance, that acting upon this parol variation of the term of the lease, defendants had refrained from giving a written notice on or before November 15th, 1912.

The reply took issue on these as well as upon other affirmative averments of the answer, which are substantially as above stated, although in different language.

Over the objection of plaintiffs at the trial of the cause the court admitted evidence of a parol agreement to the effect stated in the answer, defendants' testimony further being to the effect that all of the members of their firm were about to leave the city of St. Louis in September and expected to be absent until some time in December, and on that account, as they were not able to determine, owing to business complications, whether they would want an extension at the time they left the city; that they left St. Louis in September and did not return until the middle of December, when they gave the written notice, which plaintiffs refused to accept, insisting that it had not been given in writing at the time specified in the lease. It was also in evidence that on the surrender of possession of the premises by defendants to plaintiffs, although endeavoring to lease the premises to other parties, plaintiffs had been unable to do so until some time afterwards, when they had rented them to another party at a reduced

rental. All this testimony as to the parol agreement claimed was objected to by plaintiffs as varying by parol the terms of an instrument required under the statute to be in writing. The objections were overruled and exception duly saved.

At the instance of plaintiffs the court instructed the jury that plaintiffs were entitled to recover, unless the jury found "from the evidence that prior to November 15th, 1912, the plaintiffs waived the provision of the lease, requiring the defendants to give notice on or before November 15th, 1912, of their intention to terminate said lease and consented that such notice might be given after the return of the defendants from their trip in December, 1912, and you will find that a written notice was given by the defendants upon their return from their trip in December, 1912, of their intention to terminate said lease on the 31st day of January, 1913."

At the instance of plaintiff the court also instructed as to the measure of damages.

At the instance of defendant the court instructed the jury that if they believed from the evidence that plaintiffs, "prior to November 15th, 1912, waived the provision of the lease requiring defendants to give notice before November 15th, 1912, of their intention to terminate said lease by consenting that such notice might be given after the return of defendants from their trip in December, 1912; and if the jury believe and find from the evidence that in reliance upon said waiver, defendants forbore to give such notice until after the 15th day of November, 1912, and that they gave such notice after their return in the month of December, 1912, then the verdict should be for defendants."

Of its own motion the court gave other instructions and also refused certain instructions asked by defendants as well as by plaintiffs which it is unnecessary to notice.

There was a verdict for defendants.

Plaintiffs filed a motion for new trial, which set out ten grounds, two of them, numbered 8 and 9, the 8th being as follows:

"Eighth. That the court erred in admitting oral evidence for the purpose of showing an alleged change and modification of a written contract, which, under the law, to be binding and effective upon all parties, had to be in writing, and any modification, change or alteration thereof, to be binding and effective upon both parties, should have also been in writing and signed by the parties to the contract."

The 9th ground was substantially to like effect, adding an absence of an allegation and proof of a consideration for the alleged waiver of the terms and provisions of the lease.

The court sustained the motion for a new trial on the 8th and 9th grounds set out in the motion. Whereupon, saving exceptions, the defendants have duly appealed.

## Opinion.

[1] Section 2783, Revised Statutes 1900, provides:

"No action shall be brought \* \* \* upon any contract made for the sale of lands, tenements, hereditaments or any interest in or concerning them, or any lease thereof, for a longer time than one year, \* \* \* unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized. \* \* \*"

This statute, the "Statute of Frauds," as it is called, is not here pleaded. But the answer sets up the alleged contract and avers it was verbal, and the reply denies any such contract. It is the general rule that to avail one's self of the Statute of Frauds, it must be pleaded, as see *Graff v. Foster et al.*, 67 Mo. 512, loc. cit. 521, and cannot ordinarily be raised by demurrer, as see *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, loc. cit. 685, 78 S. W. 1006. But the reply takes issue as to the contract or agreement set up in the answer. Hence the Statute of Frauds is available, even without specially pleading it. *Hurt v. Ford*, 142 Mo. 283, loc. cit. 301, 44 S. W. 228, 41 L. R. A. 823; *Hillman v. Allen*, 145 Mo. 638, loc. cit. 643, and cases there cited (47 S. W. 509).

While the decision of our Supreme Court in *Missouri Real Estate Syndicate v. Sims*, supra, has been cited in 20 Cyc. p. 314, note 49, in support of the proposition that in our jurisdiction it has been held that the Statute of Frauds must be pleaded, an examination of that case does not support this. All that is there said is that if defendant, by his demurrer, admits the allegation as to the consideration being paid and "defendant thinks that the Statute of Frauds has anything to do with the case, it is his privilege to plead it."

So we proceed on the assumption that the question here presented involves the application of the Statute of Frauds, section 2873, Revised Statutes 1900, supra.

Judge Gantt, speaking for our Supreme Court, in *Warren v. A. B. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644, has given a very learned and exhaustive opinion on this section of our statute, and has there held that a subsequent oral agreement made on a new and verbal consideration before the breach of the written agreement between the parties, if not within the Statute of Frauds, may enlarge the time of performing the written agreement, or may vary any other of its terms, or may waive or discharge it altogether, but subsequent verbal changes or modifications which the statute requires to be in writing are not allowed to vary the rights of the parties under a written contract. Judge Gantt there quotes very ex-

tensively and with approval from a decision by Judge Ellison, speaking for the Kansas City Court of Appeals in *Rucker v. Harrington*, 52 Mo. 481, loc. cit. 497, in which the same doctrine is announced.

In *Reigart v. Manufacturers' Coal & Coke Co.*, 217 Mo. 142, 117 S. W. 61, Judge Woodson has also reviewed the authorities, there particularly construing what is now section 2784, relating to contracts for sale of goods. But in none of these cases was the doctrine of estoppel discussed or in decision.

In *Andrews v. Broughton*, 78 Mo. App. 179, loc. cit. 189, Browne on the Statute of Frauds is quoted approvingly as holding:

"It is clear that if the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon it, however clear of the Statute of Frauds it may be, or whatever be the form of action employed. The engagement in such case is said to be entire and indivisible." *Browne on Statute of Frauds* (5th Ed.) § 140.

Again in *Beckmann v. Mephram*, 97 Mo. App. 161, it is said (loc. cit. 163, 70 S. W. 1094, 1095):

"It is moreover undoubted law that 'if part of an entire contract is within the statute (of frauds) the whole is governed by it.' 2 Reed, Statute of Frauds, § 735."

See *Andrews v. Broughton*, supra, also quoting section 140 from Browne on Statute of Frauds, which we have given.

In 2 Reed on the Statute of Frauds, at section 735, it is said:

"If part of an entire contract is within the statute the whole is governed by it. The courts will not sever the contract in order to give force to a part without the statute; and it has also been held that voluntary performance of that part of the contract which is void is no ground for compelling performance of the remainder."

It is a common branch of equity to afford relief where at law none would be granted if fraud enters. Thus, in Browne on the Statute of Frauds (5th Ed.) par. 457a, it is said that it is necessary, in a "discussion of the question of equity jurisdiction over the enforcement of oral contract in which the defense of the statute of frauds may be relied upon, to bear in mind the nature and foundation of that jurisdiction." Referring to and quoting from *Glass v. Hulbert*, 102 Mass. 34, 35 (3 Am. Rep. 418), it is said that the principle is well stated by the Supreme Judicial Court of Massachusetts in that case, when it says:

"The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party

has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds."

Further along in section 458, it is said:

"The change of situation necessary to create the equitable estoppel must have been made in reliance upon and in pursuance of the contract, although it is not confined to the doing of what the contract stipulates, i. e., part performance strictly so called."

In 2 Reed on Statute of Frauds, § 454, it is said:

"Subject to certain exceptions which will be given hereafter, the general doctrine may be laid down as true that the subsequent oral modification of a written contract under the statute of frauds is not valid at law; nor at equity without part performance. \* \* \* An alteration by parol of the terms of a written contract under the provision of the statute of frauds cannot be binding, for the reason that the alteration creates a new contract which it would be necessary to prove partly by parol evidence."

At section 459 it is said:

"Even in regard to contracts relating to land the strict doctrine has not always been adhered to. Thus a condition in a written contract within the statute of frauds and relating to land, when for the benefit of the party to be charged, may be orally waived by him," citing *Blood v. Hardy*, 15 Me. 64.

In section 461, it is said:

"Where a stipulated time is given in a deed in which to rescind, the fact of such rescission may be proven by parol; that is, the rescission may be by an act in pais or by word of mouth," citing *Hughes v. Wilkinson*, 37 Miss. 486.

At section 462 it is said:

"In an not unimportant particular the general weight of authority favors the proof of a subsequent oral contract to modify a previously written one, when, namely, the effect of the later is merely to extend the time within which the previous contract is to be performed; and this whether the subject-matter of the agreement is or is not affected by the statute of frauds."

A number of cases are cited in support of this.

In section 462 it is said (p. 39):

"One who agrees verbally to extend the time for the performance of a written contract, and thereby puts the other party off his guard,

will be estopped from taking advantage of the non-performance at the first time agreed upon, and the other party will have the extended time in which to perform," citing *Chambers v. Board of Education*, 60 Mo. 370, loc. cit. 379, among other authorities.

In *Chambers et al. v. Board of Education of Cameron*, 60 Mo. 370, it is said (loc. cit. 379):

"There is no doubt that written contracts may be altered by subsequent parol agreements, in relation to the time of performance or in regard to matters about which the written contract makes no provision."

That was said in reference to a contract required to be in writing under the statute.

In *Clark et al. v. Dales et al.*, 20 Barb. (N. Y.) 42, it is held that it was competent for the parties, by a subsequent parol contract, to extend the time for the performance of the original agreement. It is there said (loc. cit. 64):

"But the enlargement of the time of performance of an agreement under seal should be regarded rather as a waiver of strict performance, that is, the parties consent to accept performance at a future day, and when a party procures delay he shall not be allowed to urge it for his own protection. \* \* \* Nor is a new consideration necessary to give validity to an agreement to extend the time; the waiver is enough for that purpose. \* \* \* The effect of such enlargement is to substitute or adopt the extended time for the time specified in the original contract. It then stands as a new agreement, wherein the mutual promises furnish a good consideration."

Another writer on the Statute of Frauds, *Smith on Fraud* (Ed. 1907) § 247, states the doctrine thus:

"The doctrine of estoppel in pais is based upon a fraudulent purpose and fraudulent result. Before it can be invoked in the aid of a litigant it must appear that the person against whom it is invoked has, by his words or conduct, caused him to believe in the existence of a certain state of things and induced him to act on that belief. \* \* \* The essential elements are: Misrepresentation or concealment of material facts, ignorance of the truth of the matter by the party to whom the representations were made, and reliance upon his part in acting on the representations."

Estoppel in pais, or what is ordinarily called an equitable estoppel, was not originally exercised by courts of law. 2 *Herman on Estoppel and Res Judicata*, § 736. "They are called equitable estoppels, in contradistinction to an estoppel by deed or record." *Id.*

In *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, a case in which title to land was involved, the objection was made that equitable estoppel was not available at law. The Supreme Court of the United States, however, denied this, saying that it was certainly not the common law, citing *Littleton*



and Coke. This rule had also been announced by the Supreme Court of the United States in *Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452.

[2] Herman, in section 737, p. 868, says that the defense of estoppel in pais "may be made at law, and a resort to equity is not necessary." This is so, notwithstanding the fact that the doctrine of estoppel in pais "is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights—though, like many other equitable doctrines, constantly administered at law." Herman on Estoppel, § 739, p. 869.

[3] Applying the law as here stated to the facts in this case, there was evidence to the effect that the defendants, in September, asked for an extension of time within which to give their notice of intention to terminate the lease, January 31st, 1913, and that plaintiffs acceded to this request. The verdict of the jury was conclusive in favor of the defendants as to this. It was further in evidence that relying upon this promise and assurance of plaintiffs, defendants had refrained from giving their notice of intention to terminate the lease at that date and that they gave the notice in writing within the time agreed on, that is toward the middle of December. The jury found this to be the fact. We hold, on the authorities cited by us, that there was no error in the trial court admitting parol evidence to prove that fact, nor in submitting these issues to the jury.

We have found no case in our state that deals with the doctrine of estoppel as here involved, that is, in which the precise point here involved was in decision or discussed, nor have we found any decision of our court that militates against the view which we here take.

We are aware that there is a good deal of diversity of opinion in the courts of other states on this matter of a waiver by parol of any of the terms of a contract required under the statute to be in writing, but so far as we have examined them, they were not precisely this case, or involved a different state of facts from those here present.

We think that the principles of law which we have here stated, gathered from decisions and text-writers, are the ones to be applied here and are controlling.

But it is said by appellants in argument that the respondents are in no position to complain of the admission of parol evidence after they had themselves submitted such issue to the jury on the theory that they had themselves invited the error. In the view we take of the case it is unnecessary to discuss this.

Our conclusion is that the judgment of the circuit court in granting a new trial on the

grounds stated was error. No other error is suggested.

The judgment of the circuit court is reversed and the cause remanded with directions to that court to overrule plaintiffs' motion for a new trial and enter judgment in accordance with the verdict of the jury.

ALLEN and BECKER, JJ., concur in result.

# CAVENDER v. B. JOHNSON & SON. (No. 2357.)

(Springfield Court of Appeals, Missouri, May 9, 1919.)

## 1. CONTRACTS §—346(10)—PLEADING — VARIANCE—AMOUNT—"ABOUT."

Where plaintiff pleaded a contract to take out of river 100,000 ties during the year, and established by his evidence a contract to take out during the year "about" 100,000 ties, there was not such a variance between the pleading and the evidence as to be fatal, for "about" means "approximately," and is a common word, having no legal or technical significance, and should be given its common meaning of giving a margin for moderate excess in or diminution of a named amount, negating the idea that exact precision is intended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, About.]

## 2. APPEAL AND ERROR §—1067 — INSTRUCTIONS—REFUSAL OF REQUESTED INSTRUCTIONS—GIVING OF INFERIOR INSTRUCTIONS.

In an action for breach of contract to deliver ties, while a requested instruction refused was more accurate and more in conformity to the petition and proof than that given by the court, its refusal held not substantial error.

Appeal from Circuit Court, Carter County; E. P. Dorris, Judge.

Action by James M. Cavender against B. Johnson & Son. Judgment for plaintiff, and defendants appeal. Judgment affirmed.

O. L. Munger, of Piedmont, and J. L. Moore and Garry H. Yount, both of Van Buren, for appellants.

S. L. Clark, of Van Buren, and J. M. Carnahan, for respondent.

BRADLEY, J. Plaintiff sued to recover damages for breach of contract. Upon trial below before the court and a jury, plaintiff recovered judgment for \$150, and defendants appealed.

Plaintiff charges in his petition that—

"On the — day of January, 1917, he entered into a contract with defendants to take out of Current river at Chicopee, Mo., for defendants, 100,000 railroad ties, in consideration that defendants would furnish the said ties in Current river at Chicopee, to be furnished by the defendants and taken out by plaintiff within the year 1917, and defendant agreed to pay to

plaintiff for taking out of Current river and piling on the railroad switchyards at Chicopee, Mo., the sum of 2 cents per tie for each 6x8 tie and 2½ cents per tie for each 7x9 tie. Plaintiff states that the defendants furnished, and the plaintiff took out of Current river and piled on the railroad switch yards at Chicopee, Mo., under said contract, 45,000 ties, for which defendants paid to plaintiff the price and sum agreed upon as aforesaid; but plaintiff states that on the 4th day of September, 1917, the said defendants quit furnishing ties for this plaintiff to take out as per their contract as aforesaid, and failed and refused to furnish the balance of the ties for plaintiff to take out and pile on the switchyards at Chicopee, Mo., the balance of the ties as per their contract as aforesaid, and plaintiff says that he was at all times ready and willing to comply with the terms of the contract on his part, and performed all the conditions of the contract on his part, but that defendants failed and refused to comply with the contract as aforesaid, to plaintiff's damage in the sum of \$550."

Plaintiff explained the contract as follows:

"About the 1st of January, 1917, I was pulling ties for Graham. I owned a farm down the river, and I asked Graham if he would let me have the contract for the year to pull ties for B. Johnson & Son; and he said he would take the matter up with the company and let me know, and he said he had about 100,000 on the river, and that they would buy more. Some two or three weeks from that time I saw Graham and asked about the matter, and wanted to know about the contract, as I wanted to start to farming if I didn't work, and he told me to go ahead; that I could have the contract."

Under this contract plaintiff removed from the river 46,987 ties, and piled them on the switchyards at Chicopee.

Graham, the agent of defendants, denied that plaintiff had any contract for any number of ties, but stated that he employed plaintiff to take ties out of the river at the price stated. The only difference is that plaintiff claims that he had a contract to take out about 100,000 ties during 1917, while defendants insist that the contract was not for any certain number of ties, and was to cover no particular time, and that plaintiff's unsatisfactory work was the cause of his discharge.

[1] Defendants make several assignments of error, but frankly say that they are relying principally on the proposition that plaintiff sued on a certain definite contract to take out 100,000 ties during the year 1917, and that the proof did not establish such a contract. Appellants say in their brief that the trial court permitted a recovery upon a quantum meruit, and not upon the contract pleaded. Plaintiff pleaded a contract to take out of the river 100,000 ties during 1917, and established by his evidence a contract to take out during the year about 100,000 ties. We do not agree that this is such a variance as

to be fatal, nor do we agree that any principle of quantum meruit is directly involved. Plaintiff either had a contract to take out about 100,000 ties during the year as he contends, or he was employed by defendants at so much per tie, without reference to time or number of ties, as defendants contend. The jury adopted plaintiff's version, and by that we are bound, unless the jury was misdirected, or some other error was committed in the course of the trial to defendants' hurt. When one specializes in the petition, he must be particular in the proof; but this has reference to things of substance, and not to matters of no consequence. *Goode v. Central Coal & Coke Co.*, 179 Mo. App. 207, 166 S. W. 844. About 100,000 ties means approximately 100,000, and so far as substance is concerned the case stands here as if plaintiff had omitted the word "about" in his evidence touching the contract. 1 Cyc. 197, defines the word "about" as a common word having no legal or technical significance, and should be given the meaning given in common parlance. It gives a margin for moderate excess in or diminution of, and negatives the idea that exact precision is intended. See, also, *Pitkin v. Lloyd*, 47 Mo. App. loc. cit. 282.

[2] Defendants requested, and the court refused, an instruction to the effect that before plaintiff could recover the jury must find that defendants contracted with plaintiff to take out 100,000 ties from the river at or near Chicopee during the year 1917, and place said ties on the right of way of the railroad. While this instruction was refused, the court gave of its own motion an instruction telling the jury that before plaintiff could recover they must find that defendants contracted with plaintiff for him to take out 100,000 ties, or whatever number of ties defendants rafted down Current river in 1917. The instruction requested by defendants was perhaps more accurate and more in conformity with the petition and proof, and, with an explanation of the significance of the word "about," would have been the better direction. The record shows, however, that the damages claimed were based upon evidence of the profit there would have been, had plaintiff been permitted to finish his contract to take out the 100,000 ties.

We find no substantial error, and the judgment below should be affirmed; and it is so ordered.

FARRINGTON, J., concurs.

STURGIS, P. J. In concurring in this case, it seems to me that the gist of plaintiff's case on the pleadings, evidence, and instructions given is that he was wrongfully discharged from completing his contract with defendant to take out of the river at Chico-

pee, Mo., whatever ties defendant floated to that point for that purpose during the year 1917. The amount of ties designated as "about 100,000" is an estimate of the number to be handled, rather than an essential part of the contract, for in the nature of things neither party could tell the exact number, as that would depend more or less on the market, the condition of the weather, river, etc. Each party could form a somewhat accurate estimate of the number, but what defendant contracted to do was to pay plaintiff so much per tie for whatever ties were floated to and to be taken out of the river at that point. The evidence shows that plaintiff and defendant carried out the terms of this contract till about the 1st day of September, 1917, at which time plaintiff had taken out of the river and was paid for nearly 46,000 ties. The defendant then wrongfully terminated the contract and discharged the plaintiff, as the jury found. Thereafter during the remainder of 1917 the defendant floated to Chicopee and had taken out of the river by other parties over 30,000 ties. Plaintiff showed that he was able, ready, and willing to complete this contract and handle these additional ties, and protested against defendant discharging him and hiring others to do this work. It was for his loss of profits in not being allowed to handle these additional ties that plaintiff sued and recovered. Plaintiff sued for the profits lost in not being allowed to handle at the agreed price the difference between the number of ties he did handle, 46,000, and the total number floated to Chicopee that year, which total he alleged to be 100,600 ties, but which the proof showed to be 76,000. The fact that the proof showed a smaller number than plaintiff alleged, and smaller than was estimated at the time of making the contract, does not prevent plaintiff from recovering for loss of profits on the actual excess. The question of suing on a specific contract and recovering on a quantum meruit is not presented, and plaintiff's failure to prove as much as he alleged and sued for does not make a fatal variance between the allegations and proof.

The modification of defendant's instruction complained of is in accordance with this view of the case, and was therefore proper.

STATE ex rel. CLARK v. KLENE, Circuit Judge, et al. (No. 16598.)

(St. Louis Court of Appeals. Missouri. April 29, 1919. Rehearing Denied May 22, 1919.)

1. ARMY AND NAVY § 34—SOLDIERS' AND SAILORS' RELIEF ACT—DISCRETION.

Soldiers' and Sailors' Civil Relief Act March 8, 1918, § 201 (U. S. Comp. St. 1918,

§ 3078½c); leaves the granting of a motion to stay proceedings within the sound discretion of the court.

2. ARMY AND NAVY § 34—STAY OF PROCEEDINGS—RELIEF ACT—DISCRETION OF COURT.

Where an army officer had procured a divorce, and his wife had filed a motion to set aside the judgment of divorce on the ground of fraud, court held not to have abused its discretion in refusing to stay proceedings under Soldiers' and Sailors' Relief Act, § 201 (U. S. Comp. St. 1918, § 3078½c), although officer made a request for leave of absence, which was refused.

3. PROHIBITION § 5(1) — DISCRETION OF COURT—NATURE AND SCOPE OF REMEDY.

The judicial exercise of discretion by an inferior court having jurisdiction will not be interfered with by a writ of prohibition.

4. PROHIBITION § 4—DISCRETION AS TO GRANT OF WRIT.

Discretion of the court as to issue of a writ of prohibition should be applied with judicial circumspection, and applied to the facts as presented by each individual case, and prohibition should not be granted, unless a usurpation of jurisdiction by the inferior tribunal is clear.

Proceeding in prohibition by the State of Missouri, on the relation of Ira R. Clark, against Ben J. Klene, one of the Judges of the Circuit Court of the City of St. Louis, and Nell Clark. Writ denied.

H. C. Whitshill, of St. Louis, for relator. Wilber B. Jones, of St. Louis, for respondents.

BECKER, J. By our writ of prohibition the relator seeks to prohibit the defendant, Benjamin J. Klene, judge of the circuit court of the city of St. Louis, and Nell Clark, from proceeding to hear and determine a motion to set aside and vacate a judgment, namely, a decree of divorce rendered in favor of the relator, Ira R. Clark, against Nell Clark, one of the respondents herein. Upon application being filed, a preliminary rule was entered, requiring the respondents to show cause. Respondents in due course made their return, wherein they demurred to the petition and writ in this cause for the following reasons:

"First. Because said petition and writ do not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle relator to the relief prayed for in his said petition, nor to any relief from this court, nor to the issuance of any writ to prevent the respondent Klene, as judge aforesaid, from continuing in the discharge of his official duty, and hearing and determining the certain motion to set aside and vacate a decree of divorce granted relator referred to in said petition.

"Second. Because it appears upon the face of said petition that the said certain motion to set aside and vacate was filed at and during the same term of said circuit court as that at which

the said decree of divorce was rendered, and that power to make any orders affecting said decree of divorce rested and continued to rest during said same term in the discretion of said circuit court, and jurisdiction to act in the premises was and is in said circuit court.

"Third. Because it appears upon the face of said petition that any action to said proceedings under the said act of Congress referred to in said petition is within the discretion of said circuit court, and jurisdiction to act in the premises was and is in said circuit court.

"Fourth. Because it appears on the face of said petition that relator herein is not entitled in this cause to the benefit of said act of Congress."

Whereupon relator moved for judgment upon the pleadings.

The ground for the application of this writ is based upon the Soldiers' and Sailors' Civil Relief Act of Congress of March 8, 1918. U. S. Compiled Stat. 1918, tit. XVII, p. 417 et seq. The relator herein, as plaintiff in a suit pending in the said circuit court, having filed a written application, duly verified, setting forth that for the past 20 months he has been and still is in the military service of the United States, and unable by reason of that fact to be present in person and to defend himself against the charges and accusations made against him by a motion filed in said cause by the defendant, Nell Clark, one of the respondents herein, in which said motion the said relator (as plaintiff in said action) is alleged to have obtained a decree of divorce from the defendant, Nell Clark, upon fraud and false and untrue testimony and affidavits in said proceeding, and that plaintiff was not the innocent and injured party within the meaning of the law of the state of Missouri, and that plaintiff was not entitled to the relief granted him by the said circuit court in awarding him a decree of divorce.

The petition is lengthy, but the apparent facts admitted by the pleadings may be stated as follows: That relator filed his petition for divorce in the circuit court of the city of St. Louis, and upon the statutory affidavit an order of publication was obtained as against the defendant on the ground that the defendant was a nonresident of the state, or on the ground that the defendant had absented herself from the usual place of abode, so that the ordinary process of law could not be served upon her; that upon the filing of the proof of publication a default was granted plaintiff and on February 19, 1919, on ex parte hearing, a decree of divorce was granted to said relator; that on February 28, 1919, and during the same term of the court at which the said judgment of divorce had been rendered, the respondent, Nell Clark, filed her certain motion in said cause to set aside and vacate the said judgment of divorce in favor of the said relator on the following grounds,

among others, that she had no actual notice of the pendency of said suit; that the relator had perpetrated a fraud upon her and upon the court by various allegations in the petition, in that he was not a resident of the state of Missouri for the required length of time immediately next before the filing of said suit; that the relator at all times well knew where she was, but had fraudulently induced the court to issue an order of publication to obtain jurisdiction of the cause; that each and all of the allegations contained in the petition were false and untrue; that relator was not an innocent and injured party, in that he had been guilty of gross indignities toward the defendant, and had been repeatedly drunk while in the uniform of an officer of the United States army, and had come home in such condition while he and the defendant were living at Jefferson Barracks, Mo.; that he had wasted his practice as a physician and surgeon; that defendant has a good and valid defense to the petition, and that at the time the petition was filed defendant was temporarily absent from the state of Missouri, as she was at and during all the time the action for divorce was pending; and in the motion the defendant prayed the court to set aside the decree, and to restore her status as a married woman, and to permit her to file an answer and cross-bill in said cause. This said motion was duly verified.

It further appears that the judge of the circuit court, upon the filing of said motion of the defendant, peremptorily set such motion for hearing on March 28, 1919, whereupon the relator, acting through his attorney of record, filed a written motion to stay proceedings in the action, relying upon the Soldiers' and Sailors' Civil Relief Act of Congress of March 8, 1918 (40 Stat. 440, c. 20); that on March 28, 1919, the said motion was overruled, and that the court proceeded to take up for hearing the said motion of the respondent, Nell Clark; that the said application of the relator to stay proceedings in the action recited, among other reasons, that the plaintiff in the cause was and had been for 20 months past in the military service of the United States, having been regularly commissioned for a term ending in May, 1923; that he had applied for leave of absence, "to be present at a divorce proceeding to which he was a party thereto;" that said application had been refused; that the charges against him and the allegations contained in defendant's motion are each false and untrue, and are a direct reflection upon his character as a private citizen and as an officer in the United States army; and that he desires an opportunity to be present and to be heard, and to offer testimony to refute the same, which he cannot now do on account of his military duties.

Section 201 of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918 (section

§ 3078½c, U. S. Comp. Stat. supra), provides that:

"At any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, *unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.*" (Italics ours.)

As we read this section, we are of the opinion that the framers of the act intended to lodge in the trial court a sound discretion, upon a motion to stay proceedings being filed by a party litigant, to be exercised according to the facts as they may appear in each case. And our view in this regard is strengthened by a reading of the entire act, in that various other sections thereof provide that the things therein provided shall be discretionary upon the court. And this must of necessity be so, in that no such act as this could possibly be framed which could set a hard and fast rule, mandatory upon the court, upon the mere filing of a motion to stay proceedings, to sustain the same without in many instances doing irreparable injury to parties litigant and result, instead of making the act one for the protection of those who may be engaged in the service of the United States army and navy, in making it one which enables the act to be invoked as a sword instead of a shield.

The present case, perhaps, may be looked upon as presenting facts illustrative of the very point we have endeavored to make. Here we have a case wherein relator, as plaintiff below, when already in the service of the United States army, voluntarily filed his suit for divorce against his wife, and, upon affidavit that she was a nonresident of the state, obtained an order of publication, and in due course thereafter, having filed proof of publication, was permitted to take a default as against the alleged nonresident defendant, and then upon ex parte hearing was granted an absolute decree of divorce; the effect of such judgment being that the former wife is deprived of any possible relief under the Articles of War governing courts-martial article 95 (9 Federal Statutes Annotated [2d Ed.] page 1238 [U. S. Comp. St. § 2308a]) of which requires that married officers in the service of the United States army support their wives. Therefore, so long as the decree of divorce remains of record, the wife, by reason of such decree, is deprived of any opportunity to apply for support under such provision in the Articles of War governing courts-martial, and then when, within the same term of court at which the decree was rendered, she files a motion

alleging fraud in the procurement of such divorce, the plaintiff, under the provisions of the Soldiers' and Sailors' Civil Relief Act, by merely filing his motion to stay proceedings, may deprive her of any redress in the civil courts until six months after the expiration of the war, or until three months after the expiration of plaintiff's time of service, which in the instant case is some time in 1923. In other words, the defendant, though she filed a timely motion, setting up fraud upon the court as well as upon herself in the procurement of an ex parte decree of divorce, the plaintiff would be enabled, by invoking the aid of the said act, to deprive the defendant of all her civil rights and remedies, as well as to deprive her of any opportunity to secure her rights under the Articles of War governing courts-martial.

It is perhaps well to note that it appears from the record before us that, though the relator made application to his superior officers for a leave of absence, he therein stated the purpose for which he desired his leave of absence was "to attend the trial of a divorce case in which he was a party," while in all candor and honesty of purpose it would have been proper for him to have stated as the ground for asking leave that he might attend the hearing of a motion in which it was sought to set aside a decree of divorce obtained by him on the ground of alleged fraud on his part upon the court and upon the defendant—quite a different matter, in our judgment, particularly when the granting or denying of the leave of absence is to be passed upon by officers of the United States army.

[1-4] As stated above, we are of the opinion that section 201 of the Act (section 3078c, supra) leaves the granting of a motion to stay proceedings within the sound discretion of the court, and in view of the facts as they appear from the record before us we are unwilling to rule that the learned trial judge has in any wise, in so far as he has proceeded, as shown by this record, exceeded that sound discretion which is vested in him under the act. The judicial exercise of discretion by an inferior court having jurisdiction will not be interfered with by a writ of prohibition, and whilst the mere power to grant a writ of prohibition is not of so much importance, in determining whether or not it shall go, as is the question of the discretion of the court which is asked to issue it, such discretion should be applied with judicial circumspection, and applied to the facts as presented by each individual case, nor should it be granted unless the usurpation of jurisdiction by the inferior tribunal is clear. State ex rel. v. McQuillin, 262 Mo. 256, 171 S. W. 72; State ex rel. v. Oakvird, 195 Mo. App. 354, 191 S. W. 1079; State

ex rel. v. Seay, 25 Mo. App. loc. cit. 629; State ex rel. v. Lubke, 29 Mo. App. 555.

This conclusion makes it unnecessary for us to decide the other questions discussed in the briefs. The preliminary rule in prohibition is therefore quashed, and the permanent writ refused.

REYNOLDS, P. J., and ALLEN, J., concur.

#### NATT v. AIKEN et al. (No. 12760.)

(Kansas City Court of Appeals. Missouri. May 5, 1919.)

##### 1. MASTER AND SERVANT §285(5) — JURY QUESTION—EVIDENCE—SUFFICIENCY.

In servant's personal injury action, where there was evidence that cement sacks were carefully piled in the usual way under a foreman's direction, except that the height was unusual, *held*, that the question as to whether the unusual height, combined with the sagging of the floor on which the sacks were piled, caused them to fall was for the jury.

##### 2. MASTER AND SERVANT §288(16)—ASSUMPTION OF RISK—JURY QUESTION.

Evidence that plaintiff piled cement sacks to an unusual height on his foreman's orders, etc., *held* not to establish, as a matter of law, that he assumed risk of sacks falling upon him.

##### 3. MASTER AND SERVANT §289(37) — CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Evidence that plaintiff was injured by cement sacks falling upon him, which he had piled to an unusual height at his foreman's orders, *held* not to establish his contributory negligence as a matter of law.

##### 4. MASTER AND SERVANT §101, 102(1)—PERSONAL INJURY—INSTRUCTIONS.

In a servant's action for injury caused by cement sacks falling upon him, a requested instruction that defendants had a right to conduct business in their own way, and had a right to pile cement as high as they chose, *held* properly refused.

##### 5. DAMAGES §132(1)—PERSONAL INJURIES—AMOUNT.

\$2,500 damages were not excessive for injuries causing badly broken shoulder blade, care by physician for eight or nine months, inability to work for four months, and some permanent effects from injury.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Thomas P. Natt against Charles G. Aiken and Henry L. Thayer, copartners doing business as Aiken & Thayer. Judgment for plaintiff, and defendants appeal. Affirmed.

John J. Cosgrove, of Kansas City, for appellants.

Cliff Langsdale, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff, a laborer employed by defendants, who were building contractors, was engaged in piling sacks of cement in a temporary storage shed adjacent to the structure on which defendants were at work. While piling these sacks of cement, some of those piled fell upon and injured plaintiff, and this suit was brought, resulting in a verdict for \$4,000, which the court, by an enforced remittitur, reduced to \$2,500, and judgment was rendered for that sum. The defendants appealed.

The grounds of the suit are: (1) That the defendants negligently ordered the sacks to be piled about 12 to 15 feet high, knowing, or by ordinary care they would have known, that sacks piled to such a height would become unsteady and fall upon and injure one working thereabout; (2) that defendants negligently failed to brace and keep braced the floor of said shed, so as to keep it from sagging with the weight of the sacks placed in the shed under defendants' orders, and that the floor sagged and caused the sacks to fall.

It is contended that the demurrer to the evidence should have been sustained. We do not think so. The evidence offered in plaintiff's behalf is to the following effect: That the shed was about 24 feet long, 12 to 14 feet wide, with a slanting roof, which made the shed 14 feet high on one side and 10 or 12 feet high on the other. The floor was of one-inch planks, supported by joists 18 inches apart, which were about 10 inches or a foot above the ground on the north side, and somewhat closer to the ground on the south side.

Plaintiff and his fellow workmen were ordered to unload two carloads of cement in sacks of 100 pounds each (a carload being from 650 to 900 sacks), and place it in the shed, where there was already 250 or 300 sacks. The foreman directed the men, including plaintiff, to pile the sacks "right up to the roof," and in obedience to these orders they piled them from 20 to 24 sacks high, which was much higher than they were usually and regularly piled; the rule being not to make them more than 15 sacks high. The sacks were piled in rows, and the rows were built up so as to make one row a step up to the higher row next to it, so that, when the first row was completely built up, there were a number of rows parallel thereto, and so built up as to form steps up to the highest row. They had completely built up five rows in this way, and there were a number of unfinished rows of lesser and lesser heights, so as to form the

steps as aforesaid, and the floor was covered with sacks. In building up the sixth row, plaintiff, after depositing his sack, turned to descend the steps formed by the other rows of sacks, when the completed rows fell upon and injured him.

The evidence is that the sacks were piled in the usual and proper manner, and that care was used to so lay the sacks as to "tie" them together, and to so distribute the weight in each sack as to preserve its level and equilibrium. Some weeks before, cement had been piled only 10 sacks high in the shed, and the weight thereof had caused the floor to sag about 6 inches. Thereupon the foreman had ordered two of the men to place some timbers and blocking underneath to prevent the floor from sagging further. This they did by reaching under as far as they could from one (the higher) side. They dared not get under the shed themselves, fearing lest the floor would settle upon and crush them. They could in no way raise the floor to its normal level with the weight of the cement on it, but could only prevent further sagging, at least to the extent they were able to reach with the bracing they used. Shortly before the piling of the cement on the occasion of the injury, this former cement which had caused the floor to sag had been taken out and used in the construction work, with the exception of the 250 or 300 sacks heretofore mentioned as being already in there. When the weight on the floor had been reduced to the 200 or 300 sacks, the floor returned to its level, and was, of course, in proper place when the plaintiff began piling on this occasion. The bracing which had, as stated, been previously placed under the floor, however, would not prevent the floor from sagging to the point where the bracing met and stopped it before; and if cement piled only 10 sacks high caused it to sag on that occasion, naturally piling it 20 to 24 sacks high would cause the floor to sag again. The only way to observe the sagging would be to go outside and look underneath the floor; and on the occasion of the injury the sagging of the floor could not be observed from above, for the further reason that the floor was covered with sacks. No other bracing was put under the floor than that placed there some weeks before to prevent the former sagging going further.

The jury were amply justified in finding that the extra weight of sacks caused the floor to again sag, at least to the point where the former bracing had stopped it, for if a certain weight caused the floor to sag, the same or a greater weight would naturally cause it to sag again. Plaintiff's witnesses do not say the floor was straight and level at the time the sacks fell, but only that the floor had returned to its proper level when they began piling the sacks.

[1] In view of plaintiff's evidence that the sacks were piled carefully and in the way in which they usually were piled (except as to the height), and that, as to height, they were, under repeated orders and directions of the foreman, piled much higher than the regulation height, we cannot agree to the proposition that it is just as reasonable to infer that the sacks fell because of the way in which they were piled, rather than because of the height to which they were piled. We think the evidence was ample to enable the jury to reach the conclusion that it was the latter rather than the former which caused the sacks to fall, or that it was the unusual height combined with the sagging of the floor which caused them to fall. Indeed, there is no evidence that the sacks were not properly piled, aside from their great height. The defendants offered no testimony, save as to the extent of plaintiff's injuries. Plaintiff's evidence is not open to the charge that it goes no further than to show that one or the other of two possible causes produced the injury, for only one of which the defendants are liable.

[2, 3] Neither can it be said that, in obeying the orders of the foreman to pile the sacks so high, the plaintiff must, as a matter of law, be denied a recovery on the ground that he assumed the risk. There is nothing in the evidence to show that the danger from sacks piled so high was so obvious that no prudent workman would continue to work when directed to do so. The servant had a right to rely on the superior judgment of the foreman. The plaintiff's right to recover cannot be denied, as a matter of law, either upon the ground of contributory negligence or assumption of risk. *Fogus v. Chicago & Alton R. Co.*, 50 Mo. App. 250; *Levecke v. Curtis, etc., Mfg. Co.*, 197 Mo. App. 262, 276, 193 S. W. 985; *Shimp v. Woods-Evertz Stove Co.*, 173 Mo. App. 423, 158 S. W. 864; *Smith v. Kansas City*, 125 Mo. App. 150, 101 S. W. 1118.

We are wholly unable to see how it can be said that the danger arose from the fact that the work was continually changing, nor how the principle of "changing conditions," producing danger from the hazard and progress of the work, can have any application to this case. Nor do we agree with defendants in their contention that there is no evidence in the case to show that the piling of the sacks to such an unusual height was dangerous. No witness testified and said in so many words that it was dangerous; but there is ample evidence to show that the increase in the height of the sacks increased their tendency to fall, and indeed there was some evidence tending to show that the likelihood of the sacks falling because the height was too great was discussed among the workmen. But, as stated, the plaintiff was ordered to pile them to the

height aforesaid; and the evidence shows that, if anything of the danger of their falling was communicated to plaintiff, he believed they would stand. He testified, however, that none of the men said anything to him of the likelihood of their falling.

[4] Defendant's instruction No. 3 told the jury, without qualification, that the defendant "had the right to conduct his business in his own way, and that he had a right to pile said cement to the top of the shed if he chose." In other words, he could pile it as high as he chose, even though it was dangerous to do so, and even though no other reasonably prudent employer would have done so, because of the dangers arising either from their inherent tendency to fall or from the danger of the insufficiency of the floor to hold its level under so great a weight. The instruction did not declare the law and was properly refused.

[5] The trial court has reduced the verdict to \$2,500. We cannot say this amount is excessive. Plaintiff's shoulder blade was broken; the pieces being separated about a quarter of an inch. The muscles and flesh at this place were caught between the separated parts. It was necessary to open up the place, take out and push back these imbedded muscles, drill holes through the bone on each side of the fracture, and then lace the bones together by means of heavy catgut. He was under the doctor's care for 8 or 9 months, was unable to work at all for 4 months, and could do very little for 7 months. The doctor testified the injury was permanent, and that he never would have as good use of the arm as he had before.

There is no reason for us to disturb the judgment, and it is accordingly affirmed.

All concur.

#### ANDERSON ELECTRIC CAR CO. v. SAVINGS TRUST CO. (No. 15458.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted April 9, 1919. Opinion Filed May 6, 1919. Rehearing Denied May 22, 1919.)

#### 1. TROVER AND CONVERSION ¶2 — CONVERSION OF MONEY.

Trover and conversion does not lie for the conversion of money collected on check and draft.

#### 2. TROVER AND CONVERSION ¶32(1) — CONVERSION OF MONEY—PETITION.

Petition held not for the conversion of checks and a draft, but for the conversion of the money charged to have been collected on them, without its description or identity as a specific chattel, and petition therefore did not state a cause of action.

#### 3. APPEAL AND ERROR ¶196(9) — RESERVATION OF GROUNDS FOR REVIEW—INFIRMITY OF PETITION.

The point that the petition fails to state a cause of action, since it seeks to recover for the conversion of money not described or identified as a specific chattel, can be raised for the first time on appeal.

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by the Anderson Electric Car Company, against Savings Trust Company, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

John H. Boogher and Brownrigg, Mason & Altman, all of St. Louis, for appellant.

Sears Lehmann and Lehmann & Lehmann, all of St. Louis, for respondent.

REYNOLDS, P. J. The petition in this case is in three counts. The first, in substance, averred that on a day named plaintiff was the owner of a certain check, drawn on the German Savings Institution, payable to the order of plaintiff, for the sum of \$500, signed by one Slegmund. It is further averred that the defendant came into possession of the check "as a trust company" on a day named and although it appeared on the face of the check that it belonged to the plaintiff, defendant, "without any authority or direction from plaintiff, and without the knowledge of plaintiff, proceeded to collect said check and received the \$500 called for therein on or about the 24th day of November, 1911. That said check is indorsed upon the back thereof 'Anderson Electric Co., by H. S. Turner, Jr., Manager,' and also by 'H. S. Turner, Jr.' That said indorsement on the back thereof was not placed there by plaintiff, nor with its authority, knowledge or consent, and the same is not the indorsement of the plaintiff." Plaintiff then states "that the money collected by defendant on its check as aforesaid belonged to the plaintiff. Plaintiff states that it has demanded of defendant that it pay to it the \$500 collected by defendant upon plaintiff's check as aforesaid and that defendant has refused to pay to plaintiff the said sum or any part thereof, but has converted the same to its own use by crediting it to and paying it to one H. S. Turner, Jr. That defendant converted the said \$500 to its own use as aforesaid on or about the 24th day of November, 1911, wherefore, plaintiff prays judgment against the defendant on this count for \$500 and interest from November 24th, 1911."

The second count is for money collected on a check for \$200, drawn on the National Bank of Commerce in St. Louis, by one Reymershoffer. The remaining allegations in this second count are identical, except as to



the amount and date, with those of the first.

The third count is identical in its allegations with that in the first, except that the instrument there described and on which the money is charged to have been collected is described as a draft drawn by the Lafayette Bank on the Citizens' Central National Bank of New York payable to the order of one Pauly for \$100. The remaining allegations, except as to date and amount, are as in the first. It is alleged that these checks and the draft are filed with the petition.

The answer was a general denial.

There was a verdict and judgment for the plaintiff for the full amount claimed. From this defendant has duly appealed.

[1, 2] Very clearly this is an action for conversion. It is not for conversion of the checks and draft, but for the money charged to have been collected on them.

On the authority of the decision of our court in Kobusch Furniture & Carpet Co. v. Lowenberg, 194 Mo. App. 551, 185 S. W. 747, this petition states no cause of action. We held in the Kobusch Case, supra, that trover lies only for specific chattels wrongfully converted, and not for money had and received for payment of debts, money being the subject of conversion only when it can be described or identified as a specific chattel.

After making the announcement of the law as above stated, our court held in the Kobusch Case, supra, that this seems to be the rule early declared in this state, citing *Petit v. Bouju*, 1 Mo. 64. Judge Norton, speaking for our court in that case, quoted from *Hazleton v. Locke*, 104 Me. 164 loc. cit. 168, 71 Atl. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009, to the effect that from its nature the title to money passes by delivery "and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission;" that "mere failure to deliver money in specie on demand would not be technical conversion nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover but might be the ground for an action of assumpsit." *Simmons v. Spencer* (C. C.) 9 Fed. 581, and *Kerwin v. Balhatchett*, 147 Ill. App. 561, are cited in support of the above.

There is no attempt to do that here; consequently we hold that the petition states no cause of action.

[3] Learned counsel for respondent argues that as this point was not made in the court below by demurrer or motion in arrest, it cannot be raised in this court, citing in support of this, *Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, 273 Mo. 142, 200 S. W. 1079. We do not think that the opinion and point in decision there sustains this contention. It has been decided in many cases by our appellate

courts that the point that the petition fails to state a cause of action can be raised for the first time on appeal. The authorities in support of this are so numerous that it is unnecessary to cite them.

We are also referred by those same counsel to the case of *Kansas City Casualty Co. v. Westport Avenue Bank*, 191 Mo. App. 287, 177 S. W. 1092, in support of the petition and judgment. The facts for determination in that case and so much of the decision in it as covers the precise point then before that court are not as here. That was an action for the conversion of the specific checks. This is an action, not for conversion of the checks but for the conversion of money collected on them, which is not in any manner described so as to be identified.

Moreover, the evidence wholly fails to show any conversion of any specific money by the defendant.

Counsel argue that the label of the action is immaterial. That may be, but the cause of action attempted to be set up is tort for conversion. As we hold, it does not set up facts necessary to show conversion, nor does it pretend to be for money had and received.

The judgment of the circuit court is reversed.

ALLEN and BECKER, JJ., concur.

# SLINKARD v. LAMB CONST. CO. (No. 15240.)

(St. Louis Court of Appeals. Missouri. April 8, 1919. On Motion for Rehearing, April 24, 1919.)

## 1. EVIDENCE ~~424~~ — PAROL EVIDENCE TO VARY WRITTEN CONTRACT—EFFECT OF RULE AS TO STRANGER.

The rule that in the absence of fraud, accident, or mistake, parol evidence is inadmissible to vary the terms of a written contract, cannot be invoked by a stranger to the contract.

## 2. RELEASE ~~123~~—CONSIDERATION.

An employe's release of claim for injuries construed as a mere recital of a specific sum and not contractual in the legal sense so as to deprive him of his right to show want of consideration.

## 3. RELEASE ~~562~~ — PERSONAL INJURY — CONSIDERATION—QUESTION FOR JURY.

Evidence, in an action for personal injuries, held to present a question for the jury as to whether or not there was any consideration for a release of claim for injury,

## 4. NEGLIGENCE ~~186~~(26)—PERSONAL INJURY — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for personal injuries sustained while endeavoring to control a team fright-

ened by a blast in a quarry, evidence held to warrant the court in submitting to the jury the question of plaintiff's contributory negligence.

**5. TRIAL ¶54(1)—RECEPTION OF EVIDENCE—CONDITION OF PLAINTIFF—RESTRICTION.**

In an action for personal injuries, a layman's testimony as to physical appearance of plaintiff and conversations with him, admitted only on the question of his ability to come into court to testify, was not objectionable.

**6. APPEAL AND ERROR ¶1047(1)—HARMLESS ERROR—RESTRICTION OF EVIDENCE.**

In an action for personal injuries, a layman's testimony as to physical appearance of plaintiff and conversations with him, admitted only on question of his ability to come into court to testify, if error, was not prejudicial, where defendant did not object to introduction of testimony of plaintiff given at former trial.

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

"Not to be officially published."

Action by John F. Slinkard against the Lamb Construction Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed, and on motion for rehearing cause certified to Supreme Court.

John P. McCammon, of Springfield, for appellant.

Rodgers & Koerner, of St. Louis, for respondent.

**BECKER, J.** This is an appeal from a judgment in the sum of \$4,500 in favor of plaintiff on account of injuries received by plaintiff while he was unloading coal from a wagon at a quarry of the defendant in St. Louis county, on January 26, 1914. Plaintiff was employed by the Polar Wave Ice & Fuel Company, for which company he was at work when injured. The Lamb Construction Company, defendant, owned and operated a quarry located on an unrequented road, approximately 300 yards south of the Olive Street road in St. Louis county, and immediately north of what is known as Delmar Garden. The quarry covers an area of 250 by 200 feet, and has a depth of nearly 200 feet.

On the afternoon of the day on which plaintiff met with his injuries, and shortly before 6 o'clock, plaintiff was delivering coal at the quarry, having backed his wagon, to which was attached a team of horses, into a shed adjoining the engine or power house of the quarry situated immediately upon the west brink of the quarry. The horses were facing west. Some 30 or 40 feet in front of them was a steep embankment leading to a branch of the river Des Peres.

After plaintiff had backed his wagon up to the shed, which had been designated by the employes of the defendant company as

the place for the unloading of the coal, plaintiff proceeded to the rear of the wagon, and, standing upon the ground, began shoveling the coal from the rear of the wagon into the shed. The horses were not hitched, and the lines were placed on top of the coal in the wagon. Defendant's engineer and his father were in or about the engine house immediately adjoining the place where the coal was being unloaded, while in the quarry below the employes of the defendant company were at work breaking blocks of stone, some 4 or 5 feet by 2½ to 3 feet thick, into smaller pieces, and for this purpose were drilling holes into the stone and inserting dynamite therein and exploding it, resulting in the breaking of the stone into smaller pieces. Such shots are designated "squib shots," and the testimony shows that the report of such explosions was about as loud as that of a 38 or 44 caliber revolver or shotgun.

According to the testimony, when the man who did the drilling, loading, and firing was about to shoot, it was customary for him to cry "Fire," so that the men in the quarry could shelter themselves against flying particles of stone; and when the firer lighted the fuse he would again give the warning "Fire," and the men on the top of the quarry would repeat it. There is some testimony on the part of defendant that on the occasion in question such custom was observed; but according to plaintiff's testimony, however, no warning was given.

While plaintiff was thus engaged in shoveling the coal from the tail end of the wagon and at a time when there were still some two tons of coal in the wagon, one of these so-called "squib shots" was fired in the quarry below, and plaintiff's team became frightened and started to run. Plaintiff immediately ran from the rear of the wagon to the side of the team, intending to get hold of one of the bridles and stop the team to keep them from running into the creek. At or about the time that plaintiff was taking hold of one of the bits, a second blast was shot in the quarry below, adding to the fright of the horses, so that when plaintiff got hold of the bit and endeavored to quiet the team he was thrown down and trampled upon and was injured.

The negligence assigned in the petition was the failure on the part of the defendant to give a warning of the intention to fire the shot. The defendant's answer was a general denial and a plea of contributory negligence, in that plaintiff had failed to secure his horses while unloading the wagon and in not placing his lines within reach when he went to the rear of the wagon to unload it. Defendant further pleaded that plaintiff, at the time he met with his injuries, was employed by the Polar Wave Ice & Fuel Company, and had made a claim against said company, and that he had executed to said company a full

and complete receipt and release of and for his claim for damages for said injuries in consideration of the payment to him of \$61.50, and that the defendant was thereby released and discharged of and from any claim on account thereof. The reply alleged that there was no consideration for the alleged release. To the defense of no consideration for the release the defendant demurred, which demurrer was, however, overruled.

The release in question was introduced in evidence and reads as follows:

"Received of Polar Wave Ice & Fuel Company the sum of sixty-one <sup>50</sup>/<sub>100</sub> dollars, \$61.50, which I (being of lawful age) acknowledge to be in full accord and satisfaction of a disputed claim growing out of a bodily injury sustained by me on or about the 26th day of January, 1914, for which bodily injury I have claimed the said Polar Wave Ice & Fuel Company to be legally liable, which liability is expressly denied; and in consideration of said sum so paid I hereby remise, release and forever discharge the said Polar Wave Ice & Fuel Company, its successors and assigns, from any and all actions, cause or causes of actions, claims and demands for, upon or by reason of any damage, loss, injury or suffering which heretofore has been, or which hereafter may be, sustained by me in consequence of such accident and injury.

"It is expressly understood and agreed that said sum of \$61.50 is the sole consideration of this release, and the consideration stated herein is contractual, and not a mere recital; and all agreements and understandings between the parties are embodied and expressed herein.

"In witness whereof, I have hereunto set my hand and seal, this 18th day of March, 1914,  
[Signed] John Slinkard. [Seal.]

"Witnesses:

"Wm. J. Preckel,

"Alex. J. Muckermann."

As to the release, plaintiff was permitted to testify, over the objection of the defendant, that his employer had not paid him any money to sign the release; that he had signed a paper at the office of the Polar Wave Ice & Fuel Company, after he had become sufficiently well to attempt to begin work, but that no money was paid him at the time for the signing thereof; that, while ill and confined to his home, his employer had, at different times, left sums of money for him which aggregated \$61.50, but that at the time he had met with his injuries the company owed him for wages some \$12 or \$14; that nothing was said regarding the signing of a release until he endeavored to return to work, which was some weeks after the date of the accident, when, as above stated, he signed the release at the office of the company, but was not paid any money or anything else for the signing of it at the time.

William Preckel, a witness for the defendant, testified that he was a branch manager for the Polar Wave Ice & Fuel Company; that he was present when plaintiff signed the release in question; that he was

not sure whether any sum of money was paid to plaintiff at that time for the signing of the release. The witness further stated, however, that he had taken money to the plaintiff's home prior to the time when plaintiff had returned to work and signed the release.

[1] I. Appellant contends that the learned trial court erred in admitting testimony for plaintiff over the objections of defendant in permitting plaintiff to contradict, by parol, the release in evidence and the statements therein contained.

In view of the fact that the defendant company is a stranger to the alleged contract of release and is not bound by it, the rule that in the absence of fraud, accident, or mistake, parol evidence is not admissible to vary the terms of a written contract, has no application. That a third party or a stranger to a contract cannot invoke the rule is no longer open to question. *McKee v. St. Louis*, 17 Mo. 184, 190; *McKim v. Met. St. Ry. Co.*, 196 Mo. App. 544, 196 S. W. 433, and cases cited.

[2, 3] As we read the release in question, the consideration alleged therein is a mere recital and is not contractual in the legal sense so as to deprive plaintiff of his right to show the actual consideration or the want of consideration for the signing of said release. *Harms v. Casualty Co.*, 172 Mo. App. 241, loc. cit. 248, 157 S. W. 1046. According to the testimony of plaintiff, on several occasions while he was confined to his home by reason of his injuries, his employer had sent him sums of money aggregating \$61.50, but without any understanding that in consideration therefore he was to sign a release, and that in point of fact he had not signed the alleged release until some weeks later when he had returned and was endeavoring to again take up his work with his employer. And it was not denied but that the Polar Wave Ice & Fuel Company owed plaintiff some \$12 or \$14 for wages which had been earned but not paid prior to the day on which he met with his injuries. In light of the testimony it became a question of fact, to be determined by the jury, whether or not there was any consideration for plaintiff executing the release in question. *Bennett v. Lumber Co.*, 118 Mo. App. 699, 84 S. W. 808; *Gates v. Crane Co.*, 204 S. W. 38.

[4] II. Appellant contends that plaintiff should have been held guilty of contributory negligence as a matter of law, and that the trial court erred in failing to direct a verdict for defendant. To this we cannot agree.

We hold that, under all the facts and circumstances in this case, it was properly a question for the jury to determine whether the plaintiff was or was not exercising due care and caution for his own safety when he received his injuries. In other words, it was a question for the jury whether an ordinarily careful and prudent man would, un-

der all the circumstances, have acted and done as plaintiff did at the time he was injured, and the jury evidently believed from all the evidence that plaintiff acted as an ordinarily careful and prudent man would have acted under the circumstances, and therefore found he was exercising due care and caution for his own safety when he received his injuries, and therefore was not precluded, on the ground of contributory negligence, from maintaining this action. This result we hold is amply supported by sufficient testimony.

Plaintiff was not a volunteer, but was acting in the line of his duty in attempting to keep the team of horses, belonging to his employer and intrusted by his employer to his care, from running away and to thereby not alone save the team and wagon from possible damage and injury but from the possibility of doing injury to the property of others. Plaintiff's employment necessarily carried with it the duty on his part to protect such team and wagon from injury within the limits of action that an ordinarily careful and prudent man would take under the existing circumstances. If, in light of the status of the situation at the time plaintiff proceeded to stop the team from running away, an ordinarily careful and prudent man in charge of the team of horses belonging to his employer would have acted in like manner as plaintiff did in this case, then plaintiff cannot be held as a matter of law to have been guilty of contributory negligence, although his attempt to control the team in point of fact resulted in injury to himself.

It was plaintiff's duty to exercise his judgment under all the circumstances and conditions pertaining at the time, as to whether he could stop the team without injury to himself. And it must be borne in mind that plaintiff was confronted with an emergency requiring immediate action, created or caused by defendant's negligence. Having determined upon his course of action, which unfortunately resulted in injury to himself, it became first a question for the court whether as a matter of law plaintiff knowingly and voluntarily placed himself in a position where he was liable to receive serious injury so as to preclude a recovery on his part, on the ground of contributory negligence. If not thus guilty of contributory negligence as a matter of law, then it became a question to be submitted to the jury for determination, whether or not plaintiff should be held not to have exercised that due care and caution which an ordinarily careful and prudent man would have exercised under the circumstances.

We find no difficulty in answering the first question. Plaintiff, as an employé of the Polar Wave Ice & Fuel Company, had been driving the team for a period of 18 months, a team not shown to be anything else but

gentle. The team was harnessed to a coal wagon in which there remained something over two tons of coal, when, as plaintiff was standing on the ground at the rear of the wagon engaged in shoveling the coal from the wagon to the ground, the team took fright at a blast which was shot off at the bottom of a quarry immediately next to the place where the team and wagon were standing; the quarry being some 200 feet deep. The horses having taken fright started to run, whereupon the plaintiff immediately ran to the head of the horses intending to grasp the bridle of one of the horses. When the horses had proceeded about 10 feet, and just as plaintiff was in the act of grasping one of the bridles, another blast was exploded in the quarry below which added to the fright of the horses, causing them to lunge forward with the result that plaintiff, who had grasped the bridle of one of the horses, was knocked down, either by the horses or by the tongue of the wagon, and trampled upon and injured. According to plaintiff's evidence, no warning was given by the quarry company or its employes that they were about to set off the blasts, though said team and wagon were upon the premises of the defendant's quarry delivering coal at a shed which had been designated by the quarry company as the place to deliver the coal. The lines were upon the wagon, and the horses were not hitched; the record being silent as to whether the quarry company had provided any means with which, or any posts to which, the horses could have been hitched. It further appears that the quarry was situated upon an unfrequented road in St. Louis county. Under this evidence, the court could not hold plaintiff guilty of contributory negligence as a matter of law, but we hold the evidence is sufficient to warrant the court in submitting to the jury the question of plaintiff's contributory negligence.

While the cases make a distinction between the risks allowable when human life is at stake, and those when the destruction of property is threatened, we cannot but hold that the facts in this case do not bring it within the purview of this recognized distinction. The evidence before us does not show that the plaintiff was, in endeavoring to stop the team, undertaking something which, in the judgment of an ordinarily careful and prudent man, could be held to have been liable to cause him a serious injury. We are all the more of this opinion in view of the fact that in the present case the plaintiff is not a mere volunteer, but was under a duty by reason of his employment to take the necessary steps, commensurate with safety to himself, to control the horses. We therefore rule this point against appellant.

[5, 6] III. Objection is made that the court permitted a layman to testify, over defendant's objection, as to whether plaintiff himself was able to appear in court at the time

of the trial to testify when plaintiff's physician was present in court. But an examination of the record discloses that the witness was permitted merely to testify as to the physical appearance of plaintiff and to conversations the witness had had with him, which testimony the court, at the time, directed the jury was being admitted in evidence, not as bearing upon plaintiff's injuries, but merely on the question as to whether or not plaintiff "can come into court and testify in his own behalf." When later on in the course of the trial attorneys for plaintiff offered in evidence the testimony given by the plaintiff at a former trial, no objection was made by defendant's counsel to the reading of the same to the jury. We find that what the witness testified to was not objectionable and could in no event have been prejudicial to the defendant, and, no objection having been made to the reading of the testimony given by plaintiff at the former trial, the appellant cannot now be heard to complain of the action of the trial court in this regard.

There are several other points raised, all of which we have considered, but find them to be without merit.

The case was submitted upon instructions which fully and fairly presented the case to the jury. Finding no prejudicial errors in the record, and the judgment being for the right party, it is accordingly affirmed.

ALLEN, J., concurs.

REYNOLDS, P. J., dissents.

On Motion for Rehearing.

BECKER, J. Motion for rehearing overruled.

REYNOLDS, P. J., dissenting and deeming the opinion of the court contrary to that of the Supreme Court in *McManamee v. Mo. Pac. Ry. Co.*, 135 Mo. 440, 37 S. W. 119, *Eversole v. Wabash R. R. Co.*, 249 Mo. 523, loc. cit. 541, 155 S. W. 419, and of the Kansas City Court of Appeals in *Logan v. Wabash R. R. Co.*, 96 Mo. App. 461, 70 S. W. 734, asks that it be certified to the Supreme Court, which is accordingly done.

WARD v. STUTZMAN et al. (No. 13232.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

1. FRAUDULENT CONVEYANCES ⇨309(4)—  
CLAIM TO OWNERSHIP OF PROPERTY LEVIED  
ON—INSTRUCTIONS.

On buyer's claim to ownership of property levied on under execution issued on judgment recovered against seller, where seller's judgment

creditor claimed sale to have been void under Rev. St. 1909, § 2381, invalidating sale made with "intent to hinder, delay or defraud creditors," instruction that sale was valid, unless made with "intent of defrauding and delaying his creditors," was reversible error, since sale was fraudulent, if intent was either to defraud or delay.

2. TRIAL ⇨296(2) — INSTRUCTIONS—CORRECTION.

In action between buyer and seller's judgment creditor, involving issue of whether sale had been fraudulent as to seller's creditors, instruction requiring seller's judgment creditor to prove sale was made with intent to defraud and delay creditors was not cured by a correct statement of the law in seller's judgment creditor's instructions, where buyer's instruction covered her entire case and directed a verdict for her.

3. FRAUDULENT CONVEYANCES ⇨308(1)—  
SALE OF STOCK OF GOODS—JURY QUESTION  
—FRAUD.

Evidence held sufficient to warrant submission to jury of question of whether sale of stock of jewelry was fraudulent as to seller's creditors.

4. FRAUDULENT CONVEYANCES ⇨16—FRAUD  
— CIRCUMSTANCES ATTENDING CONVEYANCES.

Transfers of property constituting badges of fraud do not in themselves constitute fraud, but are signs or evidence from which its existence may be inferred, and are more or less strong or weak, according to their nature and the number occurring in the same case.

5. FRAUDULENT CONVEYANCES ⇨74(2)—IN-  
ADEQUACY OF CONSIDERATION.

Gross inadequacy of consideration is one of the indicia of fraud.

6. FRAUDULENT CONVEYANCES ⇨74(2) — IN-  
ADEQUACY OF PRICE—FRAUD.

Mere inadequacy of price, unattended by other circumstances giving color and form to the transaction, is not usually sufficient to establish fraud.

7. FRAUDULENT CONVEYANCES ⇨15 — SALE  
OF STOCK OF GOODS—INADEQUACY OF PRICE  
—SOLVENCY OF SELLER.

That stock of goods and fixtures were worth enough to meet seller's debts, but were sold in bulk for a grossly inadequate price, making seller insolvent, to buyer's knowledge, was a badge of fraud.

8. FRAUDULENT CONVEYANCES ⇨282 —  
FRAUDULENT INTENT—NOTICE TO BUYER—  
PRESUMPTION.

Actual knowledge, on part of buyer, of seller's fraudulent intent, must be proved, and not presumed.

9. FRAUDULENT CONVEYANCES ⇨301(1)—  
FRAUDULENT INTENT—NOTICE TO BUYER.

Actual knowledge by buyer of seller's fraudulent intent may be proved by circumstantial evidence.

10. APPEAL AND ERROR ⇐758(3), 761—  
BRIEFS—SUFFICIENCY.

Appellant's brief, raising only one point, that court erred in giving instruction containing statement fully covering facts of the case, and immediately thereafter a statement, under heading entitled "Brief," giving instruction complained of in full and discussing it, with citation of authorities relied on, *held* to comply with rules of court requiring separate statement of errors and points relied on.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

"Not to be officially published."

Action by D. B. Ward against Ora Stutzman. Judgment for plaintiff, and writ of execution issued. Claim to ownership of property levied on was filed by Elsie N. Maupin. Judgment for claimant, and plaintiff appeals. Motion to dismiss appeal overruled, judgment reversed, and cause remanded.

Samuel Feller, of Kansas City, for appellant.

New, Miller, Camack & Winger, of Kansas City, for respondent.

BLAND, J. The defendant, Ora Stutzman, owned a stock of jewelry and fixtures, and on the 26th day of August, 1914, sold it to claimant, Elsie N. Maupin. No notice, such as is required by the Bulk Sales Law, was given. Laws of 1913, p. 163. In the following April Stutzman confessed judgment in favor of plaintiff. About two weeks thereafter plaintiff had an execution issued on this judgment, and the sheriff levied it on the stock of jewelry then in possession of claimant Maupin as purchaser from Stutzman in the preceding August. Claimant Maupin then filed her claim with the sheriff, asserting her ownership of the property. Thereupon plaintiff gave the sheriff an indemnity bond, and the latter sold the property to a stranger to these proceedings. Plaintiff filed his answer to Maupin's claim, and to this answer Maupin filed a reply, in which she pleaded the 90-day statute of limitation prescribed in section 4a of the act of 1913 (Laws of 1913, p. 163). The case was tried on the contention of plaintiff that the sale from Stutzman to Maupin was void under the provisions of the Bulk Sales Law. The trial court held that said law was not complied with, and the case was appealed. This court on February 12, 1917, reversed the judgment. Ward v. Stutzman, 195 Mo. App. 376, 191 S. W. 1090.

The suit was again tried, plaintiff filing an amended answer to Maupin's claim, in which plaintiff set up that said sale or trade was void, because made by Stutzman with intent to hinder, delay, and defraud his creditors, and especially this plaintiff, and that claim-

ant Maupin knew of such purpose and intent. These allegations were denied by Maupin, and the case was tried on that issue, which resulted in a verdict in favor of claimant Maupin.

[1] The court, at the request of Maupin, instructed the jury that their verdict should be for Maupin, "unless you further find and believe from the evidence that defendant Stutzman made said sale and transfer of said property for the purpose and with the intent of defrauding and delaying his creditors." (*Italics ours.*) Plaintiff urges that the giving of this instruction was error, and the point is well taken. The statute (section 2381, R. S. 1909) provides that:

"Every conveyance or assignment in writing, or otherwise, of any estate or interest \* \* \* in goods and chattels, \* \* \* made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, \* \* \* shall be from henceforth deemed and taken, as against such creditors and purchasers, prior and subsequent, to be clearly and utterly void." (*Italics ours.*)

Under this statute a sale made with the intent either to hinder, defraud, or delay creditors is fraudulent. It is not necessary that the intent be to defraud and delay creditors. In other words, the instruction should have been that the finding should be for Maupin unless Stutzman made a sale for the purpose and with the intent of hindering, delaying, or defrauding his creditors, etc. The giving of the instruction, worded as it was, was reversible error. Rupe v. Alkire, 77 Mo. 641; Burgert v. Borchert, 59 Mo. 80; Crow v. Beardsley, 68 Mo. 435; Baer, Seasongood & Co. v. Lisman, 85 Mo. App. 317; Dunham-Buckley & Co. v. Halberg, 69 Mo. App. 509.

[2] Claimant Maupin contends that because the jury were correctly instructed in several of plaintiff's instructions, it being urged that all of the instructions should be read together, that the jury could not have been misled. Claimant Maupin's instruction No. 1 covered her entire case and directed a verdict. Under such circumstances the error in said instruction could not be cured by a correct statement of the law in plaintiff's instructions. Dunham-Buckley & Co. v. Halberg, supra; Baer, Seasongood & Co. v. Lisman, supra; State ex rel. Long v. Ellison, 272 Mo. 571, 199 S. W. 984; State ex rel. Met. St. Ry. Co. v. Ellison, 208 S. W. 443.

[3] It is the contention of the claimant that the verdict was for the right party, and therefore the judgment should be affirmed, regardless of the error mentioned. We are unable to agree with this contention. There was evidence to go to the jury on the question as to whether the conveyance was fraudulent. At the time of the transfer Stutzman was indebted to plaintiff and various other

parties, but the total amount of his indebtedness was nothing like the value of his stock of goods. He (Stutzman) owed plaintiff the sum of \$623 for goods purchased and which went into his jewelry business. Stutzman's entire stock of merchandise and fixtures was traded in bulk to Maupin for real estate in Excelsior Springs, Mo. There was testimony that the real estate was incumbered in the sum of \$1,950 and was worth \$2,400, leaving an equity of \$450. There was testimony that Stutzman's stock was worth \$2,800. Maupin agreed to assume about \$450 of Stutzman's bills. The trade rendered Stutzman insolvent, which Maupin knew. Maupin also knew of Stutzman's indebtedness, including that of Ward. We think that under the circumstances this was sufficient evidence to go to the jury on the point mentioned.

[4-7] There are often circumstances attending conveyances and transfers of property that are said to be badges of fraud; that is, evidence of an intent to hinder, delay, and defraud creditors. These badges of fraud do not in themselves constitute fraud, but they are signs or evidence from which its existence may be inferred. They are more or less strong or weak, according to their nature and the number occurring in the same case. 20 Cyc. 439, 440, 441. One of the indicia of fraud is gross inadequacy of consideration, such as there is evidence tending to prove was present in this case. *Stern Auction & Commission Co. v. Mason*, 16 Mo. App. 473, loc. cit. 477; *Dry Goods Co. v. Schooley*, 66 Mo. App. 406. Mere inadequacy of price, however, unattended by other circumstances giving color and form to the transaction, is not usually sufficient to establish fraud. There is other evidence of fraud in this case. The sale or trade of Stutzman's property rendered him insolvent, and this was known to claimant Maupin. Without the stock and fixtures sold to Maupin, Stutzman could not pay his debts. The equity in the real estate was not even enough to satisfy plaintiff's claim. The stock and fixtures were worth enough to meet all of Stutzman's debts. This circumstance, together with the fact that the entire business was sold in bulk, and the gross inadequacy of price, was a badge of fraud. 20 Cyc. 449; *Brewing Ass'n v. Steinke*, 68 Mo. App. 52; *State, to Use of Salomon, v. Mason*, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Se-

ger's Sons v. Thomas Bros., 107 Mo. 635, 18 S. W. 33.

[8, 9] While actual knowledge on the part of Maupin of any fraudulent intent or purpose on the part of Stutzman must be proved, and not presumed (*Commercial Bank v. Vollrath*, 135 Mo. App. 63, 115 S. W. 510; *Phillips & Co. v. Rule*, 124 Mo. App. 525, 102 S. W. 32), yet direct and positive evidence is not necessary to establish it; it may be found from facts and circumstances such as were present in this case (*Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613; *Dry Goods Co. v. Schooley*, supra). Claimant cites the case of *Durkee v. Chambers*, 57 Mo. 575, on the point that a bona fide assignee for value will not be affected by the fraudulent intent of his assignor, of which he has no knowledge, and that knowledge on the part of the assignee of the mere fact of the assignor's indebtedness at the time of the transfer will not be sufficient to defeat it. However, as we have already stated, there are a number of facts present in this case, other than the mere fact that Maupin knew of Stutzman's indebtedness.

[10] Claimant Maupin has filed a motion to dismiss the appeal, and in support thereof says that plaintiff's brief does not comply with our rules requiring that the brief filed by appellant shall "contain, separately and in numerical order, the points or legal propositions relied on, and does not separately allege the errors committed by the inferior court, and does not separately set out, and in numerical order, the points and authorities relied upon in said brief." Plaintiff's brief starts out with a statement, properly headed and fully covering the facts of the case. After concluding the statement, there is another heading, entitled "Brief." Immediately under this head it is stated that—

"The court erred in giving instruction No. 1 (Rec. 153) at the request of the respondent Maupin, which instruction reads as follows."

Then the instruction is set out in full, and the same is discussed, with citations of authorities relied upon. Appellant raises but one point in his brief; and we think that the brief substantially complies with our rules.

The motion to dismiss is overruled, and the judgment is reversed, and the cause remanded.

All concur.

**PRODUCERS' OIL CO. v. GREEN.**  
(No. 7753.)

(Court of Civil Appeals of Texas. Galveston.  
June 28, 1919.)

**1. CORPORATIONS §432(12)—AUTHORITY OF EMPLOYÉ—EMPLOYMENT OF PHYSICIAN—SUFFICIENCY OF EVIDENCE.**

In physician's action against corporation for professional services rendered employé of the corporation, evidence held insufficient to sustain finding that employé who had made arrangements for the rendition of such services had authority to bind the corporation.

**2. CORPORATIONS §407(1)—AUTHORITY OF EMPLOYÉ—MEDICAL SERVICES.**

A private corporation with limited power of operating, drilling for, and producing oil was not liable for medical services rendered its employé upon request of another employé having no authority to bind the corporation.

**3. CORPORATIONS §429, 432(1)—AUTHORITY OF AGENTS—NOTICE OF AUTHORITY—BURDEN OF PROOF.**

Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with notice of but in case of controversy have the burden of showing authority assumed to have been in fact possessed.

**4. MASTER AND SERVANT §351—WORKMEN'S COMPENSATION—INJURIES TO EMPLOYÉ—PHYSICIAN'S SERVICES.**

Corporation was not liable for medical services rendered an employé in absence of special authority from board of directors, where corporation had provided method of caring for injuries to employés by means of insurance it had taken out for their benefit under the Workmen's Compensation Act. (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz).

Appeal from Harris County Court, at Law;  
Roy F. Campbell, Judge.

Action by Dr. C. C. Green against the Producers' Oil Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Woods, King & John, of Houston, for appellant.

Campbell, Myer, Myer & Freeman and Sewall Myer, all of Houston, for appellee.

GRAVES, J. Dr. Green brought this suit against the Producers' Oil Company a corporation, and W. J. Sherman, an individual, to recover the reasonable value of his professional services in having performed a surgical operation upon R. R. Earp, one of the Oil Company's employés, who had been injured while in its service. He sought judgment against Sherman individually only in event the corporation was not held, thus alleging the basis of its liability:

"That on or about the 25th day of February, 1916, the said W. J. Sherman, being then and

there the duly authorized agent of his codefendant, Producers' Oil Company, requested this plaintiff to perform an operation upon one R. R. Earp, an employé of Producers' Oil Company, who had been injured during his employment with said company. Acting upon this request, plaintiff did in fact perform said operation, known as suture of the patella. Said operation was performed with care and skill, and was, from both a medical and practical standpoint, successful. That before performing the operation plaintiff was assured by the defendant, acting through its authorized agent as aforesaid, that said Producers' Oil Company would pay to the plaintiff his fees for performing said operation, though no express contract as to the amount of the charge was made."

Over the protest of the Oil Company the cause was submitted on special issues to a jury, who found that W. J. Sherman, before the service was rendered, requested Dr. Green to perform the operation upon Earp under statement that the company would pay him for it, and that Sherman was authorized by the Oil Company to make such request and statement.

No issues being raised as to the rendition of the service nor as to the reasonableness of the amount claimed therefor, pursuant to this verdict the court entered judgment in Dr. Green's favor against the corporation alone for \$150, permitting Sherman to go hence with his costs.

The Oil Company appeals contending through a number of assignments that it was not liable, and that its request for a peremptory instruction embodying that view of the law should have been given below.

We think the position well taken. The undisputed testimony showed that Sherman was merely a stenographer and clerk in the office of the general superintendent for the South Texas division of the business, C. P. Clayton, the latter being a general officer of the company and head of the department in which Sherman worked, the actual operation of the corporation's business being divided into departments, each having a head; that at the time Sherman made the request of and statement to Dr. Green found by the jury the Producers' Oil Company was a subscriber to the Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), and had provided for the insurance of all its employés thereunder, which facts were then communicated to Dr. Green; and that, aside from such authority as legally might and actually did come to him from his superior officer, Mr. Clayton, Sherman had none whatever to bind the company to pay for medical services rendered to Earp; indeed, Dr. Green himself excludes any other source by the specific declaration of his cause of action already quoted, and by his testimony hereinafter referred to.

Beyond the uncontroverted features stated,



there may at first blush appear to be some haziness in the evidence as to what authority was, or more accurately speaking, perhaps, was attempted to be, conferred on Sherman by Clayton, but it is thought a careful reading of the record as a whole will dispel it.

Sherman first testified by deposition, the material portion of his evidence there given being this:

"I was in the head office. I was not one of the department heads. \* \* \* I was connected with the general superintendent's office. I was a stenographer and clerk in the office. I handled the accident report in the claim or injury of Mr. R. R. Earp, an employé of the Producers' Oil Company. The Humble office turned that over to me. The superintendent at Humble mailed it into the office and I got it when it reached the office. Part of my duties was opening the mail and attending to matters of this kind. Nobody gave me authority to attend to matters of this kind. \* \* \* It was part of the duties of the office. One of the duties of the desk I was on was attending to matters of this kind. That was one of the duties of the desk that I occupied on or about February 25, 1916. It was one of the duties I performed under C. P. Clayton, general superintendent, and was turned over to me by him to handle.

"I am the same W. J. Sherman who phoned to Dr. Charles C. Green about this matter. \* \* \* Mr. Clayton told me to phone to Dr. Green about this matter. He was the head of that department at that time. I reported back to Mr. Clayton that I had phoned to Dr. Green.

"The actual running of the business of the Producers' Oil Company was divided into departments, each with a department head. Mr. Clayton was the general superintendent of this division of the Producers' Oil Company, and he occupied that position on the 25th day of February, 1916.

"I kept Mr. Clayton informed as to what was being done and the progress being made by me in the Earp matter, and the Earp matter was being handled by me under the supervision and control of Mr. Clayton."

Upon the trial he was again a witness, orally reiterating that he was only a stenographer and clerk in the general superintendent's office, and as such merely under the duty of handling and making out the accident report in such instances as this, explaining in detail that his former apparently unqualified statements in the deposition were not meant to go further and to imply that Mr. Clayton had placed him in general charge of Earp's case. These material excerpts will sufficiently indicate the purport of his explanations:

"Neither Mr. Clayton or any other general officer of the company authorized me to arrange to have this man operated on. I have stated in my direct examination that it was my duty to handle the accident report. It was not a part of my duty, and I did not have authority from any general officer of the company, or any one else over there, to arrange for medical services for this employé or any other employé. My duty

with reference to that was merely to collect the accident reports off of the people and send them in to the insurance company. \* \* \* I testified on direct examination by deposition, in answer to the question as to what connection I had with the claim or injury of R. R. Earp, that I handled the accident report. \* \* \* I referred to handling the accident reports. That would not have any connection whatever with employing physicians to render medical service or any other service to an injured employé. He asked me this question, 'It was one of the duties you performed under C. P. Clayton, general superintendent, and was turned over to you by him to handle?' To which I answered, 'Yes.' The duties I referred to there were the handling of the accident report. Mr. Clayton instructed me to call Dr. Green to ascertain if the man could be removed from the St. Joseph's infirmary to the Baptist Sanitarium. He didn't say anything to me about arranging with any one for payment of medical services rendered to that man. \* \* \* Neither Mr. Clayton or any other head of the departments had authorized me to arrange for medical services for any of its employés.

"He asked me, 'Did you report back to Mr. Clayton that you had phoned Dr. Green?' and I answered, 'Yes, sir.' I told Mr. Clayton that Dr. Green had told me that, as he was a director out at the infirmary, he would explain to the Sisters and that he knew that it would be all right, and that they would look to the insurance company for their money.

"He asks me here, 'Did you keep Mr. Clayton informed as to what was being done and the progress that was being made in this matter?' To which I answered, 'Yes.' I told Mr. Clayton that Dr. Green said that he would arrange with the sanitarium, and that was the end of it. I never made any report to him, that for the injured man to be put there. I had to promise Dr. Green that the Producers' Oil Company would pay this bill. \* \* \* I stated here, in answer to this question, 'And the Earp matter was being handled by you under the supervision and control of Mr. Clayton?' 'Yes, sir.' That was the accident report on Mr. Earp—merely the accident report—that I mean in answer to that question."

"These reports were made on blanks like the one showed me by counsel. I had not any other duty with reference to the handling of these matters other than the handling of these reports. There is nothing in this report showing that it is part of my duties to arrange for medical services. I testified that the extent of my duties was getting the necessary information, filling out these blanks, and sending one to Austin and one to Dallas; one to the Industrial Accident Board at Austin, and one to the Texas Employers' Insurance Company, whose head office is at Dallas."

It cannot be said that Dr. Green contradicted, or even attempted to weaken, any of this evidence; rather did his own proof tend to confirm it. In accurate accord with his pleading above quoted from, he testified that the only arrangement he had about the company's paying his fee was made over the telephone with W. J. Sherman, this being his version of what transpired:

"I had a conversation about this matter over the telephone with Mr. Jutney W. Sherman, of the Producers' Oil Company. He called me. When he called me on the phone he asked me if I was treating Mr. Earp at the infirmary, and I told him I was. He then asked me was the injury a serious one, and what would be necessary to be done. He says, 'The reason I am asking you, he is one of the Producers' Oil Company men.' He said, 'The Sisters will not take him because they have had some trouble with the insurance company; they felt that he might be put there for a week and then there would be no way of getting their money.' I said, 'I am on the staff, and I will go out there, and if there is any way I can fix it I will let you know.' I told him it would be twenty-four or forty-eight hours before I operated on him, to give the oozing from the bone time to stop.

"Anyhow, after that, I called him up afterwards, and told him that I had had the following conversation with the Sisters. \* \* \* And before that I asked him, I says, 'What part will you be responsible for?' And he says, 'We will be responsible for all expenses during the first week.' Then I said, 'My operation will be within twenty-four or forty-eight hours, and will come in the first week, and that, of course, will come in the list of expenses.' He said, 'Yes.' I says, 'Well, then, as I understand it, Earp will not have to be responsible for any of the expenses except after the first week and the first week you will pay it.' He says, 'Yes.'

"I then made the arrangements, with the understanding with Mr. Earp that the Producers' Oil Company would pay the first week's expenses, including my operation, and after that he would have to pay the expenses, as there would not be any expense of mine except for the operation. \* \* \* Then I went on and operated, and afterward I went to W. J. Sherman, and gave him a report of the amount and about how long the man would be in the hospital."

"I understood at that time that the Producers' Oil Company did have their employes insured under the Workmen's Compensation Act. \* \* \* I made no effort to find out from the officers of the Producers' Oil Company who Mr. Sherman was. I did not ring up any officer of the Producers' Oil Company. I made no inquiry of any of them as to what Mr. Sherman's authority in the premises was. Sherman called me up; he did not promise to pay me this bill in person. I relied on the Producers' Oil Company. I relied on Mr. Sherman's word that the Producers' Oil Company would pay my bill."

[1, 2] With the entire body of the evidence in this condition, we conclude that the jury's finding that Sherman was authorized by the Oil Company to make the arrangement they found he did with Dr. Green had no support. As will be noted, it was not even shown that his chief, Mr. Clayton, the company's divisional superintendent, had any knowledge of it; he himself was only a stenographer and clerk in that official's department; and private corporations with the limited charter powers of operating, drilling for, and producing oil, as this one was shown to be, may not become bound upon the mere ipse dixit of

such an underling for medical services, rendered, or to be rendered, under the circumstances here presented, to another of its employes.

[3] Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with notice of, but, in case of controversy, have the burden of showing, the authority assumed to have been in fact possessed. *El Fresnal Irrigated Land Co. v. Bank of Washington*, 182 S. W. 701; *Rishworth v. Moss*, 191 S. W. 843; *Wills v. Ry. Co.*, 41 Tex. Civ. App. 58, 92 S. W. 273; *Godshaw v. Struck & Bro.*, 109 Ky. 285, 58 S. W. 781, 51 L. R. A. 668; *Cleburne Street Railway Co. v. Barber*, 180 S. W. 1176; *Ry. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092; *Texas Building Co. v. Doctors Albert and Edgar*, 57 Tex. Civ. App. 638, 123 S. W. 717; *Overton v. First Texas Insurance Co.*, 189 S. W. 514.

Manifestly no such burden was met in this case. Apart from Sherman's deposition, there is nothing even tending to connect Mr. Clayton with the transaction; and a fair construction of what Sherman there meant, in the light of his oral explanations at the trial, is that Mr. Clayton only turned over to him the matter of attending to the accident report in Earp's case, and not the management of it generally, with authority to do whatever Clayton himself could have done in the premises.

[4] But even if it were otherwise, and it had been shown that Clayton both knew all Dr. Green says occurred between himself and Sherman, and had delegated to the latter every power he himself possessed for the corporation, a majority of the court are of opinion that it would still not have been bound; this for the reason that the company had previously provided a method of caring for such contingencies by means of the insurance it had taken out for the benefit of its employes under the Compensation Act, and not even one of its general officers could substitute a different provision, or impose a liability on account of services rendered an employe, particularly in the absence of special authority from the board of directors. The minority member, however, thinks that in this contingency the facts of the case would have brought it within the operation of the principle applied in instances of emergency, and so have rendered the corporation liable for its general superintendent's acts. *Texas B. Co. v. Albert*, 57 Tex. Civ. App. 638, 123 S. W. 716; *Perkins v. Kilpatrick* (App.) 193 S. W. 876; *Gray v. Lumpkin*, 159 S. W. 880. At any rate, since all are agreed that no such proof was made, this divergence of view becomes immaterial and need not be enlarged upon.

The facts appearing to have been fully developed under the conclusions reached, it

becomes the duty of this court to sustain so much of the various assignments of error presented as raise the question herein discussed, to reverse the judgment of the lower court, and to here render judgment for the appellant; that order has accordingly been entered.

Reversed and rendered.

## WEGENKA v. CITY OF ST. JOSEPH et al. (No. 13193.)

(Kansas City Court of Appeals. Missouri.  
April 7, 1919.)

### 1. MUNICIPAL CORPORATIONS ⇨513(6)—TAX BILLS—ACTION TO ENJOIN ISSUANCE—NECESSARY PARTY.

In owner's action to enjoin issuance of special tax bills for construction of pavement and delivery thereof to contractor, the contractor is the real party interested and a necessary party to the suit.

### 2. APPEAL AND ERROR ⇨187(4)—EXCEPTIONS—AVAILABLE ERROR—ADMISSION OF PARTY TO SUIT.

Court's action in admitting party to suit upon its own application is not available as error on appeal where no objection or exception thereto was saved.

### 3. PARTIES ⇨40(2)—REAL PARTY IN INTEREST—APPLICATION TO BE MADE PARTY DEFENDANT.

The real party in interest may be made a party defendant on his own application whenever such interest is made to appear to the court.

### 4. INJUNCTION ⇨176—TEMPORARY INJUNCTION—MODIFICATION ON MOTION TO DISSOLVE.

In owner's action to enjoin issuance of special tax bills for paving construction, where temporary injunction prohibited issuance of all tax bills on abutting property in which plaintiff had no interest as appeared from petition, court, upon motion to dissolve temporary injunction, could modify it so as to make it apply merely to tax bills against plaintiff's property, without the taking of evidence, notwithstanding Rev. St. 1909, §§ 2529, 2531.

### 5. INJUNCTION ⇨157—ISSUANCE OF TAX BILLS—TEMPORARY INJUNCTION—SCOPE—INTERESTS OF PLAINTIFF.

In action to enjoin issuance of special tax bills for street improvements by owner of abutting property, such owner is not entitled to have temporary injunction apply to bills against property in which he has no interest.

### 6. INJUNCTION ⇨178—TEMPORARY INJUNCTION—MOTION TO DISSOLVE—ORDER FOR BOND.

Where plaintiff, given temporary injunction, failed to give bond as required by Rev. St. 1909, § 2522, court, in ruling upon motion for

dissolution of temporary injunction, could upon its own motion require that such bond be given.

### 7. INJUNCTION ⇨183(1)—MOTION TO DISSOLVE TEMPORARY INJUNCTION—INSUFFICIENCY OF PETITION.

Sufficiency of petition for injunction may be attacked by motion to dissolve a temporary injunction in the same manner as general demurrer.

### 8. INJUNCTION ⇨171—TEMPORARY INJUNCTION—MOTION TO DISSOLVE—EVIDENCE.

Court, in acting on motion to dissolve temporary injunction, is not compelled to have evidence thereon if the facts upon which the court acts appear on the face of the pleading on which injunction was issued.

### 9. INJUNCTION ⇨171—MOTION TO DISSOLVE TEMPORARY INJUNCTION—SUFFICIENCY OF PETITION.

In action to enjoin issuance of special tax bills, motion to dissolve temporary injunction which does not attack sufficiency of petition to state cause of action does not raise the issue of the sufficiency thereof, though facts are alleged tending to show tax bills to be void, where such defects do not render petition wholly insufficient to state any cause of action whatever.

### 10. QUIETING TITLE ⇨7(5)—VOID TAX BILLS.

Where defects rendering special tax bills absolutely void appear on the face of the tax proceedings, there is no lien upon the property under the tax bills and no cloud upon the title of such property entitling owner to maintain a suit in equity.

### 11. APPEAL AND ERROR ⇨193(9)—REVIEW—SUFFICIENCY OF PETITION TO STATE CAUSE OF ACTION.

Sufficiency of petition to state cause of action can be attacked in appellate court for the first time only where it is wholly insufficient to state any cause of action whatever.

Appeal from Circuit Court, Buchanan County; Thomas B. Allen, Judge.

"Not to be officially published."

Action by Anna Wegenka against the City of St. Joseph and others. From order modifying temporary injunction, plaintiff appeals. Affirmed.

Sterling P. Reynolds, of St. Joseph, for appellant.

Charles L. Faust and John E. Dolman, both of St. Joseph, for respondents.

TRIMBLE, J. The city of St. Joseph, by proceedings appropriate for that purpose, ordered Olive street to be paved from Fifteenth to Twenty-Sixth street, a distance of 11 blocks, the work to be paid for by special tax bills on the abutting property. The Metropolitan Paving Company was awarded the contract, and began the work, and, it seems, has nearly performed it, but has not quite completed it, as we gather from the allegations in plaintiff's petition.

Charging that the city, the city engineer, and the board of public works were about to issue the special tax bills for the paving of the street between the points named, the plaintiff brought an injunction suit to prohibit the issuance in any manner of any special tax bills on account of said paving from the first of said points to the other on said street, and to prohibit the delivering of said tax bills to said Metropolitan Paving Company or to any one. The city and the above-named officers were made parties, but the paving company was not. One ground of the injunction sought, among others, was that the pavement was not constructed according to the required plans and specifications in a number of specific particulars.

Upon this petition, and the ex parte showing made by plaintiff, the court issued a temporary injunction enjoining the issuance of all the tax bills against the abutting property for the entire 11 blocks.

[1] The petition, on its face, showed that the Metropolitan Paving Company was the real party interested and a necessary party to the suit. No demurrer on the ground of a defect of parties defendant was filed, but, instead of this, the Metropolitan Paving Company filed a motion asking to be made a party defendant, which the court sustained. To this the plaintiff made no objection and saved no exception.

Thereafter the city and the Metropolitan Paving Company filed answer, and also filed a joint motion to dissolve said temporary injunction on the ground that the same was improvidently issued, that the court had no authority to grant said injunction, and that the granting thereof was contrary to law.

The court considered the motion, but no evidence was offered thereunder; the consideration not extending beyond the face of the pleadings and the hearing of arguments of counsel.

The petition showed on its face that injunction was sought to prohibit the issuance of all tax bills on all the abutting property for the entire 11 blocks, and the temporary injunction prohibited the issuance of all such bills. But the petition also showed that plaintiff owned only three lots in the above-mentioned territory, with a total fronting of only 141 feet, and was not interested in any other of said property.

The court, on the hearing of said motion, found that plaintiff was not entitled to a temporary injunction except as to the tax bills against the property owned by plaintiff, and therefore modified the temporary injunction by limiting it to those assessed against the three lots owned by plaintiff, and directed that plaintiff file an injunction bond to the city and the paving company in the sum of \$500.

From this order modifying the temporary injunction, which was in effect a dissolution of the injunction as to the tax bills on the

other property in which plaintiff was not interested, the plaintiff prosecutes this appeal.

[2, 3] It is contended that the court erred in admitting the paving company as a party to the suit upon its own application. If such be an error, it is one that cannot be taken advantage of, since no objection nor exception was saved. *Mulherin v. Simpson*, 124 Mo. 610, 28 S. W. 86; *Kansas City ex rel. v. Schroeder, etc., Surety Co.*, 196 Mo. 281, 300, 93 S. W. 405. However, it would seem that the paving company was the only one really interested in the outcome of the suit; and the real party in interest may be made a party defendant on his own application whenever such interest is made to appear to the court. *State, to Use, v. Hudson*, 86 Mo. App. 501, 509; *Green v. Conrad*, 114 Mo. 651, 21 S. W. 839; *Valle v. Cerre*, 36 Mo. 575, 83 Am. Dec. 161; *State ex rel. v. Allen*, 124 Mo. App. 465, 476, 103 S. W. 1090; same case on second appeal, 132 Mo. App. 98, 102, 111 S. W. 622.

[4, 5] Appellant complains of the court's action in modifying the temporary injunction, the ground of this complaint being that the court did so without hearing evidence, and therefore was without power to modify, citing sections 2529 and 2531, R. S. 1909. But it appears upon the face of the record and pleadings that the injunction sought and ordered applies to and includes all of the tax bills against all of the property in the 11 blocks, and that plaintiff has no possible interest in any of said property except the three lots mentioned above and to which the modifying order restricted the injunction. The court therefore needed no testimony to enable it to modify the temporary injunction order so far as concerns its dissolution as to the property not owned by plaintiff. Nor is plaintiff in any position to complain of this feature of the modification. On the face of the petition, plaintiff was not entitled to even a temporary injunction restraining the issue of tax bills against property she had no interest in. *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436, 439; *Verdin v. City of St. Louis*, 131 Mo. 26, 114, 33 S. W. 480, 36 S. W. 52.

[6] Appellant contends that the paving company, being an intervener, has no right to demand that a bond be required of plaintiff, and that the court erred in requiring a bond of plaintiff in its modifying order. We do not understand that the court inserted the bond requirement at the request of the paving company. It asked for no bond. It joined with the city in asking that the injunction be dissolved in toto, which would dispose with all need for a bond if the motion were sustained. The requirement that plaintiff file an injunction bond seems to have been inserted by the court of its own motion to supply the failure to give bond in the first place, and in obedience to the provisions of section 2522, R. S. 1909.

[7, 8] Respondents, on their part, contend that the court should have wholly dissolved the injunction, and not merely modified it. The basis of this contention is that plaintiff's petition states no ground for equitable relief. It is permissible, under our Code, to attack the sufficiency of the petition by a motion to dissolve a temporary injunction in the same manner as by a general demurrer. *Albers Comm. Co. v. Spencer*, 245 Mo. 368, 376, 150 S. W. 712. This confirms our view that the court, in acting on the motion to dissolve, is not compelled to have evidence thereon, if the facts upon which the court acts appear upon the face of the pleadings on which the injunction was issued.

[9-11] But the motion to dissolve in this case does not, as it did in the *Albers Case*, "contain all the elements of demurrers"; for it says nothing about the insufficiency of the petition to state a cause of action. In one feature of the petition (given as one of the reasons why the injunction should be granted) facts are alleged which apparently tend to show that the tax bills are absolutely void and that such defect is one appearing upon the face of the proceeding, all of which, if true, shows that no lien would arise under the tax bills and no cloud would be cast on plaintiff's title, so as to entitle her to maintain a suit in equity. *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436, 439; *Verdin v. St. Louis*, 131 Mo. 26, 112, 114, 33 S. W. 480, 36 S. W. 52; *Henman v. Westheimer*, 110 Mo. App. 191, 195, 85 S. W. 101; *Turner v. Hunter*, 225 Mo. 71, 83, 123 S. W. 1007. But such defect does not exist as to the other grounds alleged in the petition; and, if it is defective in its allegation of these other grounds, the defects are not such as to make the petition wholly insufficient to state any cause of action whatever. It is only when the petition is in this condition that it can be attacked in the appellate court for the first time.

As stated, the motion to dissolve does not appear to have been aimed at the sufficiency of the petition to state a cause of action; and, as the petition does not wholly fail to state any cause of action whatever, but may perhaps, and doubtless does, state a cause of action in a defective manner, we will not grant respondent's request to dismiss, but will affirm the judgment.

It is so ordered.

The other Judges concur.

MILLER v. TALLENT. (No. 2432.)  
(Springfield Court of Appeals. Missouri.  
May 9, 1919.)

1. CHATTEL MORTGAGES §=34—BILL OF SALE AS SECURITY.

A bill of sale whereby the owner of horses assigned and set them over to an indorser on his

notes as security was in the nature of a mortgage to secure or protect the indorser, rather than a present transfer of absolute title.

2. CHATTEL MORTGAGES §=197(2)—FAILURE TO RECORD—LACK OF TRANSFER OF POSSESSION—INVALIDITY AS TO EXECUTION CREDITORS—STATUTE.

Under Rev. St. 1909, § 2861, bill of sale whereby owner of horses assigned and set them over to an indorser of his notes as security, which bill was a mortgage rather than a present transfer of absolute title, was void as to execution creditors of the owner, and the horses might be levied upon and sold in satisfaction of judgment against him, though the judgment creditors and purchaser were informed of existence of the bill of sale, not recorded; no possession of the horses having been given the indorser mortgagee.

3. FRAUDULENT CONVEYANCES §=132(3)—FAILURE TO TRANSFER PROPERTY—STATUTE.

Under Rev. St. 1909, § 2887, sale was fraudulent and void as against the seller's creditors where there was no change of possession, despite any notice to or knowledge of the void sale to a purchaser on execution against the seller.

4. APPEAL AND ERROR §=1068(3)—HARMLESS ERROR—INSTRUCTION—ACCURACY.

In replevin by the holder of a bill of sale of mares against the purchaser at execution sale against the owner, an instruction, too broad in stating the instrument called a bill of sale was not in effect such, and gave plaintiff no right to reduce the property to his possession, was proper nevertheless where its effect was to instruct that as against the execution creditor and defendant purchaser at execution sale the bill of sale was void, which was the case.

Appeal from Circuit Court, Bollinger County; Peter H. Huck, Judge.

Suit by I. W. Miller against Frank Tallent. From judgment for defendant, plaintiff appeals. Affirmed.

John V. Noell, of St. Louis, and J. W. Caldwell, of Marble Hill, for appellant.

Mozley & Blanton, of Benton, for respondent.

STURGIS, P. J. This is a replevin suit for a roan mare in which the defendant had a verdict and judgment for the return to him of this mare, which had been taken from him under the replevin writ and given to the plaintiff. The plaintiff appeals.

The defendant's possession and claim of title is based on his purchase of the animal at an execution sale under a judgment against Israel Bloom. At the time of the levy on this animal under the execution she was in the possession of said Bloom who was exercising ownership. The plaintiff, Miller, bases his claim of ownership and right to possession on a certain bill of sale signed and executed by said Bloom whereby I, "to secure I. W. Miller as indorser for me on

notes and papers that may or have been signed by the said I. W. Miller, hereby assign and set over to the said I. W. Miller fifteen head of horses now in my possession, and all other stock or other property that I may hereafter own."

This instrument further provides that all sales of such property by Bloom shall be with the consent of Miller, and all proceeds of sales shall be at his disposal, and that Bloom shall act as Miller's agent. Bloom is the uncle of plaintiff, and lived in another county. This bill of sale was not recorded, and no possession of the property conveyed was taken by plaintiff. The grantor in the bill of sale continued in possession of the property sold or mortgaged and dealt with it as his own, though accounting to Miller for the proceeds, keeping the money in a bank in his name and checking it out by checks signed in Miller's name by Bloom. The execution creditor had this mare levied on and sold as the property of Bloom, thereby ignoring any right of Miller therein, though at the sale Miller asserted his ownership under the bill of sale and warned all purchasers that he would enforce his claim by legal proceedings.

[1, 2] It is apparent that, if the execution creditor of Bloom had a right to subject the property in question to levy and sale under his execution to satisfy his judgment debt, then the title of the purchaser at such sale will be protected. The whole question depends on whether the bill of sale to plaintiff is void as to execution creditors. That such bill of sale is in the nature of a mortgage to secure or protect the plaintiff as grantee rather than a present transfer of absolute title to such grantee is apparent from a reading of such instrument. Treating it as a mortgage, then, under section 2861, R. S. 1909, it is void as to execution creditors because not recorded, and no possession of the mortgaged property being given to the mortgagee. When the possession of mortgaged property is retained by the mortgagor, and the mortgage is not recorded, such mortgage is void as to creditors, and the mortgaged property may be levied upon and sold in satisfaction of a judgment debt against the mortgagor; and it makes no difference in such cases that the judgment creditor and purchaser are informed of the unrecorded mortgage. *Wilson v. Milligan*, 75 Mo. 41; *Martin-Perrin Mercantile Co. v. Perkins*, 63 Mo. App. 310, 314; *Rawlings v. Bean*, 80 Mo. 614, 619.

[3] The same result follows if we regard this instrument as an absolute conveyance in presenti of the property mentioned, for by section 2887, R. S. 1909:

"Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of the possession of the thing sold shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith."

Such sales of personal property not followed by a change of possession to the vendee are void as to execution creditors of the vendor, and title cannot be asserted by the vendee against the execution purchaser from the vendor. Notice to or knowledge of such purchaser of the attempted void sale is of no avail. *Cummins v. Lumber Co.*, 130 Mo. App. 557, 562, 109 S. W. 68; *Collins v. Wilhoit*, 108 Mo. 451, 458, 18 S. W. 839; *Clafin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336.

[4] The bill of sale under which plaintiff claims title does not therefore, under the unquestioned facts, afford him a basis of recovery as against the defendant, and the trial court should have directed a verdict for defendant. The question of error in the instructions and in excluding certain evidence as to Bloom informing certain persons of plaintiff's bill of sale and relationship to this property is unimportant. We may concede that defendant's instruction No. 2, telling the jury that the instrument called a bill of sale is not in effect a bill of sale and does not give plaintiff the "right to reduce the property to his possession," is erroneous as being too broad, since such instrument is valid between the parties, and, had plaintiff reduced the property to his possession before it was levied upon, a different question would be presented. The effect of the instruction, however, is to tell the jury that, as against this defendant, as against the execution creditor, this bill of sale is void, conveys no title, and that plaintiff cannot recover thereunder. This is good law as applied to the facts of this case.

Since the judgment therefore is for the right party, such judgment will be affirmed.

BRADLEY and FARRINGTON, JJ., concur.

#### NOTE.

##### ABSOLUTE BILL OF SALE AS MORTGAGE.

(U.S.D.C.Ark.1907) A bill of sale conveying the grantor's stock of goods, fixtures, storehouse, and lot, as security for money loaned, was, in fact, a chattel mortgage, within Kirby's Dig. Ark. § 5896, declaring that a mortgage shall be a lien only for the time it is filed for record.—In re Reynolds, 153 Fed. 295.

(Ala.1911) In trover for an ice box and other goods sold by bill of sale sufficient to pass title by defendant to R., and by R. to G., and by G. to plaintiff, defendant cannot show that his bill of sale to R. was really a mortgage of which G. had notice, and that defendant had sold the other goods to G. on credit for an amount sufficient to cover defendant's debt to R., as that defense involved varying his bill of sale by parol.—*Shriner v. Meyer*, 55 South. 156, 171 Ala. 112, Ann. Cas. 1913A, 1103.

(Ala.App.1918) The question of whether a conveyance is a mortgage is one of intention to be decided from a consideration of the whole transaction, and not from any particular feature of it, and the characterization of the transaction by the parties in the instrument itself may be fairly disregarded.—*Bank of Mobile v. Lewis*, 80 South. 179.

(Cal.1912) In view of Civ. Code, §§ 2888, 2889, a bill of sale absolute on its face, but given with the understanding that the vendee should resell to the vendor on his paying the amount advanced, does not transfer title, though the vendee refused to accept a mortgage.—*Fraser v. Sheldon*, 128 Pac. 33, 184 Cal. 165.

(Colo.1906) In an action to have a bill of sale declared a mortgage, a recital therein that it is made in consideration of the surrender and cancellation of a note of the person executing the bill of sale is not conclusive that it was not intended as a mortgage.—*Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co.*, 86 Pac. 94, 37 Colo. 96.

(Colo.1916) Allegations of complaint seeking to have bill of sale to defendant adjudged a chattel mortgage and a first lien upon the property described therein for the amount of the defendant's debt evidenced by note and interest held not to state facts sufficient to entitle plaintiff to the relief sought.—*Dewey v. Saffer*, 155 Pac. 317, 60 Colo. 598.

(Fla.1902) An instruction that if it was verbally agreed between the parties, at the time of the execution of an absolute bill of sale of cattle, that the vendor should be allowed to redeem or have the cattle back on payment of a certain sum of money, the transaction constituted a chattel mortgage only, is properly refused, as the facts thus hypothesized are not inconsistent with an absolute sale, in the absence of an intention that the conveyance should be a security.—*Long v. State*, 32 South. 870, 44 Fla. 134.

(Fla.1902) In order to render a bill of sale which is absolute on its face a mortgage, it must have been executed with the intention or purpose of operating as a security.—*Long v. State*, 32 South. 870, 44 Fla. 134.

(Fla.1904) A feature essential to a chattel mortgage is an intent to secure, and the existence of this intent is not implied in a provision that a bill of sale shall be void if the grantor shall pay a certain sum of money by a certain day.—*Smith v. Hope*, 35 South. 865, 47 Fla. 295.

(Fla.1909) In case of doubt whether the parties to a written instrument intended it to be an absolute bill of sale, conditional sale, or a mortgage, equity will hold the transaction to be a mortgage.—*Hull v. Burr*, 50 South. 754, 58 Fla. 432, 475.

(Ga.1898) An instrument in the form of a bill of sale, though given for the purpose of securing a debt, passes title when it expressly stipulates that "it puts the title to all of the [described] property" in the creditor, and contains no language giving it the character of a mere mortgage.—*Bellerby v. Thomas*, 80 S. E. 425, 105 Ga. 477; *Thomas v. Bellerby*, Id.

(Ga.1904) An absolute bill of sale, intended to secure a debt not exceeding \$100, may be foreclosed as provided by Van Epps' Code Supp. § 6631, whether the fact that it is intended as security is shown by a bond to reconvey, or by other appropriate evidence, or not.—*Denton Bros. v. Shields*, 48 S. E. 423, 120 Ga. 1076.

(Ga.App.1916) Where an instrument purporting to be a bill of sale describes a debt and contains a defeasance clause, it is a chattel mortgage.—*Dewit v. Bozeman*, 87 S. E. 1100, 17 Ga. App. 666.

Whether an instrument is a bill of sale or a chattel mortgage depends on the intent of the parties as evidenced by the writings.—Id.

A bill of sale is distinguished from a chattel mortgage, in that the former passes title while the latter does not.—Id.

(Ill.App.1901) A bill of sale of a stock of goods to secure an indebtedness, where the title passes absolutely to the purchaser, with an understanding that, if there is anything left after paying the indebtedness, such balance is to be returned to the seller, is in legal effect a mortgage.—*Moore v. Foster*, 97 Ill. App. 233.

(Ill.App.1912) Hurd's Rev. St. 1911, c. 95, § 12, providing that every deed of real estate which shall appear to have been intended only as a security in the nature of a mortgage, though an absolute conveyance in terms, shall be considered as a mortgage, has no application to personal property.—*Osborne v. Morgan*, 171 Ill. App. 549.

(Ill.App.1914) If a bill of sale and contract are in the nature of a chattel mortgage, they will be so considered.—*Klein v. Stubbe*, 180 Ill. App. 211.

(Ill.App.1917) The fact that a bill of sale claimed to be a mortgage of corporate personalty is acknowledged by a justice of the peace is evidence that the instrument was intended to be a mortgage.—*Gordon v. Brucker*, 208 Ill. App. 188.

(Ind.T.1904) Where a bill of sale was intended only as indemnity to the buyer, who was surety on a debt of the sellers, and it was understood that the sellers were to retain possession of the property, and sell it, and first pay a prior mortgage debt out of the proceeds, and then apply the balance to the settlement of the debt for which the buyer was surety, the transaction was not an absolute sale, but constituted merely a second mortgage on the property sold.—*Rogers v. Nidiffer*, 82 S. W. 673, 5 Ind. T. 55.

(Ky.1899) A writing purporting to be a bill of sale, but reserving to the seller the right to take possession of and sell the property in case the purchaser shall make default as to payments, will be enforced as a chattel mortgage.—*Baldwin v. Owens*, 51 S. W. 438, 21 Ky. Law Rep. 352.

(Ky.1899) A writing purporting to be a bill of sale should be treated as a chattel mortgage, where it appears that such was the intention.—*Boli v. Irwin*, 51 S. W. 444, 21 Ky. Law Rep. 366.

(Mass.1867) A bill of sale of personal property given by A. to B. as security for B.'s promissory note lent to A., and an instrument of defeasance executed by B. as part of the same transaction, by the terms of which "the bill of sale is to be surrendered to A. in case said note is provided for by A. at maturity," constitute a mortgage, which, in the absence of any agreement of the parties to the contrary, is a continuing security for the amount for which B. continues to be responsible as maker of that and other successive promissory notes, with the proceeds of each one of which the former note is provided for at maturity, and which are procured by A. from B. for that purpose.—*Taber v. Hamlin*, 97 Mass. 489, 93 Am. Dec. 113.

(Mass.1906) A bill of sale, though absolute in form, is but a mortgage, where given under an oral agreement that it shall be held simply as security for the seller's indebtedness.—*Clark v. Williams*, 76 N. E. 723, 190 Mass. 219.

(Mass.1911) Where, though the bill of parcels named plaintiff as buyer, it contained no

condition of defeasance or provision that he should hold title as collateral security for the money furnished by him to purchase the goods, the transaction did not, on its face, amount to a chattel mortgage in favor of plaintiff.—*Garrison v. Pritchard*, 96 N. E. 715, 210 Mass. 296.

(Mich.1898) Where plaintiff, a creditor of C., was given a bill of sale of a certain stock of goods owned by C., with the understanding that she was to sell said goods, and, after satisfying her claim, turn the balance of the proceeds over to C., the bill of sale operates as a chattel mortgage, and not as a sale absolute.—*Canfield v. W. J. Gould & Co.*, 73 N. W. 550, 115 Mich. 461, 4 Detroit Leg. N. 933.

(Mich.1901) A bill of sale may be shown to be a mortgage, notwithstanding a statement in it that it is "understood to convey an absolute title."—*Wetmore v. Moloney*, 86 N. W. 808, 8 Detroit Leg. N. 313, 127 Mich. 372.

(Mich.1904) Where a bill of sale given to secure the buyers for debts of the seller provided that on the payment of such indebtedness from the proceeds of a sale of the property and of the business in which it was used the title to the remainder should vest in the seller, it was a chattel mortgage.—*Haynes v. Hobbs*, 98 N. W. 978, 136 Mich. 117, 10 Detroit Leg. N. 999.

(Mo.App.1901) Where a purported bill of sale is executed to indemnify the holder, it is a mortgage.—*Albert v. Van Frank*, 87 Mo. App. 511.

(Mont.1897) A cashier, personally indebted to the bank, at the request of a director, and to secure his indebtedness, executed a bill of sale of property in another town. The bill of sale was deposited in the vault by the cashier, with the knowledge of the director, and a clerk notified of its whereabouts. No other officers of the bank were present, or cognizant of the transaction. A few hours later, the bank closed its doors, insolvent. *Held*, that there was a delivery and acceptance of the property as security sufficient to pass title to the bank.—*State v. Conrow*, 47 Pac. 640, 19 Mont. 104.

(Mont.1913) Both the general rule and Rev. Codes, § 5768, recognize that a bill of sale, absolute on its face, may in fact be a chattel mortgage.—*Rairden v. Hedrick*, 129 Pac. 498, 46 Mont. 510.

A bill of sale, with an agreement to repurchase, may amount to a chattel mortgage or conditional sale, depending upon the intention, as shown by the surrounding circumstances.—*Id.*

In an action at law upon a document purporting to be a bill of sale absolute on its face, it may be shown to be a chattel mortgage.

—(Neb.1914) *Weber v. Towle*, 149 N. W. 406, 97 Neb. 233;

(Or.1913) *Zimmerle v. Childers*, 136 Pac. 349, 67 Or. 465.

(N.Y.1880) A bill of sale of a safe, described as in process of construction, while the work for its manufacture had not begun, executed, as security for a loan, is purely executory, and does not operate as a mortgage.—*Hart v. Taylor*, 82 N. Y. 373.

(N.Y.) Decedent, in his lifetime, by written instrument, transferred personal property to defendant on condition that, if he paid a note due the latter, the transfer was to be void, but, if he died before it was paid, the transfer was to be absolute. Decedent died before the note

was paid. *Held*, that the instrument was a mortgage, and decedent's administrator was entitled to redeem.—(1899) *Hughes v. Harlam*, 55 N. Y. Supp. 1106, 37 App. Div. 528, judgment affirmed (1901) 60 N. E. 22, 166 N. Y. 427.

(N.Y.1916) A bill of sale of chattels with a separate defeasance is a valid chattel mortgage.—*Sheldon v. McFee*, 111 N. E. 220, 216 N. Y. 618, affirming judgment (1914) 145 N. Y. Supp. 624, 160 App. Div. 361, and rehearing denied 112 N. E. 1076, 217 N. Y. 665.

A bill of sale absolute on its face filed as a chattel mortgage under Lien Law, § 230, *held* valid as a chattel mortgage.—*Id.*

(Or.1899) An application by an insolvent debtor for a loan, to be secured on a stock of bicycles, was refused; but the negotiations resulted in his giving an absolute bill of sale on the stock, whereupon the vendee gave the debtor an option to purchase the stock within a limited time. The consideration for the bill of sale was paid, and the stock delivered to, and possession retained by, the vendee, except a few wheels, which he intrusted to the debtor to sell on commission. The debtor surrendered the option before its expiration, for a valuable consideration, and the vendee sold the stock at retail, realizing a large profit. *Held*, that the transaction was a conditional sale, and not a mortgage.—*A. G. Spalding & Bros. v. Brown*, 59 Pac. 185, 36 Or. 160.

(Or.1904) Where a bill of sale of personal property was intended as a mortgage, but was not executed, witnessed, and acknowledged as a conveyance of real property, as required by B. & C. Comp. § 5630, it was invalid.—*Culver v. Randle*, 78 Pac. 394, 45 Or. 491.

(Tex.Civ.App.1905) A sale of personal property with a verbal reservation of title to secure the payment of the purchase price constitutes a valid mortgage between the parties.—*Crews v. Harlan*, 88 S. W. 411.

(Utah,1901) A bill of sale of a house situated on mining ground, given to the party furnishing the lumber for the erection of the house, without a transfer of possession, amounts to nothing but a mortgage securing the debt, and does not pass title.—*Azzalia v. St. Claire*, 64 Pac. 1106, 23 Utah, 401.

(Vt.1833) Where A. was owing B., and executed to him a bill of sale, absolute on its face, of his household goods, and at the same time received back the goods, giving his receipt therefor to B., promising to return them to him after one year, on demand, and a contemporaneous agreement was made that the bill of sale should be void, and the title of the goods should revert in A., if he paid his debt within a year *held*, that this was a mortgage to secure payment in one year, and, on default of such payment, B.'s title became absolute.—*Gifford v. Ford*, 5 Vt. 532.

(Wis.1897) One indebted to a bank more than \$5,000 gave it as security an absolute bill of sale of several thousand dollars' worth of lumber, in which the consideration was stated to be \$2. *Held* a mortgage.—*Salter v. Smith*, 72 N. W. 352, 97 Wis. 84.

(Wis.1905) A conveyance of property in writing as security is a mortgage, regardless of the letter of the instrument.—*Smith v. Pfleger*, 105 N. W. 476, 126 Wis. 253, 2 L. B. A. (N. S.) 783, 110 Am. St. Rep. 911.



OLIVER, State Auditor, v. SOUTHERN TRUST CO. et al. (No. 197.)

(Supreme Court of Arkansas. April 28, 1919.)

1. STATUTES  $\S$ 21—ENACTMENT—NUMBER OF VOTES—APPROPRIATIONS.

Const. art. 5, § 28, relating to appropriations, etc., means that Legislature cannot authorize payment of any claim against state unless a pre-existing law authorizes contract under which claim was incurred, except by bill passed by two-thirds of the members elected to each branch of General Assembly.

2. STATUTES  $\S$ 64(1)—PARTIAL UNCONSTITUTIONALITY—EFFECT.

That part of a statute is unconstitutional does not authorize the courts to declare the remainder void unless all the provisions are connected in the subject-matter or so dependent on each other that it cannot be presumed that Legislature would have passed the one without the other.

3. STATUTES  $\S$ 64(1)—PARTIAL UNCONSTITUTIONALITY—EFFECT.

If, when the unconstitutional portion of a statute, or even of a section of a statute, is stricken out, the remainder is complete in itself, capable of being executed according to the apparent legislative intent wholly independent of that which was rejected, it must be sustained.

4. STATUTES  $\S$ 211—CONSTRUCTION—TITLE.

While the title of an act is not controlling in its construction, it is always proper to look to the title in determining its meaning.

5. STATUTES  $\S$ 210—CONSTRUCTION—PREAMBLE.

While the preamble of an act is not controlling in its construction, it is always proper to look to the preamble in determining its meaning.

6. STATUTES  $\S$ 64(8)—PARTIAL INVALIDITY—INTERDEPENDENT PROVISION—APPROPRIATIONS.

Acts 1915, p. 328, entitled an act to appropriate money for an exhibit of state resources at an exposition, passed after commission had received private donations and advances, with preamble reciting that legislative appropriation was proper means to defray expenses, sections 1, 2, 4, and 5 of which related to duties of commission, and by section 6 appropriating \$40,000 to commission, which appropriation was invalid because bill had not received affirmative vote required by Const. art. 5, § 30, was wholly invalid, as parts were interdependent, and not separable.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Mandamus by the Southern Trust Company, trustee, and others against Hogan Oliver, as Auditor of the State of Arkansas. Demurrer to petition overruled, and judgment for petitioners, and the respondent appeals. Reversed, and petition dismissed.

Jno. D. Arbuckle, Atty. Gen., and T. W. Campbell, Asst. Atty. Gen., for appellant. Moore, Smith, Moore & Trieber, of Little Rock, for appellees.

SMITH, J. Appellees filed their petition for mandamus, which contained the following recitals:

The Governor of the state, on or about the ——— day of ———, 1914, appointed a commission to select a site at the Panama-Pacific International Exposition upon which to erect a building within which the exhibits of this state might be housed, and to take such steps as might be necessary for the collection and maintenance of such exhibits as would be shown at the Exposition. Because of the early approach of the opening day of the Exposition, to wit, February 20, 1915, it was deemed inadvisable by the commission to await until the next ensuing session of the General Assembly to pass legislation formally authorizing the commission to proceed with the work and to make an appropriation towards the expense thereof. Accordingly, on June 28, 1914, the commission selected a site and proceeded with the erection of a building thereon, and with the collection of the respective exhibits and with the transportation of them to the Exposition. In order to pay for the foregoing work approximately \$25,000 in money was donated to said commission by citizens of the state, and other citizens of the state donated several thousand dollars worth of building materials of various kinds. In addition to the foregoing fund, the commission during the progress of said work received and had available the further sum of approximately \$18,000 which was loaned and advanced it by other citizens.

At the ensuing session of the General Assembly Act No. 82 was passed, which was approved February 25, 1915, entitled, "An act to appropriate money for an exhibit of the resources of the state of Arkansas at the Panama-Pacific International Exposition of 1915, and for other purposes."

That in the passage of said act the General Assembly had in view the fact that the commission had received and was in the act of collecting and maintaining said exhibit with the aforesaid donations and advances of money and material, but in order to make a more creditable display appropriated the additional sum of \$40,000, or so much thereof as might be necessary, in order that the exhibit might be made more successful. Upon the passage of the act two-thirds of the members present and voting in the Senate voted that the act become a law, and a majority less than two-thirds of those present and voting in the House of Representa-

tives voted to the same effect. A quorum was present and voting in each house.

Thereafter, on March 15, 1915, in a suit brought by J. C. Belote, a citizen and taxpayer of the state, against the auditor and treasurer of state, to restrain the auditor from issuing and the treasurer from paying warrants drawn against the appropriation contained in the act, we held that the bill had failed to receive the necessary affirmative vote required by article 5, § 80, of the Constitution, and therefore never became a law. *Belote v. Coffman*, 117 Ark. 352, 175 S. W. 37.

By reason of this decision no money was ever paid out of the state treasury upon said appropriation, but the commissioners proceeded with the completion of the building and the assembling of the exhibit, which it maintained with entire success at the Exposition throughout its duration. Thereafter, in order to reimburse those persons who had prior to the passage of Act No. 82 of 1915 loaned and advanced to said commission money which was used in the collection and maintenance of said exhibit, the General Assembly passed an act, which was approved by the Governor on February 27, 1919, entitled "An act to provide for the payment of the indebtedness incurred by the Arkansas commission to the Panama-Pacific International Exposition," appropriating, for the repayment of the said persons and citizens who had made loans and for the payment of certain obligations incurred by the commission, the sum of \$23,384.33. This act directed the auditor to draw his warrant on the treasurer in favor of the Southern Trust Company as trustee for persons having claims against said commission; the number and amount of each being set out in the preamble of the act. In the passage of said act of 1919, 28 members of the Senate voted that it become a law, there being no votes to the contrary; and in the House of Representatives 60 members voted that it become a law, and 28 voted to the contrary.

The petition concluded with the allegation that, notwithstanding the passage of said act, the auditor has refused to issue his warrant on the treasurer as required by said act, whereupon it was prayed that a writ of mandamus issue compelling him to do so.

To the above petition the auditor filed a demurrer on the ground that it did not state facts sufficient to entitle the petitioners to the relief prayed. The demurrer was overruled, and, upon the auditor declining to plead further, the court entered an order requiring him to draw and deliver his warrant as prayed in the petition, and this appeal has been prosecuted from that order.

[1] The present appeal does not involve the section of the Constitution construed in the case of *Belote v. Coffman*, supra; but the auditor's refusal to draw his warrant is

based upon section 26, art. 5, of the Constitution, which reads as follows:

"No extra compensation shall be made to any officer, agent, employé or contractor after the service shall have been rendered or the contract made; nor shall any money be appropriated or paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws; unless such compensation or claim be allowed by bill passed by two-thirds of the members elected to each branch of the General Assembly."

It will be borne in mind that the Senate consists of 35 members and the House of 100, so that this act of 1919 did not receive the vote of two-thirds of the members elected to the House.

On behalf of appellees it is insisted that, while the appropriation contained in the act of 1915 failed because it did not receive the affirmative vote of two-thirds of those present and voting in the House of Representatives, yet a valid act was passed which legalized the work of the commission up to the time of its passage and conferred authority for the continued performance of its duty and authorized the obligations thereafter incurred. The correctness of this contention is the point at issue.

As applied to the facts in this case, the section of the Constitution under consideration (section 26, art. 5) means that the Legislature cannot authorize the payment of any claim against the state unless a pre-existing law authorized the contract under which the claim was incurred except by a bill passed by two-thirds of the members elected to each branch of the General Assembly; in other words, its effect is to prevent the Legislature from making appropriations in satisfaction of contracts not authorized by some law existing at the time the contract was made, except upon the vote just stated. The question at issue may therefore be stated as follows: Did the commission, under the act of 1915, have the authority to make the contracts upon the credit of the state covering the claims which the act of 1919 attempted to pay?

[2, 3] The rule of construction applicable here is the one applied by us in the case of *Cotham v. Coffman*, 111 Ark. 108, 163 S. W. 1183, in which case we said:

"If the proviso requiring Garland county to assume the payment of two-thirds of the salary of the judge of that circuit is unconstitutional and void, what becomes of the act? Does that fact render the whole act void? The rule in such cases has been stated by Judge Cooley in his work on Constitutional Limitations to be as follows: '\* \* \* Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning

that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is, not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them. Cooley's Constitutional Limitations (6th Ed.) p. 216. This rule has been followed in innumerable cases in the various courts, and by this court in the following cases: *L. R. & Ft. Smith R. Co. v. Worthen*, 46 Ark. 329; *State v. Marsh*, 37 Ark. 356; *State v. Deschamp*, 53 Ark. 490 [14 S. W. 653]; *Cribbs v. Benedict*, 64 Ark. 555 [44 S. W. 707]; *Wells Fargo & Co. v. Crawford County*, 63 Ark. 576 [40 S. W. 710, 37 L. R. A. 371]."

In the application of the rule quoted in the case from which we have quoted it we held that the constitutional and unconstitutional portions of the act there construed were separable, and we gave effect to the constitutional part. But do we have the same result here?

[4-6] The title of the act of 1915 indicates the prime and controlling purpose was to appropriate money; and while the title of an act is not controlling in its construction, it is always proper to look to the title in determining its meaning. *School Dist. v. Howard*, 124 Ark. 475, 187 S. W. 444. This is true also of the preamble, where we find the recital that—

"Whereas, a legislative appropriation is the fairest and most equitable method of raising the necessary funds, each citizen thereby contributing according to his assessed wealth, which, if equally distributed, would amount to only a few cents to each individual; therefore, be it enacted," etc.

The purpose expressed both in the title and preamble is so interwoven in the body of the act that we are constrained to conclude

that the act as a whole contemplates the disbursement of the funds appropriated in the section of the act (section 6) which contained the appropriation, and that the other sections contain the details and directions for the expenditure of the appropriation, so that, if section 6 is stricken out, the legislative purpose would be so far defeated that the Legislature would not have passed the act with this section omitted.

The first section defines the duties of the commission and concludes with the proviso that—

"No commissioner or county representative heretofore or hereafter appointed shall receive any compensation for their services save while they are in the actual service of said commission and engaged in the work of collecting exhibits or in charge of said Arkansas building or exhibits."

The payment here provided for was manifestly contemplated to be made out of the appropriation which was contained in section 6 of the act.

Section 2 provides for the display of the exhibits and approves the action of the commission in employing an architect to construct the state building. Section 3 provides for the employment of the necessary assistants in displaying the exhibits and in distributing advertising matter to visitors; but it is obvious that these expenditures were authorized in view of the appropriation which the act contained.

Confirmation of this view is coerced when section 4 is analyzed. That section provides for keeping an account of all proceedings and for the audit of all expenses, and that—

"The salaries of the secretary, assistants, employes and help shall be paid by warrants drawn on the state auditor, signed by the commissioner, to be paid out of the fund hereinafter appropriated for the purpose therein expressed; and said commission shall keep an exact account of all the expenditures of all the money by them ordered paid, and at the close of said Panama-Pacific International Exposition, said commission shall furnish to the Governor an itemized statement of all moneys drawn by them from the state, under said appropriation, and the purposes for which drawn, which shall be sworn to by the commissioner general and attested by the secretary. That the commissioner general and treasurer of said commission shall enter into a lawful bond to the state of Arkansas, to be approved by the auditor of state, in the sum of ten thousand dollars for the faithful performance of the duties imposed upon them by the provisions of this act."

Section 5 specifies the amount of the salaries and wages of the officers and employes authorized by section 4. Section 6 contains the appropriation; while section 7, the last section, contains the emergency clause undertaking to put the act immediately into effect.

Without the appropriation contained in

section 6 the whole legislative scheme fails, as this is the section which furnishes the motive power, the essential funds to make the remainder of the act effective, and, when that section fails the entire act falls with it, because the use of these funds is so inseparably connected with the whole legislative plan that no valid and enforceable law remains without it.

The judgment of the court below will therefore be reversed, and the petition will be dismissed.

**MISSOURI PAC. R. CO. v. CAREY.**  
(No. 209.)

(Supreme Court of Arkansas. May 5, 1919.)

**1. RAILROADS ⇨282(5)—INJURIES TO PERSONS WORKING ABOUT CARS—DEFECTS IN CARS—EVIDENCE—SUFFICIENCY.**

In suit for injuries to a consignee's employé by the falling of a freight car endgate, evidence that gate could not be latched because it was sprung, and that defendant railroad company had nailed cleats on the inside to support it, held sufficient to show that it was out of repair, and that defendant knew or had ample time to discover the defect.

**2. RAILROADS ⇨278(2)—INJURIES TO PERSONS WORKING ABOUT CARS—ACCEPTANCE OF RISK.**

Where a consignee's employé unloading lumber from a freight car discovered that an endgate was unfastened and could not be latched, but, upon observing certain cleats and concluding that these prevented the gate from falling, continued unloading until injured by the gate falling, the danger was not so obvious that he must be deemed to have accepted the risk.

**3. RAILROADS ⇨282(9)—INJURIES TO PERSONS WORKING ABOUT CARS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

In suit by a consignee's employé for injuries by the falling of a freight car door while he was unloading lumber after he had discovered that the door was defective and that cleats were nailed on the inside to prevent it from falling, whether he was guilty of contributory negligence was a question for the jury.

**4. TRIAL ⇨280(8)—INSTRUCTIONS—REQUEST—COVERED BY OTHER INSTRUCTIONS.**

In suit for personal injuries, there was no error in refusing to give an instruction requested by defendant defining culpable negligence, where another instruction given by the court gave a complete definition of that term.

**5. RAILROADS ⇨282(14)—ACTION FOR INJURIES—INSTRUCTIONS—SUFFICIENCY.**

In suit by a consignee's employé for injuries by the falling of freight car endgate, defendant's requested instruction that it would not be liable unless it knew that the gate was unfastened held properly refused, where the negligence charged and proved was that of permitting the gate to get out of repair so that it could not be fastened.

**6. TRIAL ⇨253(4)—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

Instruction on assumed risk which erroneously omitted the question of appreciation of danger held properly refused.

**7. TRIAL ⇨194(17)—INSTRUCTIONS—PROVINCE OF JURY.**

In action for injuries to person working about cars, instruction that jury should find assumed risk if they found the facts as recited in the instruction held erroneous as invading province of jury.

**8. TRIAL ⇨191(6)—INSTRUCTIONS—ASSUMPTIONS OF FACTS.**

Instruction directing the jury to find for plaintiff unless they found him guilty of contributory negligence held erroneous as assuming that defendant was guilty of negligence.

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Suit by Will Carey against the Missouri Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thos. B. Pryor, of Ft. Smith, and W. P. Strait, of Morrilton, for appellant.

Edward Gordon, of Morrilton, and Mehaffy, Reid & Mehaffy, of Little Rock, for appellee.

**HUMPHREYS, J.** Appellee instituted suit against appellant in the Conway circuit court to recover damages for an injury to his foot and leg caused by the falling of an endgate or door of an open freight car, due to the alleged negligent condition of repair of the car, endgate, and its parts.

Appellant filed answer, denying that it negligently permitted the car gates, or their parts, to get out of repair, or that they were out of repair at the time of the injury. In addition to denying these and all other material allegations in the complaint, it pleaded assumed risk and contributory negligence by appellee. The cause was submitted to a jury upon the pleadings, evidence, and instructions of the court, upon which a verdict was returned in favor of appellee for \$3,000, and judgment rendered in accordance therewith. From the verdict and judgment an appeal has been prosecuted to this court.

At the time appellee received the injury, he was unloading a car of lumber for J. H. Imboden & Son, which had been placed by appellant delivering carrier, on its side track at Morrilton, for the purpose of being unloaded by the consignee, who was appellee's employer. The car contained three tiers of lumber loaded lengthwise in, and higher than the sides of, the car. The car was sitting east and west. The endgates or doors were constructed of heavy iron which fitted into angle irons or side frames at the ends of the car, and were secured at the top by means of

latches on the outside, and hung on hinges at the bottom, so that the gates or doors could be opened by unlatching and lowering them to the floor.

There is a difference between counsel as to the testimony of appellee in certain particulars. After a careful reading of his evidence, we think he testified, in substance, that he climbed upon the west end of the car of lumber for the purpose of examining it and discovered one latch on the west door, or endgate, unfastened. He began unloading the tier of lumber stacked in the east end of the car leaving the other two tiers intact. When the east end was unloaded to the top of the side of the car, he discovered the east door, or endgate, unfastened and leaning toward the lumber. It was against one piece of the lumber, but not touching the rest of it. He unloaded the north side of the tier of lumber until he was standing on the floor. He then tried to close the door for the purpose of latching it, but was unable to push it back into the angle irons, or sockets, so that it could be latched, because the door was sprung. At this time he discovered a cleat nailed in a diagonal position on each side of the car, one end resting on the floor and the other near the top of the door for the purpose of preventing the door from falling to the floor. The cleats were one-fourth of an inch thicker than the angle irons, or side frame so that appellee concluded, if the door should fall, it would catch on the ends of the cleats. After observing the cleats and reaching this conclusion, he made no further effort to latch the door, but continued to unload the tier of lumber next to the door with the same feeling of security as if the door had been closed and latched. When he picked up the last piece of lumber in the tier, the gate fell to the floor, passing between the cleats, and in doing so broke his leg just above the ankle and crushed his ankle and foot. Either on the same or the next day Edward Gordon and L. O. Watson inspected the door of the car while it was standing on the side track at Morrilton, and were unable to push the door into the angle irons, or sockets, and latch it, because the door was sprung.

F. M. Huckleberry, claim agent of appellant, and J. H. Ganner a photographer at Russellville, who made several photographs of the car gate, showing the door, or endgate, partially open, as well as closed, testified that they were able to open and close and latch the door when they examined the car at Russellville shortly after the injury; that, on account of coal dust under the door at one corner, it made the door a little hard to close; that the door was shorter than the distance between the cleats by about an inch and a quarter on each end. The photographs evidenced the latter statement to be correct. The car was inspected at the Union Depot

yards at Little Rock on November 28th, and again on December 31st by car inspectors in the employ of appellant, and found to be in a good state of repair. The inspectors discovered a bulge in the center of the door, as if something heavy had fallen on it, but it was testified that the bulge did not prevent the door from being closed.

Appellant requested the court to charge the jury to return a verdict for it under the record made, and insists that the court erred in refusing to give its peremptory instruction for the alleged reasons that the undisputed evidence showed: First, that the endgate, or door, was not defective or out of repair, or, if so, that appellant did not know it, or had not had sufficient time by reasonable inspection to discover the defect; second, that appellee discovered the defect and appreciated the danger before he began to unload the car, and assumed the risk incident to the service; third, that he did not exercise the precaution of latching or propping the gate, or door, or standing out of the reach thereof, and, through that negligence, contributed to his own injury.

[1] 1. Three witnesses testified that the door was sprung so that it could not be forced into its socket or frame and latched. This was sufficient legal evidence to support the finding that the door was out of repair. It was properly inferable from the evidence that cleats had been nailed on the inside of the car diagonally from the floor to the top of the door; that appellant had discovered the defect and nailed the cleats there to prevent the door from falling. This was sufficient legal evidence to support the finding that appellant knew of the defect or that sufficient time had elapsed for appellant to discover it by proper inspection.

[2] 2. Under our construction of appellee's evidence as a whole, he did not discover the latches on the east door unfastened before he began to unload the lumber. The latches he discovered unfastened were on the west door, and he discovered them when climbing on the car of lumber to examine it. The discovery that the east door was unlatched and leaning inward was made after he had unloaded the tier of lumber in the east end of the car down to a level with the top of the door. This discovery, however, did not place appellee in danger so long as there was sufficient lumber left in the east tier to catch the door in case it fell. Appellee continued to unload from the north side of the tier into a dray wagon until he reached the floor on that side. He then tried to push the door into the socket and fasten the latches, but was unable to do so. At that particular time, he discovered the cleats, which he concluded were nailed there to catch the door and prevent it from falling. He continued the unloading, thinking the cleats would catch the door, and felt as safe in the prosecution of

his work as if the door had been closed and latched. As he picked up the last stick of lumber, the door fell on his left leg and foot, breaking the leg just above the ankle and badly crushing the ankle and foot. While appellee discovered the defect in the door, or gate, after partially unloading the car he observed the cleats, which were placed there, according to his best judgment, to prevent the gate from falling; so it cannot be said, under these circumstances, that the danger was so obvious that appellee must be deemed in the law to have accepted the risk. Especially is this so after he had commenced to unload the lumber. *C., R. I. & Pac. Ry. Co. v. Lewis*, 103 Ark. 99, 145 S. W. 898. In announcing this conclusion, we do not mean to intimate that the question of assumed risk is in the case.

[3] 3. Appellee testified that he was familiar with the character of the car he was unloading and that he was familiar with the character of work he was doing; that he knew that the gate, or door, was heavy and would fall to the floor unless latched or prevented from doing so by cleats which were nailed on the inside of the car; that he thought the cleats would prevent the gate from falling, and continued his work under the belief that he was as secure from danger where he was standing by reason of the cleats as if the gate, or door, had been latched. Under these circumstances, it cannot be said, as a matter of law, that the danger was so obvious that an ordinarily prudent person would not have continued to work in exactly the same way appellee did. This makes the question of contributory negligence in the instant case one for the jury, because fair-minded persons might well differ as to whether an ordinarily prudent person would have continued the work after discovering the defect in the door and the cleats nailed on the inside of the car for the purpose of preventing the door from falling to the floor. *St. L., I. M. & S. R. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070; *St. L., I. M. & S. R. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911; *St. L. & S. F. R. Co. v. Carr*, 94 Ark. 246, 126 S. W. 850; *Doniphan Lumber Co. v. Henderson*, 100 Ark. 53, 139 S. W. 649.

[4] Appellant insists that the court erred in refusing to give instruction No. 4, requested by it, defining culpable negligence. The instruction requested conforms to the reasons assigned for the rule in the case of *Little Rock & Ft. Smith R. Co. v. Duffey*, 35 Ark. 602. The instruction itself contains no error, unless it be that in the form asked it is argumentative. We do not think the court erred, however, in refusing to give it, because instruction No. 2 given by the court was a complete and full definition of culpable negligence.

[5] Again, appellant insists that the court erred in refusing to give instruction No. 6,

requested by it, carrying the idea that a master cannot be held responsible for a defective condition of the working place of the servant, unless the master had discovered, or could have discovered, the defect by the exercise of ordinary care. Appellant cites the case of *Bauschka v. Western Coal & Mining Co.*, 95 Ark. 477, 129 S. W. 1095, in support of the instruction. The rule announced in that case carried the idea suggested, and is a correct rule of law, but the instruction, as requested, exempted appellant from liability unless it knew that the door was unfastened or that it had remained unfastened a sufficient length of time so that by the exercise of ordinary care appellant could have discovered and corrected the defect. This instruction, as drawn, was improper, because the gist of the negligence charged and proved was that the negligence consisted in permitting the gate to get out of repair so that it could not be pushed into its sockets and fastened, and not the fact that it was unfastened.

[6, 7] Again, appellant insists that the court erred in not giving instruction No. 10 requested by it, announcing the doctrine of assumed risk. This instruction was erroneous for several reasons, one of which is that it left out the question of appreciation of danger. Another is that upon the finding by the jury of a given state of facts recited in the instruction they were instructed to find that appellee assumed the danger. It was within the province of the jury, and not the court, to say whether or not appellee assumed the danger under the facts and circumstances revealed by the evidence. The court did not err in refusing to give said instruction.

[8] We deem it unnecessary to discuss any other assignments of error except the insistence of appellant that the court erred in giving instruction No. 6. That instruction is as follows:

"You are instructed that negligence is the doing of something that a man of ordinary prudence would not do under the circumstances, or the failure to do something which a man of ordinary prudence under the circumstances would do; and, if you find from the evidence in this case that Carey was doing what a man of ordinary prudence would have done under the circumstances, he is not guilty of contributory negligence, and your verdict must be for the plaintiff."

In addition to a general objection, appellant specifically objected to this instruction because it "directed the jury to find for appellee unless they found him guilty of contributory negligence." We think the effect of the instruction, as drawn, was to assume on the part of the court that appellant was guilty of negligence and to instruct the jury to return a verdict for appellee, unless they found him guilty of contributory negligence

This instruction was erroneous and in direct conflict with the other instructions given by the court. It is impossible to harmonize the law announced in conflicting instructions. The jury cannot tell which instruction they should follow. *St. L., I. M. & S. R. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911; *St. L. S. W. Ry. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112; *Helena Hardwood Lumber Co. v. Maynard*, 90 Ark. 377, 138 S. W. 469.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

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SWIFT & CO. v. COX et al. (No. 215.)

(Supreme Court of Arkansas. May 12, 1919.)

1. JUSTICES OF THE PEACE  $\S$  174(6)—APPEAL—AMENDMENT OF PLEADINGS—NEW CAUSES OF ACTION.

Upon appeal from the justice of the circuit court, it was not abuse of discretion to permit filing in circuit court of affidavit controverting grounds of plaintiff's attachment, such action not offending against Kirby's Dig.  $\S$  4682, providing that the same cause of action shall be tried in the circuit court upon appeal, since the circuit court may allow amendments of pleadings and new issues, keeping clear of new causes of actions and set-offs not presented below.

2. JUSTICES OF THE PEACE  $\S$  86(11)—ATTACHMENT BOND—DISCHARGE BY DISSOLUTION.

The question whether a bond given in the justice court by defendant to secure possession of attached property was made under Kirby's Dig.  $\S$  362, or section 372, is unimportant, as liability on a bond executed under either section was discharged by the dissolution of the attachment.

3. EXEMPTIONS  $\S$  123 — AMENDMENT OF SCHEDULE UPON APPEAL FROM JUSTICE COURT.

Upon an appeal from the justice to circuit court, an amendment of defendant judgment debtor's schedule, permitted by the circuit court, so as to exclude from property claimed as exempt certain partnership property bought by judgment debtor and another, the title to which had been reserved by vendor, and certain other articles on which they had executed a mortgage, was proper where, omitting such articles, the remainder did not equal \$500 in value.

4. EXEMPTIONS  $\S$  61—PARTNERSHIP PROPERTY—RIGHT TO CLAIM EXEMPTION AS SEGREGATION.

A debtor is entitled to claim his chattel exemptions in partnership property when his interest therein has been ascertained and segregated, but the right of exemption does not exist so long as the property claimed exempt continues to be partnership property.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by Swift & Co. against J. E. Cox and another. From judgment for named defendant, plaintiff appeals. Reversed and remanded.

W. H. Dunblazier, of Ft. Smith, for appellant.

Appellee, pro se.

SMITH, J. Appellant sued appellees, J. E. Cox and J. A. Ray, copartners doing business as Cox & Ray and operating a butcher shop in Ft. Smith, before a justice of the peace, on an open account for \$290, and at the same time sued out an attachment against the fixtures and goods on hand, on the ground that they were about to dispose of these partnership assets with the fraudulent intent of cheating their creditors. The possession of the attached property was returned to Cox upon the execution of the following bond:

"We undertake to pay to the plaintiff, Swift & Company, such sums of money, not exceeding five hundred eighty (\$580) dollars, as may be adjudged to him in this action, or that the property, viz., as per list attached and made a part hereof, attached hereto shall be forthcoming and subject to the order of the court for the satisfaction of such judgment as may be rendered in this action, on the day of sale, whichever shall be directed by the court."

Judgment for the amount sued for was rendered by default, but the attachment was not sustained. Execution was immediately issued and levied upon the attached property; whereupon appellee J. E. Cox filed a schedule of property which he claimed to own and which he claimed as his exemptions. This schedule included the attached property. The justice did not sustain the claim of exemptions; whereupon both parties appealed, appellant from the judgment on the attachment, and appellee from the denial of his exemptions.

No affidavit was filed in the justice court controverting the grounds for attachment recited in the affidavit therefor, and appellant filed a written motion in the circuit court that the attachment be sustained for the want of the controverting affidavit. The court first took the view that the right to make this motion had been waived inasmuch as it had not been made in the justice court, but later granted appellee Cox permission to file this affidavit, and the affidavit was then filed, to which action of the court exceptions were duly saved. The cause was submitted to the court sitting as a jury by consent, and the court dissolved the attachment and sustained the claim of exemptions in the attached property, and this appeal has been duly prosecuted.

Judgment is now asked upon the bond set out above upon the ground that it imports an obligation to pay the debt notwithstanding the attachment has been dissolved; and complaint is also made of the action of the court in permitting appellee to amend his schedule, and in sustaining the claim of exemptions based upon the amended schedule.

[1] No abuse of discretion was committed by permitting appellee to file the controverting affidavit in the circuit court. The appeal took the case to the circuit court for a trial de novo, and the filing of this affidavit did not offend against section 4682 of Kirby's Digest, which provides that—

"The same cause of action, and no other, that was tried before the justice shall be tried in the circuit court upon the appeal, and no set-off shall be pleaded that was not pleaded before the justice, if the summons was served on the person of the defendant."

The circuit court may permit amendments of the pleadings and allow new issues to be made, keeping clear of new causes of action and set-offs not presented in the court below. *Railway v. Hall*, 44 Ark. 375; *Birmingham v. Rogers*, 46 Ark. 254; *Meddock v. Williams*, 91 Ark. 93, 120 S. W. 842.

[2] The briefs discuss the question whether the bond set out above was executed under section 362 or section 372 of Kirby's Digest, it being insisted that, while appellee intended to execute the bond authorized by section 372, he has in fact executed the one authorized by section 362. This question is unimportant, as liability on the bond executed under either section would be discharged by the dissolution of the attachment, and the attachment was dissolved.

[3] Complaint is made of the action of the court below in permitting appellee to file an amendment to his schedule in which he waived his claim of exemptions to portions of the property there described. The justice of the peace had caused the property listed in the schedule to be appraised, and its value as thus ascertained exceeded \$500, the maximum amount which could be claimed as exempt. The amendment to the schedule which the circuit court permitted appellee to make excluded from the property claimed as exempt certain property bought by Cox & Ray the title to which had been reserved by the vendor and certain other articles upon which they had executed a mortgage. Omitting the articles upon which there was a mortgage and a vendor's lien, the remainder did not equal \$500 in value. The court properly permitted this amendment to be made.

[4] It does not follow, however, from what we have said, that the court properly sustained the claim of exemptions. Indeed, under the undisputed testimony, as the same ap-

pears in the record before us, this should not have been done. It was admitted of record in the trial that Cox and Ray were partners, and no attempt was made to explain how, if at all, Cox acquired the interest of Ray. Indeed, questions were propounded to Cox by appellant which afforded the opportunity to make this explanation, but an objection to this testimony made by Cox's attorney was sustained, and we have a record containing an admission of a partnership with an attempt by one of the partners to claim as exempt the partnership assets against a partnership debt. In the case of *Farmers' Union Gin & Milling Co. v. Seltz*, 93 Ark. 329, 124 S. W. 780, we said (to quote the syllabus):

"A debtor is entitled to claim his chattel exemptions in partnership property when his interest therein is ascertained and segregated."

But this right exists only when this interest has been ascertained and segregated, for the right of exemption does not exist so long as the property claimed as exempt is partnership property. *Richardson v. Adler*, 46 Ark. 43; *Porch v. Arkansas Milling Co.*, 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895.

So the judgment here must be reversed, and the cause remanded for a trial of this issue; the burden being on the claimant to establish his right of exemptions. *Porch v. Arkansas Milling Co.*, supra.

#### KINDRIX et al. v. STATE. (No. 216.)

(Supreme Court of Arkansas. May 12, 1919.)

#### 1. CRIMINAL LAW §676—NUMBER OF IMPEACHING WITNESSES — DISCRETION OF COURT.

In a prosecution for manufacturing whisky, court did not abuse its discretion in limiting the number of witnesses for the purpose of impeaching testimony of prosecuting witness to five in number, especially where he announced his intention to do so before any of the witnesses were called.

#### 2. CRIMINAL LAW §636(7)—TRIAL—COMMUNICATIONS WITH JURY — ABSENCE OF DEFENDANT.

It is reversible error for court to communicate with jury, in the absence of defendant, any directions in regard to their verdict.

#### 3. CRIMINAL LAW §874 — RENDITION OF VERDICT — EXAMINATION OF JUROR — CONSTRUCTION OF STATUTE.

In view of Kirby's Dig. § 2423, inquiry of juror under section 2419, providing that upon rendition of verdict clerk or judge may, upon instance of either party, ask juror if it is his verdict, need not be limited to receiving the answer "Yes" or "No," but must be limited to ascertainment whether verdict is juror's verdict, without examining juror as to how ver-



dict was arrived at, except as to whether it was arrived at by lot.

**4. CRIMINAL LAW §854(7)—JURY—SEPARATION OF JUROR.**

Separation of juror from rest of jury for purpose of asking sheriff to inform court that he was sick, where he did not discuss case with sheriff or any other person during separation, was not error.

Appeal from Circuit Court, Montgomery County; Scott Wood, Judge.

John Kindrix and others were convicted of manufacturing whisky, and they appeal. Affirmed.

Norwood & Alley, of Mena, for appellants. Jno. D. Arbuckle, Atty. Gen., and Robert O. Knox, Asst. Atty. Gen., for the State.

SMITH, J. Appellants were indicted and convicted for manufacturing whisky. At their trial they had nine witnesses present for the purpose of impeaching S. H. Williams, the witness on whose testimony the prosecution relied for a conviction; but the court stated in advance of the introduction of this impeaching testimony that appellants would be allowed to introduce only five witnesses for this purpose. The number of witnesses allowed by the court were introduced and testified to the bad character of the witness for the state and that they would not believe him on oath. Appellants offered the testimony of four more witnesses to the same effect, but the court refused to permit them to testify. Three witnesses testified that the witness Williams had a good reputation.

Upon the return of the verdict of the jury the record contains the following recital:

"After hearing the instructions of the court and the arguments of the counsel, the jury retired to consider of their verdict and on the following morning returned into court with a verdict finding the defendants guilty as charged, and 'we, the jury, also recommend that they be pardoned at the expiration of six months of their term.'

"Mr. Norwood: Just one minute. Mr. Smith (addressing one of the jurors), I will ask you if during the deliberation of this case if you didn't see the judge and ask him if the jury would find the defendant guilty and recommend a pardon if the judge would recommend that he be pardoned at the end of three or six months?

"Mr. Smith: I asked the judge if we could come to terms if the jury could do that, if he could recommend—

"Mr. Norwood: I want the court to consider this as evidence on my motion for a new trial.

"The Court: I expect you could get at that better by objecting to the receiving of the verdict and introduce your testimony later.

"Mr. Norwood: I object to receiving that verdict and them giving that reason now, and I want this considered at the same time on my motion for a new trial.

"The Court: That verdict now applies to both of the defendants; is that the understanding of all the jury?

"The Jury: Yes, sir. (By request the jury are polled and all say that it is their verdict.)

"Mr. Norwood: I want to prove by the jury that it was reported to them that it would be recommended that a pardon be granted, and that induced them to reach their verdict.

"The Court: We will let you introduce them as witnesses if you want to right now.

"— Smith, being duly sworn, testified as follows:

"By Mr. Norwood: Q. Mr. Smith, you acted as foreman of the jury? A. Yes, sir.

"Q. Didn't you about an hour before you returned your verdict into court discuss the matter with the trial judge and tell him that the jury would probably return a verdict of guilty and recommend a pardon and want to know if the court would recommend it. A. I didn't ask if he would recommend it; I asked if we could do that. I asked if we could make that recommendation ourselves.

"Q. Didn't you know you had a right to recommend anything you wanted to? A. I don't know; I just wanted to ask him at the request of the jury.

"Q. The court told you if they would recommend a pardon at the end of three or six months that the court would recommend it, too? A. I didn't understand it that way, what I wanted to know, and I think the jury all understands that.

"The Court: Just have him state what statement he made to the jury.

"Q. What did you tell the jury the court told you? A. I told the jury that the court said that we could do that all right.

"Q. And didn't you tell the jury that the court said he would recommend a pardon? A. The judge said he thought that the court and the prosecuting attorney would both recommend a pardon. I didn't ask him to recommend it. We merely wanted to know whether we could make such a disposition as that of the case.

"Q. Didn't that influence the jury to return a verdict, the fact that the court and the prosecuting attorney would recommend it and that you all were allowed to recommend it? A. It did a part of them.

"Q. Didn't you discuss the case with the sheriff last night and tell him how some of the jurors stood and tell him how you voted on the first ballot? A. No, sir; I did not; I don't think we discussed the case at all. The sheriff was up here two or three different times, but we were not deliberating at that time, though. I don't remember saying anything to the sheriff about how we stood."

Thereupon Jurors Summitt, Chitwood, Prowse, and O'Neill were examined and substantially corroborated the testimony of Foreman Smith.

As ground for new trial it was also alleged that one Gibbs, a member of the jury, had been permitted to separate from his fellows, and while thus apart from them discussed the case with the sheriff. The testimony on that issue, however, only tended to

show that Gibbs was sick and desired the sheriff to so inform the court to the end that the jury might be discharged, and it was shown that the juror did not discuss the case with the sheriff or any other person except his fellow jurors.

[1] The court did not abuse its discretion in limiting the number of impeaching witnesses to five, especially as the announcement of the intention so to do was made before any of these witnesses were called. This testimony related to a collateral issue about which the court had the right to impose a reasonable limitation, and we do not think the limitation imposed constituted an abuse of the discretion which the court had. *Thompson on Trials*, § 353.

[2] It is, of course, not only improper, but is error calling for the reversal of the judgment, for the court to communicate with the jury, in the absence of the defendant, any directions in regard to their verdict. *Hinson v. State*, 133 Ark. 149, 201 S. W. 811; *Pearson v. State*, 119 Ark. 152, 178 S. W. 914. And so here the judgment would have to be reversed if there was any legal competent testimony that, in the absence of the defendant, the court had had a communication with the jury in which they were instructed in regard to the verdict to be returned. Appellant says that such was the character of the communication between court and jury shown by the testimony set out above. But we do not stop to inquire whether this is true or not for the reason that this is not such testimony on that subject as we have the right to consider. Here the verdict of the jury had been read, whereupon the proceedings were had which we have set out in full. The statute provides for a poll of the jury, and section 2419 of Kirby's Digest on that subject reads as follows:

"Upon a verdict being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his verdict, and if one answers in the negative the verdict cannot be received."

[3] We do not interpret this statute to mean that the inquiry of the clerk or judge is limited to receiving the answer "Yes" or "No" from a juror as to whether the verdict returned is his verdict or not; but we do hold that the inquiry is limited to the ascertainment of the fact whether the verdict returned is the juror's verdict, and that it is not proper or permissible under the statute to inquire of the juror how the verdict was arrived at, except, indeed, that the juror may testify whether the verdict was arrived at by lot. Section 2423, Kirby's Digest; *Wingfield v. State*, 95 Ark. 71, 128 S. W. 562; *Harris v. State*, 31 Ark. 196; *State v. Bogain*, 12 La. Ann. 264; *Bean v. State*, 17 Tex. App. 60; *Bassham v. State*, 38 Tex. 622.

A number of states have statutes on the subject, while others regulate their practice by the common law. In Massachusetts, for instance, even in a capital case, the right of polling the jury is denied upon the ground that no such right existed at common law; there being no statute on the subject. *Commonwealth v. Roby*, 12 Pick. (Mass.) 496; *Commonwealth v. Costley*, 118 Mass. 1.

Other courts in construing statutes similar to our own discuss the policy of the lawmakers in their enactment, and it is shown in these cases that it has not been deemed wise to permit the integrity of trial by jury to be destroyed by permitting a litigant to question the juror as to his verdict except to determine that the verdict returned is in fact the juror's verdict and was not arrived at by lot.

In 2 Bishop's New Criminal Procedure, § 1003(3), the law is stated as follows:

"(3) *Polling*.—'If,' says Hale, 'the jury say they are agreed, the court may examine them by poll; and,' he adds, 'what is not law now, 'if in truth they are not agreed, they are finable.' Thereupon any juror may dissent, even in the case of a sealed verdict. This practice is followed in most of our states; in some only at the discretion of the court; in probably most it may be demanded by either party, and the court cannot refuse it. The question to the juror is simply, 'Is this your verdict?' If one dissents, the panel should be sent back for further deliberation. A juror cannot be asked as to misconduct of the jury. The right continues till the verdict is recorded or the jury dispersed. There are states wherein this practice is not accepted."

An interesting case on the practice of polling a jury is that of *State Life Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, and the same case in the same volume (84 N. E.) at page 1093. The second opinion was an opinion on rehearing, and was devoted to a consideration of the inquiry proper to be made on polling a jury. This is a well-considered opinion and cites a large number of cases. After quoting from the case of *Labar v. Koplin*, 4 N. Y. 547, a statement of the law to the effect that it is the absolute right of a party to have the jury polled on their bringing in their verdict, but that the object of polling the jury is to ascertain if the verdict which has just been presented is their verdict, or, in other words, if they still agree to it, and not to ask them what their verdict means nor to question them as to their intention in finding it, the court, through Hadley, J., proceeded to say:

"This being the intent and purpose of the law, the exact form of the question to be propounded would seem immaterial so long as the answer pertinent thereto would be in exact line with such intent and purpose. This is illustrated by the fact that the form of the question varies in different jurisdictions as well as in different courts of the same jurisdiction, although all agree upon the purpose and limita-

tions of the poll. But the one in most common use is the simple question, 'Is this your verdict?' and several hold, with *Bowen v. Bowen*, 74 Ind. 470, that this covers the whole scope of the inquiry and is all that a party has a right to ask. And while we are unqualifiedly of the opinion that it is a much safer practice for our courts to confine themselves to this simple form of inquiry, yet we do not hold, and we do not understand the *Bowen* Case to hold, that the inquiry must necessarily be in those exact words, and that the same inquiry may not be couched in different language."

We need not consider here how otherwise than by the testimony of a juror the fact of an improper communication between court and jury may be established, as no such question is presented by the record, and we think the question which the present record does raise is disposed of when we say that such proof cannot be made by the juror. Section 2423, Kirby's Digest; *Jenkins v. State*, 131 Ark. 312, 319, 198 S. W. 877; *Speer v. State*, 130 Ark. 457, 458, 464, 198 S. W. 113; *Triplett v. Wesson*, 128 Ark. 233, 193 S. W. 537; *Reiff v. Interstate Business Men's Ass'n*, 127 Ark. 254, 192 S. W. 216; *Barnett Bros. v. Western Assurance Co.*, 126 Ark. 562, 181 S. W. 226; *Capps v. State*, 109 Ark. 193, 197, 159 S. W. 198, 46 L. R. A. (N. S.) 741, Ann. Cas. 1915C, 957; *Osborne v. State*, 96 Ark. 400, 132 S. W. 210; *Griffith v. Mosley*, 70 Ark. 244, 67 S. W. 309; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *St. L. I. M. & Sou. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Fain v. Goodwin*, 35 Ark. 109; *Clark v. Bales*, 15 Ark. 452, 457; *Pleasants v. Heard*, 15 Ark. 403; *Atkins v. State*, 16 Ark. 591, 592.

[4] Although the juror Gibbs did separate from his fellows, it is affirmatively shown that no improper communication occurred between him and the sheriff, and the court below properly held that no error had been committed in this respect.

Upon a consideration of the whole case no reversible error is found and the judgment of the court below is affirmed.

# GOOD ROADS MACHINERY CO. v. COX, County Clerk. (No. 219.)

(Supreme Court of Arkansas. May 19, 1919.)

## 1. PROCESS $\Leftrightarrow$ 148—TRUTH OF SHERIFF'S RETURN—ACCOMPANYING EVIDENCE.

The recital of sheriff's return on process made pursuant to Kirby's Dig. § 6381, may be contradicted by other evidence which accompanies it.

## 2. COUNTIES $\Leftrightarrow$ 169—REISSUE OF WARRANTS—PUBLICATION—PROOF OF SERVICE—RETURN—AFFIDAVIT OF PUBLICATION.

Sheriff's return reciting in detail proper service of notice calling in county warrants for

cancellation and reissuance in the manner provided by statute, under Kirby's Dig. §§ 1176, 4923, was sufficient proof of service, notwithstanding accompanying affidavit of publication by publisher of newspaper, instead of "editor, proprietor, manager or chief accountant," as required by section 4924; such affidavit not being sole evidence of publication, and not being inconsistent with sheriff's return.

Appeal from Circuit Court, Greene County; R. H. Dudley, Judge.

Certiorari by the Good Roads Machinery Company against E. E. Cox, County Clerk of Greene County. Petition for writ dismissed, and petitioner appeals. Affirmed.

Huddleston, Fuhr & Futrell, of Paragould, for appellant.

T. W. Davis, of Blytheville, and Jeff Bratton, of Paragould, for appellee.

MCCULLOCH, C. J. Appellant is the holder of a county warrant of Greene county, issued prior to certain statutory proceedings in that county calling in the warrants of the county for reissue or cancellation, and this appeal involves an attack on said order; appellant having failed to appear and present the warrant for reissuance.

The sole point of attack on the validity of the proceedings in the county court is that the affidavit to the proof of the publication of notice was made by the publisher of one of the newspapers in which the notice was published, whereas the statute (Kirby's Digest, § 4924) provides that notices and advertisements required by law proved by the affidavit of "the editor, proprietor, manager or chief accountant, with a copy of such advertisement annexed, stating the number of times and the date of the papers in which the same was published, shall be sufficient evidence of publication."

The sheriff made his return in writing, which recites in detail proper service of the order of the county court in the manner required by statute. Kirby's Digest, §§ 1176, 4923. Separate affidavits concerning the publication in the two newspapers were filed with the return of the officer; the affidavit concerning the publication in one of the newspapers being properly made by the manager of the newspaper, but the other was made by the publisher.

Appellant relies upon the case of *Gibney v. Crawford*, 51 Ark. 34, 9 S. W. 309, where the rule was laid down that the calling in of county warrants for cancellation or reissue is a special statutory proceeding which, in order to be valid, must be strictly in accordance with the terms of the statute, and that, the statute "having prescribed the manner in which the notice should be given, it could not be given legally in any other manner; and having prescribed what shall be the evidence

of the publication it can be proven in no other manner."

In the case just referred to there was no return of the sheriff in the record, and the only evidence of publication was a defective affidavit. The statute in force at that time provided that the affidavit of the "editor, publisher or proprietor, or the principal accountant of any newspaper," should constitute "the evidence of the publication thereof." Mansfield's Digest, § 4359. The statute now in force differs from the one in force at that time, in that it merely provides that the affidavit of the parties named shall constitute "sufficient evidence of publication." Kirby's Digest, § 4924. The distinction has been pointed out, and the difference in the effect of the two statutes discussed, in the opinion of this court in *Porter v. Dooley*, 66 Ark. 1, 49 S. W. 1083, and in subsequent cases. In *Gibney v. Crawford*, supra, it was also pointed out that it is the duty of the sheriff in making his return on the order of the county court calling in warrants to file with his return the affidavits proving the publication in newspapers, and in that case, since there was no return on the record, the affidavits constituted the sole evidence of the proof of publication. In *Baker v. York*, 65 Ark. 142, 45 S. W. 57, and *Miller County v. Gazola*, 65 Ark. 353, 46 S. W. 423, it does not appear from the opinion whether or not written returns were made by the sheriff, and the several orders of the county court were declared to be void because of the defective affidavits concerning the publication in the newspapers. The present case differs from either of those cases in both respects, for here we have the return of the sheriff showing publications of the notice in the manner prescribed by statute. The delivery of the order of the court by the clerk pursuant to the terms of the statute (Kirby's Digest, § 1176) constitutes process which the sheriff must serve as required by law, and the statute directs the sheriff to make a return in writing on all process which comes to his hands (Kirby's Digest, § 6381).

[1, 2] It being the duty of the officer to make return of the affidavits of each "editor, proprietor, manager or chief accountant," the recitals of his return may be contradicted by the other evidence which accompanies it. *Nevada County v. Williams*, 72 Ark. 394, 81 S. W. 384. But in this instance the accompanying affidavit does not contradict the return of the sheriff, for it is defective only in that it was made by the wrong person; and, as the statute does not make the affidavit of the "editor, proprietor, manager or chief accountant" the sole evidence of publication, but only makes it sufficient evidence, it does not contradict the return of the sheriff in the complete statement made therein that the publication was for the requisite number of

times, at the proper time, and by a newspaper which had a bona fide circulation, as required by the statute.

We are of the opinion, therefore, that the order of the county court is not void, and the judgment of the circuit court was correct.

**Affirmed.**

**SMITH v. BUCKEYE COTTON OIL CO.**  
(No. 226.)

(Supreme Court of Arkansas. May 19, 1919.)

**1. APPEAL AND ERROR** ¶889(3)—TREATING PLEADINGS AS AMENDED.

Pleadings will not be treated as amended on appeal so as to allege a fact which appears in the testimony, not as a direct affirmation, but only as an inference from the testimony.

**2. MASTER AND SERVANT** ¶92(1) — NEGLIGENCE OF PHYSICIAN — LIABILITY OF EMPLOYEE—NEGLIGENCE IN SELECTION OF PHYSICIAN.

Employer having duty of furnishing employé with medical attention, or undertaking to discharge that duty, is not liable for physician's negligence or lack of skill, but only for failure to exercise ordinary care to select a physician with requisite skill and learning who will give employé the treatment and attention which the case requires.

Appeal from Circuit Court, Prairie County; Thos. C. Trimble, Judge.

Action by Flinn Smith against the Buckeye Cotton Oil Company. Judgment for defendant, and plaintiff appeals. **Affirmed.**

Glenn H. Wimmer, of Des Arc, and Brundidge & Neely, of Searcy, for appellant.

Cockrill & Armistead, of Little Rock, for appellee.

SMITH, J. Appellant was the plaintiff below, and alleged in his complaint that while employed by appellee (the defendant) he was directed to wipe an engine, and while doing so got his fingers caught and crushed in the machinery, and that thereafter he was directed to go to a physician employed by appellee to treat its injured employes, and that this physician treated his injuries so carelessly and negligently that the amputation of all the fingers on the injured hand became necessary. In support of those allegations testimony was offered which would have supported a verdict, had the jury so found, that appellant had not been properly and skillfully treated by the physician. But at the conclusion of appellant's testimony the court directed the jury to return a verdict in appellee's favor, and this appeal has been prosecuted from the judgment pronounced thereon.

[1] The testimony in the case appears to

have been addressed to the proposition that the physician was negligent, and that appellee was liable for this negligence because it directed appellant to consult him. There is no intimation in the pleadings that appellee was negligent in selecting a physician, nor is there any testimony to that effect unless it be by inference that appellee was negligent through having employed a negligent physician, and in appellant's brief cases are cited in which this court has held that pleadings will be treated as amended to conform to the testimony where the testimony is admitted without objection. No offer was made to amend the pleadings in the court below, nor was it there insisted that the pleadings should be treated as amended to conform to the testimony, and we think that no policy, however liberal, of permitting pleadings to be treated as amended to conform to unobjected testimony would require us to treat the pleadings as amended to allege a fact which appears in the testimony, not as a direct affirmation, but only as an inference from the testimony.

[2] We have a case, therefore, in which the pleadings and proof show only that an injured employé was directed to, and placed in charge of, a physician who was guilty of negligence in his treatment of the case. But this allegation and this proof did not make a case for the jury. Where the employer owes his employé the duty of furnishing medical attention, or undertakes to discharge that duty, he does not become liable for the physician's negligence or lack of skill, but is liable only when he fails in the discharge of his duty to exercise ordinary care to select a physician possessing the requisite skill and learning and one who would give the patient the attention and treatment which the case requires. This is the doctrine of the case of *Ark. Midland Ry. Co. v. Pearson*, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317, and of *St. L., I. M. & S. R. Co. v. Taylor*, 113 Ark. 445, 168 S. W. 564.

The judgment of the court below is therefore affirmed.

### EDWARDS v. HARRIS. (No. 220.)

(Supreme Court of Arkansas. May 19, 1919.)

#### 1. APPEAL AND ERROR ⇐1002—TRIAL—CONFLICT OF TESTIMONY—VERDICT—CONCLUSIVENESS.

Where there was a conflict in the testimony as to an issue, the appellate court must treat the issue as settled by the jury's verdict.

#### 2. APPEAL AND ERROR ⇐1099(7)—LAW OF CASE—FORMER RULING AS TO COMPETENCY OF EVIDENCE.

A ruling upon a former appeal that a written contract was competent evidence to prove

ownership of the flour in question became the law of the case.

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Action by E. F. Edwards against C. C. Harris. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 129 Ark. 253, 195 S. W. 1064.

Calvin Sellers and Edward Gordon, both of Morrillton, for appellant.

W. P. Strait, of Morrillton, for appellee.

McCULLOCH, C. J. Appellant was the plaintiff below, and contended that he had loaned money to a copartnership of which appellee was a member for use in paying the price of a carload of flour which appellant, as broker or agent for a milling company, had previously sold and shipped to said copartnership.

[1] The further contention of appellant was that the carload of flour was turned over to him to hold as a pledge to secure the loan, and that on the failure of the appellee and his copartners to repay the money he had sold the flour, which brought less than the amount of the debt.

On the other hand, the contention of appellee was that appellant was the owner of the flour, and that his (appellee's) firm had merely entered into an oral agreement with appellant to purchase the flour when convenient for them to buy and pay for it. There was a conflict in the testimony as to this issue, and we must treat the issue as settled against appellant by the verdict of the jury.

The testimony tends to show that Rainwater, a banker, was the agent of appellant in the transaction with appellee, and that a certain written contract which recited that appellant was the owner of the flour was prepared by Rainwater and signed by appellee. The testimony was sufficient to establish Rainwater's agency, and that appellant authorized him to prepare this contract, and the inference is warranted from the testimony that appellant was aware of what was to be the contents of the writing.

[2] The court, over appellant's objection, allowed this contract to be introduced in evidence, and this ruling is assigned as error. On the former appeal in this case (129 Ark. 253, 195 S. W. 1064) the court decided that this written contract was competent evidence as a circumstance tending to prove the ownership of the flour, and that ruling became the law of the case.

No objection has been presented here to any of the court's charge to the jury, and, as no error appears in the record, it follows that the judgment must be affirmed; and it is so ordered.

**SKILLERN v. WHITE RIVER LEVEE DIST.** (No. 211.)

(Supreme Court of Arkansas. May 12, 1919.)

**1. STATUTES  $\S$ 141(2)—RE-ENACTMENT—SETTING OUT AT LENGTH—LEVEE DISTRICTS—INDEPENDENT LEGISLATION.**

Acts 1919, No. 166, to aid a designated levee district and increasing the benefits to the real estate therein at the rate of 6 per cent. per annum, such increase to be cumulative and to continue until the indebtedness is fully paid, although relating to the same subject-matter as Sp. & Priv. Acts 1911, p. 215, does not violate Const. art. 5, § 23, requiring the re-enactment and publication at length of laws which are revived, amended, extended, or conferred, since such act does not amend Sp. & Priv. Acts 1911, p. 215, but is an independent and inconsistent enactment.

**2. LEVEES  $\S$ 25—LEVEE DISTRICTS—ASSESSMENT OF BENEFITS—POWER OF LEGISLATURE.**

Since the Legislature may act directly in assessing benefits to accrue from local improvements which it has authorized, which determination is conclusive unless arbitrary, unjust, or unreasonable, it is within the power of the Legislature to increase the benefit of a levee district at the rate of 6 per cent. per annum; to be cumulative and continuous until the entire indebtedness is paid.

**3. LEVEES  $\S$ 25—LEVEE DISTRICTS—INCREASE OF ASSESSMENTS FOR BENEFITS—DELEGATION OF LEGISLATIVE POWER.**

Where the Legislature has power primarily to determine the value of the benefits of a local improvement, it may increase such benefit assessments either directly or by a board of assessors of the improvement to which the power has been delegated.

**4. LEVEES  $\S$ 25—LEVEE DISTRICTS—STATUTES INCREASING ASSESSMENTS FOR BENEFITS—VALIDITY.**

Acts 1919, No. 166, providing for aid to a designated levee district and increasing the assessments of benefits, *held* not void as imposing any burden on the property in excess of the value of the benefits to the lands.

**5. LEVEES  $\S$ 2—CONSTRUCTION—DISREGARD OF SURPLUSAGE—MISTAKES OF FACT.**

Notwithstanding Acts 1919, No. 166, authorizing a designated levee district to issue bonds for funds to strengthen and repair levees, indicates a mistake of fact as to an indebtedness incurred because of a previous overflow, the statute must be given effect; the reference to such overflow being surplusage.

**6. PLEADING  $\S$ 8(2)—CONCLUSIONS—NECESSITY OF ALLEGATIONS OF FACT IN PLEADINGS.**

In a suit to restrain a levee district from increasing assessments and from issuing bonds, an allegation in the complaint that the indebtedness of the district will be thereby increased to greatly exceed the benefits assessed, allegations of fact showing such to be the case, is insufficient.

Appeal from Monroe Chancery Court; John M. Elliott, Chancellor.

Suit by E. A. Skillern against the White River Levee District. From a decree dismissing the complaint for want of equity, on demurrer, complainant appeals. Affirmed.

This action was instituted by the appellant against the appellee, as the board of directors of the White river levee district, for the purpose of preventing them from increasing the assessments against his land and from issuing certain bonds.

The White River levee district was created by act 97 of the Special and Private Acts of the General Assembly of the State of Arkansas for the year 1911. The act provided for the assessment of benefits by reason of the levee protection and authorized the levy of an annual tax upon the lands included in the district upon the benefits so assessed. The benefits to the lands by reason of the building of the levee were to be ascertained and assessed by a board of assessors chosen by the board of directors for that purpose, and, when the assessments were completed, they were to so remain until the next assessment was ordered by the board. The benefits were assessed by the board of assessors at \$15 per acre. The district comprised several thousand acres of land in the counties of Woodruff, Monroe, and Prairie. Act 104, vol. 1, Acts 1917, p. 519, authorized the White River levee district, upon the petition of landowners owning not less than 70 per cent. of the total acreage, to issue certificates of indebtedness to raise money to repair the levee, in emergency, when same had been damaged by overflow or other cause, or was in danger. After the passage of the act of 1917, a petition of the landowners of the district, in conformity with the statute, was filed in the chancery court, and the court granted the petition and ordered that certificates of indebtedness be issued to secure funds for the purpose of repairing certain portions of the levee. The certificates of indebtedness thus authorized were not issued, and the work of repairing the levee at that time was not performed. The Legislature of 1919 passed Act No. 166, which reads, in part, as follows:

"Sec. 2. On account of the levee improvement and the other work incident thereto, which has already been completed, and which is largely in excess of the improvement originally contemplated by the district, as well as the improvements now in process of completion, the benefits to the real estate therein, as heretofore fixed and determined, are hereby increased at the rate of six per cent. per annum; such increase of benefits shall be cumulative and shall continue from year to year until the present indebtedness of the district is fully matured and paid, and such annual installments

thereof shall be effective on the first day of June of each year.

"Sec. 3. The majority of the landowners of said district having duly authorized said district to issue certificates of indebtedness not to exceed \$100,000 for the purpose of paying the indebtedness of the district incurred during the overflow of 1918, and also for the purpose of raising funds to pay for the present necessary work of raising, strengthening and repairing the levee of said district, the board of directors of said district are hereby authorized to borrow a sum of money not in excess of \$100,000 for the purpose of funding said certificates of indebtedness, and to issue therefor the negotiable bonds of the district, payable at such times as they deem best, and bearing a rate of interest not to exceed six per cent. per annum."

The Legislature of 1919 also passed Act No. 178, section 1 of which reads as follows:

"The board of directors of the White River levee district shall have the power to straighten the channel of Cache river as a means of protecting the lands of the district against inundations from the waters of said river, and may issue the bonds of the district in a sum not exceeding \$150,000 and bearing interest at a rate not exceeding six per cent. for the purpose of raising the money to do such work."

Appellant was the owner of land in the levee district. He set up the above statutes in his complaint, and alleged that the original assessments of benefits amounted to \$15 per acre on the lands; that the board of directors "are proceeding to increase the benefits assessed" against his lands and other lands of the district 6 per cent. per year for the year 1919. He alleged that no certificates of indebtedness were issued under the provisions of the act of 1917, but, notwithstanding that fact, the board of directors "are attempting to issue and sell the negotiable bonds of the district to the amount of \$100,000 under the provisions of Act 166 and \$150,000 under Act 178 of the Acts of 1919." He alleged that the issue of bonds in these amounts "will cause the indebtedness of the district to greatly exceed the benefits assessed against the lands of the district by the board of assessors; that the same is prohibited in the act creating said district, and that, if such bonds are issued and sold, such action of the board of directors will create a cloud" upon his title. He alleged that the acts of the board in increasing his assessments and issuing of bonds above set forth were unlawful, and prayed that the board of directors be restrained from so doing.

The appellee demurred to the complaint on the ground that it did not state a cause of action. The court sustained the demurrer and entered a decree dismissing the same for the want of equity, from which is this appeal.

Appellant, pro se.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). It appears from the allegations of the complaint that the board of assessors provided for in Act 97 of the Acts of the General Assembly for the year 1911, creating appellee levee district, assessed the benefits to be derived from the protection afforded by the levee improvements contemplated at \$15 per acre. It further appears that the Legislature of 1919, by section 2 of Act No. 166, "passed for the purpose of aiding the White River levee district," "increased the benefits to the real estate therein at the rate of 6 per cent. per annum." The act specified that:

"Such increase shall be cumulative, and shall continue from year to year until the present indebtedness of the district is fully matured and paid."

[1] Section 5 of Act 97, creating the district, provides that the assessments of the board of assessors "shall be the assessment of said levee district until the next assessment shall be ordered by the board of directors." It is argued that section 2 of Act 166, supra, alters and extends the provisions of section 5, supra, of the original act, creating the district, without re-enacting and publishing at length that section, and thus violates section 23, art. 5, of the Constitution, which provides:

"No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

Section 2 of Act 166, supra, does not purport to, and does not in fact, amend or extend the provisions of section 5 of Act 97 of the Acts of 1911, "by reference to its title only or in any other way." The title of the act under review is "An act entitled an act in aid of the White River levee district." It is a wholly independent enactment. True, its effect is to repeal that part of section 5 of Act 97 of the Acts of 1911 which reads:

"And their assessment as equalized shall be the assessment of said levee district until the next assessment shall be ordered by the board of directors."

But this is so because section 2 of Act 166, supra, is a direct assessment of benefits by the Legislature, and is in invincible conflict with that part of section 5 of Act 97, last above quoted, which continues the assessment of benefits made by the board of assessors "until the next assessment shall be ordered by the board of directors." In *Scales v. State*, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768, Chief Justice Cockrill, speak-

ing of the provision of the Constitution now under consideration, said:

"It is well settled that this provision does not make it necessary, when a new statute is passed, that all prior laws modified, affected or repealed by implication by it should be re-enacted."

See, also, the opinion by him in *Watkins v. Eureka Springs*, 49 Ark. 131-134, 4 S. W. 384. The act therefore is not in conflict with section 23, art. 5, of the Constitution.

[2-4] It is also urged that the Legislature has no power to increase the benefits assessed by the board of assessors at the rate of 6 per cent. per annum and to make same cumulative and continuous until the existing indebtedness matured and was paid. It is the settled law in this state that the Legislature may act directly in assessing benefits to accrue from local improvements which it has authorized, and the "legislative determination should be and is conclusive unless it is arbitrary and without any foundation in justice and reason." *Salmon v. Board of Directors*, 100 Ark. 366, 140 S. W. 585; *Moore v. Board of Directors of Long Prairie Levee District*, 98 Ark. 113, 116, 117, 135 S. W. 819; *Board of Improvement v. Pollard*, 98 Ark. 543, 136 S. W. 957; and cases cited. Since under these decisions the Legislature has the power primarily to determine the value of the benefits to be derived from a local improvement, it follows as a necessary corollary to this doctrine that the Legislature may increase the original amount of the benefit assessment, whether same was made directly by it or by a board of assessors to which the power had been delegated. The exercise of the power in the first instance did not exhaust it. The Legislature could continue to exercise the power until the purpose in creating the levee district had been consummated. The method prescribed in section 2 of Act 166, supra, by which the Legislature determined that the amount of the value of the benefits which would accrue to the lands by reason of the improvement would be represented by a sum consisting of the original assessment of \$15 per acre at rate of 6 per cent. per annum thereon, to be cumulative and to continue from year to year until the indebtedness of the district was mature, was within the province of the Legislature. The amount of the value of the benefits could be easily and definitely ascertained by this method, because it fixed with certainty the time for the interest to run as the date when the then indebtedness of the district matured. In *Oliver v. Whittaker*, 122 Ark. 291, 183 S. W. 201, the court held that assessments of benefits could be made to bear interest at the rate of 6 per cent. per annum under a statute which provided that "the deferred installments of the assessed benefits shall bear interest at the rate of

six per cent. per annum, and should be payable only in installments as levied." In construing this provision, the court said that it was not intended "to authorize the imposition of any burden in excess of the actual value of benefits to the property, together with interest on deferred payments." So it may be said here that there was nothing in the language of the act that reveals any intention on the part of the Legislature to impose any burden upon the property in excess of the value of the benefits to the lands.

The appellant further contends that the board had no authority to issue bonds under the third section of Act 166, supra, for the reason that at the time of its passage there were no certificates of indebtedness outstanding, inasmuch as the work contemplated by the act of 1917 was never performed, and no certificates of indebtedness were actually issued under the authority of such act. But the language of section 3 of Act 166, supra, shows that the board was authorized to issue certificates of indebtedness in the sum of \$100,000 not only for the indebtedness of the district "incurred during the overflow of 1918," but also "for the purpose of raising funds to pay for the present necessary work of raising, strengthening, and repairing the levee of said district."

Although it appears from the allegations of the complaint that the Legislature made a mistake in finding that there was a present indebtedness against the district for work done during the overflow of 1918, yet the language of the third section of the act shows that the Legislature was not under any misapprehension as to the existing necessity of "raising, strengthening, and repairing" the levee of the district. There are no allegations of fact in the complaint showing that the necessary work to be done in order to effectuate the purpose in building the levee, namely, to protect the lands from overflow, would cost less than the sum of \$100,000. To be sure, the Legislature would have no power to authorize the issuance of bonds to liquidate an indebtedness which had not been, and which would never be, incurred. But, taking the language of the act as a whole, it clearly evinces the purpose to provide a fund to be expended in necessary work on the levee.

[5] Being convinced that such was the intention of the Legislature from the language employed, it is our duty to give effect to the statute even though some of the language indicates that it was used under a mistake of fact. The words "incurred during the overflow of 1918" should be treated as surplusage, and could and should be eliminated in order to carry out the manifest purpose of the Legislature. This view is in accord with recognized canons for the cor-



rect interpretation of statutes, as announced by the best authors on the subject, and often approved by our own court. See Lewis' Sutherland on Stat. Con. §§ 363 to 384, inclusive; also sections 489, 490; Endlich on the Int. of Stat. § 365, chapter 4, § 73, and sections 264, 265; *Bowman v. State*, 93 Ark. 168, 129 S. W. 80; *Garland Power & Dev. Co. v. State Board of R. R. Incorp.*, 94 Ark. 422, 127 S. W. 454; *Snowden v. Thompson*, 106 Ark. 517, 153 S. W. 823; *State v. Trulock*, 109 Ark. 556, 160 S. W. 516; *Nakdimen v. Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S. W. 272; and other cases cited in 4 Crawford's Digest, p. 4677, §§ 53-55.

[6] It is alleged in the complaint that the issues of bonds under Acts 166 and 178, supra, will cause the indebtedness of the district to greatly exceed the benefits assessed against the lands of the district, but no facts are alleged to show that such is the case. In *Moore v. Board of Directors of Long Prairie Levee Dist.*, supra, we held that the courts cannot review "merely on general allegations that the assessments are arbitrary, excessive, and confiscatory." Facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of the facts.

In disposing of the allegations of the complaint on demurrer and ruling that Act 178 of the Acts of 1919, supra, is not open to the objection here urged against it, we reserve our decision as to its validity if its constitutionality should be challenged on other grounds.

Finding no error in the rulings of the court, its judgment is affirmed.

### NELSON v. STATE. (No. 221.)

(Supreme Court of Arkansas. May 19, 1919.)

#### 1. CRIMINAL LAW §1159(2, 4)—REVIEW—EVIDENCE TO SUSTAIN VERDICT—CREDIBILITY OF PROSECUTING WITNESS.

In a prosecution for violation of the law prohibiting the sale of intoxicating liquors, the credibility of the state's witness was a question for the jury, and where he testified to the sale, it cannot be said that there was no substantial evidence to support the verdict.

#### 2. INTOXICATING LIQUORS §238(1)—PROSECUTION FOR SELLING—EVIDENCE OF GUILT—QUESTION FOR JURY.

In a prosecution for violation of the law against selling intoxicating liquors, where defendant was introduced as a witness and denied that he sold whisky and contradicted state's witnesses, it was for the jury to determine whether or not defendant was beyond a reasonable doubt guilty of the offense charged.

#### 3. CRIMINAL LAW §703—OPENING STATEMENT — MISCONDUCT OF COUNSEL — GOOD FAITH.

In a prosecution for selling intoxicating liquor, the prosecuting attorney's opening statement that "prosecuting witness, after making inquiries and having information as to the defendant's selling whisky," etc., presumably leading up to an outline of the witness' testimony, and not as an attempt to introduce hearsay evidence, and apparently in good faith, must be held not misconduct of counsel; good faith being the general test in passing upon preliminary statements in criminal cases to the jury.

#### 4. WITNESSES §350 — CREDIBILITY OF DEFENDANT—FORMER OFFENSES.

Where the defendant, being prosecuted for selling intoxicating liquors, took the stand as a witness, it was proper on cross-examination for the prosecuting attorney to ask the defendant concerning the commission of other offenses, for the purpose of reflecting upon his credibility.

#### 5. CRIMINAL LAW §1086(14)—APPEAL—RECORD—EXCEPTIONS.

Where the record in a criminal case fails to show that exceptions were saved concerning matters argued for reversal, such matters cannot be considered.

Appeal from Circuit Court, Lonoke County; Geo. W. Clark, Judge.

Albert Nelson was convicted of the offense of selling intoxicating liquors in violation of law, and he appeals. Judgment affirmed.

J. B. Reed, of Lonoke, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was convicted of the offense of selling intoxicating liquor, and the principal contention on this appeal is that the evidence was not sufficient to sustain the verdict.

[1] The testimony of one Ross was the only direct testimony tending to establish appellant's guilt. Ross testified that he obtained money from one Mr. Swalm with which to buy whisky, and that he purchased the whisky from appellant in Lonoke county, where the venue in the case is laid in the indictment. Ross was rigidly cross-examined, and according to his testimony as copied in the record he was to some extent vacillating and uncertain in some of his statements, but he testified that he purchased the liquor from appellant. His credibility was a question for the jury, and we cannot say that there was not substantial evidence in support of the verdict.

[2] Appellant was introduced as a witness, and denied that he sold whisky, but this contradiction was a question for the jury to determine whether or not appellant was,

beyond reasonable doubt, guilty of the offense charged in the indictment.

[3] It is next contended that certain remarks of the prosecuting attorney in his opening statement to the jury before the testimony was introduced constituted prejudicial error. The remarks objected to, as copied in the record, were as follows:

"The prosecuting witness, George Ross, after making and inquiring and having information as to the defendant selling whisky, and another man by the name of Strong, and talked with him about the matter."

The remainder of the statement of the prosecuting attorney is not brought into the record, and we have no means of knowing definitely just the connection in which this remark was made, but we assume that it was a part of the preliminary statement leading up to an outline of the testimony of the witness Ross. The substance of the remark is that the prosecuting witness, after receiving information as to the defendant's selling whisky, talked with him about it, and proceeded to buy the whisky. It does not appear to have been an effort on the part of the prosecuting attorney to introduce hearsay testimony, nor does it appear that the remark was made otherwise than in good faith, in an attempt of the officer to correctly outline to the jury the testimony which he expected to introduce for their consideration. Good faith is generally the test in passing upon the conduct of such an officer in his preliminary presentation of a case to the jury. *McFalls v. State*, 66 Ark. 16, 48 S. W. 492. According to that test, we do not think that there has been any prejudice to the rights of appellant so as to call for a reversal of the judgment.

[4] Objection is made that the prosecuting attorney was permitted to ask appellant on cross-examination concerning the commission of other offenses, but that was for the purpose of reflecting upon his credibility as a witness, and was competent. It has been so decided in numerous cases in this court.

[5] Other matters are argued here as grounds for reversal, but the record fails to show that exceptions were saved concerning those matters.

Judgment affirmed.

#### COOPER v. RUSH. (No. 212.)

(Supreme Court of Arkansas. May 12, 1919.)

#### 1. SUBROGATION $\S$ 31(5), 41(6)—JUDGMENT—PAYMENT OF NOTE BY SURETY—BURDEN OF PROOF.

In action by surety on note, alleging that he paid judgment on the note against him and

his principal, and that he had the judgment assigned to himself, and that therefore he should be subrogated to the rights and remedies of the judgment creditor, and that he is in fact a substituted judgment creditor, which allegations are denied by defendant, plaintiff has the burden of proving the assignment to himself of the judgment, for the law does not itself make the assignment, because the plaintiff, on paying the judgment, might have procured the judgment creditor to assign it to him.

#### 2. LIMITATION OF ACTIONS $\S$ 49(6)—ACCRUAL OF CAUSE OF ACTION—CONTRIBUTION.

Right of action for contribution accrues when one surety pays more than his share of the common liability.

#### 3. LIMITATION OF ACTIONS $\S$ 28(1)—STATUTE APPLICABLE — CONTRIBUTION AMONG CO-SURETIES.

The three-year statute (Kirby's Dig.  $\S$  5064) applies to a right of action by one surety on a note against another for contribution; the contract for contribution being an implied one.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by L. D. Cooper against C. C. Rush. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action at law by a surety, who claims that he has paid the amount of a judgment obtained against him and his principal. According to the allegations of his complaint, on the 31st day of January, 1914, the Citizens' National Bank of Hot Springs obtained judgment in the Garland circuit court against L. D. Cooper, C. C. Rush, and C. G. Bryan for the sum of \$1,532.58 and the accrued interest. The judgment was obtained in a suit on a certain promissory note executed and delivered to the bank by C. G. Bryan and C. C. Rush on April 19, 1913, for the sum of \$3,500, for money borrowed from said bank by Bryan and Rush. L. D. Cooper indorsed said note as surety, and paid to the bank the amount of its judgment, and had the same assigned to him. The complaint further alleges that no part of the judgment had been paid to the plaintiff, Cooper, and he prays judgment against the defendant, Rush, for the amount sued for.

The defendant demurred to the complaint and also filed an answer. In his answer the defendant admits that judgment was rendered against the plaintiff, himself, and C. G. Bryan in favor of the Citizens' National Bank for the sum of \$1,532.58 and the accrued interest, as alleged in the complaint. The defendant avers that he was a cosurety with the plaintiff on said note. He denies that the plaintiff voluntarily paid such judgment, but alleges the truth to be that the same was collected by the sheriff of Garland county upon execution. He de-

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

nies that said judgment was ever assigned to the plaintiff. The defendant also pleaded the statute of limitations.

The case of *Citizens' National Bank v. C. C. Rush, C. G. Bryan and L. D. Cooper* was appealed to the Supreme Court, and the judgment was affirmed on July 13, 1914. See *Rush v. Citizens' National Bank*, 114 Ark. 170, 169 S. W. 777. It was agreed between the parties hereto that the transcript in that case should be read in evidence in the case at bar, in so far as the same was applicable. According to the evidence adduced by the plaintiff in that case, Bryan and Rush executed the note as principals, and Cooper indorsed it for them. According to the testimony of Rush, he only signed the note as surety. An execution was issued in the circuit court judgment in the case of *Citizens' National Bank v. C. C. Rush et al.*, and returned "Satisfied" by the sheriff on April 20, 1914.

The present case was submitted to the court sitting as a jury. The court found that the action was barred by the statute of limitations and dismissed the complaint of the plaintiff. From the judgment rendered, the plaintiff has duly prosecuted an appeal to this court.

L. E. Sawyer, of Hot Springs, for appellant.

R. G. Davies, of Hot Springs, for appellee.

HART, J. (after stating the facts as above). The circuit court held that the plaintiff's cause of action was barred by the statute of limitations. The plaintiff sought to avoid the bar of the statute by alleging in his complaint that he had paid the judgment against himself, the defendant, and C. G. Bryan, and had the same assigned to himself. He claims that he should be subrogated to all the rights and remedies of the judgment creditor, whose debt he paid, and that he is in fact a substituted judgment creditor. Therefore he claims that section 5073 of Kirby's Digest, the ten-year statute of limitations applicable to judgments, governs here. On the other hand, defendant denied that the judgment had ever been assigned to the plaintiff. He claims that section 5064 of Kirby's Digest, the three-year statute of limitations applicable to implied contracts not in writing, rules the present case.

[1] The burden of proof was upon the plaintiff to show that he had procured an assignment of the judgment to himself. The law does not itself make the assignment, because the plaintiff might have paid off the judgment, and might have procured the judgment creditor to assign the judgment to him; but it devolved upon the plain-

tiff to establish that fact by proof. This he failed to do.

[2] The court found in favor of the defendant on his plea of the statute of limitations. The case was tried before the court sitting as a jury, and according to the defendant's evidence he was a cosurety with the plaintiff on the note. The right of action for contribution accrues when one surety pays more than his share of the common liability. In most of the cases it is said that the contract for contribution between sureties is one which the law implies for their mutual protection and indemnity. Nearly all the cases agree, however, that no cause of action arises until payment by one of their common debt, and the statute of limitations begins to run against an action to enforce contribution at the time of such payment. *Wood v. Leland*, 1 Metc. (Mass.) 387, and *Mentzer v. Burlingame*, 78 Kan. 219, 97 Pac. 371; 18 L. R. A. (N. S.) 585, and case note. Numerous decisions which we have read are cited in the note in support of the principal case.

[3] It follows, then, that there was an implied liability only against the defendant, and the three-year statute of limitations governs. *Dismukes v. Halpern*, 47 Ark. 317, 1 S. W. 554, and 32 Cyc. 299. The record shows that the plaintiff paid the judgment on the 20th day of April, 1914. The present suit was commenced on July 23, 1918. Consequently more than three years had elapsed between the time when the plaintiff's cause of action accrued and the time when he commenced this suit.

Therefore the court was right in sustaining the defendant's plea of the statute of limitations, and the judgment must be affirmed.

GRANT et al. v. BURROWS. (No. 228.)  
(Supreme Court of Arkansas. May 19, 1919.)

1. PRINCIPAL AND AGENT ⇐100(2)—AUTHORITY TO RENT.

Facts held to show a general agency for the owners of a plantation to rent it for a five-year term.

2. FRAUDS, STATUTE OF ⇐129(10) — PART PERFORMANCE—IMPROVEMENTS.

The question whether authority of the owners' agent to lease plantation to plaintiff for a longer period than one year could be conferred in parol was immaterial, where plaintiff complied with the terms of his five-year lease by paying county, state, and a large part of levee taxes, and placing improvements on the plantation to the value of about \$6,500.

3. PRINCIPAL AND AGENT ⇐103(7)—AUTHORITY TO SELL.

Authority conferred upon agent by owners of a plantation to represent them in the or-

ganization and construction of a levee built across the plantation, in the matter of granting a right of way and agreeing to and receiving damages therefor, did not carry the inference of general authority to sell the plantation; the special agency having reference to but the single transaction.

4. PRINCIPAL AND AGENT ⇨103(7)—AUTHORITY TO SELL.

That owners of a plantation confirmed and acquiesced in a sale by their agent of a part thereof does not warrant an inference that they made him their general agent to sell the plantation without consulting them.

5. PRINCIPAL AND AGENT ⇨103(7) — AUTHORITY TO SELL.

It cannot be inferred that, because an agent had general control and management of a plantation for rental purposes, he likewise had authority to execute an option contract for the sale and purchase thereof at a future date.

6. PRINCIPAL AND AGENT ⇨99 — SPECIAL AGENCY.

General authority cannot be inferred from authority given to perform a particular act.

7. PRINCIPAL AND AGENT ⇨147(3)—SPECIAL AGENCY.

One dealing with a special agent whose authority is confined to a single transaction or a particular act must ascertain the extent of his authority and contract accordingly before the contract will be binding upon the principal.

Hart, J., dissenting.

Appeal from Miller Chancery Court; Jas. D. Shaver, Chancellor.

Suit by J. B. Burrows against R. L. Grant and others. From the decree defendants appeal, and plaintiff cross-appeals. Affirmed.

J. M. Carter, of Texarkana, for appellants.  
M. E. Sanderson, of Texarkana, for appellee.

**HUMPHREYS, J.** Appellee instituted suit against appellants in the Miller chancery court to prevent the sale to a third party of the "California plantation" on Red river in said county. The basis of the suit was a written contract entered into by and between appellee and one R. L. Grant, of date September 25, 1916, providing, in substance, that appellee should become the tenant of appellants on said property for a period of five years, beginning on the 1st day of January, 1917, and ending on January 1, 1922, for the use of which appellee was to pay all the taxes on the estate during the period and to clear 200 acres of land and make other valuable improvements. The last clause in the contract was an agreement on the part of R. L. Grant to sell the plantation to appellee at the expiration of the lease for \$10 per acre for the lands east of the levee,

and \$20 per acre for the lands west of the levee.

The final issues presented by the several pleadings and the evidence adduced were: (a) Whether appellee was a tenant for a five-year term or merely a tenant from year to year; (b) whether appellee had the right to purchase the plantation on or before January 1, 1922.

Upon hearing the court found and decreed that appellee was a tenant of appellants for a term ending the 1st day of January, 1922, and that appellants were not obligated to sell the lands to appellee. Appellants have appealed from the findings and decree adverse to them, and appellee has prosecuted a cross-appeal from the findings and decree adverse to him.

The plantation was formerly owned by Joseph Boisseau, the father of all the appellants except R. L. Grant, who was his son-in-law. Joseph Boisseau died owning this plantation in the year 1906, leaving seven children, four of whom owned the plantation at the time this suit was instituted. Mrs. Bessie S. Grant owned three-fourteenths, Miss Nettie Boisseau, six-fourteenths, Mrs. Augurs, three-fourteenths, and Joseph Boisseau, Jr., two-fourteenths. Joseph Boisseau, Jr., was of unsound mind, and resided with his duly appointed guardian, W. C. Augurs, who had authority by virtue of his guardianship to lease, but not sell, his ward's interest in said plantation. Dr. R. L. Grant and Bessie S. Grant, his wife, lived at Texarkana, near the plantation, and the other appellants at Shreveport, La. Dr. R. L. Grant assumed the management and control of the plantation by and with the consent of the other appellants. The place had been neglected and had little productive value. In 1910 Dr. Grant rented the place to M. B. Armstrong for a term of three years. Armstrong was to make certain improvements in lieu of rents, but failed to make them and had to give up the place. In 1911 he rented the property to appellee for a term of five years, to end on the 31st day of December, 1916; the consideration being that appellee should clean up all the ground that had formerly been in cultivation and make improvements, for which he should be paid a certain proportion of the cost in case the property was sold and appellee compelled to move off before the expiration of his lease. In 1913 a levee district was organized which included a part of this plantation. The levee was completed in the fall of 1916. In the organization of the district and the construction of the levee Dr. Grant represented the other appellants in all transactions with the levee board, such as agreeing upon the value of the right of way, receiving damages therefor, etc. For purposes of better represent-

ing them, the other appellants at the time conveyed him five acres of land within the district. This deed was never placed of record, and Dr. Grant never claimed any interest in the lands under it. It was treated as a matter of form only. On the 25th day of September, 1916, several months before the expiration of the old rental contract between R. L. Grant and appellee, appellee and Dr. R. L. Grant entered into the written contract made the basis of this suit. Appellee continued to occupy the place under this written contract two years, during which time he felled the timber on 100 acres of land inside the levee, and placed 10 acres thereof in cultivation, built seven houses, ranging in size from two to five rooms, and in cost from \$250 to \$1,500, a barn, crib, fences, etc., drove seven wells in which he placed pumps, and built two overhead cisterns. The total amount expended by him for improvements was about \$6,500. He also paid the county, state, and a part of the levee taxes. The plantation produced from 90 to 120 bales of cotton and about 4,000 bushels of corn per year, in addition to a large amount of grass used for pasturage. Appellants authorized Dr. R. L. Grant to control and rent the plantation, but thought the rental contracts were made from year to year with the privilege of selling it at any time. In the exercise of the authority conferred upon him, he managed and rented the property after Joseph Boisseau died in 1906, in the language of some of the witnesses, just as if he owned it. During the long period of his supervision, the other appellants exacted no accounting, required no report concerning the details of his management, nor the character of rental contracts made by him. Appellants knew in a general way that the property was rented for taxes and improvements. They also knew that appellee had occupied the place for years as tenant and had made valuable improvements thereon. From time to time they communicated with each other concerning the general management and conduct of the place by Dr. Grant. They also gave him authority to find purchasers for the property, and during the existence of the written contract with appellee confirmed a contract of sale made by Dr. Grant to Mrs. Black of 200 acres off of the tract known as the "Kitchen Bend." On several occasions after making the written contract Dr. Grant urged appellee to take advantage of his option to purchase the land under the contract. Finally appellee concluded to do so, but discovered that appellants had agreed to sell the plantation to Mr. Young for \$30,000, which was \$12,000 more than the consideration provided in appellee's option.

[1] It is contended by appellants that Dr. Grant had no authority to make a five-year rental contract for them with appellee, and that, if such authority existed, it was

not conferred in writing, and therefore void under the statute of frauds. After a careful reading of the evidence, we are convinced that Dr. Grant was a general agent of the other appellants for the purpose of renting the California plantation. He was permitted to control and manage it just as if it were his own place for many years. No restrictions whatever were placed upon him with reference to renting it. The most that appellants say is that they understood he was renting it from year to year with the privilege of selling it at any time. This understanding was due entirely to the carelessness or neglect of the other appellants. They knew of the long tenure of appellee and of the valuable improvements he was placing upon the property, and, in the exercise of the slightest diligence, could have ascertained from Dr. Grant or appellee the character of appellee's occupancy. They do not claim that they expressly placed any restrictions upon Dr. Grant in conferring authority upon him to manage and control the property. Even if the evidence warranted the conclusion that restrictions had been placed upon him, there is an entire absence of any showing that they notified appellee of the restrictions. The execution of the rental contract for a term of five years was clearly within the apparent, if not the actual, scope of Dr. Grant's authority, and appellants, who were the real owners of the land, are bound by the rental contract. *Forrester-Duncan Land Co. v. Evatt*, 90 Ark. 301, 119 S. W. 282; *Brown v. Brown*, 96 Ark. 456, 132 S. W. 220; *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S. W. 130; *Three States Lumber Co. v. Moore*, 132 Ark. 371, 201 S. W. 508; *Crossett Lumber Co. v. Fowler*, 208 S. W. 788.

[2] Appellant insists that the contract of rental made by R. L. Grant with J. B. Burrows was void because R. L. Grant had no written authority from the other appellants to lease the land. In support of appellants' contention our attention is called to section 3664 of Kirby's Digest. This court has held in several cases that authority may be conferred by parol to sell real estate for another. *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063; *Kempner v. Gans*, 87 Ark. 221, 111 S. W. 1123, 112 S. W. 1087; *Davis v. Span*, 92 Ark. 213, 122 S. W. 495; *Vaught v. Paddock*, 98 Ark. 10, 135 S. W. 331. The court, however, has not passed upon the question whether authority to lease real estate for another for a longer period than one year can be conferred in parol, and it is unnecessary to determine that question in the instant case, because, if the statute were applicable, the undisputed proof establishes the fact that appellee complied with the terms of the contract to the extent of paying the county, state, and a large part of the levee improvement taxes, and placing improvements to the value of about \$6,500 up-

on the property, which greatly enhanced its value. It has been held that such a partial performance of a rental contract by the tenant takes it out of the operation of the statute of frauds. *Phillips v. Grubbs*, 112 Ark. 582, 167 S. W. 101; *Storthez v. Watts*, 117 Ark. 500, 175 S. W. 406.

[3-7] Appellee, cross-appellant, earnestly insists that the court erred in refusing to decree a specific performance of his option to purchase said lands, and asks for a reversal of that part of the chancellor's decree. There is an entire lack of evidence showing any general authority conferred on Dr. Grant by the other appellants to sell the California plantation. It is true that authority was conferred upon Dr. Grant to represent the other appellants in the organization and construction of a levee built across the property, in the matter of granting a right of way and agreeing to and receiving the damages therefor. This authority had reference to a single transaction, however, and general authority to sell the plantation is not properly inferable from such a special agency. It is also true that the other appellants confirmed and acquiesced in a contract of sale made by Dr. Grant to Mrs. Black of 200 acres off of the tract in question known as the "Kitchen Bend," but the mere fact that they approved this sale does not warrant the conclusion that they had made him their general agent to sell the land without consulting them; nor can the inference be drawn that, because he had general control and management of the property for rental purposes, he likewise had authority to execute an option contract for the sale and purchase thereof at some future date. This court has said that general authority cannot be inferred from authority given to perform a particular act, and that a person dealing with a special agent whose authority is confined to a single transaction or a particular act must ascertain the extent of his authority and contract accordingly before it will be binding upon the principal. *Liddell v. Sahline*, 55 Ark. 627, 17 S. W. 705; *Mutual Life Ins. Co. v. Reynolds*, 81 Ark. 202, 98 S. W. 963; *Jonesboro, Lake City & East. R. Co. v. McClelland*, 104 Ark. 150, 148 S. W. 523; *Three States Lumber Co. v. Moore*, 132 Ark. 371, 201 S. W. 508.

No error appearing, the decree is in all things affirmed.

HART, J. (dissenting). In this state by statute parol leases for a longer term than

one year are invalid. Section 8664 of Kirby's Digest reads as follows:

"All leases, estates, interest of freeholds, or lease of years, or any uncertain interest of, in, to or out of any messuages, lands or tenements, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year."

This section of the statute of frauds expressly declares that all verbal contracts relating to the title to, or any interest in, lands for more than one year, shall be inoperative. It requires all such contracts to be in writing, signed by the owner, or, if by an agent, he must be authorized in writing, signed by the owner, and the contract by the agent must be in writing, and signed by him.

In the case at bar the contract was for five years, and was in writing signed by the agent of the parties. No authority in writing was conferred upon the agent to make such a contract. The undisputed evidence shows that he had no such authority. It is unnecessary to express an opinion on this statute for the reason that I believe that the doctrine of part performance only applies to such contracts to lease or to renew leases as fall within the statute of frauds.

I do not think that the improvements made refer to and result from the agreement entirely as stated in the majority opinion. The greater part of the houses and some of the other improvements were built by him, not under his contract of lease, but under the belief that he was going to have the option to purchase the land. It is true the improvements which were made under the contract of lease were permanent in their nature and something more than required by ordinary husbandry, but they did not amount during the two years to more than the rental value of the land. Burrows had been renting the land on a lease contract from year to year. The improvements made by him under the lease contract with Dr. Grant were not of such a character and value as to be clearly inconsistent with a continuation of the old relation.

Therefore his continued possession should be referred to his original tenancy, and should not be considered an act of part performance of his contract for a new lease on the land.

GIBSON v. HEMPSTEAD COUNTY.  
(No. 223.)

(Supreme Court of Arkansas. May 19, 1919.)

DRAINS ~~60~~—DRAINAGE DISTRICT—COST OF  
PRELIMINARY SURVEY—LIABILITY OF COUN-  
TY—STATUTE.

Under Acts 1911, p. 193, § 1, there is no liability against a county for the expenses of the preliminary survey where a projected drainage district has not been formed; the petitioners for the district being liable on their bond for the cost of the survey where the district is not created.

Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

Claim by Giles H. Gibson against Hempstead County. From judgment for the County, claimant appeals. Affirmed.

U. A. Gentry, of Hope, for appellant.

Steve Carrigan, of Hope, and Bitter & Monroe, of Washington, Ark., for appellee.

WOOD, J. A petition and bond required by the statute were filed with the county court of Hempstead county, for the proposed creation of a drainage district in Hempstead county, Ark.

Giles H. Gibson was duly appointed under the statute as engineer to make a preliminary survey of the territory intended to be embraced in the district. He made the survey and filed a report with the county court, which was approved in all things by the court, but the court on final hearing of the petition for creation of the district refused to grant the same and dismissed the petition. Afterwards Gibson filed his claim in the county court in the sum of \$500 for services as engineer in the preliminary survey.

The county court refused to allow the claim, and on appeal to the circuit court judgment was entered in favor of the county, from which is this appeal.

Section 1 of Act 221 of the Acts of 1911, among other things, provides that:

"When three or more owners of real property within a proposed district shall petition the county court to establish a drainage district to embrace their property, \* \* \* and file a good bond to pay for the expenses of survey of the proposed district, in case the district is not formed, it shall be the duty of the county court to enter upon its records an order appointing an engineer to be selected by the petitioners; provided, the engineer whom they select is a suitable person, and if not naming an engineer satisfactory to the court, who shall give bond," etc. "All expenses incident to the survey and the cost of publication shall be paid by the county, as the work progresses upon proper showing; but all expenses incurred by the county shall be repaid out of the proceeds of the first assessment levied under this act."

The petitioners filed a bond to the state of Arkansas for the use and benefit of Hemp-

stead county, for the expenses that might be incurred incident to the expense of the preliminary survey of a proposed improvement, and conditioned that, should the district be formed, the obligation was to be null and void; otherwise to remain in full force and effect.

The language of the statute shows clearly that it was not the intention of the Legislature to make the counties liable for the costs of the preliminary survey of proposed drainage districts where the drainage district is not formed. The statute expressly provides that the petitioners shall "file a good bond to pay for the expenses of the survey of the proposed district in case the district is not formed."

It is unnecessary to set forth the whole statute, but an examination of it will discover that there is nothing in it to warrant the conclusion that it was the intention of the Legislature to make the county liable for the expenses of a preliminary survey, where the district has not been formed.

The language, to wit, "All expense incident to the survey and the cost of publication shall be paid by the county as the work progresses upon proper showing," makes it the duty of the county court upon a proper showing to pay for the work incident to the preliminary survey while the work of such preliminary survey is in progress. But this language was not intended to create a liability against the county for the expense of such preliminary survey where the district was not formed.

On the contrary, the language, "but all expenses incurred by the county shall be repaid out of the proceeds of the first assessment levied under this act," shows clearly that the Legislature contemplated that the county was not to be liable for the expense of the preliminary survey where the district was not formed.

While there is some ambiguity in the language of the section, taking it as a whole, we reach the conclusion that there is no liability against the county for the expenses of a preliminary survey where the district has not been formed. The language of the act shows that it was the purpose of the Legislature to make the petitioners for the district liable on their bond for the cost of the preliminary survey where the district was not created. The statute expressly provides for a bond to that effect. See *Burton v. Chicago Mill & Lumber Co.*, 106 Ark. 296-306, 153 S. W. 114.

Having reached the conclusion, under the undisputed facts, that the statute does not create any liability against the county, the question is not before us as to whether or not the statute would be valid if it did create such liability. Nor is the question before us as to whether the county is liable where the district has been created.

There was no error in the ruling of the court, and its judgment is therefore affirmed.

## STATE v. BARNES.

(Supreme Court of Tennessee. May 20, 1919.)

## 1. PARENT AND CHILD §17(1)—FAILURE TO PROVIDE FOR CHILD—OFFENSES.

Where a father failed to provide for his infant child under 16 according to his means, but suffered the child to sicken and die without medical attention, he cannot be punished under Acts 1915, c. 120, making it a misdemeanor for a father to willfully fail to provide for his child under 16, but providing that, upon complaint, the father shall be required to execute a bond to secure the child's support, etc., and in event of his failure to comply with the undertaking he may be imprisoned for misdemeanor, as a delinquent parent cannot be imprisoned as an original proposition under the statute, but only for repudiation or breach of the undertaking required by the statute.

## 2. PARENT AND CHILD §3(1)—DUTY OF PARENT.

It is the legal duty of a father to provide proper care, treatment, and medical attention for his infant child.

## 3. HOMICIDE §2—BREACH OF DUTY.

If one owes to another a plain particular and personal duty imposed by law or contract, an omission resulting in the death of the party to whom such duty was owing usually renders the delinquent party guilty of homicide; so, where an infant child died by reason of her father's failure to provide proper medical attention, the father is guilty of homicide.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Homicide.]

## 4. HOMICIDE §75—FAILURE TO PROVIDE FOR CHILD—GRADE OF OFFENSE.

As to whether a father, who suffered his child to die for want of proper medical attention, is guilty of murder or manslaughter, depends upon the circumstances; it being probable that, if the neglect was not malicious or willful, he would be guilty only of manslaughter.

Appeal from Circuit Court, Obion County; Joseph E. Jones, Judge.

S. K. Barnes was indicted for unlawfully, willfully, and without good cause failing to provide for his minor child under the age of 16 years, by suffering the child to sicken and die without proper care and medical attention. The indictment having been quashed, the State appeals. Reversed and remanded for further proceedings.

The Attorney General, for the State.  
E. J. Green, of Obion, for appellee.

GREEN, J. From action of the trial court quashing an indictment in this case the state appeals. The indictment is as follows:

"S. K. Barnes, \* \* \* on the — day of August, A. D. 1917, being the father of and legally chargeable with the care of Bessie May Barnes, an infant child under the age of 16 years, in the county of Obion aforesaid, then and there unlawfully, willfully, and without good cause neglected and failed to provide for said Bessie Barnes, according to his means, by suffering said child to sicken and die without proper care, treatment, and medical attention."

The motion to quash was based on three grounds: First, that the indictment charged no violation of any law or statute; second, that chapter 120 of the Acts of 1915, upon which the indictment was thought to have rested, did not apply to the facts stated; and, third, because it appeared from the indictment that the child was dead.

[1] The state insists that the indictment can properly be sustained by chapter 120 of the Acts of 1915, even though the neglected child died before the indictment was found.

Chapter 120 of the Acts of 1915 makes it a misdemeanor for a father to willfully fail to provide for his child under 16 years of age according to his means, or to leave it destitute or in danger of becoming a public charge. The penalty prescribed by this statute is that the father shall be required to execute a bond or undertaking to secure the child's support, and in case he fails to do so, or to comply with the conditions of said undertaking, then the father may be imprisoned as for a misdemeanor.

Manifestly the father cannot be required to enter into an obligation for the support of a child who has died. The delinquent father cannot be imprisoned as an original proposition under this statute. He can only be imprisoned for a repudiation or breach of the undertaking to support, imposed as the primary penalty of the statute. So we are of opinion that the father here cannot be reached under the act of 1915, the child being dead, and the trial judge correctly so held.

It does not follow, however, that this indictment should have been quashed. We think it does charge a violation of law.

[2] It is the legal duty of the father to provide "proper care, treatment, and medical attention" for his child. *Wallace v. Cox*, 136 Tenn. 69, 188 S. W. 611, L. R. A. 1917B, 690. If by reason of his breach of this duty the death of this child resulted, we think the father may be guilty of homicide.

[3] If one owes to another a plain particular and personal duty, imposed either by law or by contract, an omission, resulting in the death of the party to whom such duty was owing, usually renders the delinquent party guilty of a homicide. This proposition is very well established by authority. *Westrup v. Commonwealth*, 123 Ky. 95, 93 S. W. 646, 6 L. R. A. (N. S.) 685, 124 Am. St. Rep.



316; *People v. Beardsley*, 150 Mich. 206, 113 N. W. 1128, 13 L. R. A. (N. S.) 1020, 121 Am. St. Rep. 617, 13 Ann. Cas. 39; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387; *Anderson v. State*, 27 Tex. App. 177, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189.

This principle has been applied in cases of the neglect of the duty of a parent to care for his child, and to provide medical attention. *Gibson v. Commonwealth*, 106 Ky. 360, 50 S. W. 532, 90 Am. St. Rep. 230; *Regina v. Senior* [1899] 1 Q. B. 283.

In the latter case Lord Russell said:

"Neglect is the want of reasonable care; that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind; that is, in such a case as at the present, provided the parent had such means as would enable him to take the necessary steps. \* \* \* At the present day, when medical aid is within the reach of the humblest and the poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect." *Regina v. Senior*, *supra*.

[4] As to whether a parent so neglecting his child is guilty of murder or manslaughter would depend on the circumstances. If the neglect be willful or malicious, it is probably a case of murder. If the omission is not malicious, and is a mere case of negligence, the parent is perhaps guilty of manslaughter only. *Rex v. Hughes*, 3 Jur. N. S. 996; *Lewis v. State*, 72 Ga. 164, 53 Am. Rep. 835; *State v. Smith*, 65 Me. 257; *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6.

The questions above discussed are elaborated in note under *Westrup v. Commonwealth*, *supra*, as that case is reported in 124 Am. St. Rep. 816.

It results that the judgment of the trial court will be reversed, and this case remanded for further proceedings.

#### STATE ex rel. THOMASON, Comptroller, v. SHEPHERD'S ESTATE.

(Supreme Court of Tennessee. May 27, 1919.)

#### TAXATION—§862—COLLATERAL INHERITANCE TAX—SHARES OF BROTHERS AND SISTERS—STATUTES.

Although Acts 1893, c. 174, § 1, providing for collateral inheritance tax, was not enforceable for a time against property passing to an intestate's brother or sister in view of the revenue law, Acts 1893, c. 89, § 7, passed subsequently, which was held to repeal it by implication to the extent of its repugnance and the subsequent revenue acts, Acts 1895 (2d Sess.) c. 4, Acts 1897, c. 2, Acts 1899, c. 432, § 1,

Acts 1901, c. 128, Acts 1903, c. 287, Acts 1907, c. 541, Acts 1909, c. 479, Acts 1915, c. 101, and Acts 1917, c. 70, amending Acts 1915, c. 101, and the language, "and acts amendatory thereof," in Acts 1901, c. 128, which refers to live amendatory acts only, does not have the effect of reinstating Acts 1893, c. 89, § 7, and shares of brothers and sisters are now subject to collateral inheritance tax.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Bill by the State, on the relation of John B. Thomason, Comptroller, against the estate of Robert H. Shepherd, deceased, and John S. Webb, administrator, to collect collateral inheritance tax, in which Mary A. Sneed, sister of deceased, as sole heir and distributee, was made a party. Decree of county court for complainant, and defendants appealed to the circuit court, which reversed the decree and dismissed the bill, and complainant appeals. Decree entered, reversing decree of circuit court and affirming the decree of county court.

Thomas B. Caldwell, of Nashville, and Gilmer P. Smith, of Memphis, for appellant.

Barton & Barton and W. H. Borsje, both of Memphis, for appellee.

HALL, J. The question involved in this case is whether, during the year 1915, property passing by intestacy or devise to brothers and sisters in estates of the value of \$250 or more was subject to the payment of a collateral inheritance tax under the laws of this state.

Robert H. Shepherd died intestate on or about May 7, 1915, a citizen of Shelby county, Tenn., an unmarried man without issue. His only heir and distributee was Mary A. Sneed, his sister. The defendant, John S. Webb, was duly appointed and qualified as administrator of his estate. The estate consists of property valued at \$23,278. The present action was brought in the county court of Shelby county, Tenn., by the state upon the relation of John B. Thomason, its comptroller, seeking to collect a collateral inheritance tax alleged to be due under chapter 174, Acts 1893. The bill was filed on January 10, 1917.

At the July term of said county court, 1917, Mary A. Sneed, the sole heir and distributee of the said Robert H. Shepherd, deceased, was made a party defendant to said bill by leave of the court. Thereafter said defendants filed a demurrer to the bill, setting up the defense that the bill presented no ground for the collection of said tax, it appearing from its allegations that Mary A. Sneed, the sole heir and distributee of Robert H. Shepherd, deceased, was his sister; and, therefore, under the laws of this state, the property de-

scending to her from her deceased brother is not liable for a collateral inheritance tax.

The county judge overruled this demurrer, and a decree was entered at the May term of the court, 1918, in favor of the complainant for a collateral inheritance tax of 5 per cent. of the clear value of said estate, and from this decree the defendants prayed, were granted, and perfected their appeal to the circuit court of the county.

Upon the hearing in the circuit court a decree was rendered, reversing the decree of the county court and sustaining the demurrer of the defendants, and the complainant's bill was dismissed with costs. From this decree an appeal was prayed, granted, and perfected to this court, and the action of the circuit judge in dismissing the bill is assigned for error.

By section 1, c. 174, Acts 1893, it is provided that all estates—real, personal and mixed—of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of the state, passing from any person who may die seized or possessed of such estates either by will or under the intestate laws of this state, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain, gift, or sale, made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons or to bodies corporate or politic, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed thereof, shall be, and are made subject to a duty or tax of \$5 on every \$100 of the clear value of such estate or estates so passing, and at the same rate for any less amount, to be paid to the use of the state; and all owners of such estates and all executors and administrators and their sureties shall only be discharged from liability for the amount of such taxes or duties the settlement of which they may be charged with, by having paid the same over for the use of the state as thereafter directed; but no estate which may be valued at a less sum than \$250 shall be subject to said duty or tax. Said section further provides that the term "children" shall not be construed to apply to adopted children.

On the same day, but at a later hour in the day, the Legislature passed a general revenue law for the state, imposing privilege taxes, being chapter 89 of the acts of that session; and in section 7 of that act a collateral inheritance tax was imposed, but this section expressly excepted from the tax imposed estates passing to brothers and sisters by devise or intestacy. Such estates were not, however, excepted by the provisions of chapter 174, Acts 1893, which is the general

collateral inheritance tax law in force in this state.

This court held in the case of *Bailey v. Drane*, 96 Tenn. 16, 33 S. W. 573, that in this respect the two acts of the Legislature of 1893 were inconsistent, and that the general revenue law having been passed at a later hour in the day than the general collateral inheritance tax statute, the exception in the general revenue act should prevail; and that therefore construing the two acts together, the collateral inheritance tax could not be imposed upon estates passing to brothers and sisters. In that case the court said:

"The two acts are repugnant and irreconcilably conflicting upon this particular point, and, being so, the latter one repeals the former, by implication, to the extent of that repugnance and conflict."

The next general revenue act passed by the Legislature was in 1895. Acts 1895 (2d Sess.) c. 4. In that act no mention was made of a collateral inheritance tax. The same is true of the general revenue act passed by the Legislature in 1897. Acts 1897, c. 2. The general revenue act passed in 1899 (Acts 1899, c. 432), in section 1, declares "that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the Acts of 1893." Since that time general revenue acts have been passed by the Legislature as follows: Chapter 123, Acts 1901; chapter 257, Acts 1903; chapter 541, Acts 1907; chapter 479, Acts 1909; chapter 101, Acts 1915; and chapter 70, Acts 1917, the latter amending chapter 101, Acts 1915. In all of these acts it is provided "that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the Acts of 1893, and acts amendatory thereof."

In the case of *Zickler v. Union Bank & Trust Co.*, 104 Tenn. 277, 57 S. W. 341, this court held that the General Revenue Act of 1895, dealing generally with the subject of privilege taxation, took the place of the General Revenue Act of 1893, and repealed or suspended the latter act by implication, whereupon chapter 174, Acts 1893, subjecting to inheritance tax the estates of brothers and sisters descending by devise or the intestacy of the decedent, was again revived and became operative, and that the shares of brothers and sisters so descending were liable for the inheritance tax provided for in said act.

It is insisted by complainant that all of the provisions of chapter 174, Acts 1893, are now in full force and effect, and that the shares of brothers and sisters are liable for the collateral inheritance tax imposed by said act; while it is contended by the defendants that the language, "and Acts amendatory thereof," appearing in chapter 128, Acts 1901, and the subsequent acts referred to, had the effect of reviving and reenacting sec-

tion 7 of the General Revenue Act of 1893; or, stated differently by counsel for defendants in their brief, that said language amended chapter 174, Acts 1893, so as to except brothers and sisters from the provisions of said act, and that their shares in estates devised by or descending from a deceased brother or sister are no longer liable for such tax.

We are of the opinion that this contention is not well grounded. We do not think that the language, "and Acts amendatory thereof," appearing in the acts referred to, had the effect of amending chapter 174, Acts 1893, and we know of no theory upon which said language could have such an effect. Said language did not purport to amend chapter 174, Acts 1893. We think the language, "and Acts amendatory thereof," had reference to such live amendatory acts as might then be in existence, and cannot be construed as relating to the General Revenue Act of 1893, which was repealed or suspended, by implication, by the General Revenue Act of 1895. Since the repeal or suspension of chapter 89, Acts 1893, no act has been passed by the Legislature amending chapter 174, Acts 1893, so as to except the shares of brothers and sisters from its provisions.

It is said in the brief of counsel for defendants that the question involved in the suit

at bar was decided in accordance with the contention of defendants by this court in the case of Tate et al. v. Greenlee, reported in 141 Tenn. —, 207 S. W. 716. This statement is erroneous. The question of whether the shares of brothers and sisters descending from a deceased brother or sister by inheritance or devise was not involved in that case. It is true that the provisions of chapter 89, Acts 1893, were referred to in the opinion in that case, but the court did not pass on the question of whether the shares of brothers and sisters were liable for the tax under chapter 174, Acts 1893, and it was not necessary for it to do so. The question there being whether shares, which it was alleged had been assigned to Tate and Greenlee by the nephews and niece of the decedent prior to his death, were liable for the collateral inheritance tax.

It results that we are of the opinion that the estate of Robert H. Shepherd, deceased, which descended to his sister, Mrs. Mary A. Sneed, under the laws of descent and distribution, is liable for the inheritance sued for; and a decree will be entered in this court, reversing the decree of the circuit court and affirming the decree of the county court allowing a recovery for said tax, costs, and attorney's fees.

## ROSEN et al. v. GALIZIO.

(Court of Appeals of Kentucky. May 23, 1919.)

JUDGMENT  $\S$  143(10) — DEFAULT — SETTING ASIDE—MISTAKE OF COUNSEL.

Where counsel's neglect was induced by his misunderstanding his client's statement that he "settled that case," meaning another case, the court abused its discretion under Civ. Code Prac.  $\S$  340, in refusing to set aside the default.

Appeal from Circuit Court, Campbell County.

Action by Lorenzo Galizio against Abe Rosen and others. Judgment for plaintiff, and the defendants move for an appeal. Motion sustained, and judgment reversed.

Wm. F. Clark and Frank Spitzlberger, both of Newport, for appellants.

Oscar Forster, of Newport, for appellee.

QUIN, J. We will designate the parties to this appeal as they appear in the court below; appellant being the defendant. In his petition filed March 28, 1918, plaintiff alleged he was the owner of a certain automobile valued at \$250, and which was detained by the defendant, and he asked judgment for the possession of the automobile, or its value, and \$200 damages. Both summons and order of delivery were duly served upon defendant.

On April 20th a motion was made by plaintiff to take the petition for confessed. A week later this motion was sustained. May 11th a motion by defendant to set aside the order sustaining the above motion and for leave to plead was overruled. May 16th defendant moved the court to reconsider its ruling on this motion, and, this motion having been overruled, a trial was had and a verdict rendered in plaintiff's favor in the sum of \$250.

Motion and grounds for new trial having been filed and overruled, defendant has made a motion for an appeal. Abuse of discretion on the part of the lower court in refusing to set aside the judgment is the chief ground upon which a reversal is sought.

When defendant on May 16th renewed his motion, he filed in support thereof his own affidavit and that of Frank Spitzlberger, an attorney, from which affidavits it appears that defendant employed said attorney some time in March to represent him in this action. At this time the defendant was the defendant in another suit in which, however, he did not employ the said Spitzlberger. Defendant met his attorney some time during the month of April, and said to him, "I settled that case Frank," by which he meant to say he had settled the case in which the said attorney had not been employed, but said Spitzlberger

misunderstood him, and thought he referred to the case in which he had been employed. He paid no further attention to it until he discovered a default judgment had been entered. With the motion appellant tendered an answer duly verified, in which he set up a defense to the action. Both the affidavits and answer were tendered before trial. We think under the facts stated the court should have permitted the answer to have been filed.

In Clifford v. Gruelle, 32 S. W. 937, 17 Ky. Law Rep. 842, a reversal was ordered in a case where an attorney had been employed to make defense to a suit, and the attorney, on examining the docket, failed to find any suit against his client, as it was docketed under a different name, there being several parties to the suit, hence he overlooked the matter, and judgment was entered by default.

In Dixon v. Lyne, etc., 10 S. W. 469, 10 Ky. Law Rep. 769, it was held that the lower court did not abuse its discretion in setting aside a judgment as to one of the defendants because of a misunderstanding between said defendant's husband and an attorney, the husband being under the impression he had employed the attorney to represent his wife, but the attorney did not understand that he was to make a separate defense for her.

Columbia Fin. & Trust Co. v. Bates, 74 S. W. 248, 24 Ky. Law Rep. 2412, involves a similar question. Here the appellant had intended bidding on property to be sold at a judicial sale, but, having received an impression from its counsel that the sale would be postponed, it was not represented at the sale. The property sold at an inadequate price, and the court held, under the circumstances, it was the duty of the chancellor to order a resale.

Where a defense is not interposed and a judgment is consequently suffered through a genuine misunderstanding between the party and his counsel the judgment may be set aside. 23 Cyc. 942. See, also, Bovey-Shute Lumber Co. v. Lakefield, 28 N. D. 113, 147 N. W. 720; Panesi v. Boswell, etc., 12 Helsk. (Tenn.) 323.

It is manifest from the facts stated in the affidavits that there was such a misunderstanding between defendant and his attorney as prevented defendant from making his defense to the action, and as soon as he discovered the mistake he promptly took steps to set aside the default judgment, tendering with his affidavits an answer, this before the trial, and the refusal to set aside the judgment and permit the answer to be filed was such an abuse of discretion on the part of the lower court as entitled defendant to a new trial. Civil Code,  $\S$  340.

Courts are created for the purpose of administering right and justice, and through a

misunderstanding and under facts such as are shown by this record, a judgment having been entered affecting materially his substantial rights, a litigant can hardly be said to have had his day in court. He should be accorded the opportunity of presenting his defense.

Wherefore the motion for an appeal is sustained, and the judgment reversed, with directions to permit the answer to be filed and for further proceedings consistent with this opinion.

### CUMBERLAND R. CO. v. GIRDNER.

(Court of Appeals of Kentucky. May 23, 1919.)

#### 1. APPEAL AND ERROR ⇨1006(4) — VERDICT AGAINST WEIGHT OF EVIDENCE — THIRD TRIAL.

Under Civ. Code Prac. § 341, where there have been three verdicts for the same party, the court will not disturb the third one upon the ground that it is flagrantly against the weight of the evidence and not sustained thereby, where the same complaint was made against the first two verdicts and urged as grounds for setting them aside; and this, although the first two judgments were reversed or set aside for errors of law.

#### 2. EVIDENCE ⇨598(1)—WEIGHT—NUMBER OF WITNESSES.

In personal injury action, where three witnesses testified to plaintiff's theory and four to that of plaintiff, it cannot be said that a verdict adopting the testimony of the three witnesses for plaintiff, rather than the facts testified to by defendant's four witnesses, is flagrantly against the evidence, or that the verdict is not sustained by it.

#### 3. APPEAL AND ERROR ⇨263(1)—OBJECTIONS TO INSTRUCTIONS.

Where no exceptions were taken to any of the instructions given by the court on its own motion, nor did defendant offer any instruction, defendant cannot complain of the action of the court in instructing the jury.

#### 4. APPEAL AND ERROR ⇨1099(7) — LAW OF CASE.

In personal injury case, the sufficiency of plaintiff's proof that he was exercising due care, and that defendant's negligence was the sole and proximate cause of his injuries, having been involved, presented, and argued on prior appeal, upon substantially the same evidence, such questions cannot be considered on subsequent appeal.

#### 5. APPEAL AND ERROR ⇨1096(3) — LAW OF CASE.

The rule as to opinion on prior appeal being the law of the case not only precludes considering on subsequent appeal errors relied upon on prior appeal, and mentioned in the opinion thereon, but also considering errors relied upon on the prior appeal and not noticed in the prior opinion, as well as errors appearing in the rec-

ord and which might have been but were not relied on.

#### 6. DAMAGES ⇨96—PERSONAL INJURIES—DISCRETION.

The amount of damages to be awarded for personal injuries is necessarily left largely to the sound discretion of the jury.

#### 7. DAMAGES ⇨98 — PERSONAL INJURIES — YOUTH.

That plaintiff in personal injury case who has suffered a permanent injury is a mere youth will not be allowed as an element to reduce his damages, but would tend to increase rather than diminish them.

#### 8. DAMAGES ⇨132(9) — LOSS OF LEG — AMOUNT.

Verdict of \$9,500 for loss of leg, it being amputated between knee and hip, held not excessive.

#### 9. NEW TRIAL ⇨77(2)—EXCESSIVE VERDICT.

In personal injury case, it is only when verdict for plaintiff is excessive to an extent as to cause the mind at first blush to conclude it was returned under the influence of passion or prejudice on the part of the jury that the court is authorized to set it aside for that reason.

Appeal from Circuit Court, Knox County.

Action by John Frank Girdner, by, etc., against the Cumberland Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Black & Owens, of Barbourville, for appellant.

Sawyer A. Smith, of Barbourville, for appellee.

THOMAS, J. This is the second appeal of this case, the first opinion being reported in 174 Ky. 761, 192 S. W. 873, where the facts, out of which the litigation grew, as well as the contentions of the respective parties, are clearly and fully stated. Upon the trial then under review there was a verdict followed by a judgment in favor of plaintiff for the sum of \$2,000, which was reversed upon the grounds: (a) That the court overruled defendant's motion to exclude from the jury all of the testimony given by the plaintiff, John Frank Girdner, who, at the time he testified on that trial, was about nine years of age (being eight years old when he sustained the injuries for which he sues), because he declined to answer questions propounded to him upon cross-examination; (b) that the court failed to properly instruct the jury, in that the defendant's theory of the case was not submitted under a concrete instruction which the court held under the peculiar facts of the case it was entitled to; and (c) that the verdict was flagrantly against the evidence. After the return of the case there was a second trial had, in which the plaintiff cured ground (a) for the

reversal by properly answering all questions propounded to him by defendant's attorneys, and the concrete instruction which the court directed under ground (b) was given to the jury. The evidence was substantially the same, and the jury returned a verdict in favor of plaintiff for the sum of \$8,000. Upon that trial defendant filed motion and reasons for a new trial embodying the same complaints as it did in its motion filed in the first trial, and the trial court sustained the motion, saying:

"Although this court does not find that the verdict is against the weight of the evidence, yet the law as laid down in the former appeal is the law of the case, and being of the opinion that the evidence is not substantially different from the first case, and that law governing this court, the motion for a new trial of the defendant is hereby sustained, and the defendant is hereby granted a new trial, on the ground above indicated and that only, to which the plaintiff objects and excepts."

A third trial was had in which the evidence in behalf of plaintiff's theory of the case was in some respects strengthened over that heard upon the first trial when the case was here on the first appeal, and upon the last trial there was a verdict in favor of plaintiff for the sum of \$9,500, upon which judgment was rendered, and, defendant's motion for a new trial having been overruled, it prosecutes this appeal, urging in its motion many grounds for a reversal, but insisting in this court that—

"(1) Appellee failed to prove he was in the exercise of ordinary care at the time of the injury. (2) Appellee's negligence was the sole, direct, and proximate cause of his injury. (3) The damages are excessive and were given under the influence of passion and prejudice on the part of the jury."

Notwithstanding the above classification of the errors complained of, at the beginning of appellant's brief its counsel discusses other supposed grounds, among which is the contention that the verdict is flagrantly against the evidence, and we had perhaps as well dispose of it at the beginning.

[1] The two new trials heretofore obtained by defendant—the first of which was granted by this court on the first appeal and the second by the court below—were granted because the verdicts were not sustained by and were flagrantly against the evidence. Section 341 of the Civil Code, in part, says:

"Nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence."

In applying that provision of the Code, this court has uniformly held in a long line of cases that, where there have been three verdicts for the same party, the court will not disturb the third one upon the ground that it is flagrantly against the weight of the evi-

dence and not sustained thereby, where the same complaint was made against the first two verdicts and urged as grounds for setting them aside; and this, although the first two judgments were reversed or set aside for errors of law. *L. & N. R. Co. v. Graves' Assignee*, 78 Ky. 74; *L. & N. R. Co. v. Adams*, 10 S. W. 425, 10 Ky. Law Rep. 718; *L. & N. R. Co. v. Ballard*, 88 Ky. 159, 10 S. W. 429, 10 Ky. Law Rep. 735, 2 L. R. A. 694; *City of Bardstown v. Nelson Co.*, 121 Ky. 737, 90 S. W. 246, 28 Ky. Law Rep. 710; *Cincinnati R. Co. v. Halcomb*, 105 S. W. 968, 32 Ky. Law Rep. 381; *Champion Ice Co. v. Delsignore*, 105 S. W. 1181, 32 Ky. Law Rep. 427; *Mobile R. Co. v. Morrow's Adm'r*, 112 S. W. 639; *L. & N. R. Co. v. Daniel*, 131 Ky. 689, 115 S. W. 804, 1198, 119 S. W. 229; *Wall's Ex'r v. Dimmitt*, 141 Ky. 715, 133 S. W. 768.

[2] Many other cases from this court, determined both before and since the cases cited above, hold to the same construction of the section of the Code, supra, and the rule of practice forbidding the granting of more than two new trials upon this ground is now firmly fixed in this jurisdiction. So that, were we of the opinion that the verdict now under review was flagrantly against the evidence and not sustained thereby, we would be bound by this well-established rule of practice and could not reverse the case for that reason on this, the third, trial. But we are not disposed to hold that the verdict upon the last trial is subject to the criticism made. Three witnesses testified to the accident occurring in the manner which plaintiff contends it did: i. e., that he was walking on the ends of the ties of the railroad track, at a place where it is conceded in this record he had the right to be, and that the train backed on him without giving signals or any warning of its approach; that upon being struck by the rear of the tender, which was in front of the train as then made up, he was knocked or pushed down upon his face on the ends of the ties, and in scuffling to relieve himself of the peril he finally got his right leg over the rail when the rear trucks of the last car ran over it, resulting in its being amputated between the knee and the hip. Four witnesses testified to facts contradicting the statements of plaintiff as to how the accident happened. They say the train passed plaintiff while he was off of the track and at a safe place, that it did not strike him or knock him down, and two of them testified to facts which would indicate that he was trying to board the train in order to ride a short distance up to the depot; but neither of the two states that plaintiff was grabbing at the train or any portion of it as though he were endeavoring to board it. Upon this crucial issue we have three witnesses testifying to plaintiff's theory and four to that of defendant. We cannot say that a verdict adopting the testimony of the three witnesses for plaintiff, rather than the facts testified to by defendant's four

witnesses, is flagrantly against the evidence, or that the verdict is not sustained by it.

[3] The court on its own motion upon the trial now under review gave to the jury eight instructions, all of which were given upon the first trial except the modification of the eighth instruction directed by the former opinion of this court. No exceptions were taken to any of them, nor did defendant offer any instructions, so that there can be no complaint growing out of the action of the court in instructing the jury. There remains, then, only the three grounds taken from appellant's brief first mentioned above.

[4, 5] As to ground 1, that plaintiff failed to prove that he was in the exercise of ordinary care at the time he sustained his injuries, and ground 2, that appellee's negligence was the sole, direct, and proximate cause of his injuries, it is sufficient to say that each of them was involved, presented, and argued upon the first appeal. They were then, as now, based upon substantially the same evidence, with the possible exception of plaintiff's evidence being stronger upon the last trial than upon the first. Under the thoroughly established rule that the opinion upon the first appeal is the law of the case in subsequent trials, we are not at liberty to consider these two grounds upon this appeal. The rule forbidding our doing so, not only precludes us from considering on a subsequent appeal errors which were relied upon on the first appeal, and which were mentioned in the first opinion, because such errors are *res adjudicata*, but we are also precluded by the rule from considering errors relied upon and not noticed in the first opinion, as well as errors appearing in the record and which might have been but were not relied on. *McNeill v. Thompson*, 84 S. W. 1145, 27 Ky. Law Rep. 289; *United States Fidelity & Guaranty Co. v. Blackley*, 85 S. W. 196, 27 Ky. Law Rep. 392; *C. & O. R. R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859; *Dupoyster v. Ft. Jefferson Improvement Co.*, 121 Ky. 518, 89 S. W. 509, 28 Ky. Law Rep. 504; *Springfield v. Louisville Railway Co.*, 130 Ky. 468, 113 S. W. 513; *Illinois Life Ins. Co. v. Wortham*, 119 S. W. 802; *Stewart's Adm'r v. L. & N. R. R. Co.*, 136 Ky. 717, 125 S. W. 154; *Wall's Ex'r v. Dimmitt*, 141 Ky. 715, 133 S. W. 768; *N. C. & St. L. Ry. Co. v. Henry*, 168 Ky. 455, 182 S. W. 651; *Same v. Banks*, 168 Ky. 581, 182 S. W. 680; *Consolidation Coal Co. v. Moore*, 179 Ky. 293, 200 S. W. 458; and *Consolidation Coal Co. v. Bailey*, 183 Ky. 204, 208 S. W. 762.

[6, 7] This leaves only ground 3, that the verdict is excessive and appears to have been returned under the influence of passion and prejudice on the part of the jury. Under our system of judicial procedure, such questions must necessarily be left largely to the sound discretion of the jury. In the very nature of things there can be no accu-

rate standard of measurement. Many elements enter into the calculation, such as expectancy of life, permanency of the injury, extent of the impairment to earn money, earning capacity of the one injured, and other facts which might throw light upon the question and enable the jury to arrive at an approximately correct sum under all the facts and circumstances. The fact that the plaintiff in this case is a mere youth will not be allowed as an element to reduce his damages. On the contrary, it is a fact which would tend to increase rather than diminish them, since in all probability his journey through life as a permanent cripple and a possible dependent is correspondingly lengthened. This court in a number of cases has sustained verdicts for larger sums where similar injuries were inflicted, and it has sustained as large or larger ones where the injuries were much less severe. In the case of *L. & N. R. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, 10 Ky. Law Rep. 211, a \$10,000 verdict was upheld as not excessive, where the plaintiff lost his leg below the knee. The same sized verdict was upheld in the case of *L. & N. R. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992, 16 Ky. Law Rep. 369, for a similar injury, except that the amputation was above the knee. In the case of *L. & N. R. R. Co. v. Moore*, 83 Ky. 675, a verdict for \$9,000 was sustained for the loss of a foot. A \$10,000 verdict was declared not to be excessive in the case of *South Covington & Cincinnati St. Ry. Co. v. Weber*, 82 S. W. 986, 26 Ky. Law Rep. 922, where the plaintiff, a child, lost its hand. A verdict for the same amount was upheld in the case of *C. & O. R. R. Co. v. Davis*, 119 Ky. 641, 60 S. W. 14, 22 Ky. Law Rep. 1156, where the plaintiff, a boy nine years old, lost his foot. In the case of *C. & N. O. & T. P. Ry. Co. v. Goode*, 169 Ky. 102, 183 S. W. 264, a verdict for \$12,500 was sustained as not being excessive, where the injuries only impaired plaintiff's foot and leg; the court saying:

"The injury sustained by appellee is practically equivalent to the loss of a foot or leg, and we have time and again approved recoveries for substantially a like amount as that awarded him for like injuries."

In the more recent case of *L. & N. R. R. Co. v. Copley*, 177 Ky. 171, 197 S. W. 648, plaintiff recovered a verdict for \$12,000 for the loss of a leg, and it was upheld on appeal; the court saying:

"Verdicts much larger, and for less impairing injuries, will be found in the cases referred to."

The cases to which the court referred are the *Goode Case*, *supra*, *C. & N. O. & T. P. Ry. Co. v. Nolan*, 167 Ky. 11, 179 S. W. 1046, and *East Tennessee Telephone Co. v. Jeffries*, 160 Ky. 483, 169 S. W. 825.

[8, 9] In the light of these authorities,

there can be no serious contention that the verdict of \$9,500 in this case is excessive, or, if so, that it is to such an extent as to cause the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury. It is only such excessiveness that will authorize a court to set aside the verdict for that reason. *C. N. O. & T. P. Ry. v. Goode*, supra; *Louisville Railway Co. v. Bryant*, 142 Ky. 159, 134 S. W. 182; and *Louisville & Atlantic Railroad Co. v. Cox's Adm'r*, 187 Ky. 388, 125 S. W. 1056.

Perceiving no error prejudicial to the substantial rights of the defendant, the judgment is affirmed.

### HORN et al. v. ADAMS et al.

(Court of Appeals of Kentucky. May 27, 1919.)

#### DRAINS §15—CREATION OF DISTRICT WITHIN ESTABLISHED DISTRICT.

In view of Ky. St. § 2380, subsec. 49, a drainage district may be organized within the limits of an established drainage district to meet the peculiar needs of a portion of the district, notwithstanding subsection 30, providing that owners may construct lateral drains from their own lands to main drain; such subsection merely giving owner right to connect lateral drains with main drain and to condemn land for that purpose.

Appeal from Circuit Court, Davless County.

Proceeding by J. B. Horn and others to organize a drainage district and establish and construct a public ditch. Exceptions by E. H. Adams and others filed and sustained and petition dismissed, and petitioners appeal. Reversed and remanded, with directions.

J. R. Hays and R. M. Holland, both of Owensboro, for appellants.

T. F. Birkhead, of Owensboro, for appellees.

CLAY, C. The question on this appeal is whether a drainage district may be organized within the limits of an established drainage district to meet the peculiar needs of a portion of the district.

The question arises in the following way: Prior to the proceeding, the Davless county court, on the petition of a large number of landowners, organized the Panther Creek drainage district for the purpose of straightening, widening, and deepening Panther creek, which is a large stream with two forks, known as North Panther and South

Panther, with the view of furnishing a common outlet for the drainage of about 50,000 acres of land. Panther creek and its two forks have about 30 lateral branches, which are natural water courses. All of the lands lying on these laterals were assessed for the construction of Panther creek and its two forks; but no provision was made for straightening, widening, deepening, or improving any of the laterals. Burnett's fork is a lateral of Panther creek and extends north through a wet and fertile valley for a distance of about seven miles. While the lands of Burnett's fork have been assessed in the Panther Creek drainage district, yet, without the improvement of Burnett's Fork, they will derive little, if any, direct benefit from the improvement of Panther creek. This proceeding was instituted by J. B. Horn and others for the purpose of organizing a drainage district and establishing and constructing a public ditch in and along Burnett's fork. J. H. Allen and others, who own land in the proposed drainage district, filed exceptions in the county court based on the ground that a new drainage district could not be organized in a district already established. The county court refused to permit the exceptions to be filed, and an order was entered establishing the drainage district. On appeal to the circuit court, the exceptions were filed and sustained, and the petition for the ditch dismissed. The petitioners appeal.

It is provided by the drainage act that its provisions shall be liberally construed so as to carry into effect the true intent and meaning thereof, and to promote the leveling, ditching, draining, and reclamation of wet, swampy, or overflowed lands. Kentucky Statutes, § 2380, subsec. 49. The Panther Creek drainage district was organized for the purpose of constructing a main canal to take the place of Panther creek, and drain a very large area of land. While the various tributaries of Panther creek might have been included in the drainage plan, no such steps were taken. The construction of the main canal or ditch in Panther creek was of no substantial benefit to the lands on Burnett's fork, unless they could be connected by proper drains; and, as no such connection was authorized or provided by the proceeding to establish the Panther Creek district, it follows that, unless the Burnett's Fork district may be established within the territory embraced in the Panther Creek district, the landowners on Burnett's fork, unless able to construct their own ditches, are in a decidedly unfortunate predicament. In view of this situation and of the liberal construction directed to be given to the statute, we conclude that the right to establish a drainage district in an existing district should be



upheld, unless forbidden by the statute. One reason assigned for a denial of the right is that the statute provides that the bonds shall be a first and paramount lien upon the lands assessed, and that this could not be the case if other bonds for the main improvement in the district already established had been issued. Whether the bonds issued by the subdistrict would be prior to those issued by the district itself is a question which we shall not undertake to decide in the absence of the parties in interest. Manifestly, the same question would arise if it had been sought to improve not only Panther creek, but Burnett's fork, in the same proceeding, and, as it is admitted that the latter plan might have been pursued, it is clear that the question of priority does not control the method of procedure.

Another contention is that subsection 30, § 2380, Kentucky Statutes, plainly contemplates that the owners themselves shall construct lateral drains from their own lands to the main drain, thereby excluding the idea that further assessments for that purpose may be made. The section in question is as follows:

"The owner of any land that has been assessed for the cost of the construction of any ditch, drain or water course, as herein provided, shall have the right to use the ditch, drain or water course as an outlet for lateral drains from said land; and if said land is separated from the ditch, drain or water course by the land of another or others, and the owner thereof shall be unable to agree with said other or others as to the terms and conditions on which he may enter their lands and construct said drain or ditch, he may file his ancillary petition in such pending proceeding to the court, and have the same condemned in the same manner as now or as may hereafter be provided for the condemnation of right of way by railroads. When the ditch is constructed, it shall become a part of the drainage system and shall be under the control of the board of drainage commissioners and be kept in repair by them as herein provided."

In our opinion, the only purpose of this provision was to give to the owners, whose property had been assessed for the construction of the main ditch, the right to connect therewith, and the further right to condemn land for that purpose, and there is nothing in the provision which expressly, or by necessary implication, forbids the further assessment of particular lands to meet their particular needs. Indeed, the drainage act of North Carolina not only contains a similar provision, but the act, as a whole, is quite similar to ours. In the recent case of *Drainage Commissioners v. East Carolina Home & Farm Association*, 165 N. C. 697, 81 S. E. 947, Ann. Cas. 1915C, 40, the Supreme Court of that state held that the drainage act of that state authorized the formation of

another drainage district within the boundaries of an existing district, for the purpose of benefits to accrue solely to land within the smaller district from its construction of laterals. In the course of its opinion, the court said:

"The formation of the Washington County drainage district, No. 4, covers a part of the territory embraced in the Pungo River drainage district, but in no wise conflicts with the purposes of the latter. The latter was for the purpose common to the entire scope of territory embraced within its limits, which was to construct the Pungo River canal. The Washington County drainage district, No. 4, was formed subsequently, and is for the purpose of benefits to accrue solely to that part of the territory of the Pungo River drainage district which is embraced within Washington County drainage district, for which most of the landowners of the larger district were not willing to issue bonds, since they would derive no benefit from the construction of the lateral canals that are indispensable for the drainage of the Washington County drainage district, No. 4. The assessments for the principal and interest of the drainage bonds issued by the smaller and later formed district are postponed to the payment of the assessments for the principal and interest of the bonds issued by the older and larger district, and it was so understood and agreed between the plaintiffs and defendant.

"There is no conflict between the two districts, and the purposes of the smaller district are ancillary to the larger district. These drainage districts are not municipal corporations, but are quasi public corporations. *Sanderlin v. Luken*, 152 N. C. 788, 68 S. E. 225; *Youngeville v. Webb*, 155 N. C. 379, 71 S. E. 520; *Drainage Com'rs v. Webb*, 160 N. C. 594, 76 S. E. 552. But even if they were, their condition would be roughly similar to that existing between the county and the state or between a township and a county. The analogy is not perfect, but this conveys the idea. A somewhat similar arrangement is seen in the road system of France, where they have national roads maintained by the general government; departmental (or state) roads supported by the departments; and cantonal (or county) roads kept up at the expense of each canton. Each lesser territory thus maintains the roads of special interest to it, in which the larger divisions are not interested."

Other courts have taken the same view of the case. *Sibbett v. Steele*, 240 Mo. 85, 144 S. W. 439; *In re Little River Drainage District*, 236 Mo. 94, 189 S. W. 330; *Lee Wilson & Co. v. Wm. R. Compton Bond & Mortgage Co.*, 108 Ark. 452, 146 S. W. 110. For other cases bearing on the question, see *Mittman v. Farmer*, 162 Iowa, 364, 142 N. W. 991, Ann. Cas. 1915C, 1 and note. It has been further held that a drainage district may likewise include lands forming a part of another district. *Bird v. Harrison County*, 154 Iowa, 692, 135 N. W. 581; *State v. Fuller*, 83 Neb. 784, 120 N. W. 495. In the last-mentioned case, the court said:

"Relator alleges that his land is within the limits of another proposed drainage district, and that the law does not authorize or contemplate the overlapping of those districts so that real estate may be subject to separate assessments in as many distinct districts. The statute does not refer in specific terms to the overlapping of districts, nor does it forbid their formation. While some complications may arise in the prosecution of public improvements on land within two or more districts and in assessments to pay therefor, yet we are of the opinion that the objection made is not a serious one. Relator's land can only be assessed for, and to the extent of, benefits actually bestowed by virtue of the improvements made by any particular district. The assessments can only be laid after notice, and, if the levy is not supported by the facts, the landowner has an ample remedy by appeal to the courts wherein upon inquiry the truth may be ascertained and a judgment rendered that will amply protect him in his property rights. If his land may be improved by the construction of ditches or dykes in two or more districts, he ought to pay to the limit of those benefits. To hold otherwise would permit the owner of a large tract of land included in a district which had not benefited that land to any appreciable extent to receive the advantage of an improvement made by another district, and yet escape payment therefor."

The case of *People v. Lease*, 248 Ill. 187, 93 N. E. 783, is not authority for a contrary view under our statute. That case arose under the Illinois Levee Act (Hurd's Rev. St. 1909, c. 42). Under that act, not only is a drainage district authorized to carry out the work originally reported and confirmed, but, if additional drains or work appear to be necessary for more complete drainage of particular tracts of land, authority is given for that purpose to the drainage commissioners, who have complete jurisdiction of all questions concerning the drainage of all the lands in the district. Section 59 of act. Hence, if a drainage district were organized out of territory included in a drainage district already organized, there would necessarily be a conflict of authority between the two districts, and the conclusion that this could not be done was based on the principle that two municipalities cannot exercise jurisdiction over the same territory, for the same purpose, at the same time. Under our act, however, the authority of the drainage commissioners is limited to the construction and maintenance of the ditches provided for in the original plan, and they are not vested with the power to pass on and determine all questions of drainage within the district. Hence, if a district be organized within an established district, no conflict of authority will result.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

# OHIO VALLEY OIL & GAS CO. v. IRVIN DEVELOPMENT CO. et al.

(Court of Appeals of Kentucky. May 2, 1919.  
Rehearing Denied June 20, 1919.)

## 1. MINES AND MINERALS ¶78(1)—OIL AND GAS LEASE—TESTING OR WORKING.

The purpose of gas and oil leases is the development of the property and the collection of royalties, and the lessee will not be permitted to postpone the land's development for an unreasonable length of time, or extend the lease indefinitely by paying nominal rent.

## 2. MINES AND MINERALS ¶78(3)—OIL AND GAS LEASE—FORFEITURE—NOTICE.

While an agreed royalty and development of the property was provided for in a gas and oil lease, lessor could not forfeit lease for non-development without notifying lessee that he would no longer accept the annual rentals, but would demand commencement of operations within a reasonable time.

## 3. MINES AND MINERALS ¶79(6)—OIL AND GAS LEASE—FORFEITURES—NONPAYMENT OF RENT.

Under oil and gas lease providing for annual rental of \$1250, where the payment thereof at the end of the first year was delayed for three days, and the rental was then deposited as provided in the lease, such deposit was sufficient to avoid forfeiture for failure to pay rent.

## 4. LANDLORD AND TENANT ¶112(2)—WAIVER OF FORFEITURE—ACCEPTANCE OF RENT.

Acceptance of rent for the defaulted period, or any part of it, in a lease, is a waiver of the right to declare a forfeiture.

## 5. MINES AND MINERALS ¶58—OIL AND GAS LEASE—MUTUALITY.

Oil and gas leases for 5 and 10 years, or as long as oil or gas was produced, requiring commencement of operations within one year or payment to extend the lease within the year, entitling lessor to certain royalties, are not unilateral, and void for want of mutuality.

Appeal from Circuit Court, Powell County.

Suit by the Ohio Valley Oil & Gas Company, assignee of V. M. Gaines and another, lessees, against the Irvin Development Company, assignee of C. E. Townsend, subsequent lessee, and others. From a judgment for defendant, sustaining a demurrer to the petition, plaintiff appeals. Reversed, with directions.

B. G. Williams, of Frankfort, and Albert B. Kerr, of New York City, for appellant. Pendleton & Bush, of Winchester, and Hugh Riddell, of Irvine, for appellees.

QUIN, J. H. S. Rogers and wife, on December 15, 1915, leased to Gaines and Witt the oil and gas privileges on a 50-acre tract of land. This lease was recorded Janu-

ary 27, 1916, the recited consideration being \$1 and the covenants and agreements contained therein, including a royalty of one-eighth of the oil produced and saved. On June 10th the same lessors executed what is termed a confirmatory lease on the same premises to V. M. Gaines, one of the original lessees, for a consideration of \$12.50. This was dated the same as the original lease, and recorded February 2, 1917. The first lease was for a term of ten years, or as long as oil or gas was produced; the second was for a five-year term. January 6, 1917, said lessors executed to C. E. Townsend a lease on the same property. This was recorded January 12, 1917.

Claiming to be the assignee under the lease to Gaines and Witt, appellant instituted suit in the lower court against Townsend's assignee, appellee, the Irvin Development Company, and H. S. Rogers and wife, alleging the above, and further that appellee was boring wells and otherwise attempting to develop said land, and possession of said land had been denied appellant; also that, at the time Townsend persuaded and induced Rogers and his wife to make the lease to him, he (Townsend) and his successive assignees had actual notice of the prior leases, and that all rentals due thereunder had been paid. An injunction was asked against appellee, restraining and enjoining it from doing any further work on the land, and ordering it to remove its machinery therefrom, and asking that appellant's lease be held to be valid and subsisting.

In an amended petition appellant alleged that, having failed to drill a well on the leased premises within a year, it caused to be deposited in the Powell County Deposit Bank, December 18, 1916, to the credit of H. S. Rogers, the sum of \$12.50, in accordance with the terms of said lease, and said deposit had been retained by Rogers, and no part returned to appellant; that Rogers advised Townsend of the prior lease, and he (Townsend) examined the records relative to same, and upon inquiry at the bank was advised that the rent money of \$12.50 had been paid. This was before the execution of the Townsend lease. A demurrer to the petition as amended was sustained; hence this appeal.

Inadequacy of consideration and failure to pay the rental in advance are urged in support of the judgment below; it being further claimed that the Gaines leases were mere unilateral executory contracts, lacking in mutuality, and time must be considered as of the essence of same, and by failure of the lessee to drill, or pay to extend the lease, within the year, the contract expired by its own terms. It is not contended that said leases are void. The Gaines leases are not essentially different from the Townsend lease.

Appellee's assignor, before taking his

lease, had both actual and constructive notice of the prior leases, the averments of the petition as amended being taken as true, and was also advised the rental had been paid. No wells were drilled in the property the first year, and the rental of \$12.50 was not paid until December 18, 1915, three days after it was due, though the bank mentioned in the second lease was directed, in a telegram sent December 16th, to make the deposit. The allegation that the deposit was made and the money was commingled with other money which Rogers had in said bank, and upon which he checked, is admitted by the demurrer.

[1] Because of the inability oftentimes on the part of the owner to develop his property, leases of the mineral rights are made to persons prepared and equipped to do the work. Development of the property and collection of royalties are the purposes uppermost in the minds of the lessor in the making of these leases, and the lessee will not be permitted to postpone development of the land for an unreasonable length of time, or extend the lease indefinitely, by the payment of a mere nominal rent. *Monarch Oil, Gas & Coal Co. v. Richardson*, 124 Ky. 602, 99 S. W. 668, 30 Ky. Law Rep. 824; *Dinsmore v. Combs*, 177 Ky. 740, 198 S. W. 58; *Thornton on the Law of Oil & Gas*, § 75.

[2] In *Warren Oil & Gas Co. v. Gilliam*, 182 Ky. 807, 207 S. W. 698, after referring to the rules above stated, the court says:

"However, the right of the lessor to forfeit the lease for nondevelopment cannot be arbitrarily exercised. He must first notify the lessee that he will no longer accept the annual rentals and permit his land to remain idle and undeveloped, but will require the lessee to execute the contract according to the intention of the parties by beginning its development in good faith, and if, after such notice and demand, the lessee does not begin the development within a reasonable time, the lessor may then have the lease forfeited. *Monarch Oil, Gas & Coal Co. v. Richardson*, supra. Here the lessor did not, at any time, demand that the lessee begin operations and give him a reasonable opportunity to do so. That being true, there is no basis for the contention that the lease in question was forfeited because of the lessee's failure to begin operations."

Aside from the requirement in the Gaines leases that the rent be paid in advance, the facts of the two cases are practically identical. The terms, conditions, and consideration of the leases are strikingly similar. The lease was held valid, and since defendant in that case had notice of plaintiff's lease, it acquired no rights as against him, and defendant (the subsequent lessee) was accordingly enjoined from interfering with plaintiff in his right to enter on the land and remove the oil. This opinion, decided after the submission of the case at bar, is conclusive of the questions raised here.

[3] As to the question of the delay in the payment of the rental. The rental was deposited, as provided in the lease, and not rejected or returned, and Townsend, appellee's assignor, had actual and constructive notice of the earlier leases, and was advised that the rental had been paid, all before the execution of his lease. As said in *Monarch Oil, Gas & Coal Co. v. Richardson*, supra:

"The lessor in this contract did not at any time exact or demand of the lessee that it commence operating for oil or gas, but accepted the annual rentals paid in full discharge of the obligations of the contract, although at the end of any rental period he might have declined to accept rent and required the lessee to begin operations for oil or gas."

There was no declination here; on the contrary, at least an implied acceptance of the rental. Judge Cochran, of the United States District Court for the Eastern District of Kentucky, had before him recently the construction of a similar lease, in the case of *Zelgier et al. v. Hopkins et al.*, 258 Fed. 487, and in a yet unreported opinion on a motion to reconsider a decree dismissing the appeal he has gone quite extensively into the authorities construing such leases. Questions similar to those involved on this appeal are discussed at length in the opinion. He holds that the lease is an executed and not an executory instrument. The lease in that case provided for the payment of the rental in advance. The court held that a failure to pay the rent in advance did not work a forfeiture of the first lease, and among the cases cited and approved by the court is that of *Monarch Oil, Gas & Coal Co. v. Richardson*, supra, and other cases from this court. In the course of the opinion the court says:

"He agrees to so do or pay a certain quarterly rental in advance until one [well] is completed. The agreement to so pay is absolute, if the well is not drilled. If not paid, the rent is recoverable. Though not in hand, it is in the bush. There is no provision that, if it is not paid, the interest in the land for the purpose of exploration shall be forfeited; and there is a provision that the lease shall be terminated in another contingency—i. e., upon removal and reconveyance by the lessee. If this line of reasoning is sound, it follows that a negative answer must be given to the question put. \* \* \* I feel quite sure, therefore, that if the second provision as to exploration was not in the lease in question, there was no forfeiture by the failure to drill within the year or to pay the first quarterly rental in advance. \* \* \* What is meant is that the payment of rentals shall fully and completely extend the agreement to explore from time to time until it is complied with by the completion of a well. This is the only thing needing a provision for extension. I therefore see nothing in this statement to bring about a different conclusion from that reached without regard to it. \* \* \*

"The plaintiffs were not in fault in not drilling a well within a year. The lease contemplat-

ed that they need not do so. It was provided that delay in compliance with the agreement to so do could be secured by payment of rentals. It is alleged that no demand was ever made on plaintiffs to drill a well and that they were ready and able to do so at any time after July 14, 1916, when the lease was assigned to them to drill and prospect on the land for oil and gas, and that the lessor, though duly notified by the bank of the deposits to her credit, has never refused to accept them. The lease under which the operating defendants claim was not made upon her initiative. The allegation is that it was procured by them. It is further alleged that it was so procured with knowledge of complainants. This may mean no more than knowledge of their lease, and constructive knowledge arising from its being of record at that. But they also knew of plaintiffs' attempt to make the first quarterly payment, or they did not concern themselves to inquire of plaintiffs whether they had paid or done anything towards making payment. They ignored plaintiffs completely. But, however this may be, it is distinctly alleged that the operating defendants entered and began drilling on the land 'with full knowledge and notice of the rights' of the plaintiffs, so that what they have done since entering has been with due appreciation of the risk they were running. There can be no doubt, therefore, that a very strong case for equitable relief is made."

[4] Acceptance of rent for the defaulted period, or any part of it, will generally be a waiver of the right to declare a forfeiture. See *Thornton*, §§ 184, 863. In *American Window Glass Co. v. Indiana Natural Gas & Oil Co. et al.*, 37 Ind. App. 439, 76 N. E. 1006, the court had under consideration the question of the payment of rents past due. The lease, in that case, required the rent to be deposited in a bank. The court held that, had the landowner at the end of the term notified the lessee they would not receive any further payments and refused to accept the same, or before payment to the bank had given it notice not to receive any payments for their use and benefit on account of the lease, the rights of the lessee would have been terminated, but this the lessor failed to do. Lessee paid the rental to the bank. The court held that the deposit in the bank constituted a payment to the lessor, and by reason thereof extended the lease another year.

[5] As to the unilaterality of the *Gaines* leases, this court in the case of *Hughes et al. v. Parsons*, 183 Ky. 584, 209 S. W. 853, has held adversely to appellee's contentions. From the substance of the lease as given in the opinion, the provisions are in no material feature different from the *Gaines* leases; the court saying it was not a unilateral contract.

For the reasons indicated, the judgment is reversed, with instructions to overrule the demurrer to the petition as amended, and for such further proceedings as may not be inconsistent with this opinion.

## SCHMIDT v. CITY OF NEWPORT et al.

(Court of Appeals of Kentucky. May 20, 1919.)

1. MUNICIPAL CORPORATIONS  $\S$ 816(1) —  
SIDEWALKS — PERSONAL INJURIES — COM-  
PLAINT—SUFFICIENCY.

A petition in an action for personal injuries, received by a pedestrian when she slipped and fell on a sidewalk which was used for advertising purposes by an amusement company, held sufficient to present a cause of action against both the city and the amusement company.

2. MUNICIPAL CORPORATIONS  $\S$ 763(1) —  
STREETS—CARE AND MAINTENANCE.

While a city is not an insurer of the safety of persons traveling upon its streets, it has the duty of exercising ordinary care to keep and maintain its streets and pavements in a reasonably safe condition for use by the public, once it has undertaken to do so.

3. MUNICIPAL CORPORATIONS  $\S$ 788(2) —  
SIDEWALKS—DEFECTIVE CONDITION—NOTICE  
—LIABILITY.

The liability of the city for injuries from defective street does not arise until the city, through its authorized officers, has received or has had reasonable opportunity to obtain knowledge of such defective condition; but the municipality will be charged with notice of such defects as it could by the exercise of reasonable care have discovered, and where it authorized the use of a sidewalk by property owner for advertising purposes, and injury resulted directly or proximately therefrom, the city is liable.

4. MUNICIPAL CORPORATIONS  $\S$ 755(1) —  
STREETS—GROUND OF LIABILITY FOR PER-  
SONAL INJURIES.

A municipality is not responsible for injury to one falling upon a pavement, unless the pavement was inherently dangerous, or was constructed and maintained according to a plan which was not reasonably safe, and which a reasonably prudent person would not have adopted or maintained.

5. PLEADING  $\S$ 817—CONCLUSIONS—ALLEGATION OF NEGLIGENCE.

In an action against a city for personal injuries resulting from a fall on a sidewalk, allegations that the sidewalk was maintained in a "slippery, smooth, glazed, and glossy" condition, which rendered "the walk unfit and unreasonably unsafe and dangerous to public travel by pedestrians," and that it was negligently constructed on a dangerous grade, held sufficient, since an averment of negligence is not the statement of a mere legal conclusion.

6. MUNICIPAL CORPORATIONS  $\S$ 768(2) —  
SIDEWALKS — CONSTRUCTION — DANGEROUS  
CONDITION—LIABILITY FOR PERSONAL IN-  
JURIES.

The mere fact that a pavement is constructed of smooth tile is not sufficient in itself to render it so dangerous and unsafe as to fix liability upon a municipality for injuries to persons falling thereon, or even to raise a pre-

sumption that such walk is inherently dangerous, but it is in a glazed, highly polished condition, rendering it slick and slippery, which makes it so inherently dangerous as to render the city liable.

7. MUNICIPAL CORPORATIONS  $\S$ 808(8), 814—  
SIDEWALKS—INJURY TO PEDESTRIANS—LIA-  
BILITY—JOINER OF CITY AND PROPERTY  
OWNER.

Where a city allowed a sidewalk to be used for the special benefit of a theater and its business, by reconstructing a part of it with smooth tiling for advertisement purposes, this constituted an extra burden or servitude, and if it was in such an unsafe condition as to render the city liable for injuries sustained by a pedestrian falling thereon, the theater company was also liable, and was properly joined with the city in the action.

Appeal from Circuit Court, Campbell County.

Action by Margaret Schmidt against the City of Newport and another. From the judgment dismissing the action after sustaining a general demurrer to the second amended complaint, plaintiff appeals. Reversed.

Geo. J. Herold and Phil J. Ryan, both of Newport, for appellant.

Brent Spence, of Newport, for appellee city of Newport.

William A. Burkamp, of Newport, for appellee Frankel Amusement Co.

SAMPSON, J. This action by Mrs. Schmidt against the city of Newport and the Frankel Amusement Company, Incorporated, was commenced in the Campbell circuit court on June 6, 1917, to recover damages for personal injury sustained by her in a fall on the sidewalk in front of the Hippodrome Theater in the city of Newport on the evening of March 16th. Both general and special demurrers were filed by the defendants, and the general demurrer sustained, and the special demurrer overruled, to the original petition. Thereafter an amended petition was filed by Mrs. Schmidt; but without demurrer or other pleas she filed a second amended petition, in lieu of both of the former pleadings, and to this last a general demurrer was filed by each of the defendants and sustained, and plaintiff declining to plead further the action was dismissed, and she prosecutes this appeal.

[1] The original petition was very inaptly drawn and did not state a cause of action. The amended petition was a great improvement upon the original petition, and the second amended petition was very much better in form and substance than the two preceding. It was in the nature of a substituted petition, and appellant, Schmidt, in her brief states that she relies upon the

second amended petition exclusively. In this pleading it is alleged that the city of Newport is a municipal corporation of the second class, and that the Frankel Amusement Company is a corporation, organized under the laws of this commonwealth; that the amusement company owns and operates, and has at all times mentioned owned and operated, a theater at 711-713 Mammoth street, in the city of Newport; that the sidewalk in front of the building is 12½ feet wide; that it was originally built of concrete and maintained by the city; that the amusement company, in building its showhouse, obtained permission from the city to take up a certain part of the concrete pavement immediately in front of its entrance and replace the same with tiling, on which it was to and did place the word "Hippodrome," the name of the theater, for advertising purposes; that the lobby of the theater was floored with tiling, and this tiling allowed to extend out onto the pavement about 3 feet and for a distance of 27 feet along in front of the building; that this condition had prevailed for about three years; that said tiling on the sidewalk was constructed and maintained at all times hereinafter stated of a slippery, smooth, glazed, and glossy surface and rendered said sidewalk unreasonably unsafe and dangerous for public travel by pedestrians, and especially so during and immediately after it had rained, or while said tiling sidewalk was wet; that said sidewalk, including said tiling thereon, was negligently constructed and maintained at all times herein mentioned at an unreasonably unsafe and dangerous grade, and was rendered unreasonably unsafe and dangerous for public travel by pedestrians; "that said defendant the Frankel Amusement Company, at all times herein set out, while operating said theater, and on March 16, 1917, allowed said sidewalk to be and remain in the aforesaid unreasonably unsafe and dangerous, smooth, glazed, glossy, and slippery condition and unreasonably unsafe and dangerous grade; that said defendant the Frankel Amusement Company, at all times herein set forth, while owning, operating, and controlling said theater or showhouse, and on March 16, 1917, for the purposes of advertising its theater and business, allowed said tile to remain in and upon said sidewalk, and the word 'Hippodrome' in and upon said tiling upon said sidewalk"; that the Amusement Company placed and maintained an additional burden and servitude in and upon the use of said public sidewalk; "that the city of Newport knew of said condition after same was constructed and maintained, and was or could, by the exercise of ordinary care on its part, or on the part of its officers, have known of the said dangerous and defective condition which had existed on March 16, 1917, and continuously prior there-

to for more than three years, and the same was known long enough to the defendant city of Newport, if exercising ordinary care, to have eliminated or removed same"; that the plaintiff, while walking along said sidewalk on the evening of March 16, 1917, exercising ordinary care for her own safety, slipped, and fell on said tiling pavement by reason of its dangerous and unsafe condition, and broke her right leg at or about her knee, and otherwise injured her, to her damage in the sum of \$10,000. The petition also sets forth grounds for special damage, medical treatment, etc. Taking the whole petition together, we are convinced it presents a cause of action against both defendants. The plaintiff, under the allegations of the petition, could have maintained an action against either or both defendants.

[2, 3] While a city is not an insurer of the safety of persons traveling upon its streets, it is under the duty of exercising ordinary care to keep and maintain its streets and pavements in a reasonably safe condition for use by the public once it has undertaken so to do. Liability does not arise until the city through its authorized officers receives or has reasonable opportunity to obtain knowledge of the defective condition of the street or pavement, but the municipality will be charged with notice of all defects of which it could, by the exercise of reasonable care, have learned; and if it authorize a property owner, such as the Frankel Amusement Company, to use the pavement along the street for purposes of its own, and in so using and occupying the pavement, reasonable care is not exercised for the safety of the traveling public, and injury results directly and proximately therefrom, the city as well as the property owner is liable in damages. As said in the case of the Hippodrome Amusement Co. v. Carlus, 175 Ky. 783, 195 S. W. 113, L. R. A. 1918E, 377, if the property owner is allowed an extraordinary use of the sidewalk for his private convenience, or for the benefit of his property, and such use constitutes a servitude of the sidewalk for his private benefit, or use, and injury arises from the defective condition of the sidewalk because of such servitude placed upon it, the property owner is liable primarily to the individual for the injury sustained. This liability, however, does not absolve the city from responsibility. *Baumelster v. Markhan*, 101 Ky. 132, 39 S. W. 844, 41 S. W. 816, 19 Ky. Law Rep. 308, 72 Am. St. Rep. 397.

[4] The rule appears to be well established in this jurisdiction that a municipality is not responsible for injury to one falling upon a pavement, unless the pavement was inherently dangerous, or was constructed and maintained according to a plan which was not reasonably safe, and which reasonably prudent persons would not have adopted or

maintained and as said in the City of Lebanon v. Graves, 178 Ky. 755, 199 S. W. 1066 (L. R. A. 1918B, 1016):

"It makes little, if any, substantial difference, so far as the liability of the city is concerned, whether the unsafe and dangerous condition of the street was due to a defective plan, or due to conditions that the city permitted to come up, after the construction of the street pursuant to the plan, that contemplated a street reasonably safe for public travel, and that, when a city undertakes to construct or reconstruct a street or pavement, it is under a duty to so construct and maintain it as that it will be reasonably safe for public travel, and this duty is a continuing one, and no plan will justify the construction of a pavement so slick and slippery as to be unsafe and dangerous."

After setting forth the slippery and dangerous condition in that case, the opinion proceeds:

"We think there was ample room for reasonable difference of opinion as to whether this pavement was reasonably safe for public travel. Indeed, the decided weight of the evidence shows that it was palpably unsafe and dangerous for public travel. Whenever a particular place in a pavement is laid in such condition, and so remains for about three years, as that travelers walking on it are seen to slip or fall almost every day, and others, who are familiar with its danger, avoid it altogether by going out in the street, it is manifest that such pavement is unsafe and dangerous. We have, therefore, no difficulty in ruling that the trial court properly submitted the case to the jury."

[5] From the allegations of the petition, the pavement at the point where Mrs. Schmidt fell was constructed and maintained in a "slippery, smooth, glazed, and glossy" condition, which rendered "the walk unfit and unreasonably unsafe and dangerous for public travel by pedestrians, and the "sidewalk, including said tiling thereon, was negligently constructed and maintained at all times therein mentioned at an unreasonably unsafe and dangerous grade, and was rendered unreasonably unsafe and dangerous for public travel." It is argued that these allegations are too general. A general allegation of negligence is sufficient. An averment of negligence is not the statement of a mere legal conclusion. Newman's Pleading and Practice, §§ 3240 and 8291.

[6, 7] It would appear that the original construction was upon such heavy grade and of such a smooth and slippery and slick surface as rendered the pavement inherently dangerous to pedestrians. The mere fact that a pavement is constructed of smooth tile is not sufficient in itself to render it so dangerous and unsafe as to fix liability upon a municipality for injury to persons falling thereon, nor to even raise a presumption that such walks are inherently dangerous. Indeed, we are inclined to the opinion that a

tile pavement is as safe as a concrete pavement, and in addition is quite as durable and much more beautiful. But if it is glazed and so highly polished as to be slick and slippery, it may become inherently dangerous, and render the city liable in damages for injuries received by persons who fall thereon; but this liability rests upon the inherent slippery nature of the walk, and not upon the material, color, or advertisement written or printed thereon. Nor do we regard the word "Hippodrome," in the advertisement, as such a burden or servitude as was calculated to impose liability upon the theater company, in the absence of other contributing facts and circumstances. But the tiling in the pavement was itself intended as an advertisement and was calculated to attract attention and render the theater conspicuous, and thus become an asset and benefit to its business. In this way the pavement was used for the special benefit of the theater and its business, and this use was an extra burden and servitude upon the pavement. If the pavement was maintained in such unsafe condition as to render the city liable for the injury sustained by Mrs. Schmidt, then the amusement company was also liable, and the two were not improperly joined in the action.

Judgment reversed with directions to overrule the general demurrer to the second amended petition, and for other proceedings not inconsistent with this opinion.

Judgment reversed.

## CHICAGO, M. & G. R. CO. v. STAHR.

(Court of Appeals of Kentucky. May 9, 1919.  
Rehearing Denied June 20, 1919.)

### 1. RAILROADS $\S$ 72(8)—RIGHT OF DEED—CONTRACT TO CONSTRUCT DRAINAGE DITCHES—INSTRUCTIONS ON DAMAGES FOR BREACH.

In an action by the grantor in a right of way deed for damages to crops resulting from railroad company's breach of contract to construct ditches, instructions placing upon the company the obligation to construct ditches so as to carry off the rainfall in "vicinity" held erroneous as placing upon the company, not only liability for its failure to perform the contract, but also for the consequences of grantor's failure to lead tiles into the ditches as he had a right to do under the contract.

### 2. RAILROADS $\S$ 72(9)—BREACH OF CONTRACT IN RIGHT OF WAY DEED—DAMAGES.

For breach of a contract by a railroad company to construct drainage ditches specified in deed of right of way, the measure of damages as to the land in cultivation is the difference between what was raised and what could have been produced, and the measure of damages as to such land as the grantor was prevented from cultivating is its rental value.

### 3. TRIAL $\Rightarrow$ 214—INSTRUCTIONS—ISSUES.

Where defendant pleaded and produced evidence to show that the damages complained of resulted, not by breach of contract to construct ditches specified in a right of way deed, but by water backing up through ditches from a pond into which plaintiff, the grantor, had drained land in accordance with such contract, and for drainage of which pond defendant was not responsible, it was error not to submit that issue to the jury by instruction.

### 4. TRIAL $\Rightarrow$ 295(4) — INSTRUCTIONS — SUFFICIENCY — CORRECTION BY OTHER INSTRUCTIONS.

Where plaintiff's instruction is erroneous and misleading and the court has erroneously refused another instruction presenting an affirmative defense, such errors held not cured by defendant's instructions directing a verdict if specified facts are found under the rule that instructions will be considered as a whole.

Appeal from Circuit Court, Fulton County.

Action by Stephen Stahr against the Chicago, Memphis & Gulf Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Trabue, Doolan, Helm & Helm, of Louisville, and B. T. Davis, of Hickman, for appellant.

Hester & Hester, R. O. Hester, and W. H. Hester, all of Mayfield, for appellee.

CLARKE, J. This is an appeal from a verdict and judgment for \$980 awarded appellee as damages for a breach of contract. As grounds for reversal, it is urged: (1) That the court, by instructions given over defendant's objection and exception, enlarged the terms of the contract and also authorized double damages for a breach thereof; (2) that the court erred in refusing to give tendered instructions presenting the defendant's affirmative defense; and (3) that the verdict is excessive and flagrantly against the evidence.

The contract sued on is contained in a deed by which the plaintiff conveyed to the defendant a right of way 80 feet in width through his farm, and also a strip of land 10 feet wide running from the west end of the right of way strip and almost at right angles thereto, along plaintiff's western boundary line "to the lowest point on the surface, for the purpose of a ditch to be opened immediately upon the construction of said railroad, for the water from the ditches on either side of the railroad and the Chicago, Memphis & Gulf Railroad Company and its assigns to keep and maintain the ditches on either side of said railroad and the ditch on the west line open and in good repair to the level of the lowest point of the surface

on said line and the said Stephen Stahr and his heirs and assigns to have the right if they so desire to lead tile into the ditches on either side of said railroad and into the ditch on the west line at such points as may be desired."

[1] In instruction No. 1 given by the court, the defendant's obligation under the contract was stated to be to construct and maintain ditches upon either side of its railroad track, and therefrom over the lateral strip of land, "as deep as the lowest point on said land lines of sufficient width to carry said water from said land, as would reasonably be expected to fall in said vicinity," and a verdict was authorized for the plaintiff for any injury to his crops or loss of the use of the land he was prevented from cultivating in the years 1913, 1915, and 1916, as the jury believed from the evidence resulted from overflow or water remaining on his land longer than it otherwise would have done "from rainfall in said vicinity."

1. This instruction placed upon the defendant the obligation to construct and maintain these ditches so as to carry off "rainfall in said vicinity," which was not defined, and which the jury may have concluded meant the whole or any part of plaintiff's farm, and which possibly would not have been error had plaintiff tiled all of his land to the ditches as he had the right to do; but, as plaintiff had not tiled any of his land to these ditches, he could not recover for any damage to his crops or loss of the use of his land from water standing thereon, except for such water as would have flowed off naturally and without tiles through the ditches, if properly constructed and maintained by the defendant; and in authorizing, as this instruction does, a recovery for all damages that resulted from a failure of the defendant to construct and maintain ditches of sufficient width and depth to carry off the rainfall "reasonably expected in that vicinity," the court placed upon defendant the liability, not only for any failure upon its part to perform its contract, but also the consequences of plaintiff's failure to lead tiles into the ditches for the drainage of his land. Manifestly, this was an extension of defendant's contract liability and clearly a reversible error.

[2] 2. As urged by counsel for appellant, instruction No. 3, defining the measure of damages, if literally construed, seems to warrant double damages by authorizing allowance for any damage to crops and the loss of the use of the same land for each of the three years, which, of course was not intended, and probably not so understood by the jury; but this instruction should be corrected, upon another trial, so as to make it clear that the measure of damages appli-



cable only to such of the land as was in cultivation was. the difference between what was raised and what could have been produced thereon if there had been no breach of contract by the defendant, while for so much of the land as plaintiff was prevented from cultivating, if any, the measure of damages was its rental value for such time as plaintiff was prevented from using it.

[3] 3. Defendant, by a separate paragraph of its answer pleaded that the damage done to plaintiff's growing crops in the several years complained of was caused not by any breach of its contract, but by water backing up through the ditches and onto plaintiff's lands from a depression called "Ross' Pond," into which the ditches which defendant was required to construct discharged such water as accumulated therein; and, as there was some evidence to sustain this plea, it was error upon the part of the court to refuse to submit this theory of the case, since if, as contended by the defendant, the damage to plaintiff's crops, or any part thereof, resulted from the absence of drainage from Ross' Pond, for which the defendant was in no wise responsible, plaintiff obviously was not entitled to recover such damage from the defendant, and, as this affirmative defense was presented by both pleadings and evidence, it should have been submitted to the jury by proper instruction, whether or not the instruction offered by defendant upon the question was correct in form. Hobson on Instructions, § 13; Cumberland R. R. Co. v. Girdner, 174 Ky. 761, 192 S. W. 873; Consolidation Coal Co. v. Spradlin, 173 Ky. 229, 190 S. W. 1069; L. & N. R. Co. v. King's Adm'r, 131 Ky. 347, 115 S. W. 198.

[4] It is insisted by counsel for appellee that the errors, if any, in instruction No. 1 given, and the error, if any, in refusing to give instruction Z offered by defendant presenting its affirmative defense, were cured by instructions X and Y given upon defendant's motion, which directed a verdict for the defendant, if the jury believed it had constructed and maintained ditches on each side of the railroad, and the ditch on the west property line to the lowest point on the surface of said line with proper opening under the track connecting the several ditches, and that the judgment must be affirmed under the rule that instructions will be considered as a whole, and, unless prejudicial when so considered, a reversal will not be ordered even though some of the instructions are not technically correct. But we are sure that the rule has no application here, since we do not think the instructions X and Y cured the error in No. 1, and we are sure none of the instructions given even suggested to the jury the affirmative defense presented by defendant.

Since another trial will be necessary, we do not now pass upon the question of whether or not the verdict is excessive.

For the reasons indicated, the judgment is reversed, and the cause remanded for another trial consistent herewith.

#### VENTERS et al. v. POTTER.

(Court of Appeals of Kentucky. May 30, 1919.)

#### 1. HUSBAND AND WIFE $\S$ 198—HUSBAND'S CONVEYANCE OF WIFE'S PROPERTY—FORGED DEED—FAILURE TO ASSERT OWNERSHIP.

Where husband conveying wife's property forged her signature to deed, wife's negligence in not ascertaining that deed was forged and in not promptly asserting a claim to the property, notwithstanding knowledge that purchaser's son was in possession, was not such fraud as to estop her from claiming the property.

#### 2. JUDGMENT $\S$ 255—CONFORMITY TO PROOF—DEED—INTEREST CONVEYED.

Wife, having accepted commissioner's deed of partition conveying land allotted to her in partition proceedings, jointly to wife and husband, and having offered such deed in proof of her title in her action to cancel a deed to the land to which husband had forged her signature, cannot in such action recover any greater interest in the land than was conveyed by such commissioner's deed.

Appeal from Circuit Court, Letcher County.

Suit by Louisa Potter against Booker E. Venter and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

W. H. May, of Jenkins, Ed. C. O'Rear and J. B. Adamson, both of Frankfort, and Allie W. Young, of Moorehead, for appellants.

F. W. Stowers, of Pikeville, for appellee.

CLAY, C. Upon the death of Allen Hall, an action was brought in the Letcher county court by his children and heirs to partition among them the real property left by the decedent. Lot No. 9, containing 49 acres, was allotted to Malinda Johnson. Lot No. 10, containing 47 acres, was allotted to Louisa Potter. The two lots adjoin. Before the deeds of partition were made, James Potter, the husband of Louisa Potter, purchased lot No. 9. On April 3, 1900, the commissioner executed a deed by which he conveyed the two lots to James and Louisa Potter jointly.

On November 8, 1902, James and Louisa Potter conveyed to the Northern Coal & Coke Company the minerals underlying the two lots, with the exception of a small boundary of about 10 acres upon which the dwelling

house was located. The Consolidation Coal Company subsequently became the owner of the estate thus granted to the Northern Coal & Coke Company.

On April 27, 1908, a deed executed by James Potter, and purporting to have been executed by Louisa Potter, was made to John Venters. This deed conveyed the surface of the 96-acre tract embracing lots 9 and 10 in the division of the estate of Allen Hall, together with the minerals excepted in the deed to the Northern Coal & Coke Company. This deed was put to record, and Venters moved into the dwelling house and lived there until his death. Some time prior to his death, the Consolidation Coal Company, by mesne conveyances became the owner of an undivided three-sixths interest in the small boundary of minerals, and the owner of an undivided three-sixths interest in the surface of the entire 96-acre tract.

In March, 1915, Louisa Potter brought this suit to cancel the deed to Venters on the ground that her signature thereto was a forgery, and to recover the surface of lot No. 10 and the small boundary of minerals not included in the deed to the Northern Coal & Coke Company. On final hearing she was granted the relief prayed for, and the defendants appeal.

It is not seriously contended that the evidence of forgery was not sufficient to sustain the chancellor's finding, but it is insisted that the plea of estoppel interposed by the Consolidation Coal Company should have been sustained. The facts pleaded and relied on as an estoppel are as follows: Upon the execution of the deed in question, possession of lot No. 10, containing the dwelling house, was delivered to Venters. Shortly thereafter plaintiff and her husband moved to Greenup county, where they remained for two or three years. Plaintiff then returned to Letcher county and took up her residence in sight of the land. At that time a son of John Venters was in possession. From that time on she asserted no claim of ownership, paid no taxes on the property, and never brought suit to recover the property until after the death of John Venters. In the meantime the property was conveyed to the Consolidation Coal Company, which purchased without any knowledge or notice of the forgery and paid a valuable consideration for the land. It is argued that, although Louisa Potter had no actual knowledge of the forged deed, the fact that Venters had taken possession of her land and was occupying it and claiming it as his own was sufficient to put her on inquiry as to how he held the land, and had this inquiry been pursued she would have ascertained that the deed was a forgery. That being true, it is insisted that she was charged with constructive knowledge of the forged deed, and having, with this knowledge, suffered and per-

mitted Venters to occupy the land as his own and to sell it to others who had the right to rely on the record, and who purchased and paid for the land without any knowledge of the forgery, she is now estopped to claim the land as her own. In view of the fact that a married woman may dispose of her real estate only in the manner provided by the statute, some of the courts hold that she cannot divest herself of such property in any other mode than that pointed out by the statute. *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; 10 R. C. L. § 63, p. 745. But the trend of modern authority seems to be in favor of denying the right, even with respect to land, to invoke and use the disabilities of coverture as a cloak for fraud (10 R. C. L. § 63, p. 745), and this is the rule adopted by this court. *Mays v. Pelly*, 125 S. W. 713; *Dulaney v. Figg*, 123 Ky. 291, 94 S. W. 658, 29 Ky. Law Rep. 678; *Newman v. Moore*, 94 Ky. 147, 21 S. W. 759, 15 Ky. Law Rep. 1, 42 Am. St. Rep. 343. In the case of *Mays v. Pelly*, we said:

"But in no case have we held that a married woman can divest herself of title by a contract or conveyance not executed in the manner pointed out in the statute. The estoppel of a married woman is rested altogether upon the doctrine that she will not be allowed to use her coverture to perpetrate a fraud. If the element of fraud is wanting, the doctrine of estoppel will not be applied."

And in the more recent case of *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30, the court used the following language:

"But a married woman cannot estop herself by her acts and declarations from asserting dower and other claims to land, except in those cases where to permit her to do so would operate as a fraud."

Indeed, it is a rule of almost universal application that, with respect to real property, a married woman will not be estopped by her silence and failure to assert her rights. 10 R. C. L. § 655, p. 747; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

[1] Here it does not appear that Louisa Potter knew of the forged deed, or that she took any part in the sale made by Venters. The most that can be said is that she was merely negligent in not ascertaining that the deed was forged and in not promptly asserting a claim to the property. In our opinion, these facts do not amount to fraud within the meaning of the rule above set out, and we therefore conclude that the chancellor did not err in holding that the plea of estoppel was not available.

[2] The judgment is attacked on the ground that Louisa Potter was permitted to recover the entire surface of lot No. 10, as well as the minerals under the 10-acre tract theretofore reserved, whereas the commissioner's deed conveyed to her only a half interest in

that property. It is suggested that this question cannot now be raised, because it was not raised below. As a matter of fact, however, Louisa Potter alleged title to lot No. 10. Her title was denied. To prove her title, she introduced the commissioner's deed, which conveyed to her only a half interest in lot No. 10. Whether this deed could have been corrected as against subsequent purchasers it is unnecessary to decide. As a matter of fact, it has never been corrected. Though her husband was the purchaser of lot No. 9, and she herself was allotted lot No. 10 in the division of her father's estate, there was nothing to prevent them from having the two lots conveyed to them jointly, if they so desired. Having accepted and held under the deed, without any effort to have it corrected, and having offered the deed in proof of her title, she is bound by its provisions, and cannot recover any greater interest in the property than that conveyed by the deed. Hence she should have been adjudged only a half interest in the surface and reserved minerals of lot No. 10.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

### CRAWFORD v. STAPLES et al.

(Court of Appeals of Kentucky. May 30, 1919.)

#### 1. ATTACHMENT ⇐360—WRONGFUL ATTACHMENT—ACTION FOR DAMAGES.

That plaintiff's property was wrongfully attached in another action is concluded by the judgment therein dismissing the attachment, and his right to maintain an action directly against those who wrongfully caused the attachment to be issued, instead of suing upon the attachment bond, is specifically conferred by Ky. St. § 7.

#### 2. ATTACHMENT ⇐375(1)—WRONGFUL ATTACHMENT—DAMAGES—COST OF FEEDING LIVE STOCK.

In an action for damages for wrongful attachment of personal property, where plaintiff owner of the property was not deprived of its use and possession, he having given a bond for its retention, he only bore the cost of maintenance of the live stock attached as he would have done had there been no attachment, and is not entitled to recover the cost of feeding them.

#### 3. ATTACHMENT ⇐375(1)—DAMAGES FOR WRONGFUL ATTACHMENT—LOSS TO LIVE STOCK.

In an action for damages for wrongful attachment of plaintiff's live stock in an action against one other than plaintiff, *held*, that plaintiff suffered no loss of profit from failure to consummate a sale upon a purchase offer made while the attachment was pending, which loss was the proximate result of the attachment,

where he still retained property equivalent in value to the price offered, and his only loss was to horses from disease and mules from increased age, both of which were natural causes not resulting from attachment.

#### 4. ATTACHMENT ⇐375(3)—WRONGFUL ATTACHMENT—MEASURE OF DAMAGES—USE—DEPRECIATION IN VALUE.

In an action for damages for wrongful attachment of live stock, the criterion of damages for the loss of the use of property owned and held for use is the value of such use, and for property owned and held for sale the value is estimated on the basis of the deterioration or depreciation in salable value caused by the attachment.

#### 5. APPEAL AND ERROR ⇐1056(4)—ATTACHMENT ⇐375(2)—WRONGFUL ATTACHMENT—HARMLESS ERROR—DAMAGES—EVIDENCE.

In an action for wrongful attachment of live stock, where all the losses sustained were due to natural causes, and not to the attachment, plaintiff was only entitled to nominal damages, and he cannot complain of the exclusion of evidence of losses not recoverable.

#### 6. ATTACHMENT ⇐375(1)—WRONGFUL ATTACHMENT—DAMAGES—PREVENTION OF SALE.

In an action for wrongful attachment of plaintiff's live stock, a claimed loss from being prevented by the attachment from accepting an offer of sale *held* too remote, improbable, and speculative to justify damages, at least until notice of the possibility of the sale was brought to the parties securing the attachment.

Appeal from Circuit Court, Henderson County.

Action by L. J. Crawford against J. B. Staples and others. Judgment for defendants, and plaintiff appeals. Affirmed.

B. S. Morris, of Henderson, for appellant.  
F. J. Pentecost, McClain & Pentecost, Henson & Taylor, and Dorsey & Dorsey, all of Henderson, for appellees.

CLARKE, J. In January, 1913, in an action by appellees against Gilbert Crawford on a note, an attachment was levied upon two horses and two mules as the property of Gilbert Crawford, the sheriff, however, leaving the horses and mules in the possession of L. J. Crawford, who claimed to own them, as his agent.

Upon a trial of that action it was decided that the horses and mules were the property of L. J. Crawford, and the attachment was discharged. Thereupon L. J. Crawford instituted this action, not upon the attachment bond, but against appellees, the plaintiffs in the attachment suit, to recover of them \$520 as damages for the wrongful attachment of his property.

[1] That his property was wrongfully attached in that action is concluded by the judgment therein; and his right to main-

tain this action directly against those who wrongfully caused the attachment to be issued and levied upon his property, instead of suing upon the attachment bond, is specifically conferred by section 7 of Kentucky Statutes. *Farmers' & Shippers' Tob. W. H. Co. v. Gibbons*, 107 Ky. 611, 55 S. W. 2, 21 Ky. Law Rep. 1348; *Mitchell v. Mattingly*, 1 Metc. 237; *Worthington v. Morris' Ex'r*, 98 Ky. 54, 32 S. W. 269, 17 Ky. Law Rep. 624; *Fite v. Briendenback*, 127 Ky. 504, 105 S. W. 1182, 32 Ky. Law Rep. 1283.

[2] Of the three defendants in this action, all of whom controverted plaintiff's allegations of damages, J. B. Staples and M. C. Dunn admit they caused the attachment to be levied upon plaintiff's horses and mules, but the Union Bank & Trust Company denied it was interested in that action or knew of or authorized the levy of the attachment, and upon this issue the evidence conclusively sustains its contention; so the court did not err in dismissing the petition as to this defendant.

Since Staples and Dunn confessed responsibility for the wrongful attachment, it is only necessary for us to determine whether or not the court erred upon a submission without a jury in awarding plaintiff only nominal damages to which he was entitled on the pleadings. He asserts two items of damage—one for the cost of feeding and caring for the attached property; the other for loss from depreciation in value while attached.

As to the first item, plaintiff is clearly not entitled to recover, since he owned the property, and, not having been deprived of its use and possession, he only bore the cost of maintenance, just as he would have been compelled to do if there had been no attachment. *Samples v. Rogers*, 134 Ky. 93, 119 S. W. 199.

[3] To sustain the claimed loss from depreciation while attached plaintiff proved the horses were worth \$400 and the mules \$200 when attached, and that one of the horses died and the other lost the sight of one eye while attached, as the result of a disease prevalent in his neighborhood; and he attempted, but was not permitted, to prove, as is shown by avowals, that the horse that was alive and the mules, at the time the attachment was discharged, were worth respectively \$60 and \$160, and that he had received an offer from his brother-in-law of \$400 for the horses and \$200 for the mules, and that they were then worth the amounts offered, which he was prevented from accepting by the attachment.

It will thus be seen that, admitting the one horse died and the other lost its sight from disease in no wise caused by the attachment, and that the mules had depreciated in value because of increased age, plaintiff seeks to recover of defendants these losses,

due solely from natural causes, and not proximately resulting from the attachment, upon the ground that he was prevented from making a sale at their market values because of the attachment, and that the loss of the sale was the proximate result of the attachment.

Waiving the failure of plaintiff to prove or avow that the offer to buy was made by a person able to pay for the property the prices offered, which prices are shown to have been the market values and no more, it is apparent he suffered no loss of profit or anything at all as the proximate result of not making this sale because he still had the property equivalent in value to the prices offered, and his only loss was to his horses from disease and to his mules from increased age, both of which were natural causes not in any way caused by the attachment.

[4] Damages recoverable in such actions as this are actual or compensatory, and are thus defined in 6 C. J. 533:

"Whether the action or proceeding is upon the attachment bond or independent thereof, where the suing out of the writ was wrongful, defendant in attachment is entitled to recover his actual damages, by which is meant compensation for these injuries and losses which are the direct and proximate result of the wrongful suing out of the writ and the seizure and detention of his property thereunder."

See, also, 2 R. C. L. 901, and 3 Am. & Eng. Enc. of Law, 247.

This is the rule approved and applied in this state in many cases, although variously stated. *Mitchell v. Mattingly*, supra; *Pettit v. Mercer*, 8 B. Mon. 51; *Reidhar v. Berger*, 8 B. Mon. 160; *Burgen v. Sharer*, 14 B. Mon. 500; *Trapnall v. McAfee*, 3 Metc. 34, 77 Am. Dec. 152; *Shultz v. Morrison*, 3 Metc. 98. In some of the above cases deterioration and depreciation of price are included as elements of compensatory damages, but only in cases where the defendant in attachment was deprived of possession, and then only with reference to certain kinds of property that were held and owned for sale, and not for use, which distinction is made and thus explained in *Reidhar v. Berger*, supra:

"The inquiry in regard to the injury which the party may sustain by the deprivation of the use of his property should be limited to the actual value of the use; as, for example, the rent of real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. The property in this case was not of that character, and the injury from being deprived of the use should be restricted to the interest upon the value thereof. For any injury beyond that the damages would be conjectural, indefinite, and uncertain, and the plaintiff cannot recover in this action.

"If, however, the property is damaged, or if when returned it should be of less value than when seized, in consequence of the depreciation in price, or from any other cause, for such dif-

ference the plaintiff would be entitled to recover. But this rule, so far as it relates to the fall or depreciation of the price, would not be applicable to every species of property. It would, however, clearly apply in this case, as it was the trade and business of the party to vend the goods attached, and not to keep them for the mere use."

This distinction is but an application of the general rule of proximate results to different kinds of property from being deprived of its use. As to such property as is owned and held for use the criterion of damages for the loss of use is the value of such use, but where the property is not owned and held by the owner for use, but for sale, the value of the loss of possession, not being capable of estimation on a basis of its usable value, as it has no such value to the owner, is estimated on a basis of the deterioration or depreciation in its salable value.

[5] As plaintiff was not deprived of the possession of his property, he was not entitled to recover for loss of use, or for depreciation or deterioration or any other loss, except such as resulted proximately from the attachment; and as all of the losses sustained were due to natural causes, and not to the attachment, he was entitled to recover only nominal damages, and the judgment rendered was all that could have been given, even if all evidence offered by plaintiff had been admitted. And as the loss he attempted to prove by the excluded evidence was not an element of damages recoverable, its exclusion was not erroneous.

[6] Even if the soundness of these conclusions were doubtful, another potent reason why plaintiff should not be permitted to recover for any loss for a claimed prevention of an advantageous sale he desired to make while the property was under attachment is the fact that, although bound to minimize his losses, he did not apprise the court or the plaintiffs of his desire or ability to make the sale until after the attachment was dismissed, which, no doubt, would have been readily agreed to by the plaintiffs or allowed by the court upon payment into court of the purchase price, and the loss now asserted could have been prevented.

It would be both a dangerous and unreasonable rule that would allow the owner of attached property, which is ordinarily and presumably held for use, and not for sale, to assert a claim for damage from being prevented from making an advantageous or desirable sale of which he did not inform the court or parties to the action until after the attachment was discharged, and to consummate which he made no effort whatever. Such a loss is entirely too remote, improbable, and speculative, at least until notice of

its possibility is brought within the comprehension of those liable to be charged therewith.

Wherefore the judgment is affirmed.

#### PHILLIPS et al. v. WILLIAMSON et al.

(Court of Appeals of Kentucky. May 27, 1919.)

#### 1. DEEDS $\S$ 129(1) — INTEREST CONVEYED — WORDS OF PURCHASE OR LIMITATION.

Where granting clause was unto W., her heirs and the heirs of J., their heirs and assigns, and the language of the habendum clause was to W., her heirs and the heirs of J., their heirs forever, W. did not take the entire fee but a life estate, with remainder to her children and the children of J.; the words, "her heirs and the heirs of J." being words of purchase, not limitation, and used in the sense of "children."

#### 2. REMAINDERS $\S$ 17(3) — SUIT BY REMAINDERMEN — ACCRUAL OF RIGHT.

Suit to enjoin waste by those claiming through grantee of life tenant and to have plaintiff's adjudged to be owners of a certain interest in the remainder is not barred by limitation, where the life tenant is alive, since in such case the remaindermen have no right to possession, and neither the life tenant nor any one claiming through her can hold adversely to remaindermen.

#### 3. JUDGMENT $\S$ 243 — ADJUDICATING RIGHTS OF THOSE NOT PARTIES.

In suit by plaintiffs to enjoin waste and have themselves adjudged owners of a certain interest in remainder, court properly refused to pass on question whether certain remaindermen, who were not parties, should be barred of a recovery to the extent of advancements received as provided by Ky. St.  $\S$  2352.

Appeal from Circuit Court, Pike County.

Suit by K. P. Williamson and others against George W. Phillips and another. From the judgment rendered, defendants appeal. Reversed and remanded, with directions.

Cline & Steele, of Pikeville, for appellants.  
Stratton & Stephensons and R. D. Wilson, all of Vanceburg, for appellees.

CLAY, C. On July 31, 1869, A. T. Williamson and Rachel Williamson, his wife, and Anna Williamson, the mother of A. T. Williamson, executed and delivered a deed conveying to Sarah J. Williamson and others a tract of land on Johns creek in Pike county. The caption of the deed is as follows:

"This indenture, made and entered into between Anna Williamson, A. T. Williamson and Rachel Williamson, his wife, each of the county of Pike and state of Kentucky, of the first

part, and Sarah J. Williamson and her heirs and the heirs of James H. Williamson, of the county and state aforesaid, of the second part."

The granting clause of the deed is as follows:

"Hath hereby granted sold and conveyed unto the second part, Sarah J. Williamson her heirs and the heirs of James H. Williamson their heirs and assigns."

The habendum is as follows:

"To have and to hold the same with all the appurtenances thereon to the second party, Sarah J. Williamson her heirs and the heirs of James H. Williamson their heirs forever with covenants to warrant against their heirs assigns executors and administrators."

The grantor, A. T. Williamson, and James H. Williamson, were brothers, and Anna Williamson was their mother. The consideration for the land was paid by James H. Williamson.

On November 10, 1873, Sarah J. Williamson and James H. Williamson conveyed the land to Eli Williams, in consideration of the sum of \$1,700 and the assumption by the grantee of certain indebtedness owing to the grantors. This deed contained a covenant of general warranty. Upon the purchase of the land, Eli Williams took possession thereof and remained in possession until his death in the year 1890. He left surviving him five children. Within two years after his death, Martha Williams Phillips and her husband acquired the interest of the other children and are now the owners of whatever interest Eli Williams had in the land.

James H. Williamson was twice married. By his first wife, who died in the year 1867, he had four children. In the year 1869, he married Sarah Hunt, by whom he had thirteen children.

Alleging that George and Martha Phillips were the owners of only a life estate in the property by virtue of the deed executed on July 31, 1869, to Eli Williams, and that the plaintiffs were the owners of the remainder after the life estate of Sarah J. Williamson, eight of the children of James H. Williamson by his second wife, and the widow of a deceased son by his second wife, together with one of his children by his first wife, brought this suit to enjoin the defendants, George and Martha Phillips, from committing waste and to be adjudged the owners of ten-thirteenths of the land in remainder. On final hearing the chancellor adjudged that the plaintiffs, with the exception of the widow of the deceased son, were the owners of nine-thirteenths of the land in remainder. The defendants appeal.

[1] The proper construction of the deed of 1869 is the principal question presented. For appellants it is insisted that Sarah J. Williamson took either the entire fee, or a

joint estate with the four children of James H. Williamson then living. On the other hand, it is insisted that the chancellor correctly adjudged that Sarah J. Williamson took only a life estate with remainder to her children and the children of James H. Williamson. It will be observed that in the caption the grantees are "Sarah J. Williamson and her heirs and the heirs of James H. Williamson." The grant is to "Sarah J. Williamson, her heirs and the heirs of James H. Williamson, their heirs and assigns," while the language of the habendum is, "to the second party, Sarah J. Williamson, her heirs and the heirs of James H. Williamson their heirs forever." Thus, "her heirs and the heirs of James H. Williamson" are not only mentioned as grantees, but these words are followed in the granting clause by the word, "their heirs and assigns," and in the habendum clause by the words, "their heirs forever." Under these circumstances it cannot be said that the words, "her heirs and the heirs of James H. Williamson," were used as words of limitation. On the contrary, it is clear that the purpose of the deed was to convey to Sarah J. Williamson's heirs and the heirs of James H. Williamson an interest in the property. Hence we conclude that the words, "her heirs and the heirs of James H. Williamson," were used in the sense of "children," and therefore as words of purchase and not of limitation. That being true, Sarah J. Williamson did not take the entire fee.

It remains to determine whether she took an estate for life or a joint interest with the then living children of James H. Williamson, or with all their children. It must be borne in mind that, as the land was bought and paid for by James H. Williamson, the land was in effect a gift to the grantees. In numerous cases we have held that where land is given by a father to his daughter and her children, or by a husband to his wife and her children, the daughter or wife, as the case may be, takes an estate for life with remainder to her children. *McFarland v. Hatchett*, 118 Ky. 423, 80 S. W. 1185, 26 Ky. Law Rep. 276; *Bowe v. Richmond*, 109 S. W. 361, 33 Ky. Law Rep. 173; *Fletcher v. Tyler*, 92 Ky. 145, 17 S. W. 282, 13 Ky. Law Rep. 421, 36 Am. St. Rep. 584; *Smith v. Upton*, 13 S. W. 721, 12 Ky. Law Rep. 27. The reason for this rule of construction is that, if a joint estate is given, the interest of each will remain uncertain and shift upon the birth of each after-born child, and that the donor's intention can be best carried out giving to the wife or daughter a life estate with remainder to her children, thus keeping the state intact for the benefit of all. Hence we conclude that Sarah J. Williamson took a life estate with remainder to her children and the children of James H. Williamson.

[2] There is no merit in the contention that plaintiff's right of action is barred by

limitation. The life tenant is still alive. Until her death the remaindermen have no right of possession. Hence neither the life tenant, nor any one claiming through her, can hold adversely to the remaindermen. *Green v. Jones*, 169 Ky. 146, 183 S. W. 488; *Carpenter Moorelock*, 151 Ky. 506, 152 S. W. 575; *Ison v. Cornett*, 141 Ky. 771, 133 S. W. 756.

[3] The point is also made that as the deed from James H. Williamson and wife to Eli Williams contained a covenant of general warranty, and as it was shown that Otis Williamson and Roland Williamson received from their father, James H. Williamson, who is now dead, certain advancements, they should have been barred of a recovery to the extent of the advancements so received, as provided by section 2352, Kentucky Statutes. It appears, however, that neither Otis Williamson nor Roland Williamson is a party to the suit, and for that reason the chancellor properly refused to pass on the question.

The record discloses that James H. Williamson had four children by his first wife and thirteen children by his second wife. It is further shown that all of these children were living with the exception of Major Williamson, a son by the second wife, but to whom his interest descended upon his death does not appear. It will thus be seen that James H. Williamson had seventeen children, and that, although it was not shown that the nine plaintiffs had acquired in any manner the interests of the remaining eight children, they were adjudged to be the owners of nine-thirteenths of the land in remainder. As all of the children of James H. Williamson were joint owners of the land in remainder, plaintiffs should have been adjudged to be the owners of nine-seventeenths, instead of nine-thirteenths, of the remainder interest.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

# PRUDENTIAL INS. CO. OF AMERICA v. RAGEN.

(Court of Appeals of Kentucky. May 23, 1919.)

## 1. INSURANCE — 368(1)—LIFE INSURANCE—CONSTRUCTION OF POLICY—STATUTES—TERM OF PAID-UP POLICY.

In ascertaining term of lapsed policy providing for paid-up term policy for amount of policy, less indebtedness for such term as cash surrender value less indebtedness would carry modified amount at single premium term rates, court was not required to follow either method prescribed by Ky. St. § 659, or method provided for by contract, but could take a combination of the two most favorable to insured.

## 2. INSURANCE — 152(3) — CONSTRUCTION OF POLICY—STATUTES.

The statutes of a state relating to insurance in force at time a policy is issued, must be regarded as entering into and forming a part of the policy to the same effect as if embodied therein.

## 3. INSURANCE — 146(1) — CONSTRUCTION OF POLICY—GIVING EFFECT TO DIFFERENT PROVISIONS.

The different provisions of a contract of insurance must be so construed, if it can be reasonably done, as to give effect to each.

## 4. INSURANCE — 146(3) — CONSTRUCTION OF POLICY.

Where two interpretations equally fair may be made, that which allows a greater indemnity will prevail.

## 5. INSURANCE — 146(3) — CONSTRUCTION OF POLICY.

Where terms of policy render its meaning doubtful, a construction must be given which is favorable to the party insured.

## 6. INSURANCE — 146(1) — CONSTRUCTION OF POLICY—INCONSISTENT PROVISIONS.

Where policy contains inconsistent or contradictory provisions, force must be given to those that sustain rather than those which would forfeit the contract, because forfeitures are not favored by the law.

## 7. INSURANCE — 146(3) — CONSTRUCTION OF POLICY—STATUTES.

Where a policy of insurance contains terms more advantageous to the insured than is required by statute, the provisions of the statute will be treated as a minimum of value, and the policy and statute will be considered together, and that construction given which is more favorable to insured and will sustain the contract.

Appeal from Circuit Court, Henderson County.

Action by George W. Ragen, administrator, etc., against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Marshall Bullitt, Rodman Grubbs, and Bruce & Bullitt, all of Louisville, and Dorsey & Dorsey, of Henderson, for appellant.

Vance & Hellbrenner, of Henderson, for appellee.

QUIN, J. By its policy dated July 12, 1912, appellant insured the life of Robert W. Nichols for \$15,000. The policy lapsed for the nonpayment of the premium due July 12, 1916. Under the policy insured was given the option upon lapse (1) of taking the cash surrender value specified therein, less any indebtedness; or (2) a paid-up policy for the amount stated in the policy, but this amount to be reduced by the proportion that the total indebtedness, if any, bears to the

cash surrender value; or (3) if neither of the above were accepted, the company, without any action on the part of insured, would write a nonparticipating paid-up term policy for the full amount insured, less any indebtedness, for such a term as the cash surrender value, after deducting the indebtedness, would carry the modified amount at single premium term rates at  $3\frac{1}{2}$  per cent. Insured did not accept either of the first two options.

At the time the policy lapsed there was an indebtedness on it of \$1,185, this being the cash surrender value of the policy. The indebtedness equalizing, as it does, the cash surrender value, we have as the attendant result, under the terms thereof, a valueless policy. After its mutualization in 1915, the company declared a special dividend of \$24.90 on this policy; \$24.90 would carry a policy of \$13,815 (being \$15,000, less the indebtedness of \$1,185) for 39 days, or to August 20, 1916. Insured died March 24, 1917, 255 days after the lapse.

Contending there was no insurance in force at the time of the insured's death, the company declined payment under the policy. George W. Ragen, as administrator of decedent's estate, brought suit on the policy and recovered judgment in the court below for \$13,815, with interest from August 6, 1917.

Section 659 of the Kentucky Statutes provides, in part, as follows:

"No policy of life or endowment insurance upon the ordinary plan hereafter issued by any domestic life insurance company shall become forfeit or void, for nonpayment of premiums, after three full years' premiums, in cash, have been paid thereon; but, in case of default in the payment of any premium thereafter, then, without any further stipulation or act, except, as herein provided, such policy shall be binding upon the company for the amount of paid-up insurance, which, according to the company's published tables of single premiums, the net value of the policy on such anniversary, and all dividend additions thereon, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes, will purchase as a net single premium for life or endowment insurance maturing and terminating at the time and in the manner provided in the original policy; and such default shall not change or affect the condition or terms of the policy, except as regards the payment of premium and the amount payable thereon: Provided, however, that any company may contract with its policy holders to furnish, in lieu of the paid-up insurance provided for in this section, any other form of life insurance lawful in this commonwealth, of not less value.

"The reserve for such paid-up insurance shall not be less than two-thirds of the reserve of the original policy; but, any outstanding indebtedness on account of said policy shall operate to reduce the said paid-up insurance in proportion to its ratio to the reserve of such paid-up insurance, computed by the rule of

section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes.

"Every such policy after the payment of three full years' premiums thereon, in cash, shall have a surrender value, which shall not be less than seventy per cent. of the reserve that would be required for the aforesaid paid-up insurance, after deducting for any indebtedness as above provided, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes."

The rule referred to is the Actuaries' Table of Mortality and 4 per cent. interest. The calculation of the reserve in the policy was based on the American Experience Table and  $3\frac{1}{2}$  per cent. interest. Calculating the reserve in accordance with the Actuaries' Table of Mortality and 4 per cent. as provided in the statute, we would have \$1,321.95, plus the dividend of \$24.90—\$1,346.85, less the indebtedness of \$1,185, or \$161.85.

The company has no published tables of single premiums for extended insurance, but according to the company's published rates for term insurance the single premium at age 54 (insured's attained age at the time of lapse) for \$13,815 insurance for 255 days would be \$233.89. Hence the net sum arrived at as above would not be sufficient to pay the premium for the 255 days.

Applying the provisions of the statute as to the reduction of the paid-up insurance by reason of the indebtedness, we have the above sum of \$1,346.85, which will purchase in a single premium paid-up insurance of \$2,067, the reserve on this at 4 per cent. is \$1,090.49 and more than two-thirds of the reserve of the original policy. Reducing said \$2,067 in proportion to the ratio of the indebtedness to the reserve of such paid-up insurance, to wit, the ratio of \$1,185 to \$1,090.49, we find the indebtedness exceeds the reserve; in actuarial parlance, it is greater than unity, thus reducing the paid-up insurance to less than nothing. And so, if we make the calculation by the American Experience Table with  $3\frac{1}{2}$  per cent. interest, we have a reserve of \$1,397.85; dividend, \$24.90; total, \$1,422.75—which will purchase paid-up insurance of \$2,183. The reserve on this is \$1,210.04. Reducing \$2,183 in the proportion as \$1,185 is to \$1,210.04, we get \$45 as available paid-up insurance, the reserve of which is \$24.94, and this would purchase an equivalent value in extended insurance for 39 days.

It might be well to note the difference between net premiums and published or full premiums. The premium paid by the insured is made up of the net premium and the "loading." The net premium is the mathematical amount necessary to enable the company to carry the insurance represented by the policy, exclusive of expenses, taxes, etc. It is calculated on two assumptions: (1)



That the policy holder will die as shown by some mortality table; and (2) that the company will earn a certain assumed per cent. on its invested funds.

Calculations in accordance with the Actuaries' Table of Mortality with 4 per cent. interest simply means that the predictions of this table of mortality have been assumed as facts and that the company will earn a similar percentage on its investments is likewise assumed. The "loading" is intended to cover expenses, taxes, unforeseen contingencies, etc., for which the net premium makes no provision. The net premium plus the loading makes the full or gross premium—the premium as we know it.

*Peak v. Mutual Benefit Life Ins. Co.*, 172 Ky. 245, 189 S. W. 195, involved questions kindred to those here. There the company insisted it had the right to deduct from the reserve a surrender charge of 1 per cent. of the policy, or \$50, and, had it been permitted so to do, the amount available to purchase extended insurance, after deducting the indebtedness, would not have been sufficient to cover the period between the date the policy lapsed and insured's death. In that case, as in this, the insurer argued that the insured must either rely upon the contract or the statute, and in either event the amount available for extended insurance could not have kept the policy alive until the insured's death.

Recovery was allowed in that case, and we are now asked to overrule that opinion. The main defense of the Mutual Benefit was that, even admitting it was not proper under the statute to allow a surrender charge, the statute directed that the reserve should be calculated on the Actuaries' 4 per cent. basis, and if this was done there would not be an amount sufficient to extend the policy so as to cover the date of death. It was only by basing the reserve on the American Table, with 3 per cent. as provided in the policy and disallowing the surrender charge, that the right of recovery was sustained.

On this point the court says:

"We think a fair and reasonable interpretation of the statute is that it was intended to prescribe a method of fixing the minimum reserve on all life insurance policies when they were written on a basis of 4 per cent.; but that it was not its purpose to fix that as an arbitrary rule, where the insurance was based upon a lower rate which necessitated the payment by the policy holder of higher premiums and thereby accumulated for his benefit a larger reserve. The provision in the policy for a surrender charge in the case of either paid-up or extended insurance was contrary to the statute and therefore void: the appellant was entitled to a settlement under the terms of his policy with this void provision eliminated. *Penn Mutual Life Ins. Co. v. Barnett's Adm'r*, 124 Ky. 266 [96 S. W. 1120, 99 S. W. 228, 29 Ky. Law Rep. 1120, 30 Ky. Law Rep. 434]. It is net value which the statute says shall be used in

purchasing paid-up or extended insurance, and not the cash surrender value."

*Penn Mutual Life Ins. Co. v. Barnett's Adm'r*, supra, is relied upon by counsel for appellant, who state in their brief that the court construes section 659 as they do, and hence it is correct. The Barnett Case does not permit a surrender charge, but requires the whole of the reserve of a defaulted policy to be applied to the purchase of paid-up insurance unless the parties agree to a cash surrender in lieu thereof. It does permit a "loading" of its published premium rates, as will be seen from the following:

"By treating it as so much cash, and applying it upon the company's published rate of a 'single net premium for life.' That expression is technical. No one nowadays ever pays a single net premium for life in buying life insurance. At least it may be safely assumed that it is extremely rare, if ever done. \* \* \* It is therefore required that this single premium, as published, must in all events buy such insurance as that its reserve (for all sane and safe life insurance must have a reserve) shall not be less than two-thirds of the original reserve. In other words, the 'single premium,' alluded to in the statute, must not consume more than one-third of the defaulting policy holder's reserve for any other purpose than that of finally redeeming that identical policy."

The court also held that the indebtedness should be credited on the reserve as of the date of the lapse. These are the points discussed. The insured elected to take a paid-up policy. Having paid 12 premiums, the lower court held that insured should have a paid-up nonparticipating policy of twelve-twentieths of the \$5,000 policy, or \$3,000, less the indebtedness, or \$1,802. This was reduced on appeal to \$1,104.50.

In the present case appellant complains of the method fixed by the judgment of the lower court in that it follows section 659 of the Statutes, in using the full reserve, instead of the cash surrender value, but follows the policy in the use of net rates and the treatment of indebtedness. It is urged that either the policy or the statutory method is complete in itself, but either should be enforced only as a whole, and any combination of the two would work an injustice to the insured or the insurer. The cash surrender value and the indebtedness being the same, there was no insurance in force at the date of the lapse under the strict terms of the policy; likewise, if the provisions of the statute were followed in the calculation of the reserve and in the treatment of the indebtedness, there would be no recovery.

It is admitted by counsel that the policy in the Peak Case, supra, contained the same nonforfeiture provisions as does the policy in the case at bar, and the facts of the two cases are entirely similar, and they in effect concede that, unless the Peak Case is overruled or modified, the judgment of the lower

court is correct. We see no reason for overruling the decision in the Peak Case, nor in our judgment is it necessary to apply what counsel term "net rates" to sustain a recovery.

The company's actuary testifies that the gross premium for new original term insurance in the sum of \$13,815 (the face of the policy less the indebtedness) for 225 days at insured's attained age is \$233.89. The net premium for the same period of time, age, and amount of insurance would be \$188.50, according to the Actuaries' Table and 4 per cent. or \$162.24 calculated by the American Experience Table with  $3\frac{1}{2}$  per cent.

The Barnett Case, *supra*, is the main authority relied upon by appellant, and yet, construing the policy in the light of that case and giving to the insured the benefit of the gross premium, we get this result:

Full reserve calculated on the American Experience Tables, with $3\frac{1}{2}$ per cent. interest .....	\$1,397 85
Plus dividend of.....	24 90
<b>A total of.....</b>	<b>\$1,422 75</b>
Less the indebtedness of.....	1,186 00
<b>Leaves a balance of .....</b>	<b>\$237 75</b>

—or \$3.86 more than sufficient to pay the gross premium.

[1, 2] Not only should the judgment be sustained, because it follows the rule established in the Barnett and Peak Cases, *supra*, but for the further reason that the statutes of a state, relating to insurance in force at the time a policy is issued, must be regarded as entering into and forming a part of the policy, to the same effect as if embodied therein. Cooley's Briefs on Life Insurance, vol. 6, p. 691; Hall v. Ayers, Guardian, 105 S. W. 911, 32 Ky. Law Rep. 288.

[3, 4] If, therefore, the provisions of the statute are read into the policy, and we follow the rule familiar in construing insurance policies, to wit, that the different provisions of a contract of insurance must be so construed, if it can be reasonably done, as to give effect to each, and where two interpretations equally fair may be made, that which allows a greater indemnity will prevail. 14 R. C. L. p. 925.

[5, 6] And where its terms render doubtful the meaning of a policy a construction must be given which is favorable to the party insured, or where the policy contains incon-

sistent or contradictory provisions force must be given to those that sustain rather than to those which would forfeit the contract, because forfeitures are not favored by the law. Sun Life Ins. Co. v. Taylor, 108 Ky. 408, 56 S. W. 668, 22 Ky. Law Rep. 87, 94 Am. St. Rep. 383; 14 R. C. L. p. 925; Intersouthern Life Ins. Co. v. Duff, 184 Ky. 227, 211 S. W. 738.

Ætna Life Ins. Co. et al. v. Hardison, Ins. Com'r, 199 Mass. 181, 85 N. E. 407, involved the effect to be given a statute which provided that a policy and the application therefor should constitute the entire contract between the parties. The policy in question did not include a reference to the application in the matter of warranties, and the court held the insurance commissioner was correct in suggesting that the words "and the application is attached hereto" be added to meet the requirement of the statute; the court saying:

"Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of the opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added. \* \* \* It is conceivable that the application might contain something helpful to the insured as a part of the contract, in connection with other provisions, and with questions that might arise."

This case was approved in the later case of New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478, wherein it is said that no departure from the exact provisions required by the statute should be permitted, unless the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision.

[7] Where a policy of insurance contains terms more advantageous to the insured than is required by statute, the provisions of the statute will be treated as a minimum of value; the policy and statute will be considered together, and that construction given which is more favorable to the insured, and such as will sustain the contract.

Finding no error in the judgment appealed from, same is accordingly affirmed.

## SPACEY et al. v. CLOSE et al.

(Court of Appeals of Kentucky. May 6, 1919.  
Rehearing Denied June 20, 1919.)

## 1. WILLS ⇨598 — CONSTRUCTION — LIFE ESTATE WITH REMAINDER IN FEE.

A clause devising land to trustee for the use of one for life, remainder to his children, is a devise of a life estate in the land, and each of the children upon the death of testator take a vested remainder, which becomes a fee on life tenant's death.

## 2. WILLS ⇨476 — CONSTRUCTION OF WILL AND CODICIL TOGETHER.

A will and codicil must be construed together.

## 3. WILLS ⇨438 — CONSTRUCTION — INTENTION.

In construing a will, the intent of testator must govern unless contrary to law.

## 4. WILLS ⇨545(2) — CONSTRUCTION — REMAINDER AFTER LIFE ESTATE — DEATH WITHOUT ISSUE.

Where devise is to one for life, with remainder to a class, and in the event of death of one or more of the class without issue or without children, then to the survivors of that class, the provision regarding the death of the remaindermen means such death before the termination of the particular estate, unless will shows that the testator intended a death at any time in which it might occur.

## 5. WILLS ⇨545(2) — CONSTRUCTION — DEVISE OF LIFE ESTATE — FEE IN REMAINDER — DEATH OF REMAINDERMEN AFTER TERMINATION OF LIFE ESTATE WITHOUT ISSUE.

Under a will devising land to one for life, remainder to his children, and a codicil providing that, in case a remainderman died childless, then his share should go to survivors or their descendants, after testator's death, had a defeasible fee in remainder, in an equal moiety of the land, subject to be defeated by death of the remainderman without children living at the termination of the life estate, and each remainderman had a contingent interest in the portion of the others until termination of life estate, at which time the interest of those living became a fee, and each of them could convey his interest.

## 6. DEEDS ⇨8 — TITLE OF GRANTOR.

Where, after death of life tenant of lands under a will, the lands were divided, and a portion allotted to each of his children, remaindermen in fee, and thereafter A., one of such children, died, and her heirs conveyed her allotted lands, and by the same deed conveyed all the interests which should thereafter come to them under the will in the lands held by the life tenant during his lifetime on account of the death of any other of the remaindermen without children or issue then living, nothing passed by such deed except the lands allotted to A.

## 7. DEEDS ⇨8 — TITLE OF GRANTOR.

A grantor must have a vested or contingent interest in the subject-matter of the conveyance.

## 8. ESTOPPEL ⇨38 — AFTER-ACQUIRED TITLE — SALE OF INHERITANCE.

The rule of estoppel as to grantor conveying with a warranty and that an after-acquired interest inures to the benefit of his grantee is subject to exception in the case of an heir making the sale and conveyance of an estate which he expects to inherit from an owner then living, the thing attempted to be sold having no potential existence, and the conveyance being a fraud upon the owner and against public policy.

## 9. DEEDS ⇨8 — TITLE OF GRANTOR.

A mere expectation by certain persons that in the event another died childless and intestate and the owner of certain land they would inherit an interest in it is a mere expectancy which is not a subject of sale or conveyance.

## Appeal from Circuit Court, Boone County.

Two actions between Agnes F. Spacey and others and Elizabeth Close and others involving the construction of a will were consolidated, and from the judgment therein, Agnes F. Spacey and others appeal, and there was also a cross-appeal. Judgment affirmed.

J. M. Lassing and N. E. Riddell, both of Burlington, for appellants.

S. W. Tolin and G. W. Tolin, both of Burlington, for appellees.

HURT, J. [1,2] his appeal is from a judgment in two actions between the same parties, the actions having been consolidated. From the judgment there is an appeal, and also a cross-appeal. The decision must be rested upon the construction to be placed upon a certain clause of the will of Agnes Flourney and a clause of the codicil to her will. The will was executed on February 9, 1838, and the codicil on July 18, 1840, and both were probated as her last will and testament on August 17, 1840. The clause of the will in question so far as it is necessary to be considered, is as follows:

"Item. I give and devise to Samuel Winston, the Bellevue tract of land, in the county of Boone, and, also, the slaves, Catharine and Arthur, to be held by him in trust for the use and benefit of my brother, John Grant, for and during his natural life, and not in any manner to be subject to the control or liable to the debts of the said John Grant, and after his decease, remainder to the children of said John Grant. \* \* \*"

The clause of the codicil affecting the above provision is as follows:

"Item 6. I hereby will and bequeath and devise in case one or more of the children of my brother, John Grant, shall die without children or their descendants living at the time of the death of such child or children of said John Grant, that then the shares of such child or children of said John Grant willed or bequeathed or devised to such child or children of said John Grant or to the benefit, shall go to the other surviving child or children of said John

Grant or their descendants, and be owned possessed by him or them."

There can be no doubt that, under the terms of the clause quoted from the original will, John Grant was devised a life estate in the lands, and that each of his children upon the death of the testatrix took a vested remainder, which became a perfect fee upon the death of the life tenant. The clause in the original will and the one with reference to the devise in the codicil must be construed together, and from the terms of both, aided by any lights which may be thrown upon their meaning by the other clauses of the will and codicil, the intentions of the testatrix must be ascertained and determined. It is contended, upon one hand, that the children of John Grant took a perfect fee in the lands upon his death; while, upon the other hand, it is contended that, under the terms of the will and codicil, each of the children of John Grant at his death took a defeasible fee in an equal moiety of the land, subject to be defeated by the death of such child at any time without children then living, and as a result of such construction each of the children of John Grant was the owner of a contingent remainder in the share of each other child, and which would vest and become a fee upon the death of such other child without children then living, regardless of the time when such child should die. So the question for determination is: At what time will the death of one of the children of John Grant childless have the effect of passing the interest of such child in the land under the will to the surviving children of John Grant or their descendants?

It will be observed that the clause of the codicil does not in express terms fix the time when the death of a remainderman childless will have the effect of passing his remainder interest to his surviving brothers and sisters. The only effect which the codicil has upon the interests devised to the remaindermen by the original will is to provide for a defeasance of the vested remainder of any one of them who should die childless at the time of his or her death, and in such event the interest of such one is devised over to the surviving remaindermen or their descendants. The various clauses of the will and codicil show that the testatrix was acquainted and discriminated between estates in fee and those of less extent, but there is nothing which indicates that the testatrix intended to bestow upon each of the remaindermen at the commencing of the period of enjoyment an estate less than a perfect fee, or that she intended to burden the estate of either with a defeasance which might be effective until the termination of their lives. It would seem from the particularity with which the survivorship clause in the codicil is written that, if the

testatrix should have intended that the death of one of the remaindermen at any time should have the effect of defeating the estate devised to him or her, it would have been so declared. The testatrix must have contemplated that the remaindermen would come into the enjoyment of the estate intended for them upon the death of the life tenant, and such condition is expressly provided for by the clause in the will, and there is nothing about the clause of the codicil which would indicate that she had changed her mind upon that subject or intended anything to the contrary. Intending that the land should be the property of John Grant's children when he should die, and the period for the enjoyment of it by them should commence at his death, the codicil was intended to safeguard its ownership and enjoyment by them against any portion of it becoming the property of any other than his children by the death or disposition of his interest by one or more before the period for the enjoyment of the property should commence; but there is nothing to indicate that she intended by the codicil to give to the remaindermen surviving at the period of enjoyment any less estate than was given to them under the original will.

[3, 4] While in construing a will the primary and governing principle is that the intention of the testatrix, unless the intention is contrary to law, must always govern, and all mere rules of construction must give way to the plain intention of the testator as expressed in the will, there are rules of construction which the courts have adopted in aid of the ascertainment of the intentions of the testator, and one of them is that, where an estate is given to one for life, with remainder to another, and, if the remainderman die without issue or children then to a third person, or where the devise is to one for life, with remainder to a class, and in the event of the death of one or more of the class without issue or without children, then to the survivors of that class, the provision regarding the death of the remaindermen without issue or without children means the death of the remainderman before the termination of the particular estate, unless the letter or context of the will shows that the testator intended a death at any time at which it might occur. *Birney v. Richardson*, 5 Dana, 424; *Ferguson v. Thomason*, 87 Ky. 519, 9 S. W. 714, 10 Ky. Law Rep. 562; *Pool v. Benning*, 9 B. Mon. 623; *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398, 8 Ky. Law Rep. 193; *Hughes v. Hughes*, 12 B. Mon. 115; *Wren v. Hynes' Adm'r*, 2 Metc. 129; *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. 533, 12 Ky. Law Rep. 431; *Cornwall's Assignee v. Falls City Bank*, 92 Ky. 381, 18 S. W. 452, 13 Ky. Law Rep. 606; *Pruitt v. Holland*, 92 Ky. 641, 18

S. W. 852, 18 Ky. Law Rep. 867; Jewell v. White, 166 Ky. 325, 179 S. W. 212; White v. White, 168 Ky. 752, 182 S. W. 942; Harvey v. Bell, 118 Ky. 512, 81 S. W. 671; Cassity v. Riley, 158 Ky. 507, 165 S. W. 679; Bradshaw v. Butler, 110 S. W. 420, 38 Ky. Law Rep. 531; Moore v. Sleet, 113 Ky. 600, 68 S. W. 642, 24 Ky. Law Rep. 426; Mercantile Bank v. Ballard's Assignee, 83 Ky. 481, 4 Am. St. Rep. 160; Dickinson v. Ogden's Ex'r, 89 Ky. 162, 12 S. W. 191, 11 Ky. Law Rep. 385; Lewis v. Shopshire, 68 S. W. 426, 24 Ky. Law Rep. 331; Barger v. Isaacs, 71 S. W. 907, 24 Ky. Law Rep. 1618; Anderson v. Herring, 154 Ky. 289, 157 S. W. 13; Reuling's Ex'r v. Reuling, 137 Ky. 637, 126 S. W. 151; Hughes v. Covington, 152 Ky. 421, 153 S. W. 722; Trabue v. Terry, 9 S. W. 161, 10 Ky. Law Rep. 345; Jones v. Moore, 96 Ky. 273, 28 S. W. 659, 16 Ky. Law Rep. 561; Kephart v. Hieatt, 78 S. W. 425, 25 Ky. Law Rep. 1602; Duncan v. Kennedy, 9 Bush, 580; Webster's Trustee v. Webster, 93 Ky. 632, 21 S. W. 332, 15 Ky. Law Rep. 97; Henry v. Carr, 157 Ky. 552, 163 S. W. 756.

[5] Applying this rule of construction, which is generally adhered to, as expressing the will of the testator under such conditions, each of the children of John Grant, after the death of the testatrix, had a defeasible fee in remainder in an equal moiety of the land, subject to be defeated by the death of the remainderman without children or descendants living at the termination of the particular estate, and each of the children had a contingent interest in the portion of the others until the termination of the life estate, but at the termination of the life estate of John Grant the interest of each of his children then living ripened into a perfect fee, and each of them could sell and convey, or pass his interest by will, and, if one should die intestate, his interest passed to his heirs, in accordance with the laws of descent. The will of Agnes Flourney had no further influence upon the devolution of the property. Neither of the children then living had any further contingent interest or any kind of an interest in the portion owned by another.

[6, 7] After the death of John Grant in the year 1849 the lands were divided, and a portion allotted to each of his children in severalty. After some years Ann Grant Aiken, one of the children of John Grant, died childless and intestate, and the portion allotted to her passed to her heirs. She left no children or descendants, and hence her brother and sisters and the children of a deceased sister were her heirs. Her heirs sold and conveyed the lands owned by Ann Grant Aiken at her death, and by the same deeds conveyed to the grantee all the interests which thereafter should come to them under the will of Agnes Flourney in the lands held by John Grant during his life-

time on account of the death of any other of the children of John Grant who might thereafter die without children or without issue then living. The deeds did not purport to convey any present interests in the land other than the grantor's interests in the land allotted to Ann Grant Aiken, deceased, nor did the deeds undertake to specify or describe any definite boundary or undivided interest, or to describe the interests which were intended to pass by the deeds, but they limited the interests conveyed to such as might thereafter be received by the grantors under the will, and also the interests that the children of the grantors should be entitled to under the will of Agnes Flourney in the event that any one of the children of John Grant should die childless. As the grantors had no interest, either vested or contingent, in any of the lands allotted to any of the children of John Grant, other than the portions allotted to themselves by virtue of the will, nothing passed by these deeds except the lands allotted to Ann Grant Aiken. The thing attempted to be conveyed by the deeds, other than the lands inherited from Ann Grant Aiken, did not nor ever can have any existence. A well-established principle is that one contracting to convey must have a vested or contingent interest in the subject-matter of the conveyance. In the present instance the grantors had neither a vested nor contingent interest in the lands of W. W. Grant or Elizabeth Grant Rice, two of the children of John Grant, and the lands allotted to whom are now in controversy.

[8] One who sells and conveys an estate with warranty of title is in most cases estopped by reason of his warranty, or the nature of the conveyance, from asserting title to the property conveyed, and from denying the title of his grantee, and as a general rule, when one sells an estate to which he has no title, but warrants the title, any title acquired by him thereafter inures to the benefit of his grantee but the instance in which an heir makes sale and conveys an estate which he expects to inherit from an owner then living is said to be an exception to the rule, upon the ground that the thing attempted to be sold has no potential existence, is not the subject of sale and conveyance, and is a fraud upon the owner of the estate and against public policy, and that a deed evidencing such a sale is void, including the warranty. The interests claimed by the Tupman heirs and heirs of Susan Grant Bush in the lands owned by Elizabeth Grant Rice deceased did not come to them by virtue of the will of Agnes Flourney, and the warranty in the Tupman's deeds only relates to interests which they might receive by devise under that will, and the heirs of Susan Bush have not executed any deeds, and they inherited their interests

in the lands directly from Elizabeth Grant Rice.

[9] The only thing which W. W. Grant or the Tupmans had relating to the lands of Elizabeth Grant Rice at the dates of their conveyances was a mere expectation that in the event Elizabeth Grant Rice died childless and the owner of the land, and had not disposed of same by will, they would inherit an interest in it. Such expectancy, as above stated, was not a subject of sale or conveyance, and the warranty in a deed attempting such conveyance does not estop the claim to the interests thereafter inherited. *McDowell v. Neal*, 12 Ky. Op. 293, 5 Ky. Law Rep. 331; *Lowry v. Speer*, 7 Bush, 453; *Wheeler's Ex'r v. Wheeler*, 2 Metc. 474, 74 Am. Dec. 421; *Beard v. Griggs*, 1 J. J. Marsh. 22; *Smith v. Dinguid*, 8 Ky. Law Rep. 64; *Furnish's Adm'r v. Lilly*, 84 S. W. 734, 27 Ky. Law Rep. 228. W. W. Grant disposed of his portion of the lands by will, which he was authorized to do.

The opinion of the court being in accordance with the views herein expressed, it is therefore affirmed.

#### FAULKNER'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. May 16, 1919.  
Rehearing Denied June 20, 1919.)

#### DEATH — 39 — LIMITATIONS — RUNNING OF STATUTE.

Administrator's cause of action for death of his intestate under Ky. St. § 6, is barred by limitations under section 2516, requiring action to be commenced "within one year next after the cause of action accrued," in one year from death of intestate, and does not run until one year from qualification of administrator, in view of legislative history of latter statute.

Appeal from Circuit Court, Grant County.

Action by S. T. Faulkner's administrator against the Louisville & Nashville Railroad Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

D. E. Ernst, of Russell, for appellant.

O. H. Moorman and B. D. Warfield, both of Louisville, and A. G. De Jarnett and F. A. Harrison, both of Williamstown, for appellee.

CLARKE, J. The only question for decision upon this appeal is whether the cause of action conferred by section 6 of Kentucky Statutes upon an administrator for the death from negligence of his intestate is barred by limitations, under section 2516 of the Statutes, in one year from the death of the intestate, as held by the lower court, or in one year from the qualification of the administrator as contended by the appellant.

This precise question was decided by this court in *Carden's Adm'r v. L. & N. R. Co.*, 101 Ky. 113, 39 S. W. 1027, 19 Ky. Law Rep. 132, and *L. & N. R. Co. v. Simrall's Adm'r*, 127 Ky. 53, 104 S. W. 1011, 31 Ky. Law Rep. 1269, in both of which cases it was held that the limitation period began to run upon the date of the death, and the cause of action was barred one year thereafter. In the *Carden* Case our present statute of limitation with reference to actions for death was considered in the light of former enactments upon the same subject, and it was construed as being in intent and purpose but a re-enactment of the act of 1854, which gave the right of action for the loss of life and expressly provided that the limitation period should be one year from the date of death. The *Carden* Case has been cited with approval by this court in many subsequent cases, and as we said in the *Simrall* Case, supra:

"In other words, if section 4 of the act of 1854 is in meaning and effect included in section 3, art. 3, c. 71, Gen. Stats., then it must follow that it is also included in section 2516 of the Kentucky Statutes of 1903 [the latter being our present statute]; and therefore it conclusively appears that from 1854 until the present day the legislative intent has been that the cause of action for the death accrues as of the date of the death. Such has been the ruling of this court in every case to which our attention has been called, and certainly no legislative act, during the more than 50 years of legislation since 1854, can be found altering or repealing this legislative intent."

It would therefore seem, since neither the *Carden* Case nor the *Simrall* Case has been overruled or departed from so far as we can find, that the question is not an open one in this jurisdiction. Moreover, this construction of our statute is in harmony with the great weight of authority in other jurisdictions, although in some a different conclusion has been reached, due, however, usually to the peculiar phraseology of the statute upon the question. See 8 R. C. L. 803; 13 Cyc. 339. We cannot, therefore, accept as authority the contrary conclusions of the court in *American Ry. Co. v. Coronas*, 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E, 1095, construing a federal statute somewhat similar in phraseology to our statute, but which was the initial legislation by the federal government upon the particular cause of action, whereas, as we have seen, our statute is but the re-enactment of, and expressing the same legislative intent and purpose as, a previous act which expressly provided that the limitation period began to run with the death.

Counsel for appellant also relies upon the case of *L. & N. R. Co. v. Brantley*, 106 Ky. 849, 51 S. W. 585, 21 Ky. Law Rep. 473, in which it was held that by the provisions of

section 2526, Kentucky Statutes in an action to recover for the pain and suffering of his intestate; the administrator had one year after his qualification in which to file his action provided his qualification was within one year after the death of his intestate. Counsel, however, overlooks the fact that that action was for pain and suffering of the deceased (and not for his death), for which he in his lifetime had a cause of action, which survived to his administrator, and that the extension of time given by section 2526 to an administrator applies only to actions which existed in favor of the intestate and survived to the administrator. This is not such a cause of action, since it never existed in the decedent, and did not survive to his administrator; but is conferred originally upon the administrator by section 6 of the Statutes. This distinction was carefully explained by this court in the case of *L. & N. R. Co. v. Simrall's Adm'r*, supra, in disposing of the same contention that is now being advanced by appellant, and it was expressly recognized in the *Brantley Case*, where the court said:

"In *Carden v. L. & N. R. Co.* \* \* \* this court held that, when a cause was for the death of the person, the limitation was one year."

This distinction has not been called to attention in several cases where it was immaterial, since the action was barred in either event; but in most of these cases the court has cited with approval both the *Carden* and *Brantley Cases*, so that none of these cases can be regarded as abolishing the distinction which has been thus carefully observed where it was material, or of approving the one class of cases rather than the other, but must be considered as approving both lines of cases, and the distinction therein, since both are cited with approval.

Some of the cases which fail to call attention to the distinction where it was immaterial, and which counsel for appellant seems to think abolish the distinction, and construe section 2526 of the Statutes as applicable to actions for death such as this, but which cannot be given such effect, are *Fentzka's Adm'r v. Warwick Construction Co.*, 162 Ky. 585, 172 S. W. 1060; *Fleming's Adm'r v. Ernst*, 2 Bush, 128; *Wilson's Adm'r v. I. O. R. R. Co.*, 92 S. W. 572, 29 Ky. Law Rep. 148; *Boughner v. Sharp*, 144 Ky. 323, 138 S. W. 375; *Halcomb v. Cornett*, 146 Ky. 339, 142 S. W. 636; *L. & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563, 9 Ky. Law Rep. 690.

Since the appellant did not file this action for the death of his intestate for more than a year after the death, it is apparent that it was barred by the statute of limitation, and that the court did not err in sustaining such a plea thereto.

Wherefore the judgment is affirmed.

MAY et al. v. CHESAPEAKE & O. RY. CO.  
et al.

(Court of Appeals of Kentucky. April 29,  
1919. Rehearing Denied June 17,  
1919.)

1. EJECTMENT  $\S$  9(3), 15(1)—PROOF OF TITLE  
—COMMON SOURCE.

Where both parties in action of ejectment claimed under a common source, it was not incumbent upon plaintiffs to win upon the strength of their own title, regardless of the weakness of the title of defendants, and defendants will not be permitted to deny the title of their predecessors in the chain, or interpose the defense that lands in controversy were covered by a patent issued previous to the patent which was the source of their title.

2. NAMES  $\S$  14—PRESUMPTION.

Identity of name is prima facie evidence of identity of person.

3. LIFE ESTATES  $\S$  7—PRESUMPTION OF POSSESSION.

One who took title to a life estate will be presumed, in the absence of a contrary showing, to have also taken possession under the conveyance and claimed under it.

4. VENDOR AND PURCHASER  $\S$  231(3)—NOTICE.

The law charges a prospective purchaser with knowledge of the description of the land, its location, adjoining owners, character of estate, and every other material thing set out in the recorded deeds in the chain of title.

5. VENDOR AND PURCHASER  $\S$  229(1)—KNOWLEDGE OF TITLE.

Whatever is sufficient to put a purchaser of land upon inquiry as to the facts is equivalent to full notice of all the facts that such inquiry would have discovered to him.

6. EJECTMENT  $\S$  15(1)—COMMON SOURCE OF TITLE—ESTOPPEL—PATENTS.

In an action of ejectment, where defendants claimed by adverse possession, they could not deny the validity of a patent which was the original source of their title.

7. LIFE ESTATES  $\S$  8—ADVERSE POSSESSION BY OR UNDER LIFE TENANT—REMAINDERMAN.

The possession of a tenant for life, or the possession of a grantee of a tenant for life, during the life of the life tenant, cannot be adverse to remaindermen.

8. LIMITATION OF ACTIONS  $\S$  70(2)—REMAINDERMEN—INFERENCE.

The 15-year statute of limitations begins to run against all remaindermen in favor of a grantee of the life tenant claiming adversely immediately upon the death of the life tenant, where some of the remaindermen were sui juris, although some of them were under disability; but where all the codefendants to whom the right of action descends are under disability at the time the right of action accrues, the statute does not commence to run until the disability is removed from all, even the youngest.

**9. LIFE ESTATES ¶18—TAXES.**

A life tenant is bound to preserve the property and to keep it up so long as the particular estate continues, including the payment of taxes.

**10. TENANCY IN COMMON ¶15(2)—ADVERSE POSSESSION—NOTICE.**

A cotenant, to establish the disseisin by adverse holding for 15 years, must show that he gave notice to his cotenants by express declaration that he was claiming the whole estate in severalty and denying their right therein, or he must have so used the premises as to give constructive notice to the cotenants, even where the life tenant in possession was also a cotenant.

**11. ADVERSE POSSESSION ¶60(4)—HOSTILE POSSESSION—PRESUMPTION.**

If possession in its origin is amicable, it will not become adverse, so as to set the statute of limitations in motion, unless the property is in fact held adversely, and in such manner as to apprise a person of ordinary prudence that the holding is adverse.

**12. LIFE ESTATES ¶23—TRANSFER BY LIFE TENANT.**

The deed of one having only a life estate, though attempting and purporting to convey the fee, is effective to convey a life estate only, and does not affect the interests of remaindermen.

**13. TENANCY IN COMMON ¶15(10)—ADVERSE POSSESSION—BURDEN OF PROOF.**

The burden is upon a cotenant, claiming in severalty, to establish the disseisin by adverse holding for the statutory period.

**14. TENANCY IN COMMON ¶15(7, 8)—ADVERSE POSSESSION—DISSEISIN—SALE.**

The sale and conveyance by a cotenant by recorded deeds of the whole or portions of an estate in fee, or the erection of permanent and lasting structures, are such acts as are reasonably calculated to apprise a fairly prudent cotenant of the fact that the claimant is holding adversely.

**15. TENANCY IN COMMON ¶15(2)—ADVERSE POSSESSION—GRANTEE OF COTENANT.**

One who held the entire property under a deed in severalty of record from a tenant in common, who was also life tenant, for 15 years after the death of the grantor, acquired title by adverse possession, even though the cotenants did not have actual knowledge of the adverse holding.

**16. DEEDS ¶129(1)—CONSTRUCTION.**

A deed held to convey, not an estate in fee, but only a life estate.

**17. COURTS ¶83(1)—STARE DECISIS.**

A decision of the Court of Appeals construing a deed of certain lands estopped such court, by the rule of stare decisis, to otherwise hold in another suit concerning the same lands, but did not estop the court from construing differently a similar deed concerning other lands, as against one who acquired his interest before the opinion in question was delivered, as his property rights could not have vested upon confidence in the correctness of such opinion.

**Appeal from Circuit Court, Pike County.**

Action by D. A. May and others against the Chesapeake & Ohio Railway Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Stratton & Stephenson, of Pikeville, and John W. Woods, of Ashland, for appellants. Childers & Childers, of Pikeville, for appellees Ratliff.

A. L. Ratliff, of Pikeville, J. M. York, of Catlettsburg, J. J. Moore, of Pikeville, and Worthington, Cochran & Browning, of Maysville, for appellee Chesapeake & O. Ry. Co.

**SAMPSON, J.** This action in ejectment was instituted by D. A. May and several other persons, heirs of Ann Eliza May, in the Pike Circuit Court in August, 1913, to recover of the Chesapeake & Ohio Railway Company, Greenough Coal & Coke Company, Big Sandy Railway Company, Joel Ratliff, and Harriett Ratliff, eleven-twelfths of a tract of 50 acres of land, lying on Marrowbone creek, in Pike county. The Chesapeake & Ohio Railway Company built its track across the land for a distance of one-half mile or more, and the Greenough Coal & Coke Company had constructed its mining camp, consisting of a tippie, or tipples, trams, incline, switches, tracks, commissary, and many houses used for residences upon a part of the land, and Joel Ratliff and wife were in possession of the balance of the tract, holding and claiming it as their own at the time of the institution of the action. The lands in controversy were patented to David Branham June 21, 1827, and Branham took actual possession in the same year. On March 7, 1836, Branham sold and conveyed the land to Isaac Moore by deed of that date. Moore sold it to William Ratliff, Sr., and conveyed it by deed of date March 4, 1839. Ratliff on March 13, 1846, by deed conveyed a life estate in the lands to his daughter, Mrs. Ann Eliza May, with remainder to her children, and this is the beginning of the controversy. Ann Eliza was the wife of James May, and they immediately took actual possession of the land and lived on it until 1853. In the meantime Polly May, a daughter of Ann Eliza and James May, died intestate, and James and Ann Eliza May, as the heirs of their daughter, inherited her share of the land in fee. On February 1, 1853, James and Ann Eliza May undertook to convey the fee-simple title to the entire tract by deed to Reuben Rowe. In May, 1856, Rowe conveyed it by deed of special warranty to Silas Ratliff. Shortly thereafter Silas Ratliff died, leaving a will, which was probated in 1858, devising this tract of land to his daughter, Rebecca Ratliff, who afterwards married Lovett Childers, and Mrs. Childers and her husband on June 30, 1882, deeded the land to William Ratliff and appellee Joel Ratliff with covenants of gen-



eral warranty. By deed of date April 16, 1887, William Ratliff and wife conveyed their one-half undivided interest to appellee Joel Ratliff by deed of general warranty, thus apparently investing him with title to the whole tract. Joel Ratliff took and held said land from 1887 until a short time before the institution of this action, when he sold and conveyed, by deed of date August 29, 1905, a part of it to his coappellee, Greenough Coal Company, and about the same time sold a right of way to the Chesapeake & Ohio Railway Company. The balance he holds and claims as his own.

This litigation, commenced by the children and heirs of Ann Eliza May, is based upon a claim of ownership of the tract of land to which reference is made under the deed above mentioned from William Ratliff, Sr., in 1846, to his daughter, Ann Eliza May, in which he attempted to convey to her a life estate with remainder to her children. Said deed is as follows:

"This indenture, made and entered into this 13th day of March, A. D. 1846, by and between Wm. Ratliff, Sr., of the one part, of the county of Pike and state of Kentucky, and Ann Eliza May, of the other part, of the same county and state. The said Wm. Ratliff, for and in consideration of natural affection for the said Ann Eliza (being his daughter), hath this day bargained and sold unto the said Ann Eliza a certain tract or parcel of land lying and being in the county of Pike and state of Kentucky, on the waters of the Long fork of Marrowbone creek, containing 50 acres by survey, bounded as followeth, to wit: Beginning on a beech on the south side of the creek, thence running up the creek S. 44° E. 60 poles to a beech; S. 69° E. 40 poles to a hickory; S. 74° E. 40 poles to a beech; S. 20° W. 12 poles to beech; N. 78° W. 80 poles to lynn; S. 30° W. 28 poles to a small lynn on the bank of the creek; S. 8° W. 39 poles to a beech; S. 13° E. 44 poles to a sugar tree; S. 10° W. 82 poles to a large beech; S. 59° W. 20 poles to a beech and maple; same course 100 poles to a stake; N. 40° W. 80 poles; thence running back by parallel lines, N. 59° E. 99 poles; N. 10° E. 28 poles; N. 13° W. 44 poles; N. 8° E. 39 poles; N. 30° E. 28 poles; N. 20° W. 80 poles; S. 77° E. 86 poles to the beginning, with its appurtenances, to have and to hold forever, free from me, my heirs and assigns, unto the said Ann Eliza May, her heirs and assigns, that is to say, unto Ann Eliza her lifetime, then to her children, and will forever warrant and defend from all claim or claims claiming in, through, or by me. In testimony whereof I have hereunto set my hand and seal this day and date above written. Wm. Ratliff. [Seal.]

"Attest: G. W. Brown.

"Colbert Cecil.

"Nath Robbett."

Appellants (plaintiffs below) assert that the language of the habendum clause of said deed vested Ann Eliza May with a life estate only, with remainder to her children, and that her deed made in 1853, which purported to convey the fee-simple title

to the entire tract, did in fact convey only her life estate therein, with a one-twelfth interest in fee, which she and James May inherited from one of their twelve children, who died before they executed the deed to Reuben Rowe. Ann Eliza May died in January, 1897, and this action was commenced on August 16, 1913, more than 15 years after the death of the life tenant.

Each of the appellees (defendants below) filed a separate answer, in which the material allegations of the petition and its several amendments were controverted. In another paragraph the answers interposed the 15-year statute of limitation; in another paragraph the 30-year statute of limitations was pleaded; and one defendant in yet another paragraph alleged facts which entitled it to relief under the 7-year statute of limitation. Each defendant, by way of counterclaim against the plaintiffs, averred that, since it had been in the possession of said lands, it had erected permanent, valuable, and lasting improvements thereon; that at the time it did so it in good faith believed it was the owner of the land, and built said improvements in good faith, and each defendant asks that, in case the plaintiffs, appellants here, recover said land, defendants be adjudged a lien thereon for the value of said improvements. Issue was joined, and after the taking of much evidence on both sides in depositions, the case, having been transferred by agreement to equity, was submitted for judgment, whereupon the court dismissed the petition of plaintiffs, and they prosecute this appeal.

Appellants, asserting the following proposition, urge a reversal of the judgment: (1) The deed from Wm. Ratliff, Sr., to his daughter, Ann Eliza May, and under which appellants claim, vested Ann Eliza May with a life estate only, with remainder to her children. (2) Appellants and appellee claim title through a common source. (3) Appellants and appellees are tenants in common, and in the absence of notice of hostile holding, the possession of one tenant is the possession of all, and, as there is no proof of the alleged hostile holding of appellees until within 15 years before the filing of this suit, appellees' possession was the possession of all of the tenants in common. (4) Appellees are estopped by the recitals in the deeds under which they claim title to dispute the title of appellants. (5) Appellees cannot rely on an outstanding superior title, such as the Virginia grant of 1787, with which they have no privity, to defeat the claim of appellants. (6) Nor can appellees reply upon the Silas Ratliff patent of 1800 to defeat the Branham patent of 1827, since Silas Ratliff acquired title through Ann Eliza May to a life estate and a one-twelfth undivided interest in fee in the Branham patent, and as life tenant and tenant in common Joel Ratliff and his gran-

tees are not permitted to deny the title of the remainderman, or to acquire an outstanding hostile title, while holding under the deed granting the life estate, against a tenant in common or a remainderman. (7) The statute of limitation did not begin to run against such of the appellants as were married, or infants, at the death of Ann Eliza May in 1897, nor until said persons were relieved of disability, and the infants had 3 years after becoming 21 years of age in which to commence their proceedings. (8) The 30-year statute of limitation has no application under the facts in this case. (9) The 7-year statute of limitation cannot avail appellees.

Appellees insist that the judgment should be affirmed: (a) Because the action was one in ejectment, and the burden was upon the plaintiffs to present such a title to the land as would definitely fix their right to recover, irrespective of the weakness of the title of defendants. (b) The patent to David Branham, issued in 1827, was void, because granted upon land covered by a patent issued to Duvall and Marshall, of date in 1787. (c) Because plaintiffs failed to connect themselves by an authenticated chain of title with the Branham patent. (d) The deed to Ann Eliza May vested her with the fee-simple title, and not a life estate only. (e) Joel Ratliff and those under whom he claims have held the adverse possession of the property under title of record deducible from the commonwealth for more than 30 years. (f) More than 15 years had elapsed from the death of the life tenant before the bringing of this suit, and as some of the heirs of Ann Eliza May were sui juris at the time of her death, in 1897, the 15-year statute began to run against all, and their right was barred and tolled before the commencement of the action. (g) The claim of appellants is stale.

[1] Appellees assert that they do not claim title to the lands in controversy under the grant to David Branham in 1827, but that their claim is deduced from a patent issued by the commonwealth of Kentucky to Silas Ratliff April 6, 1860. The survey on which this patent was issued is dated April 24, 1857. It is therefore the contention of appellees that no common source of title exists between appellants and appellees, while appellants insist that there is a common source of title from which both claim, and upon the determination of this question depends the solution of several other questions; for, if both parties claim title under a common source, it was not incumbent upon plaintiffs below to win upon the strength of their own title, regardless of the weakness of the title of the defendants, and appellees will not be permitted to deny the title of their predecessors in the chain, or interpose the defense that the lands in controversy were covered by a previous patent issued to Duvall and Marshall in 1787. As all the

appellees claim under the title of Joel Ratliff, and the corporations have but recently acquired their interest, they all stand upon the same footing.

[2-6] The description of the lands granted to Branham by the commonwealth is followed substantially in several deeds in the chain of title of appellees, and materially assists in identifying the lands. Let it be remembered that appellee Joel Ratliff acquired title to a one-half undivided interest from his father, Wm. Ratliff, by deed in 1887. This instrument contains the following as a part of the description of the tract of land conveyed:

"A certain tract or parcel of land lying and being in Pike county, Kentucky, on Marrowbone creek, it being a tributary of Russell's fork of Big Sandy river; also said land adjoins John A. Bartlett's land, known as the James May survey, it being willed unto Rebecca Childers by her father, bounded as follows: Beginning on a beech running up the south of Marrowbone creek."

While there appear to have been two Silas Ratliffs, two Wm. Ratliffs, and two Joel Ratliffs, there was but one James May, and the James May mentioned in the foregoing description is the same James May who was the husband of Ann Eliza May, and who joined her in the deed which she made for the tract of land in controversy to Reuben Rowe in 1853, and is the same James May mentioned in several mesne conveyances in the chain of title of appellees. In other words, it appears that the tract of land in controversy was known for many years as the James May lands. In 1882 Rebecca Ratliff Childers and her husband, in conveying said tract to William and Joel Ratliff jointly, used the following as a part of the description:

"A certain tract or parcel of land lying in the county of Pike, state of Kentucky, on Marrowbone creek, a branch of the Russell's fork of Sandy river, and known as the James May farm, it being that willed to Rebecca Childers by Silas Ratliff, her father."

Silas Ratliff, in his will made August 6, 1858, and probated in the same year, in devising the tract of land in controversy to his daughter Rebecca, who afterwards married Childers, employs the following language:

"Item. I will and bequeath to my daughter Rebecca Ratliff the tract of land lying at the forks of Marrowbone creek and known as the James May farm with its appurtenances."

The patent to Silas Ratliff, under which appellees now assert claim, is dated April 8, 1860, more than a year after the death of Silas Ratliff. It cannot be controverted that Joel Ratliff entered under the James May title, and not under the Silas Ratliff patent of 1860, for his deed so recites in effect. He says he did not know of appel-

lands' claim until only a short time before the commencement of this litigation, and we apprehend that was the beginning of his claim under the Silas Ratliff patent. That patent was registered October 19, 1859, which was after the death of Silas Ratliff. But the survey upon which it was based is dated April 24, 1857. This patent granted 100 acres, while the James May tract, mentioned in the deeds in the chain of title of appellees, is described as "containing about 25 acres." The patent issued to Branham, however, was for 50 acres. The Silas Ratliff patent was not, therefore, in existence at the time he made the will devising the James May lands to his daughter.

Appellants assert that the Wm. Ratliff who was the father of Ann Eliza May is the same Wm. Ratliff who is the father of Joel, and to whom the land in controversy was deeded by Rebecca Childers in 1882. We doubt this, but we do not regard it as important, because, if it were a different Wm. Ratliff, that would have no effect whatever upon the claim of appellants. Wm. Ratliff in 1846, having conveyed his entire interest in the tract of land to his daughter, Ann Eliza, for life, then to her children in remainder, divested himself of every species of claim to the property. That deed was placed of record in the proper office in 1846. If later Wm. Ratliff purchased the tract from Mrs. Childers and her husband, he was in the same position as any other purchaser with knowledge. If it were a different Wm. Ratliff, he received the same estate as the other grantees who purchased with the deed in their chain of title specifically granting a life estate only to their remote grantor; the life tenant still surviving. However many Silas Ratliffs there may have been, appellees' chain of title is through Silas Ratliff, father of Rebecca Ratliff Childers, and he in his will carefully devised to his daughter Rebecca the tract of land lying at the forks of Marrowbone creek and known as the James May farm. So one must conclude that the testator Silas Ratliff was the same Silas Ratliff to whom Reuben Rowe granted the land in 1856, and was the owner of the James May land, and devised it—not the new survey—to his daughter Rebecca. Identity of name is prima facie evidence of identity of person. At that time Wm. Ratliff did not have the patent, nor otherwise own, except under the James May deed, the 100-acre tract under which appellees would claim, so far as this record shows. Therefore Rebecca Ratliff Childers, under the will, took only the James May land, which land her father owned and willed to her, and not the 100-acre survey afterwards patented in the name of her father, who was then dead.

As Silas Ratliff took title to a life estate in the May lands in 1856, we will presume,

in the absence of a contrary showing, that he also took possession under said conveyance, and claimed under it. His deed, while purporting to convey the fee, was quitclaim only. Mrs. Rebecca Ratliff Childers and appellee Joel Ratliff appear to have understood and recognized this in 1882, for by the deed of Mrs. Childers to Joel Ratliff and his father, Wm. Ratliff, the land is described as:

*"The James May farm, it being that willed to Rebecca Childers by Silas Ratliff, her father, containing about 25 acres."*

Hence one cannot doubt that Joel Ratliff, at the time he purchased an interest in the lands in 1882, as well as when he purchased his father's undivided interest in the same tract in 1887, knew this land to be the "James May farm," and, so knowing, was bound to take notice of all recitals in deeds in his chain of title back to the commonwealth, limiting his estate. 10 R. C. L. 686; Talbott's Ex'r v. Bell, 5 B. Mon. 323, 43 Am. Dec. 126; Debell v. Foxworth's Heirs, 9 B. Mon. 228; Vanmetre v. Griffith, 4 Dana, 89. "As a general rule, one claiming title to lands is chargeable with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derives his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals in those instruments made it his duty to pursue; and he is not entitled to rely upon his vendor's representations contradicting such recitals." 39 Cyc. 1718; Deskins v. Big Sandy Co., 121 Ky. 601, 89 S. W. 695, 28 Ky. Law Rep. 565; Bailey v. Southern R. Co., 112 Ky. 424, 60 S. W. 681, 61 S. W. 31, 22 Ky. Law Rep. 1397; Honore's Ex'r v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147; Hackwith v. Damron, 1 T. B. Mon. 235; Shuttleworth v. Kentucky Coal, etc., 60 S. W. 534, 22 Ky. Law Rep. 1341; Dotson v. Merritt, 141 Ky. 155, 182 S. W. 181. Where one claims under a deed, he is estopped to deny the nature of estate and all limitations and reservations recited in the deed. 16 Cyc. 687; Johnston v. Gwathmey, 4 Litt. 318, 14 Am. Dec. 135; 28 R. C. L. 216.

The law charges a prospective purchaser with knowledge of the description of land, its location, adjoining owners, character of estate, and every other material thing set out in the recorded deeds in the chain of title. Leob v. Conley, 160 Ky. 98, 169 S. W. 575, Ann. Cas. 1916B, 49. It is a well-established rule of evidence that whatever is sufficient to put a purchase upon inquiry as to the facts is equivalent to full notice of all the facts that such inquiry would have discovered to him. Allen v. Ligon, 175 Ky. 767, 194 S. W. 1050; Willis v. Vallette, 4 Metc. 186; Lain v. Morton, 63 S. W. 286, 23 Ky. Law Rep. 438; Summers v. Taylor, 80

Ky. 429. It follows, therefore, that Joel Ratliff as well as his predecessors in title knew, either actually or constructively, that the deed of William Ratliff, Sr., to his daughter, Ann Elliza May, made in 1846, which was of record in the proper office, conveyed to her only a life estate with remainder to her children, and claiming and holding under such deed he was estopped to deny the title of the remainderman. While appellees insist that their claim is based upon the patent issued to Silas Ratliff in 1860, they have no deed or other title paper which connects them with that patent, but, on the contrary, hold a deed specifically calling for "the James May lands." Undoubtedly Wm. Ratliff, Sr., is the common source of title of appellants and appellees. It follows, therefore, that appellees are estopped to plead or rely upon the prior patent issued to Marshall and Duvall in 1787, there being no privity between appellees and the Marshall and Duvall patent. In *Majestic Collieries Co. v. Allen*, 176 Ky. 251, 195 S. W. 409, this court held:

"The title of the common source need not be proven, and each party is estopped to deny the validity of the title under which he claims or holds, and cannot, therefore, defeat his adversary by proof of a superior outstanding title with which he shows no privity or connection."

To the same effect are the following cases: *Woolfork v. Ashby*, 2 Metc. 288; *McClain v. Gregg*, 2 A. K. Marsh. 454; *Davis et al. v. Davis et al.*, 157 Ky. 530, 163 S. W. 468; *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911; *Heard v. Cherry*, 92 S. W. 551, 29 Ky. Law Rep. 1102; *Barnett v. Minnick*, 17 S. W. 334, 13 Ky. Law Rep. 503.

[6] Nor will appellees be permitted to deny the validity of the patent issued to David Branham in 1827, which is the original source of their title.

[7] As the statute of limitations could not, therefore, have been set in motion until the death of the life tenant in 1897, the 30-year statute could have no application.

Although the 7-year statute of limitations is relied upon as a defense in the answer of the *Chesapeake & Ohio Railroad Company*, it does not insist upon it, and we are unable to find a place for such plea in this case. No principle is better settled than that a life tenant will not be heard to deny the title of remaindermen:

"The possession of a tenant for life, as such, cannot be adverse to the remainderman or reversioner, because the right of action of a remainderman or reversioner does not accrue until the death of the life tenant. It has been so held as to life tenants in the right of dower and by the curtesy. \* \* \* Prior to the death of the tenant for life, the possession of his grantee cannot be adverse to the remainderman or reversioner, and the statute begins to run against the remainderman only on the death of the tenant of the particular estate." 1 R. C. L.

§§ 63, 64; *Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575; *Jeffries v. Butler*, 108 Ky. 531, 56 S. W. 979, 22 Ky. Law Rep. 226; *Bransom v. Thompson*, 81 Ky. 387; *Ratterman v. Apperson*, 141 Ky. 821, 133 S. W. 1005; *Ray v. Thomas*, 140 Ky. 570, 131 S. W. 503; *Penn v. Rhoades*, 124 Ky. 798, 100 S. W. 288, 30 Ky. Law Rep. 997; *Justice v. May*, 176 Ky. 81, 195 S. W. 98; *Smith v. Young*, 178 Ky. 376, 198 S. W. 1166.

The life tenant's holding is not adverse to the remainderman, but, upon the contrary, is amicable to him; the possession of the life tenant being the possession of the remainderman. That the life tenant does not hold adversely to the remainderman is so elementary as hardly to need citation of authority. *Davidson v. Kelley*, 64 S. W. 623, 23 Ky. Law Rep. 1011; *Berry v. Hall*, 11 S. W. 474, 11 Ky. Law Rep. 30; *May v. Scott*, 14 S. W. 191; *Tucker v. Price*, 29 S. W. 857, 17 Ky. Law Rep. 11; *McIlvan v. Porter*, 7 S. W. 309, 8 S. W. 705, 9 Ky. Law Rep. 899; *De Courcy's Adm'r v. Dicken*, 1 Ky. Law Rep. 260; *Simmons v. McKay*, 5 Bush, 31; *Gudgell v. Tydings*, 10 S. W. 466, 10 Ky. Law Rep. 787; *Phillips v. Johnson*, 14 B. Mon. 172; *Davis v. Willson*, 115 Ky. 639, 74 S. W. 696, 25 Ky. Law Rep. 21.

Possession acquired and held under a life tenant cannot be adverse during his lifetime to those who are entitled to the estate after the termination of the life estate. *Simmons v. McKay*, supra; *Justice v. May*, 176 Ky. 80, 195 S. W. 98, supra. So also has it been written:

"No principle is better settled than that a remainderman in real estate cannot sue for the land, the thing itself, until the termination of the life estate which precedes him. The possession of a life tenant is his possession." *Walker v. Milliken*, 150 Ky. 17, 150 S. W. 73, Ann. Cas. 1914C, 742; *Bransom v. Thompson*, 81 Ky. 387.

Limitation does not begin to run against a remainderman until the right of entry exists in him which is at the termination of the particular estate. *Francis v. Wood*, 81 Ky. 16. Even where the life tenant attempts to convey the fee, and describes the entire boundary, and this deed is placed of record, limitation does not begin to run against the remainderman until the death of the life tenant. *Walker v. Milliken*, supra; *Bransom v. Thompson*, supra; *Jeffries et al. v. Butler*, 108 Ky. 531, 56 S. W. 979, 22 Ky. Law Rep. 226; *McIlvan v. Porter et al.*, supra; *Hamilton v. Hamilton*, 29 S. W. 876; *Ratterman v. Apperson*, 141 Ky. 821, 133 S. W. 1005; *Ray v. Thomas*, supra; *Penn v. Rhoades*, supra.

Since the remote vendor of appellees entered under the life tenant, the holding was amicable, and did not and could not become adverse to the remainderman, so long as they continued to hold and claim under the James

May and Ann Eliza May deed. This brings us down to the death of the life tenant, Ann Eliza May, in January, 1897.

[8] The only maintainable defense of appellees to appellants' right to recover, to which our attention has been called, is the 15-year statute of limitations. The life tenant died in 1897, and the action was not commenced until in August, 1913, which was more than 15 years after the cause of action accrued, as appellees claim, to the remainderman. Appellants, however, insist that the statute did not begin to run against them on the death of the life tenant because several of the grandchildren were under the age of 21 years, and other heirs were married women, and therefore under disability. It is admitted by appellants that certain of the heirs of Ann Eliza were sui juris at her death. This being true, the statute of limitation began to run against all of appellants immediately upon the death of the life tenant, under a well-established rule that, where part of the heirs are of full age and not under disability at the time the right of entry descended to them, the disability of the others does not prevent the statute from running against all. *Moore v. Calvert*, 6 Bush, 356; *Patterson v. Hansel*, 4 Bush, 660; *Sharp v. Stephens' Committee*, 52 S. W. 977, 21 Ky. Law Rep. 687; *Collier v. Davis*, 12 Ky. Opin. 100; *Simpson v. Shannon*, 3 A. K. Marsh. 462; *Allen v. Beal*, 3 A. K. Marsh. 554, 12 Am. Dec. 203; *Clay v. Miller*, 3 T. B. Mon. 148. But if all the cotenants to whom the right of action descends be under disability at the time the right of action accrues, the statute does not start running until the disability is removed from all, even the youngest. *Moore v. Calvert*, supra.

[9] Appellees assert that their right to the property by adverse possession is established by the admitted fact that they have not only held actual possession, but have paid all taxes due the county and state, and that appellants have paid no taxes or other expenses of upkeep of the property. This contention is fallacious. The life tenant is bound to preserve the property and to keep it up so long as the particular estate continues. 37 Cyc. 790.

"As between a remainderman and a life tenant in possession, the latter, since he enjoys the rents and profits of the land, must pay the taxes and the remainderman, in the absence of some agreement or controlling equity is under no obligation to do so." 17 R. O. L. 636; *Prescott v. Grimes*, 143 Ky. 191, 136 S. W. 206, 33 L. R. A. (N. S.) 669; *C. & O. R. R. v. Rosskamp*, 179 Ky. 175, 200 S. W. 496; *Creuts v. Hell*, 89 Ky. 432, 12 S. W. 926; *Anderson v. Daugherty*, 169 Ky. 308, 183 S. W. 545.

"One in possession of property, either as a life tenant or tenant in fee, is personally liable for the taxes during her possession, and the property itself is also bound therefor." *Morri-*

*son v. Fletcher*, 119 Ky. 488, 84 S. W. 548; *Smith v. Young*, 178 Ky. 376, 198 S. W. 1166.

[10] Appellants next insist appellees are tenants in common with them, and as such held the land in controversy for the joint use and benefit of all the tenants in common, including appellants, and that such holding was not adverse to appellants because no notice, either actual or constructive, had been given to appellants of the intention of appellees and their predecessors to hold and claim the land adversely to appellants, nor had appellees or their predecessors done anything on the land which was so utterly inconsistent with an amicable holding as to put appellants upon notice that appellees were claiming and holding the entire estate to the exclusion of appellants as much as 15 years next before the commencement of the action. Ann Eliza May and her husband and children removed to a distant part of the state very soon after the deed to Reuben Rowe in 1853 was executed, and were never again in the vicinity of the land, except some of the children, shortly before the commencement of this action, visited in Pike county. It is a rule of long standing that one tenant in common holding under a common title is estopped to deny the title of his cotenant, and the statute of limitation does not begin to run against such cotenant until actual notice is brought to him by the occupying tenant, either by express declaration or by such acts or conduct as would preclude any other idea than absolute ownership on the part of the occupying tenant, and that the occupant intended to hold and claim the land as separate estate adversely to all the world, including his cotenant. When this comes to pass, the statute of limitation always begins to run, and the duty is upon the outstanding cotenant to assert his right within the statutory period, or forever after hold his peace. But no presumption of adverse possession arises from one cotenant merely holding and using land in the ordinary and usual way. On the contrary, such holding and use is presumed to be amicable and for the joint use of all cotenants, and this is true, even where the life tenant in possession is also a cotenant.

"It is a universal rule that the possession of one cotenant is the possession of all, and each has the present right to enter upon the whole land and upon every part of it, and to occupy and enjoy the whole." 7 R. C. L. 820.

"Each cotenant has the right to the possession of all the property held in cotenancy, equal to the right of each of his companions in interest, and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his cotenants. Accordingly the rule is that each cotenant of realty may, at all times, reasonably enjoy every part of the common property; that is, he is entitled to such

enjoyment as will not interfere with the like rights of his cotenants." 7 R. O. L. 821.

[11] Joel Ratliff, while holding an absolute deed for the whole of the land, was in fact the owner of the life estate only, plus an undivided interest of one or two cotenants (twelfths) in remainder, but not the whole estate in remainder.

A possession in its origin amicable requires open acts of renunciation sufficient to raise a presumption of notice of an adverse holding in order to constitute a disseisin such as will initiate an adverse possession and set the statute in motion. *Frazier et al. v. Morris*, 161 Ky. 72, 170 S. W. 496; 7 R. C. L. 844.

If the possession in its origin is amicable, it will not become adverse, so as to set the statute of limitations in motion, unless the property is in fact held adversely and in such manner as to apprise a person of ordinary prudence that the holding is adverse. *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152; *Cryer v. McGuire*, 148 Ky. 100, 146 S. W. 402, Ann. Cas. 1913E, 485; *McSulley v. Venters*, 104 S. W. 365, 31 Ky. Law Rep. 963; *Middleton v. Fields*, 142 Ky. 352, 134 S. W. 180; *Collins v. Blair*, 178 Ky. 120, 198 S. W. 541; *C. & O. R. R. v. Rosskamp*, 179 Ky. 175, 200 S. W. 496; *Big Blain Oil & Gas Co. v. Yates*, 182 Ky. 50, 206 S. W. 2; *Snyder v. Vinson et al.*, 167 Ky. 332, 180 S. W. 46. The text in *Ruling Case Law* is as follows:

"Every cotenant has the right to enter into and occupy the common property and every part thereof, provided in so doing he does not exclude his fellow tenants or otherwise deny them some right to which they are entitled as tenants, and they, on their part, may safely assume, until something occurs of which they must take notice which indicates the contrary, that the possession taken and held by him is held as a cotenant, and is in law the possession of all the cotenants, and not adverse to any of them. \* \* \* It is not questioned, however, that one cotenant may oust the others and set up an exclusive right of ownership in himself, and that an open, notorious, and hostile possession of this character for the statutory period will ripen into title as against the cotenants who were ousted." 1 R. O. L. § 61, p. 741.

In order that one of several cotenants may acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as amounts to an ouster of the other tenants. Acts of ownership by one cotenant do not within themselves actually amount to the disseisin of the other cotenants; indeed, they may be so explained as to show a consistency with the joint title. Generally, a cotenant's sole possession of the land becomes adverse to his fellow tenants by his repudiation or disavowal of the relation of cotenancy between them; and any act or conduct signifying his

intention to hold, occupy, and enjoy the premises exclusively, and of which the tenant out of possession has knowledge, or of which he has sufficient information to put him upon inquiry, amounts to an ouster of such tenant. 1 R. O. L. § 742.

Another eminent text-writer says:

"Where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right, brought home to the true owner, are indispensable, before any foundation can be laid for the operation of the statute of limitation." 2 *Corpus Juris*, § 230.

Adverse possession, in order to bar recovery, should be brought to the notice of the joint tenant or landlord. *Tippenhauer v. Tippenhauer*, 158 Ky. 645, 166 S. W. 225. See, also, *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152; *Upchurch v. Sutton*, 142 Ky. 420, 134 S. W. 477; *Cryer v. McGuire*, supra; *Wolford v. Smith*, 146 Ky. 341, 142 S. W. 1055; *Morton v. Lawson*, 1 B. Mon. 45; *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78; *Sullivan v. Sullivan*, 179 Ky. 686, 201 S. W. 24. In 1 Cyc. 1146, the rule is stated as follows:

"It is well settled that, where one joint owner is in possession of the whole, the presumption is that he is keeping possession, not only for himself, but for his cotenant according to their respective rights. But an ouster or disseisin, while not to be presumed from the mere fact of sole possession, may be shown by such possession accompanied with a notorious claim of an exclusive right." *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723.

The same text, in 38 Cyc. p. 25, states the rule as follows:

"But, before a tenant in common can rely on an ouster of his cotenants, he must claim the entire title to the land in himself, and must hold the exclusive and adverse possession against every other person, thus repudiating the relation of cotenancy, for an ouster of one tenant in common by his cotenant is not to be presumed, in the absence of some open, notorious act of ouster and adverse possession, and possession by a tenant in common is not adverse as to his cotenants until they are so informed, either by express notice or by acts of such an open, notorious, and hostile character as to be notice in themselves, or sufficient to put the cotenants upon inquiry which, if diligently pursued, will lead to actual knowledge; the acts and declarations of a tenant in common, intended to show his adverse holding so as to entitle him to the benefit of the statute of limitations, being construed more strongly against him than such acts and declarations would have been construed had there been no privity. \* \* \* The entry and possession of one cotenant being ordinarily deemed the entry and possession of all, mere possession by one cotenant cannot operate as an ouster or disseisin as against his cotenants, even when attended with the exclusive receipt of rents and profits, and mere lapse of time or mere delay on the part of a tenant in common not in possession, in failing to demand admission to joint

possession \* \* \* is not sufficient to evidence an adverse holding by the one in possession."

This court in the case of *Kidd v. Bell*, 122 S. W. 235, held that, to make the possession of a tenant in common adverse to the cotenant, the possession must be open, notorious, and hostile to the other cotenant, and known by him to be so.

[12] The rule governing adverse possession between tenants in common is well stated in the opinion in the case of *Rush v. Cornett*, 169 Ky. 719, 185 S. W. 90, where it is said:

"The rule is altogether different as to what constitutes adverse possession as against a cotenant. In that instance the occupant must not only be in the actual possession of the land, claiming it to a well-defined, marked boundary, and that such possession is open and notorious, and with a claim in himself to all of it, but these facts must be known to his cotenant in order to eventually ripen the possession of the claimant into title in himself."

See *Hamilton v. Steele*, 117 S. W. 378; *Vermillion v. Nickell*, 114 S. W. 270; *Winchester v. Watson*, 169 Ky. 213, 183 S. W. 483; *Johnson v. Myer*, 168 Ky. 432, 182 S. W. 190; *Collins v. Blair*, 178 Ky. 120, 198 S. W. 541; *Kidd v. Bell*, 122 S. W. 232; *Barrett v. Coburn*, 8 Metc. 510; *Chambers v. Pleak*, 6 Dana, 426.

The deed of one having only a life estate, though attempting and purporting to convey the fee, is effective to convey a life estate only, and does not affect the interests of remaindermen. *Justice v. May*, 176 Ky. 81, 195 S. W. 98.

[13] In the case at bar *Joel Ratliff*, who held under and by the life tenant, was in possession of the whole of the land in controversy at the death of the life tenant in 1897, and continued to reside thereon until and after the institution of this action. He lived on, cultivated, and used parts of it—rented and let it in any way he desired. Appellants, heirs of Ann Eliza May, did not live in Pike county, and no one of them were in the vicinity of the land, so far as this records shows, from the death of the life tenant until shortly before the commencement of this action. The home of Ann Eliza May and her husband and children was in Greenup county, Ky. Some of appellants took up their residence in other counties in Kentucky, and others in different states; but it satisfactorily appears that no one of appellants knew, or had reasonable opportunity to have known, of the claim of appellee Joel Ratliff, or any of his predecessors in title, to ownership in severalty of the land in dispute. So long as the life tenant lived, Joel Ratliff, as the grantee of the life tenant, was entitled to hold, occupy, and use the lands without let or hindrance from the remainderman; but upon the death of the life tenant his holding became adverse,

under the facts of this case, to the remainderman, unless he was a cotenant with them, and as such held and possessed the land for the joint use and benefit of himself and the other cotenants. The presumption is, in the absence of a showing to the contrary, that the holding of a cotenant is amicable, and not adverse to his fellows. The burden, therefore, is upon the cotenant claiming in severalty to establish the disseisin by adverse holding for the statutory period. In order to do so, the claimant must show (1) that he gave notice to his cotenants by express declaration that he was claiming the whole estate in severalty, and denying their right therein; or (2) he must have so exercised the possession, and controlled and used the premises, as to have apprised a reasonably prudent person that the claimant was denying the right of his cotenants to any share in the estate; or (3) he must hold the estate adversely and exclusively under a title of record for the whole in severalty, and thus bring constructive notice to the outstanding cotenants. *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. 774, 4 Am. St. Rep. 579. As said in *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152:

"Where possession is in its origin amicable, it will not become adverse, so as to set the statute of limitation in motion, unless the property is in fact held adversely and in such manner as to apprise a person of ordinary prudence that the holding is adverse."

In the recent case of *Rush v. Cornett*, supra, it was distinctly held that the possession did not become adverse to cotenants, and the statute of limitation did not begin to run, until the fact of the adverse claim was made known to the outstanding cotenants.

[14] It therefore appears that a decision of the question here involved depends partly upon the nature of the use which appellee Joel Ratliff made of the premises in question after the death of the life tenant in 1897, no less than the claim of title which the absolute and complete possession, coupled with a recorded general warranty deed for the fee estate, manifested. A review of all the authorities make it apparent that any use of lands which is not inconsistent with the cotenancy, or with the existence of the life tenancy or a leasehold, is not sufficient to make the outstanding cotenants aware of the adverse claim, and will not amount to a disseisin, or start the statute of limitation to running; but the erection of permanent and lasting structures, the sale and conveyance by recorded deeds of the whole or portions of the estate in fee, are such acts as are reasonably calculated to apprise fairly prudent persons of the fact that the claimant is holding adversely to his cotenants. In this case appellee Ratliff sold and conveyed a part of the tract in controversy to the Greenough Coal & Coke Company by deed of date the

29th day of August, 1905, and which was recorded in the office of the clerk of the Pike county court in Deed Book 40, page 112, on the 1st day of September, 1905. He also sold and conveyed to the appellee, Chesapeake & Ohio Railroad Company a right of way over and across the lands about the year 1905, which deed was duly recorded in said office. Under this deed the railroad company entered upon the premises and constructed and placed in operation its line of railroad about 1905. So the coal company entered upon the lands deeded to it in the year 1905, and erected coal tipples, railroad switches, and a mining camp. These improvements were permanent and lasting, and of such nature and conspicuousness as to have apprised a person of ordinary prudence of the adverse claim of Ratliff and his grantees, and to have amounted to a disseisin, and a vesting of title in the occupant at the end of the statutory period; but these acts were much less than 15 years before this action was commenced. Up to the time of the erection of said structures and the construction of the railroad, Ratliff had committed no act or acts which, taken alone, were reasonably calculated to have put appellants on notice that he was claiming adversely to them as cotenants.

[15] Although we are inclined to the opinion that, had appellants, or some one or more of them, resided in the immediate neighborhood of the property at the time of the demise of the life tenant in 1897, appellants would have been barred by limitation at the end of the 15-year period, because in such case a reasonable rule would require them to take notice of the fact that appellee Ratliff was claiming in severalty, yet we do not regard the continued holding of one whose original entry into possession was amicable of such a nature as to constitute a disseisin, in the absence of a recorded deed. But the actual continuous adverse possession of appellee Ratliff, as aforesaid, under an absolute deed of record for the whole estate, was such possession as was reasonably calculated to apprise a fairly prudent cotenant of an adverse claim on the part of Ratliff, and therefore sufficient to set the statute running on the death of the life tenant in 1897, and to ripen the claim into title at the end of the 15-year period. A very similar question was presented in the case of *Larman v. Huey's Heirs*, 13 B. Mon. 443, decided in 1852, where it was held that the deed of one joint tenant to another for the whole property, and the entry of a grantee under the deed claiming the whole land, amounted to an assertion of superior title and right to the whole of the estate, and was hostile to the claim of all cotenants; the court saying:

"As the plaintiff makes out no title from the commonwealth, nor any paper title further back

than the sheriff's deed to Johnson, who conveyed to Berry and Huey, the right of recovery depends entirely upon the effect of the deed to Berry and Huey, and of the subsequent transfers and possession. This last-mentioned deed [from Johnson] made the grantees, Berry and Huey, joint tenants, and the entry of either prima facie inured to the benefit of both. But we do not understand that there was any actual possession, in fact, at the date of Berry's deed to McIllyea, and whether there was or not, as that deed professes to convey the whole island, it asserts claim to the whole, and an entry under it by McIllyea or his vendee Harrison, could not be presumed to be an entry for the benefit of the other tenant in common, since it would be made under a deed which asserted title to the whole, and thus denied the title of the other to any part. The deed of Berry did not, it is true, destroy the title of Huey, nor pass it to the grantee; but the making and the acceptance of that deed was a denial of Huey's title and assertion of exclusive claim and title, and furnishes evidence of the intent with which the entry under it was made. It is also evident from other facts that Harrison claimed an exclusive possession necessarily adverse to the title or claim of Huey; and it may be assumed that whatever possession was taken and held under the deed to McIllyea was of a similar character."

See, also, *Gillaspie v. Osburn*, 3 A. K. Marsh. 77, 13 Am. Dec. 136; 1 Cyc. 1078.

The rule generally recognized by courts of this country makes a recorded deed by a cotenant to a stranger or to another cotenant, for the entire tract, notice to all other cotenants of an adverse holding by the grantee in possession. *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *DeLeon v. McMurry*, 5 Tex. Civ. App. 280, 23 S. W. 1038; *McCann v. Welch*, 106 Wis. 142, 81 N. W. 996. In *Freeman's* work on Cotenancy (section 224) it is said:

"The character of an entry may be inferred from the conveyance under which it is made, as well as established by direct declarations of the party making it. The entry of a person under a conveyance which purports to convey a moiety may well be presumed to be simply as claimant of such moiety. But when the conveyance purports to dispose of the whole, should not the entry be presumed to be in the assertion of a right in severalty? Should not such entry be, of itself, sufficient evidence that the grantee intended thereby to assert all the rights with which his grantor has assumed the authority to invest him? In other words, is not an entry under a conveyance which purports to convey the entirety equivalent to an express declaration on the part of the grantee that he enters 'claiming the whole to himself'; and is it not, therefore, such a disseisin as sets the statute of limitations in motion in favor of such grantee?"

The author then quotes from Judge Story, writing in the case of *Prescott v. Nevers*, Fed. Cas. No. 11390, as follows:

"I take the principle of law to be clear that, where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title, and that he



is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land, so described, in any other person."

He then supports the text by a case from New York (*Jackson v. Smith*, 13 Johns. 411), and continues:

"So in Pennsylvania the broad proposition is maintained that the possession of land by a purchaser 'under a deed of an entire lot is adverse to the rightful owner, though tenant in common with the grantor,' because 'the entry is under an adverse title, and not as a cotenant.' 'The sale in such case of the whole tract is in effect such assertion of claim to the whole as cannot be mistaken, because it is wholly incompatible with an admission that the other tenant in common has any right whatever.' If the conveyance made by a tenant in common, in addition to purporting to dispose of the entirety, contains a covenant of general warranty against the claims of all persons, no room is left for a doubt that the grantor intended to deal with the lands as his individual estate, and that the grantee believed he was acquiring an estate in severalty. The entry of the grantee cannot be presumed to be that of a cotenant, nor in subordination to the rights of the cotenancy. Acts of ownership on the part of such a grantee must necessarily be adverse to any other part owner. His possession taken under such deed, and continuing the requisite period of time, creates in him a complete title in severalty, by virtue of the statute of limitations. 'When one tenant in common conveys the whole estate in fee, with covenants of seisin and warranty, and his grantee enters and claims and holds exclusive possession, the entry and claim must be deemed adverse to the title and possession of the cotenant and amounts to a disseisin.'"

This text is supported by several of the earlier Kentucky cases. *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 186; *Gillaspie v. Osburn*, 3 A. K. Marsh. 77, 18 Am. Dec. 136. And Kentucky is committed to this doctrine for this court has in a long line of cases extending up to the present time reasserted the same principles. There is, however, two or three states which lay down the broad proposition that a tenant in common cannot acquire title by adverse possession, except by actual ouster. California and North Carolina are among the states holding to this doctrine. In the latter state the courts declare the law to be well settled that if one tenant in common assumed to convey the entire land, or any specific part of it, by metes and bounds, his deed is immaterial, and the possession taken under it is confined to the estate which he actually owns, and not to the boundary described in the deed, and does not start the statute of limitations running. It is an actual ouster and disseisin of the cotenant only which he is bound to notice.

In the case of *Greenhill v. Biggs*, supra, where the facts were very similar to those

in the case under consideration, one who held the entire property under a deed in severalty of record from a cotenant was held to acquire title by adverse possession, even though the cotenant did not have actual knowledge of the adverse holding; it being said:

"But actual notice has never been held by this court to be necessary in order to constitute adverse holding a bar to recovery in such case, it being deemed sufficient, when one joint owner holds and claims the land continuously, and in such manner as to apprise the other joint owners of the adverse character of the possession. *Russell's Heirs v. Marks' Heirs*, 3 Metc. 37."

After stating that one joint owner is entitled to enter and occupy the joint property, and that such occupancy is not to be regarded as adverse to his cotenants, the text in 7 B. C. L. p. 844, says:

"This proposition is based upon the supposition that the entry is made either *eo nomine* as a tenant in common, or that it is silently made, without any particular avowal in regard to it, or without notice to a cotenant that it was adverse. But the doctrine has been long since held, and the authorities sustained it, that one tenant in common may so enter and hold as to render the entry and possession adverse, and amount to an ouster of a cotenant. And so, where once it appears that the party occupying the premises holds, not in recognition of, but in hostility to, the rights of his cotenants, his possession ceases to amount to constructive possession by them, and becomes adverse, and, if maintained for the period provided by the statute of limitations, will vest in the possessor a sole title by adverse possession to the premises. \* \* \* The title acquired by one of the cotenants of real property under a deed in severalty from a cotenant who is holding adversely does not inure to the benefit of another cotenant, and it is held that the grantees may tack their possession to that of their grantor for the purpose of establishing a title by adverse possession as against such other cotenant."

The same writer, on page 851 of volume 7, says:

"The taking and recording of a deed by one tenant in common from a third person will not have any effect towards constituting such an ouster of his cotenant as would lay the foundation for the commencement of an adverse possession against him, unless accompanied and followed by a hostile claim of which the cotenant had knowledge, and by the acts of possession not only inconsistent with, but in exclusion of, the continuing right of the cotenant in the premises. And so, putting a tax deed for the whole tract on record is no ouster of a cotenant unless he knew of the adverse claim, and this is true, even though the claimant enters under such a deed and exercises certain acts of ownership. But if one enter under color of title, claiming the whole to himself, and other necessary conditions of adverse ownership concur, his possession will be adverse to his cotenant."

This rule has been followed and approved in *Mounts v. Mounts*, 155 Ky. 371, 159 S.

W. 818, and *Frazier v. Morris*, 161 Ky. 72, 170 S. W. 510.

Although a mere adverse holding of lands by one co-owner, which does not come to the actual knowledge of the outstanding tenant, or is not of such notorious nature as to put a reasonably prudent person upon inquiry, is not sufficient ordinarily to set the statute of limitation running against a cotenant, yet such holding, coupled with an absolute deed to the claimant for the whole property in severalty, recorded in the proper office, will set the statutes in motion. Applying this rule to the facts in this case, we are forced to the conclusion that the statute of limitations began to run in favor of Ratliff, inuring to the other appellees, on the death of the life tenant in 1897, and the rights of appellants were barred at the end of 15 years thereafter and before the commencement of this action.

[16] Appellees insist that the deed from Wm. Ratliff, Sr., to his daughter, Ann Eliza May, in 1846, passed the fee simple and not a life estate only, and rely upon the opinion in the case of *Ratliff v. Marrs*, 87 Ky. 26, 7 S. W. 395, 8 S. W. 876, in which a deed in almost identical terms to the one under consideration was held to convey the fee. The grantor in that deed, made in 1848, appears to be the same Wm. Ratliff who made the deed to his daughter, Ann Eliza May, in 1846. While the opinion in the case of *Ratliff v. Marrs*, supra, sustains the position of appellees, it has long since been expressly overruled, and was at the time of its delivery and now out of harmony with the prevailing rule in this state, as often expressed before and since the opinion in that case was delivered in 1888. Clearly the deed from Wm. Ratliff, Sr., to his daughter, Ann Eliza May, conveyed a life estate only to Ann Eliza, with remainder to her children. *Baskett v. Sellars*, 93 Ky. 2, 19 S. W. 9; *Atkins v. Baker*, 112 Ky. 877, 66 S. W. 1023; *Funkhouser v. Porter*, 107 S. W. 202, 32 Ky. Law Rep. 676; *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431.

[17] Even if overruled, appellees say the opinion estops the court by the rule of stare decisis to now otherwise hold, because property rights have vested upon confidence in the correctness of that opinion and must not now be disturbed. That is true as to the lands involved in that case, but since Joel Ratliff acquired his interest in the lands in controversy in 1882 and 1887, which was before the opinion in question was delivered in 1888, he cannot well claim he was relying upon it. The established rule on the subject in this state was the same in 1882 as now, and stare decisis, therefore cannot be invoked.

Wherefore the judgment is affirmed.

## LARUE v. BARBEE.

(Court of Appeals of Kentucky. May 23, 1919.)

### 1. FRAUD ⇐11(2) — MISREPRESENTATION—OPINION OR FACT—VALUE OF BONDS.

Where vendor accepts assignment of notes in part consideration for land, "without recourse" and waives vendor's lien upon purchaser's representations that bonds securing the notes were worth par, such representations were statements of facts and not merely expressions of opinion, where the purchaser claimed to have knowledge of value, and the vendor had no opportunity to ascertain the actual value.

### 2. FRAUD ⇐65(1) — VALUE OF NOTES — INSTRUCTIONS.

In vendor's action against purchaser for fraud in misrepresenting the value of bonds securing notes assigned by purchaser to vendor in part consideration for land, where only evidence as to worthlessness of the notes was a statement that the makers were insolvent, the court's failure to give instruction on measure of damages was error, since mere proof of insolvency of the makers was not proof of worthlessness of the notes.

### 3. FRAUD ⇐59(2)—VALUE OF NOTES—MISREPRESENTATION—MEASURE OF DAMAGES.

Where purchaser induces vendor to accept assignment of notes in part consideration for land upon misrepresentation as to the value of the notes, the vendor's measure of damages is the difference between the value of the notes at the time of assignment and what their value would have been if the bonds by which they were secured had been worth par as represented by purchaser.

### 4. FRAUD ⇐59(1) — MISREPRESENTATION OF VALUE OF NOTE—MEASURE OF DAMAGES.

In vendor's action against purchaser for misrepresenting the value of bonds securing notes assigned to vendor in part consideration for land, where the uncontradicted evidence shows that the notes at the time of assignment were worthless, the vendor's measure of damages is the full face value of the notes and interest.

### 5. APPEAL AND ERROR ⇐204(1)—EXCEPTIONS—ADMISSION OF EVIDENCE.

Error in admitting evidence is not reviewable, where no objection thereto was taken.

Appeal from Circuit Court, Simpson County.

Suit by J. Will Barbee against John F. Larue. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Sims, Rodes & Sims, of Bowling Green, for appellant.

G. W. Roark and Whitesides & Bradshaw, all of Franklin, for appellee.

CLAY, C. In the month of March, 1916, J. Will Barbee sold and conveyed to John F. Larue a small tract of land in Simpson coun-

ty. The consideration was the assumption of a mortgage lien for \$1,000, a note for \$100 due July 1, 1916, and the assignment "without recourse" of two notes for \$300 each, executed by Briggs & Wynne to J. G. Weill, and assigned by Weill to Larue, and secured by a bond for \$1,000 issued by the Park Theater Company, which bond was secured by a second mortgage lien on the property of that company, located in the city of Henderson. The prior mortgage lien on the Park Theater property amounted to \$12,500 and interest. Shortly after the transaction between Barbee and Larue, suit was brought to enforce the first mortgage lien, and upon a sale of the property the proceeds were not sufficient to pay anything on the second mortgage bond.

This suit was brought by Barbee against Larue to recover damages for fraud and deceit. The allegations of the petition are, in substance, as follows: In making the trade, plaintiff stated that he knew nothing about the value and condition of the Park Theater Company's property, and nothing about the financial condition of the company or the value of the bond, and was unwilling to accept the notes indorsed "without recourse" and waive his vendor's lien. Whereupon the defendant, for the purpose of inducing plaintiff to accept the two notes indorsed "without recourse" and to waive his lien on said land, falsely and fraudulently represented to plaintiff that he knew the condition and value of the property of the Park Theater Company; that he knew that the bond was a good investment and worth on the market its full face value of \$1,000; that the two notes and the interest thereon were well secured by the bond as collateral; that the Park Theater property cost \$36,000, and was then in good repair and condition; that the first lien on the property was only \$12,500; that \$1,000 had been paid the first of the year; and that all interest had been paid up, and that there was only six of the second mortgage bonds of \$1,000 each.

Relying upon the truth of these representations, plaintiff agreed to accept the notes in question "without recourse," and agreed to waive his vendor's lien. At the time of the transaction the prior lien amounted to \$14,574.49, and the interest thereon had not been paid the first of the year. Had he known the true condition of the Park Theater property and the value of the bond, he would not have accepted the notes or waived his vendor's lien. After denying the allegations of the petition, defendant pleaded, in substance, that plaintiff, in accepting the two notes "without recourse," relied solely on his own personal knowledge of the solvency of Briggs & Wynne, and did not rely upon the value of the \$1,000 bond, or the solvency of the Park Theater Company.

Plaintiff testified substantially to the facts

alleged in his petition, and stated that defendant said that it was not necessary to sign the notes "with recourse," as the bond was worth par value and the theater cost \$36,000, and the first mortgage lien was only \$12,500 and the interest on the mortgage debt had been paid up to the first of the year, and the company was paying it 6 per cent. Thereupon plaintiff told defendant that he knew nothing about the bond, and was going to take his word of honor. If defendant had not assured him that the bond was good, plaintiff would not have made the trade. On the other hand, defendant denied making any of the foregoing statements to plaintiff. He merely stated to plaintiff that, from information he had received from Henderson, he thought the bond was good. Thereupon plaintiff said that it did not matter about the bond; that Brigg & Wynne were good to him for \$600. It further appears that some time prior to this transaction defendant had received a letter from a banker at Henderson, in which he expressed a favorable opinion of the bond, but that shortly before the transaction defendant had received a letter from Weill, who had sold the bond to Briggs & Wynne, stating that the man who had rented the theater was behind in his rent, and that the insurance had not been paid, and expressing some anxiety in regard to the bonds.

The court instructed the jury, in substance, that if they believed from the evidence that the defendant falsely and fraudulently represented to plaintiff that the bond for \$1,000 was good and worth \$1,000, and that the plaintiff relied on said statement, and that, if they further believed that said bond was worthless and of no value, they should find for plaintiff; but, unless they so believed, they should find for the defendant.

The jury found for plaintiff the amount claimed in the petition, whereupon judgment was rendered for \$600, with interest from January 1, 1916, until paid, and the cost of the action. From that judgment, defendant appeals.

[1] It is insisted for the defendant that the facts of this case bring it within the general rule that false representations as to the value of an article sold are mere expressions of opinion, and afford no ground for an action for deceit. In our opinion, this rule does not apply if plaintiff's evidence be true. According to his statement, the defendant represented that the bond, by which the two notes were secured, was worth par. The representation was not as to the value of the article sold, but as to the value of the collateral security. The bond itself was issued by a corporation doing business in a city over 100 miles distant, and was secured by a second lien on property in that city. Plaintiff had no knowledge of its value, and no ready means of ascertaining its value.

On the other hand, defendant assumed to know its value, and the representation was made for the purpose of inducing plaintiff to accept the notes "without recourse," and to waive his vendor's lien. Plaintiff not only accepted the notes upon the faith of this statement, but assured defendant that such was the case. Thus, the worth of the collateral security was made a controlling element of the bargain. If such be the case, the representation that the collateral security was worth par was not, nor was it intended as, mere expression of opinion, but was a statement of fact made for the purpose of inducing plaintiff to act, and, if false and fraudulent, afforded a sufficient ground for an action for deceit. Such was the ruling of the Supreme Judicial Court of Massachusetts in *Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307, where it was held that a representation of a vendor of a bond that it was secured by machinery and real estate of the value of \$500,000 cannot be regarded or excused as one of those generalities, which, whether true or not, are to be expected from one who wishes to sell his goods, and if the representation is fraudulent and induces the plaintiff to make a bargain different from the one which he thought he was making, it is actionable. Since there was evidence that defendant falsely and fraudulently represented that the bond was worth par, it is clear that the defendant was not entitled to a peremptory instruction.

The court did not give any measure of damages, but merely told the jury in a certain event to find for plaintiff. Such an instruc-

tion would not have been prejudicial had it appeared, not only that the bond was worthless, but that the two notes were also worthless.

[2-4] The only proof as to the worthlessness of the notes was a statement of both Briggs and Wynne that they were insolvent. A party may be insolvent and yet be able to pay 95 cents on the dollar. Hence mere proof of the insolvency of the makers of the notes was not proof of the worthlessness of the notes. With the proof in this condition, it was error not to give an instruction on the measure of damages. On another trial, the evidence should be directed to the value of the notes at the time of their assignment. If the evidence as to their value is conflicting, the measure of damages, in case the jury finds for plaintiff, will be the difference between their value at the time of the assignments and what their value would have been if the bond by which they were secured was worth \$1,000. However, if it be shown by uncontradicted evidence that the notes, at the time of their assignment, were worthless, then plaintiff, in the event of a favorable verdict, will be entitled to recover the face value of the notes and interest, since they would have had that value had the bond been worth the amount represented by the defendant.

[5] Complaint is made of the admission of certain evidence, but as it was admitted without objection or exception, the propriety of the court's action cannot be reviewed.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

## P. LORILLARD CO. v. SCOTT et al.

(Court of Appeals of Kentucky. May 30, 1919.)

## 1. CORPORATIONS ⇨648—FOREIGN COMPANY—ANNUAL LICENSE TAX—AMOUNT—HOW DETERMINED—"BUSINESS TRANSACTED."

The tax commission, in determining the proportion of capital stock employed within the state in ascertaining the amount of license tax which plaintiff, nonresident corporation, should pay under Ky. St. Supp. 1918, § 4189c, properly included (1) total amount of purchase, and (2) amount of purchase in the state in its calculations; the term "business transacted," as used in the statute, meaning not only income, but every kind of business transacted within the state.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Business Transacted.]

## 2. CORPORATIONS ⇨648 — ANNUAL LICENSE TAX—AMOUNT.

In determining the amount of annual license tax of nonresident corporation under Ky. St. Supp. 1918, § 4189c, the tax commission may not select from a corporation's business transactions only such items as are favorable to the state, but must include all transactions disclosed by the corporation's report which it is required to make, as was done in the instant case.

## 3. CORPORATIONS ⇨648—FOREIGN CORPORATION—PRIVILEGE TAX—REPORT FURNISHED TO TAX COMMISSION.

Where all items furnished by plaintiff nonresident corporation for the purpose were included by tax commission in fixing amount of plaintiff's annual license tax under Ky. St. Supp. 1918, § 4189c, plaintiff cannot complain of omission of items of property which might have been included.

Application for an injunction by the P. Lorillard Company against James A. Scott and others, comprising the State Tax Commission of Kentucky. Application denied.

Humphrey, Crawford, Middleton & Humphrey and Charles W. Milner, all of Louisville, for plaintiff.

Charles H. Morris, Atty. Gen., and D. M. Howerton, Asst. Atty. Gen., for defendants.

CLARKE, J. Upon the consideration of this application for an injunction made before me, as a judge of the Court of Appeals in an action pending in the Franklin circuit court, I have sought and had the assistance of my Associates, Judges HURT, SETTLE, THOMAS, and QUIN, all of whom agree with me that the application should be denied, and that, since a construction of the statute on taxation not heretofore construed is involved,

our construction thereof should be set forth in an opinion.

[1] Plaintiff is a nonresident corporation doing business and owning property in and out of the state, and as such is required to pay an annual license tax for the privileges exercised within the state by section 4189c, vol. 3, Kentucky Statutes, which also provides the method for ascertaining the amount of the tax to be paid as follows:

"Domestic and foreign corporations shall pay an annual license tax of fifty cents on each one thousand dollars of that part of their authorized capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of this state. \* \* \*

The controversy arises over the meaning of the words "business transacted," as used in the statute and as applied to the following agreed facts for the year ending December 31, 1918:

(1) Entire gross income.....	\$ 84,115,483 06
(2) Total amount of purchase.....	28,624,736 49
(3) Total value of tangible property...	44,093,762 53
Total .....	\$156,833,988 07
(4) Gross income for Kentucky.....	226,815 29
(5) Amount of purchases in Kentucky	8,623,947 06
(6) Value of tangible property in Kentucky .....	1,512,061 85
Total .....	\$ 10,369,244 20

Plaintiff seeks to enjoin the tax commission from including items 2 and 5 above in the calculation required by the statute to determine the proportion of its capital stock employed within the state upon which the tax is levied, insisting that "business transacted," as used in the statute, means only gross income; while the tax commission insists it means not only income, but includes every kind and character of business transacted within the state, and, in conformity with that construction, has found the total of business transacted and property owned by applicant in and out of the state to be the total of the first three of the above items, namely, \$156,833,988.07, and that the business transacted and property owned within the state is the aggregate of items 4, 5, and 6, namely, \$10,369,244.20, and by comparing these aggregates has fixed the portion of the company's capital stock employed within the state at \$2,746,840, the tax upon which, at the rate of 50 cents on \$1,000, amounts to \$1,373.42.

To follow the method contended for by plaintiff and exclude items 2 and 5, the portion of its capital stock employed in the state is \$582,663.20 upon which the tax would be

§291.33. Plaintiff's contention is based upon the ordinary meaning and understanding of the words "total business transacted," which is unquestionably usually expressed by figures representing the gross income, but clearly these terms are not used in this statute in their ordinary or general significance, but rather in their technical or legal sense, which, as is admitted, covers every form of business transacted within the state. It was certainly not the purpose of the Legislature to tax the privilege of one kind of business transacted in the state, but rather to tax uniformly every kind of business transacted here.

It would hardly be contended that, had plaintiff purchased all of its raw materials within the state, but sold all of its manufactured products outside the state, it was intended by this statute that it should not pay any license tax whatever for the privilege of doing practically one-half of its entire business in the state, and yet, if plaintiff's contention is sound, such would be the result; because, for illustration, suppose that a corporation owned no property in the state, but purchased all its raw material here, amounting to, say, \$10,000, which it shipped, manufactured, and sold for \$15,000 elsewhere; it would have transacted, according to plaintiff's contention, within meaning of this statute, no business within the state, and there would be nothing upon which the state could collect a license tax, although it had as a matter of fact and within the legal significance of the terms transacted business with-

in the state amounting to \$10,000, or 40 per cent. of its entire business.

We are quite sure it was not the purpose of the statute to levy a license tax simply upon the privilege of selling property within the state, and to exempt from taxation the privilege of doing every other character of business within the state, and we therefore conclude that the construction placed upon the statute by the tax commission, and not that contended for by plaintiff, is the proper one.

[2, 3] It is however, true, as insisted by plaintiff, that the tax commission may not select from a corporation's business transactions only such items as are favorable to the state, as a basis for calculating the amount of license tax to be paid, but must include all such transactions as are disclosed by the corporation's report which it is required to make, and this the tax commission has done in this instance. Plaintiff does not contend, nor has information been furnished by it which shows, that any item of business transacted within or out of the state has been omitted which would have produced a result more favorable to it, although it is quite obvious that many items of business have been transacted by it both within and out of the state that might have been properly included in the calculation; but, as all items were included that were furnished by plaintiff in its report for the purpose, it is manifest that it cannot complain because of such omissions.

Wherefore the application for an injunction is denied.

ROARING SPRINGS TOWN-SITE CO. v.  
PADUCAH TELEPHONE CO.  
(No. 2890.)

(Supreme Court of Texas. May 7, 1919.)

1. TELEGRAPHS AND TELEPHONES §10(2)—  
TELEPHONE CORPORATIONS—STATUTES.

A corporation organized for the express purpose of operating a long distance telephone line has the power and may be treated as "created for the purpose of constructing and maintaining such line," within Rev. St. 1911, art. 1231, authorizing such companies to construct their poles and wires upon public roads or streets.

2. TELEGRAPHS AND TELEPHONES §10(3)—  
RIGHT TO MAINTAIN LINES — TOWN-SITE  
STREETS.

Streets in a town site which have been dedicated to public use by the town-site company, which has reserved a right to grant the use of such streets to telephone companies, are subject to the operation of Rev. St. 1911, art. 1231, authorizing telephone companies to construct their poles and wires upon any public road or street.

3. DEDICATION §14 — STREETS IN TOWN  
SITE—NECESSITY OF ACCEPTING GRANTEE.

The dedication of streets and alleys to the use of the public in a town site is not rendered invalid by want of acceptance by the municipality, there not being sufficient number of inhabitants to organize a municipal government, so as to make inapplicable Rev. St. 1911, art. 1231, authorizing a telephone company to maintain lines on public roads or streets.

4. DEDICATION §55 — RESTRICTIONS BY  
DEDICATOR—VALIDITY.

The general rule that a dedicator may impose such restrictions as he may see fit on making a dedication of his property to a public use is subject to the limitation that the restriction be not repugnant to the dedication or against public policy.

Hawkins, J., dissenting.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by the Roaring Springs Town-site Company against the Paducah Telephone Company, for an injunction. A judgment for defendant was affirmed by the Court of Civil Appeals (164 S. W. 50), and plaintiff brings error. Affirmed.

Decker & Clarke, of Quanah, for plaintiff in error.

T. T. Bouldin, of Matador, for defendant in error.

GREENWOOD, J. Plaintiff in error applied for a temporary injunction to restrain defendant in error from constructing a telephone line across a section of land, which belonged to plaintiff in error in Motley coun-

ty. One hundred and sixty acres, near the center of the section, had been subdivided into lots, blocks, streets and alleys, for a town site, and both by plat and deed the streets and alleys had been dedicated to public use by plaintiff in error, provided, however, that plaintiff in error undertook to reserve to itself the exclusive right to grant, for a valuable consideration, to any person or corporation the right to use the streets and alleys to construct telephone, telegraph, and electric light wires and poles, and gas, water, and sewer mains. Some of the town lots had been sold by plaintiff in error, but there have not been sufficient residents of the town site to form a municipal government. Defendant in error had incorporated for the purpose of operating a system of telephone lines, both local and long distance in Cottle county, and long distance in Motley, Dickens, Childress, and Foard counties, and had begun erecting poles and stringing wires in and over the streets and alleys of the aforesaid 160 acres of land, and along a certain right of way over the remainder of the aforesaid section, which it had undertaken to condemn by certain proceedings against plaintiff in error, in the county court of Motley county, which were claimed to be invalid on various grounds, but principally on the ground that defendant in error did not possess any right to exercise the power of eminent domain.

Plaintiff in error's right to the injunction must rest either upon an invasion by defendant in error of a valid reservation by plaintiff in error of exclusive right to grant the use of the streets and alleys in the town site to a corporation operating a long distance telephone line, or upon an unlawful infringement upon its title and possession as owner of the portion of its section of land outside of the town site.

As heretofore construed, article 1231 of our Revised Statutes declares it to be the public policy of the state that corporations created for the purpose of constructing and maintaining long distance telephone lines shall be authorized to construct their poles, wires, etc., upon any of the public roads, streets, and waters of the state, in such manner as not to incommode the public in the use of the roads, streets, and waters, and this statute is a declaration that the Legislature considers the interest of the public in convenient telephone service superior to any private interest. City of Brownwood v. Brown Tel. & Tel. Co., 106 Tex. 116, 157 S. W. 1163.

There are no averments of sufficient facts to support any claim that the public would be incommoded in its use of the town-site streets and alleys by defendant in error's poles or wires, but it is denied by plaintiff in error that defendant in error is a cor-

poration created to construct and maintain a long distance telephone line, or that the streets and alleys of the town site are public streets or roads within the true meaning of article 1231.

[1] We think that a corporation organized for the express purpose of operating a long distance telephone line possesses the power, and hence may properly be treated as "created for the purpose, of constructing and maintaining" such line. For the maintenance of the line is necessary to the operation thereof, and the construction of the line is a direct and usual method of procuring it for maintenance and operation. No one now doubts that the law is correctly declared when it is said in *Northside Ry. Co. v. Worthington*, 88 Tex. 569, 30 S. W. 1056, 58 Am. St. Rep. 778:

"Corporations are the creatures of the law, and they can only exercise such powers as are granted to them by the law of their creation. An express grant, however, is not necessary. In every express grant, there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. \* \* \* In short, if the means be such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers; if they be unusual and tend in an indirect manner only to promote its interests, they are held to be ultra vires."

[2] In our opinion, streets in a town site which have been dedicated to public use in the manner shown by the petition of plaintiff in error are subject to the operation of the statute.

[3] The contention is without merit that the dedication to the public of the streets and alleys must fail for want of acceptance by a municipality embracing the 100 acres. The court in *Atkinson v. Bell*, 18 Tex. 474, announced that a dedication to the public would not be defeated for want of an accepting grantee, adopting the rule on that subject expounded in *City of Cincinnati v. the Lessees of White*, 6 Pet. 432, 8 L. Ed. 452, as follows:

"Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from and enjoyed, by the dedication. It was admitted at the bar that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are the cases which most

frequently occur and are to be found in the books, it is not perceived how any well-grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee in case to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking; where the object and purpose of the appropriation look to a future grantee, in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from reasserting any right over the land, at all events, so long as it remains in public use, although there may never arise any grantee capable of taking the fee."

The doctrine is again approved in *Parisa v. City of Dallas*, 83 Tex. 258, 18 S. W. 568.

The substance of the opinion in the case of the *City of Corsicana v. Zorn*, 97 Tex. 323, 78 S. W. 925, as applied to the facts of this case, is that plaintiff in error's deed of dedication had the effect to invest in the purchasers of town-site lots and their assigns the right for themselves and for all others to forever use the streets and alleys with the duty of enforcing such right imposed on any incorporated town or city which might be later so formed as to include the streets and alleys. The objection of the former owner in that case that there had been no acceptance of the dedication of the streets and alleys was thus disposed of:

"There was no necessity for such acceptance, for the right which vested in the purchasers of the different lots and through them in the public was irrevocable."

The public is as much interested in being afforded convenient means of long distance telephone communication, through the utilization of streets and alleys dedicated to the use of the public, before as after the streets and alleys are subject to municipal control, and we can see no good reason for denying the salutary benefits of article 1231 from the time the streets and alleys are impressed with the public use.

[4] Having determined that under the public policy of the state, a corporation formed to operate a long distance telephone line was clothed with the authority to construct and maintain its poles and lines along the dedicated streets and alleys in an unincorporated town site, the attempt to reserve to plaintiff in error a right inconsistent with such authority cannot be upheld. For the general rule that the dedicator may impose such restrictions as he may see fit on making a dedication of his property is subject to the thoroughly estab-



lished limitation that the restriction be not repugnant to the dedication or against public policy. 13 Oyc. 466; Richter v. Granite Mfg. Co., 107 Tex. 63, 174 S. W. 284, L. R. A. 1916A, 504; McDaniel v. Puckett, 68 S. W. 1011; Jones v. Carter, 45 Tex. Civ. App. 450, 101 S. W. 514; Koenigheim v. Miles, 67 Tex. 121, 2 S. W. 81; Richards v. Cincinnati, 31 Ohio St. 513.

The power of eminent domain is expressly conferred on long distance telephone companies by article 1282, R. S., and the averments of plaintiff in error's petition are wholly insufficient to show any invalidity in the condemnation proceedings conducted by defendant in error.

It follows that plaintiff in error failed to show that it was entitled to the injunction which it sought, and the judgments of the district court and of the Court of Civil Appeals are affirmed.

HAWKINS, J. (dissenting). A dedication of streets and alleys is operative even in the absence of formal acceptance of the grant. The attempted reservation of rights in the dedicated streets and alleys is void, because in conflict with the broader purpose and with the terms of the grant, and because contrary to public policy as reflected by R. S. art. 1231. To such streets that statute applies, and over them it gives right of way to "corporations created for the purpose of constructing and maintaining magnetic telegraph lines."

The quoted descriptive phrase includes, generically, magnetic telephone lines. Railway v. Telephone Co., 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884. Consequently if the purpose clause of this telephone company authorizes it to construct and maintain long distance telephone lines, it is entitled to a right of way over the streets of said town site (City of Brownwood v. Telephone Co., 106 Tex. 114, 157 S. W. 1165); but not so if the legal effect of its charter is to limit its corporate powers to the mere operation of telephone lines, withholding and denying authority to construct and maintain such lines.

Furthermore, corporations of the class so defined by article 1231 are within the operation of our condemnation statutes, and thereby are privileged to exercise the sovereign power of eminent domain. R. S. art. 1232. If this telephone company is within that favored class, it has a legal right to condemn a right of way across the unplatted portion of the town-site company's land; but, unless it falls within the stated classification, it is not within the purview of our condemnation statutes, and therefore cannot legally exercise that power of eminent domain. But does a charter power to "operate" telephone lines include, by implication, statutory power to construct and maintain such lines, and by reference power to

condemn privately owned lands? More concretely, under our statutes and the purpose clause of this telephone company's charter, has the state clothed that corporation with power and authority to construct and maintain telephone lines, and to condemn land therefor, as well as to "operate" them? That is the only feature of this case upon which I dissent. The majority opinion in both its branches—as to right of way over said streets and also as to right of way over said unplatted land—rests, ultimately, upon an affirmative answer to my foregoing questions; but I think those questions should be answered negatively. How can a part include the whole of anything?

If the issue thus presented involved merely a construction of the purpose clause of said charter in the light of our general incorporation statute alone, the question would be serious enough; but it is doubly important in that, in deciding it, we must determine also whether the benefits of condemnation statutes shall be thereby extended, by construction and implication, to include a corporation operating, as does defendant in error, under a charter whose purpose clause fails to enumerate, specifically, any expressly designated statutory purpose in furtherance of which our condemnation statutes, by their own terms, or by express reference, expressly run.

Said charter rests, for authority, solely upon R. S. art. 1121, subd. 8, wherein our general incorporation law declares:

"The purposes for which private corporations may be formed are: \* \* \* the construction and maintenance of a telegraph and telephone line."

The purpose clause of said charter declares:

"This association is formed for the purpose of operating a through system of telephone lines," etc.

It does not use the word "construct," or the word "maintain," or any derivative of either of them. Nowhere does our law expressly authorize the formation of a corporation for the purpose of "operating" a telegraph or telephone line. Unquestionably the quoted phraseology of said charter is not expressly or specifically authorized by law, and does not expressly clothe that corporation with power or authority to construct and maintain a telephone line, and consequently does not bring defendant in error clearly under the operation of either article 1231, relating to public streets, or article 1232, relating to condemnation proceedings. Conversely, if defendant in error is entitled to the benefit of either or both of those statutes, as my Associates declare it is, it enjoys those privileges solely upon the theory that, by construction and implication, a charter which purports to author-

ize a corporation to "operate" a telephone line confers upon that corporation full statutory power and authority to construct, originally, and to maintain, a telegraph line, embracing, as a consequence, and by virtue of articles 1231, 1232, the high powers of eminent domain therein conferred upon "corporations created for the purpose of constructing and maintaining magnetic telegraph lines."

If the majority opinion is sound in so holding, then, for like reasons, and for the added reason that R. S. art. 6405, which authorizes the incorporation of railroad companies, expressly uses the word "operating," a charter, simply declaring the purpose of a corporation to be to "operate" a railroad from Brownsville to Texarkana, would confer upon such corporation, under R. S. art. 6405, full statutory authority for "constructing, owning, maintaining and operating such railroad," including, of course, the right given by articles 6506-6522 to railroad companies to condemn land for right of way, etc. The argument is that "operate," as used in said charter, includes "construct and maintain," as those words, or their quoted derivatives are used in our incorporation statutes. Etymologically the words "operate" and "construct" have essentially different meanings and "operate" signifies working something already constructed. Construction ends before operation begins; the latter begins where the former ends. The terms are complementary—not synonymous. As stated in the opinion of Judge S. P. Sadler, of Section B of our Commission of Appeals, to which this cause was referred by this court, the word "operate" "pertains to output, and does not include machinery necessary to the construction of a plant. Authority to issue bonds to purchase and construct does not cover the issuance of bonds to maintain and operate. Words and Phrases, vol. 6, p. 4989, Second Series, vol. 3, p. 748." As defined by lexicographers, and in the language of the plain people, the words mentioned have radically different primary significations. As used in article 6405 they are, very plainly, not synonymous; and, in my opinion, they are not interchangeable within contemplation of articles 1121, 1231, and 1232, supra. I am not familiar with any canon of construction, or decision which supports that view that "operate" and "construct" and "maintain," and their derivatives, are synonymous, and therefore interchangeable, in the purpose clause of the charter of the telephone company or of any other corporation, and none is cited in the majority opinion in this cause. Upon that point I have not time now to search the books. In said opinion we are referred to the Northside Railway Case. The only cognate principle enunciated in that decision is to the effect that a duly

chartered corporation may have and exercise fairly implied powers in addition to the powers expressly enumerated in and conferred by its charter and the statutes; and that, of course, is sound. But that decision is not authority for the conclusion announced by my Associates, to the effect that power to "operate" a telephone line carries power to construct and maintain such line. The doctrine of that cited case relative to implied powers has no direct application to this case. Here the telescope is reversed, in a sense, the present issue being simply whether a corporation whose charter sets out in its purpose clause only one purpose, which is not even specifically mentioned in our general incorporation statute, and which, if it is permissible at all, is so solely because it is an implied power of corporations when duly chartered under said subdivision 8 of article 1121, really has, and legally may exercise, all the several powers enjoyed by a corporation the purpose clause of whose charter follows the precise phraseology of the statute.

I can see no good reason for holding that a charter purpose clause which sets out only one of several expressly enumerated statutory purposes should be held to confer upon the corporation all of the powers wrapped up in all such statutory purposes; and the same reasoning applies, with added force, when, as in this instance, the purpose clause of the charter mentions not even one expressly stated statutory purpose but, in lieu of the statutory terms, employs one which, at most, carries only an implied power which a properly chartered corporation of such general character would have merely as an incident of expressly enumerated statutory powers specifically mentioned in its charter.

If a corporation desires to have and exercise all the powers enumerated in any particular subdivision of article 1121, it may acquire them by simply inserting such powers in the purpose clause of its articles of incorporation in *hæc verba*, or in substance; and if, through design or oversight, it fails to do so, it should be held by the courts to its own election, and accordingly should be denied the exercise of powers which, though within its grasp, it never claimed when asking of the state, its creator, power to be and power to do. And especially it seems to me is that view of the subject applicable in cases like this, wherein is involved the question as to the power of the courts to extend to such negligent or very modest corporation, purely by construction and implication, the rights of eminent domain.

In line with my views on this subject this court, through Gaines, J., afterward Chief Justice said:

"The matter of condemning property for reservoirs is not named in the title to the act, nor

is it, as we think, expressed by the mention of 'water mains.' The former term is not comprehended within the latter. They are in no respect synonymous; and the things they represent, though intimately connected in their actual use, are distinctly different. Their relation to each other and their connection in ordinary use—the necessity of one to the other which may exist under certain circumstances—may evince the intention of the Legislature to make the law applicable to both. But it is not with a question of intention we deal. The inquiry is not what the Legislature intended to embrace in the title, but what, by the terms employed, it did in fact embrace. \* \* \* The statute under consideration is void in so far as it attempts to authorize the condemnation of property for reservoirs and standpipes." *Adams v. Waterworks*, 86 Tex. 485, 25 S. W. 605.

There the effect of a statute was restricted to the area defined in its caption; here, according to my own individual view of the matter, the effect of a charter should be limited to the fair and ordinary meaning of the words actually employed in its purpose clause. The public policy of this state, as reflected by our state Constitution, and by our statute laws, and by our decisions, has been, traditionally, to restrict corporations to the exercise of only such powers as they clearly possess. The action of this court, in this case, seems to me to go to an extreme opposite. The pendulum seems to have swung far back since the decision of this court in *Smith v. Wortham*, Secretary of State, 106 Tex. 106, 157 S. W. 740, wherein I thought this court, as then constituted, construed article 1121 too strictly, even though that case presented no question as to the applicability of our condemnation statutes.

The report of the Commission of Appeals on this case is to the effect that the alleged dedication of streets in said town site is inoperative, for lack of acceptance; that the telephone company was invading the property rights of the town-site company; and that, under the peculiar phraseology of its charter, the telephone company is destitute of the right of eminent domain; upon which conclusions followed the recommendation that the case be reversed and remanded to the trial court.

Its conclusion as to the restricted signification and legal effect which should be given to "operate" in said charter is in line with the views herein expressed; and in stating them I have drawn freely upon said commission's opinion.

While I do not approve the commission's view as to the effect of the attempted dedication of streets, my general conclusion is that defendant in error is not within the operation of articles 1231, 1232, and that the

writ of injunction should have been granted; wherefore said recommendation of the Commission of Appeals should be adopted by this court.

# LLANO GRANITE & MARBLE CO. v. HOLLINGER. (No. 60-2787.)

(Commission of Appeals of Texas, Section A.  
May 28, 1919.)

## 1. PLEDGES $\Leftrightarrow$ 30(2)—AUTHORITY OF PLEDGEE—CASHING CHECK—RECITAL OF PAYMENTS IN FULL.

Where assignment from plaintiff of balance due plaintiff as subcontractor for materials was held by bank as a mere pledge or collateral to secure payment of certain indebtedness due it by plaintiff, the cashing by the bank of a check for less than the amount claimed by plaintiff, which check had been sent the bank by the contractor and recited that it was in full, when there was a dispute as to whether the contractor should pay liquidated damages for delay, did not constitute an accord and satisfaction.

## 2. ESTOPPEL $\Leftrightarrow$ 58—EQUITABLE ESTOPPEL—ELEMENTS.

One of the necessary elements of an equitable estoppel is that the person claiming it must have been induced to alter his position in such manner that he will be injured if the estoppel is not declared.

## 3. ESTOPPEL $\Leftrightarrow$ 76—EQUITABLE ESTOPPEL—ALTERING ONE'S POSITION TO HIS INJURY.

Where bank held assignment of balance due plaintiff as subcontractor for materials as a mere pledge to secure certain indebtedness due it by plaintiff, defendant debtor could not claim that plaintiff was estopped to deny the bank's authority to accept less than the amount due in full satisfaction of defendant's liability; defendant having paid only admitted liability and protected his rights under contract.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by the Llano Granite & Marble Company against Job Hollinger. Judgment for plaintiff was reversed by the court of Civil Appeals (173 S. W. 603), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and that of trial court affirmed.

Holland & Holland, of Orange, for plaintiff in error.

Jacobs & Newman, of Kansas City, Mo., and Hightower, Orgain & Butler, of Beaumont, for defendant in error.

STRONG, J. This suit was brought by the Llano Granite & Marble Company against the defendant, Hollinger, to recover for material furnished and work performed by plaintiff, as subcontractor under defendant, in the construction of a church building in

the city of Orange, Tex. The case was tried in the court below without the intervention of the jury and resulted in a judgment in favor of plaintiff.

[1] The only question for determination is whether under the evidence judgment should have been rendered for defendant under his plea of accord and satisfaction. The evidence upon this issue is in substance as follows: On June 7, 1909, the board of directors of the plaintiff corporation passed the following resolution:

"Meeting of the board of directors of the Llano Granite & Marble Company held in the office of the secretary at San Antonio, Texas, on the 7th day of June, 1909. Present J. S. Sweet, A. J. Ridder, George Bodet. It appearing that the National Bank of Commerce of San Antonio, Texas, holds the company's notes to a large amount, for advances made on account of the church constructed at Orange, Texas, and that more funds will be needed before the completion of said contract, it is therefore moved by A. J. Ridder, seconded by J. S. Sweet, that we transfer, assign and set over to the National Bank of Commerce of San Antonio, Texas, all our right, title and interest to whatever balance may be due us by Job Hollinger of Kansas City, Missouri, on said Orange contract."

H. L. Ball, president of the bank, testified:

"The order to which you refer (meaning assignment above copied) was given purely and solely as collateral security for indebtedness of the Llano Granite & Marble Company to the National Bank of Commerce of San Antonio, Texas, which at that time amounted to \$37,000.00."

On October 16, 1909, the president of the National Bank of Commerce wrote the defendant, Hollinger, stating that the bank held the above order and inclosing him a copy thereof. On March 16, 1910, Hollinger wrote the bank, inclosing a statement of account between himself and plaintiff and a check for the sum of \$5,007.06, which contained the following language in the face thereof:

"Balance in full on account of contracts dated June 25, 1907, and October 4, 1907, for Lutchler Mem. Chr. Orange, Texas. Per order from Llano Granite & Marble Co. dated June 7, 1909."

In arriving at the amount due plaintiff, as represented by the check, defendant deducted the sum of \$7,980, which he claimed was due him as liquidated damages on account of plaintiff's failure to complete the work within the time provided by the contract. This claim was disputed by plaintiff, its contention being that, by agreement and for a valuable consideration, defendant waived his claim to such damages. The evidence upon this issue was conflicting, and the trial court sustained plaintiff's contention.

Upon receipt of the check, the National

Bank of Commerce immediately wrote defendant as follows:

"Your favor of the 16th is received inclosing check \$5,007.06 on the First National Bank of Orange, together with the statement of the account of the Llano Granite & Marble Company. We are not using the check at this time, but holding it for advice from the Llano Granite & Marble Company. They desire to check the account and we will await their further advices before accepting or making use of the said check. It is probable that they will desire to communicate with you.

"Kindly promptly acknowledge receipt of this letter with your further advices."

Before collecting the check, the bank indorsed on the back thereof:

"Protesting against assertions on reverse hereof and without obligating Llano Granite & Marble Co. For Collection. Pay any bank or banker or order. National Bank of Commerce of San Antonio, Texas."

On March 30, 1910, the day before the check was paid by the bank upon which it was drawn, plaintiff wrote the defendant the following letter:

"As I wrote you some days since that Mr. Teich would go over the account and statement sent the bank by you. I have had Mr. Teich go over the account and everything seems all right as to your statement, but the liquidated damages you make claim does not seem to be right as you have not had to pay for the over time from the Lutchler Moore people. Now I wish to ask you as a man that you treat us as you would like to be treated in this matter. I have done all in my power to have this contract pushed as rapidly as we could and when the company of which you are the general contractor does not insist on your paying any liquidated damages, it does not seem that you should insist on our paying any.

"You are aware that you did not deliver the foundation to us as you should have and it was your delay that first delayed us, and therefore you should not exact of us something that you caused to be done. You are aware that we sustained a very great loss on this contract and knowing that we were sustaining this loss we went ahead and completed the contract.

"Now, Mr. Hollinger, I believe you are just in this matter and we do not wish to have any words over this as I have at all times believed that you would treat us just and fair in the settlement of this claim. Kindly let me have an expression from you by return mail and you will greatly oblige."

The National Bank of Commerce applied the proceeds of the check as a credit on the indebtedness due it by plaintiff, for which it held the account against defendant as security.

The Court of Civil Appeals reversed the judgment of the trial court and rendered judgment in favor of defendant, holding that the cashing by the bank of the check containing the recital therein constituted an accord and satisfaction of all amounts due under the contracts. 173 S. W. 603.

We cannot concur in the conclusion reached by the Court of Civil Appeals. The bank under the undisputed evidence held the assignment to the balance due under the contracts as a mere pledge or collateral to secure the payment of certain indebtedness due it by the plaintiff. The rule seems to be well settled that a pledgee holding a promissory note or chose in action as collateral security is not authorized to compromise with the person liable thereon and accept less in discharge or satisfaction of the debt than the actual amount due. *Matheney v. City*, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N.S.) 990; *McLemore v. Hawkins*, 46 Miss. 715; *De Clark v. Waters*, 10 Wyo. 81, 65 Pac. 855; *Zimbleman v. Veeder*, 98 Ill. 613; *Garlick v. James*, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; *Deputy v. Clark*, 12 Ind. 427; *Trust Co. v. Rigdon*, 93 Ill. 458; *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 478.

In the case of *Fairbanks v. Sargent*, *supra*, the court, in discussing this rule, says:

"The pledgee obtains a special property in the thing pledged, while the pledgor remains the general owner. If the property consists of a thing in action, the pledgee may sue upon it, and collect it, or receive voluntary payment of it from the debtor. The pledgee may require such payment and the debtor cannot resist his title. To the extent of his debt, the pledgee may appropriate the proceeds to his own use, and hold the balance, if any, in trust for the pledgor. But the pledgee cannot compromise the debt without the assent of the pledgor."

In applying the rule where promissory notes were held as collateral security, the Supreme Court of Wyoming, in the case of *De Clark v. Waters*, above cited, says:

"Ordinarily, the pledgee of a promissory note as collateral security is not permitted to compromise with the maker, and accept less in its discharge or satisfaction than the face value of the paper. There may be instances where such a settlement will be upheld—as where, by reason of the fact that the debt is insufficiently secured, and the maker is insolvent, a compromise is advantageous to all parties; but, according to all the authorities, it will be sustained only in extreme cases. [Citing authorities.] Where notes held as collateral are surrendered to the maker by the pledgee at a sum considerably less than their face value, the pledgor has his election to bring an action against the pledgee in tort for wrongfully disposing of the collateral, or against the maker to recover the residue of the face of the notes so surrendered. *Coleb. Coll. § 96*; *Zimbleman v. Veeder*, 98 Ill. 613."

[2, 3] The language of the court above quoted applies with equal force to a chose in action held as collateral to secure the payment of a debt. The bank, holding the assignment from plaintiff as collateral security, had the right to collect the entire debt from the defendant and apply the proceeds thereof

to the liquidation of its indebtedness, but it had no authority to accept less than the actual amount due in full satisfaction of defendant's liability under the contracts. Nor do we think plaintiff was estopped from denying the bank's authority to make the settlement. One of the necessary elements of an equitable estoppel is that the person claiming it must have been induced to alter his position in such manner that he will be injured if the estoppel is not declared. It was never intended by an estoppel to work a positive gain to the person claiming it. Its whole office is to protect him from loss, which, but for the estoppel, he could not escape. The defendant admitted by the statement inclosed to the bank that he owed the sum of \$5,007.06 under the contracts. He withheld a sufficient amount to cover his claim for liquidated damages. The payment to the bank, even if made under the belief that the bank was the legal owner of the indebtedness, in no way affected defendant's rights under the contract. If, in fact, he was misled by the language in the assignment, he suffered no injury thereby in that he paid no more than he admittedly owed, and is therefore in no position to invoke the doctrine of estoppel as a bar to plaintiff's right to recover.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and that of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### BROOKS v. MOSS et al. (No. 72-2886.)

(Commission of Appeals of Texas, Section A.  
May 23, 1919.)

#### 1. LOGS AND LOGGING ⇐3(7) — TIMBER DEEDS—CONSTRUCTION.

Deeds of conveyance of standing timber, like other contracts, should be construed in such manner as to carry out the real intention of the parties.

#### 2. LOGS AND LOGGING ⇐3(11)—CONVEYANCE OF STANDING TIMBER—CONSTRUCTION.

A deed of standing timber which gave the grantee the right to cut and remove the timber within a specified time, and an additional term or so much thereof as might be required, on payment of a specified sum, gave the grantee title only to such timber as was cut and removed within the period fixed.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Jack Moss and another against John H. Brooks and others. There was a

judgment for plaintiff, and, it having been affirmed in part and reversed and rendered in part by the Court of Civil Appeals (175 S. W. 791), the named defendant brings error. Judgment of the Court of Civil Appeals affirmed.

Thomas & Wheat, of Woodville, and V. A. Collins, of Beaumont, for plaintiff in error.

Mooney & Shivers, of Woodville, for defendants in error.

STRONG, J. On August 16, 1905, Jack Moss and his wife sold to H. P. Weir the standing timber on 331 acres of land in Tyler county. The deed conveying the timber, omitting the formal parts and the description, is as follows:

"For and in consideration of the sum of nineteen hundred and eighty-six dollars to us in hand paid by H. P. Weir, of San Augustine county, Tex., have granted, sold, and conveyed, and by these presents grant, sell, and convey, unto the said H. P. Weir, all of the timber now standing and growing on three hundred and thirty-one (331) acres of land situated in the county of Tyler, state of Texas. [Here follows description of land.]

"It is further agreed that the said H. P. Weir, or his assigns, shall have from this date three (3) years in which to cut, fell, and remove said timber, from said land as above described, and if at the expiration of said three (3) \* \* \* the said H. P. Weir, or his assigns, have not cut and removed said timber an additional term of two (2), or so much thereof as may be required, is to be granted on payment of 10 cents per acre per annum for each additional year that may be taken to remove said timber beyond the time originally granted in this contract.

"And it is further agreed that the said Weir, or his assigns, shall have the only and exclusive right to build upon said land a tramroad, wagon road, and railroad, a right of way 60 feet wide is hereby granted for said railroad or tramroad to remove said timber and timber on tracts adjacent and beyond, provided that said railroad, tramroad, or wagon road shall not run through any of the cultivated land without special agreement. The said Weir, or his assigns, shall pay the taxes upon the timber on the land hereby conveyed which accrues on and after January 1, 1907. After the timber on said land has been cut off and all improvements, such as railroads or tramroads, removed, then all rights to said Weir, or his assigns, shall be forfeited.

"To have and to hold, all and singular, the above-described timber, with all the rights thereto, unto the said Weir or his assigns; and we do hereby bind ourselves, our heirs, our executors and administrators, to warrant and forever defend the title to said timber against the claims of each and every person whomsoever lawfully claiming or to claim the same, or any part thereof."

While the deed recites that Weir should have three years from its date in which to cut and remove the timber and the addition-

al time of two years on the conditions stated in the deed, it is admitted that the real agreement was that Weir should have five years from the date of the deed to cut and remove the timber and two years additional by paying 10 cents per acre per annum. Plaintiff in error acquired Weir's title to the timber by written conveyance January 2, 1906.

[1, 2] The only question for determination is: Does the deed from Moss to Weir convey an estate in fee in the timber and for sustenance thereof an interest in the soil, or does it convey title to such timber only as was severed from the soil within seven years from the date of its execution? Deeds of conveyance to standing timber, like other contracts, should be construed in such manner as to carry out the real intention of the parties. *Houston Oil Co. v. Boykin* (Sup.) 206 S. W. 815. The deed under consideration expressly limits the time for the removal of the timber from the land. The clause in the deed stipulating that the timber be removed within the time fixed clearly shows the intention of the parties to place a limitation upon the extent and duration of the rights granted thereunder. The further provision that, "after the timber on said land has been cut off, \* \* \* then all timber rights to said Weir, or his assigns, shall be forfeited," must be construed in connection with the clause limiting the time for removal of the timber, and, when so construed, does not have the effect of extending the time for removal, but more clearly evidences the intention to pass the title to such timber only as was removed within the time limited. In the case of *Carter v. Lumber Co.* (Civ. App.) 149 S. W. 278, Judge Levy, in construing a deed to standing timber, containing a time limit clause for removal, said:

"Having agreed to a limitation upon the right of removal, then the right of the purchaser to the timber is acquired by the act of removal and appropriation; and, as appropriation of the timber as such is dependent upon the removal from the soil, the intention of the parties would appear to be a contract of sale of such timber only as is removed within the time limited."

We think it clear under the language of the deed that Weir acquired title to such timber only as was cut and removed within seven years from the date thereof. *Houston Oil Co. v. Boykin* (Sup.) 206 S. W. 815; *Carter v. Lumber Co.*, supra; *Lumber Co. v. McWhorter* (Civ. App.) 156 S. W. 1152.

We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

PHILLIPS, O. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. CHURCHILL.** (No. 57-2773.)

(Commission of Appeals of Texas, Section A. May 28, 1919.)

**1. APPEAL AND ERROR ⇨604—RESERVATION OF EXCEPTIONS—AGREEMENTS OF ATTORNEYS—SUFFICIENCY.**

An agreement between attorneys of plaintiff and defendant that a bill of exceptions was presented and filed at the trial and could be considered by the Court of Civil Appeals as part of the transcript cannot be considered by the Supreme Court for any purpose when not filed in the trial court, authenticated by the trial judge, nor incorporated in the transcript.

**2. APPEAL AND ERROR ⇨274(7)—RESERVATION OF EXCEPTIONS—SUFFICIENCY.**

An exception by defendant in a personal injury action "to the rulings of the court in not submitting to the jury defendant's special issues Nos. 1 to 12" is insufficient, under Acts 33d Leg. c. 59, amending Rev. St. 1911, art. 2061 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2061), providing that the ruling of the court as to instructions shall be regarded as approved unless excepted to as provided in the act, since it fails to show that the request was made in the time and manner required by the act.

**3. APPEAL AND ERROR ⇨273(10)—EXCEPTIONS—SUFFICIENCY.**

Where but one general exception is taken to the action of the court in refusing to give several distinct charges or issues, it is not entitled to consideration on appeal if one or more of such charges or issues should not have been given.

**4. CARRIERS ⇨320(29), 347(12)—PERSONAL INJURY ACTIONS—BOARDING AND ALIGHTING—QUESTIONS FOR JURY.**

Where plaintiff, who had assisted his mother and two children to board defendant's train, was injured while alighting from the train after it had started, on the conductor's refusal to stop the train to let him off after being requested to do so and with notice of plaintiff's object in boarding the train, the issues of negligence and contributory negligence were for the jury.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by S. A. Churchill against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff was affirmed by the Court of Civil Appeals (171 S. W. 517), and defendant brings error. Affirmed as recommended by Commission of Appeals.

Baker, Botts, Parker & Garwood, of Houston, John L. Darrouzet, of Galveston, and John T. Garrison, of Houston, for plaintiff in error.

Morsene Johnson, Roy Johnson, and Elmo Johnson, all of Galveston, S. L. Staples, of Smithville, and C. L. Black, of Austin, for defendant in error.

**STRONG, J.** This suit was brought by S. A. Churchill against the Missouri, Kansas & Texas Railway Company of Texas to recover damages on account of personal injuries alleged to have been received through the negligence of defendant company.

The facts, briefly stated, show that on the day of his injuries plaintiff accompanied his mother and two children to the Union Station in Galveston for the purpose of assisting them in boarding defendant's train. He entered the train for that purpose and began arranging their seats and baggage; but, before he accomplished this, the conductor gave the signal for the train to start, and it began to move out. Plaintiff immediately requested the conductor to stop the train and let him off. This the conductor refused to do. Plaintiff then undertook to alight from the train, and in doing so his head came in contact with an iron support of the shed under which the train was moving, knocking him from the steps of the coach to the ground and inflicting the injuries complained of.

Plaintiff alleged in his petition, and the jury found in answer to special issues submitted, that before entering the train, plaintiff informed the conductor of his purpose in boarding the train; that the train was not held a sufficient length of time to allow plaintiff to get off; that plaintiff waited a reasonable length of time for the train to be stopped after he requested the conductor to let him off; and that defendant was guilty of negligence in using the track in such close proximity to the post with which plaintiff came in contact in his effort to alight from the train. The jury also found that plaintiff was not guilty of contributory negligence in his conduct after the train started.

Judgment was rendered in the trial court for plaintiff, which was affirmed by the Court of Civil Appeals. 171 S. W. 517.

In granting the writ of error, the Supreme Court was inclined to the view that the Court of Civil Appeals erred in refusing to consider defendant's fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth assignments of error, which are predicated upon the action of the trial court in refusing to submit to the jury certain special issues requested by defendant. The Court of Civil Appeals refused to consider these assignments because it did not appear from the transcript that a bill of exception was reserved to the action of the trial court in refusing to submit the special issues requested.

This case was tried under the Practice Act of 1913 (Laws 33d Leg. p. 113), which was still in force at the time the case was acted upon by the Court of Civil Appeals. By the terms of that act, article 2061, R. S. 1911, was amended so as to read as follows:

"The ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided in the foregoing articles," Vernon's Sayles' Ann. Civ. St. 1914, art. 2061.

This writ of error was granted prior to the decisions of the Supreme Court in the case of *Railway v. Dickey*, 108 Tex. 126, 187 S. W. 184. In that case the court, after carefully reviewing the various provisions of the act of 1913, and construing them in connection with other provisions of the statute then in force, said:

"The effect, therefore, of amended article 2061 is to require the taking of a written bill of exception to the giving or refusing of a special instruction in order to have a revision of the court's action on the appeal."

There is no bill of exception in the transcript to the action of the court in refusing to submit the special issues requested, but it is insisted that the following agreement filed while the case was pending in the Court of Civil Appeals is sufficient to show that a proper bill of exception was reserved in the trial court:

"Comes now the defendant in the above styled and numbered cause (M., K. & T. Ry. Co. v. Churchill), and excepts to the ruling of the court in not submitting to the jury defendant's special issues Nos. 1 to 12, and now files same in this cause."

Signed by attorneys for defendant.

"It is agreed that above bill of exception was presented and filed at the trial, and can be considered by the Court of Civil Appeals as part of the transcript in this case."

Signed by attorneys for plaintiff and defendant.

"June 5, 1914.

"Filed in Court of Civil Appeals June 12, 1914."

[1-3] This agreement was not filed in the trial court, nor does it purport to have been signed or in any manner authenticated by the trial judge. It is not incorporated in the transcript, and, in our opinion, cannot be considered for any purpose. *McDowell v. Fowler*, 80 Tex. 587, 16 S. W. 481; *Carlton v. Krueger*, 54 Tex. Civ. App. 48, 115 S. W. 619, 1178. But, if considered as a part of the record, the exception contained therein is

clearly insufficient under the Act of 1913, because it does not show, either standing alone or when considered in connection with the record as a whole, that the request to submit said special issues was made within the time and in the manner required by said act. It may also be stated in this connection that the agreement merely shows one general exception to the refusal of the court to submit eleven different issues which were requested at one time and in one charge. Some of these issues were in substance submitted in the main charge of the court, and others call for a finding upon matters which could not affect the judgment to be rendered. Where but one general exception is taken to the action of the court in refusing to give several distinct charges or issues, it is not entitled to consideration on appeal, if one or more of such charges or issues should not have been given. *Hovey v. Sanders*, 174 S. W. 1025.

The record failing to show that a proper bill of exception was taken to the action of the trial court in refusing to submit the special issues requested, we conclude that the Court of Civil Appeals did not err in refusing to consider the assignments of error based thereon.

[4] Under other assignments, it is insisted that the evidence fails to show that the defendant was guilty of negligence which proximately caused plaintiff's injuries, and that plaintiff was guilty of contributory negligence as a matter of law. We think the questions raised by these assignments were correctly determined by the Court of Civil Appeals. The issues of negligence and contributory negligence were issues of fact which the trial court properly submitted to the jury for their determination. 2 *Hutchinson on Carriers* (3d Ed.) § 991; *Huchingson v. Railway*, 55 Tex. Civ. App. 229, 118 S. W. 1123; *Railway v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228; *Traction Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015.

We are of opinion that the judgment of the Court of Civil Appeals and that of the trial court should be affirmed.

PHILLIPS, O. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.



**NORTHCUTT et ux. v. HUME et al.**  
(No. 73-2835.)

(Commission of Appeals of Texas, Section B.  
May 28, 1919.)

**1. APPEAL AND ERROR ⇨1082(2)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF PLEADING.**

Where the trial court overruled all exceptions to the petition, thus holding it sufficient, and no error on appeal to the Court of Civil Appeals was assigned to the ruling, the Supreme Court, on error to review the judgments of the trial court and Court of Civil Appeals, should treat the petition as if no objection to its sufficiency had been made.

**2. COVENANTS ⇨116—WARRANTY OF TITLE—ACTION FOR BREACH—PLEADING AND EVIDENCE.**

In suit for breach of warranty of title, allegations in the petition that the price paid for all the land purchased by plaintiff was \$8,000, and that the price paid for the land to which the title failed was \$25 an acre, held sufficient to admit evidence of the price paid for all the land, whether in money or property, and of the proportional part of such price represented by the land lost.

**3. COVENANTS ⇨122—WARRANTY OF TITLE—ACTION FOR BREACH—DAMAGES—EVIDENCE.**

In action for breach of warranty of title, the recitals in each of the two deeds to plaintiff that the consideration for the conveyance was \$8,000, though placed therein at his suggestion, were prima facie evidence of the value put upon the property, real and personal, which he gave for the conveyances.

**4. COVENANTS ⇨118—WARRANTY OF TITLE—ACTION FOR BREACH—EVIDENCE OF VALUE OF PROPERTY RECEIVED.**

In an action for breach of warranty of title, the recitals in each of the purchasers' deeds of \$8,000 as consideration being prima facie evidence of the value put upon the property exchanged for the conveyances, the grantor or seller had the right to show that the consideration expressed in the deeds was not the real consideration, but the burden of proof was on him to show the real consideration.

**5. COVENANTS ⇨130(7)—WARRANTY OF TITLE—BREACH—RIGHT OF RECOVERY—EVIDENCE.**

For breach of warranty of title the warrantee is entitled to recover the price paid for the conveyances, and where the price is paid in property, the value of the property is admissible.

**6. COVENANTS ⇨118—WARRANTY OF TITLE—ACTION FOR BREACH OF COVENANT—PRESUMPTION.**

In an action for breach of warranty of title of land conveyed in an exchange of properties, there is no presumption, on the issue of damages, plaintiff offering the deeds to him which recite a consideration for the conveyances of \$8,000, that either party obtained an advantage in the trade.

**7. COVENANTS ⇨130(7) — WARRANTY OF TITLE—ACTION FOR BREACH—CONSIDERATION—EVIDENCE.**

In an action for breach of warranty of title of property conveyed in an exchange of properties, evidence as to the value of the property given by either party in exchange for property of the other is admissible to show the true consideration paid by the warrantee.

**8. COVENANTS ⇨122—WARRANTY OF TITLE—ACTION FOR BREACH—CONSIDERATION—SUFFICIENCY OF EVIDENCE.**

In an action for breach of warranty of title of land conveyed in an exchange of properties, evidence held sufficient to show that the price paid by plaintiff warrantee to the warrantor for all the land conveyed to him was \$8,000.

**9. COVENANTS ⇨122—WARRANTY OF TITLE—ACTION FOR BREACH—PROPORTIONAL PART OF PRICE—SUFFICIENCY OF EVIDENCE.**

In an action for breach of warranty of title of lands conveyed in an exchange of properties, evidence held sufficient to show the proportional part of the price paid by plaintiff warrantee represented by the part of the land to which title failed, though there was no direct evidence that the land was all of similar quality or equal value.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by Z. T. Northcutt and wife against H. E. Hume and others. From judgment for defendants, plaintiffs appealed to the Court of Civil Appeals, which affirmed (174 S. W. 974), and plaintiffs bring error. Judgments of the trial court and Court of Civil Appeals reversed, and case remanded for new trial on recommendation of the Commission of Appeals.

Y. W. Holmes, of Comanche, and Synnott & Underwood, of Amarillo, for plaintiffs in error.

John W. Veale and W. A. Davidson, both of Amarillo, for defendants in error.

MONTGOMERY, P. J. This is a suit to recover damages for breach of warranty of title to land. Northcutt and wife owned certain lands and personal property situated near Wildorado in Oldham county, Tex., and H. E. Hume owned two tracts of land in Hale county, Tex., of 160 acres each, one known as the Stringfellow pre-emption, and the other near Hale Center, which we will designate as the Hale Center tract. The parties named agreed upon an exchange of these properties. The agreement was that Hume was to convey to Northcutt the two tracts in Hale county, and that Northcutt was to convey to Hume his land near Wildorado, and also to deliver to Hume certain personal property. Northcutt owed certain sums of money which it was necessary for him to repay before the trade could be closed, and Hume agreed to lend Northcutt

\$2,600 with which to pay his debts, the same to be secured by a deed of trust on the Hale county property. The trade was closed by Northcutt and wife conveying to Hume the land near Wildorado and delivering the personal property, the conveyance reciting a consideration of \$3,000 cash, and by Hume conveying the two tracts in Hale county to Northcutt by warranty deed, reciting a cash consideration of \$3,000. Northcutt executed to Hume a note for \$1,000, and secured same by deed of trust on the Stringfellow 160-acre pre-emption, and also executed to Hume another note for \$1,600, which was secured by a deed of trust on the Hale Center tract. This transaction occurred on July 23, 1912.

Both the notes above referred to were by Hume transferred to the Canadian Oil & Gas Company, a corporation in which Hume was interested.

The notes having matured, the corporation caused the trustee to advertise the lands for sale as provided by the deeds of trust.

This suit was instituted by Northcutt to enjoin the sale under the deeds of trust, and both Hume and the corporation were made parties defendant. Northcutt alleged that the title to 89½ acres of land, a part of the Stringfellow pre-emption, had failed, in that same was covered by other and older valid grants. He further alleged that two tracts in Hale county had been conveyed to him by Hume by a warranty deed, and that the consideration for said conveyance was \$8,000, and that of said sum he paid Hume \$6,400, and for the balance executed two promissory notes secured by deed of trust. Plaintiff Northcutt further alleged facts showing that Hume had no title to the 89½ acres of the Stringfellow pre-emption, and that it was adversely owned and occupied when the deed to him was executed. He alleged that the price paid for said land was \$25 per acre. Certain other allegations with reference to the ownership of the notes of the Canadian Oil & Gas Company were made which it is not necessary to set out. Plaintiff prayed that the sale of the lands under the deeds of trust be enjoined, and that he recover against Hume \$2,230, and that the same be credited on the notes, and for other relief. Hume denied that the title to any part of the land had failed, and alleged that the transaction was an exchange of property, and that no price per acre, or otherwise, was agreed upon by the parties, and that the recited consideration of \$8,000 was written into the deed at the request of Northcutt. The proof showed an exchange of property, and that no definite value was fixed upon either the property conveyed by Hume or by Northcutt, and that the recitation of the consideration recited in the deed was placed therein at Northcutt's instance. Northcutt testified that this sum was his es-

timate of the value of the property, and that he had requested that the deed should recite this consideration. There was evidence as to the value of the property conveyed by Northcutt to Hume, but none as to the value of the land conveyed by Hume to Northcutt, and no evidence as to the value of that portion of the land to which the title failed as compared with the remainder of the land. The evidence was sufficient to authorize a finding that Hume had no title to a portion of the Stringfellow pre-emption. The trial court gave the jury a peremptory charge to find for the defendants. Northcutt appealed, and the judgment was by the Court of Civil Appeals affirmed. 174 S. W. 974.

#### Opinion.

There seems to be no doubt that the evidence was sufficient to show that Hume had no title to a part of the Stringfellow pre-emption at the time he made the conveyance and warranted the title. The Court of Civil Appeals in its opinion assumes this fact. The judgment of the trial court was affirmed by the Court of Civil Appeals because in its opinion the pleading and the evidence were both insufficient to furnish facts from which the amount recoverable could be determined. The Court of Civil Appeals held that the burden was on the plaintiff Northcutt both to plead and prove the value of all the land conveyed and warranted by Hume at the time of the conveyance, and also the proportional part of said value represented by the land to which the title failed, and that the plaintiff Northcutt, having failed to discharge this burden, was not entitled to recover anything.

[1, 2] The trial court overruled all exceptions to the petition, thus holding it sufficient, and no error was on appeal assigned to this ruling. We think under these circumstances that we should treat the petition as if no objection to its sufficiency had been made. The petition alleges that the price paid for all the land was \$8,000, and that the price paid for the land to which the title failed was \$25 per acre. This allegation, we think, sufficient to admit evidence showing the price paid for all the land, whether paid in money or property, and the proportional part of such price represented by the land lost.

The serious question in the case is whether there was any evidence upon which judgment for the plaintiff could be predicated.

There was no evidence of the value of the two tracts of land conveyed by Hume to Northcutt unless the recital in the deed of the consideration of \$8,000 or the value of the property given in exchange therefor constitutes such evidence.

[3, 4] The recitals in each of the deeds of \$8,000 as a consideration, although placed therein at Northcutt's suggestion, is

some evidence of the value put upon the property exchanged.

In the case of *White v. Street*, 87 Tex. 179, 2 S. W. 530, it is said:

"The deed recites that sum as the consideration paid. Of that deed the defendant was the maker; it speaks his words, and, in an action against him upon his warranty, would be of itself evidence sufficient to authorize a judgment against him for the sum stated to be the consideration, with interest on it, if the breach of warranty was shown. It would be the right, however, of the defendant to show that the true consideration was not stated, and to show what it in fact was, but the burden, in this respect, would be upon him. It is unimportant whether the consideration was paid in money or in other lands, in so far as the recital of the value of the consideration is to be deemed evidence against the maker of the deed reciting the consideration. The consideration may have been recited at the suggestion of the person who wrote the deed, but this does not militate against its truthfulness. It is not to be presumed that the maker of a warranty deed would willingly permit a consideration to be recited which was greater than that actually paid."

We think the quotation set out above is a correct statement of the law, and that the recital of \$8,000 as a consideration in the deed from Hume to Northcutt was prima facie evidence of the fact recited, although the recital was placed in the deed at Northcutt's suggestion. Of course, Hume had the right to show that the consideration expressed in the deed was not the real consideration, but the burden of proof was upon him to show that fact and what the real consideration was. There was proof that the property given by Northcutt to Hume in exchange for the property conveyed by Hume to Northcutt was worth approximately \$8,000. At least there was evidence tending to show such value. This evidence was admitted without objection and we think was competent evidence, and tended to show the value placed upon the two properties by the parties at the time of the exchange.

[5-7] The usual rule in a case of this character is that the plaintiff is entitled to recover upon a breach of warranty the price paid, and we think that, where the purchase price is paid in property, the value of the property is admissible. We agree with the contention of the attorneys for the defendant in error that there is no presumption that either party obtained an advantage in the trade. Therefore the evidence as to the value of the property given by either in exchange for the property of the other is admissible in evidence for the purpose of showing the true consideration paid.

The case of *White v. Street*, cited above, is similar to the case under investigation. In that case White exchanged 160 acres of land owned by him for a house and lot and 63 acres of land owned by one Phillips. The

title to the 63 acres failed, and in a suit by White for breach of warranty White testified that the 63 acres was valued at \$500. Phillips testified that no value was placed on the separate tracts, but that the property was exchanged without any estimate of the value. In this state of the case, Justice Stayton said:

"Appellant \* \* \* was entitled to recover the value of the 63 acres of land which Phillips conveyed to him by deed of general warranty, and interest upon such sum as was its value at the time of its conveyance. If the parties agreed upon the value at the time the conveyances were made, this may be deemed its true value. If they did not agree upon its value, then it was incumbent upon the plaintiff to show what the value of the 63 acres of land was at the time of the conveyance. It does not follow from this, however, that the plaintiff was not entitled to recover at all unless he showed that the land was then of the value of \$500. If he showed that it had any value, or that he paid *any sum* for it, then he was entitled to recover such value or *sum paid with interest*." (Italics ours.)

[8] We think the pleading, and the evidence were both sufficient to show that the price paid by Northcutt to Hume for all the land conveyed to him was \$8,000.

[9] The next question is more serious. The Court of Civil Appeals held that there was no evidence showing the proportional part of the purchase price which was represented by the part of the land to which the title failed. There was no direct evidence to the effect that the land was all of similar quality or equal value.

We think that there were circumstances in evidence from which the jury might have inferred that the land was all of substantially the same character and value. In granting the writ of error in this case, the Supreme Court referred to the case of *Gass v. Sanger*, reported in (Civ. App.) 30 S. W. 502. In that case, a writ of error was refused by the Supreme Court, and we have examined the original application for writ of error and the papers accompanying it. We find from this examination that in the case of *Gass v. Sanger* there was no evidence as to the value of the particular portion of the tract of land conveyed to which the title had failed, except matters incidentally shown in trying the question of boundary, which was also involved in that case. In that case, as in this, two tracts of land had been conveyed in the same deed reciting a gross consideration for both, and the only evidence which tended to show that all the lands conveyed were similar in quality and of equal value was the testimony introduced on the boundary issue showing that the land was situated in an open prairie country and that on account of a lack of land marks a confusion in the boundaries had resulted. Under that state of the case, Judge Stephens held that—

It was "a legitimate inference from the entire statement of facts that this land was situated in an open prairie country, where it was all so much alike that confusion and conflict of boundaries resulted, and that the land was therefore of the same general character, and presumably, in the absence of proof to the contrary, the value of each acre was its pro rata part of the entire contract price."

We have examined the statement of facts in this case, and believe that the evidence is fully as strong as in the case referred to; and, the Supreme Court having granted a writ of error and in the notation granting the writ referred to the case of *Gass v. Sanger*, we assume that the Supreme Court approved the decision in that case.

The undisputed evidence in this case shows that plaintiff Northcutt was entitled to recover something. There seems to be no doubt that the title to a portion of the tract of land purchased by him failed and the only thing left uncertain was the exact amount of the recovery. Upon the authority of the case of *Gass v. Sanger*, supra, in which case a writ of error was denied, we recommend that the judgment of the trial court and the Court of Civil Appeals be reversed, and this case remanded for a new trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission.

#### URBAN v. COOK. (No. 52-2729.)

(Commission of Appeals of Texas, Section A. May 28, 1919.)

#### PARENT AND CHILD §7(13) — CONSENT TO EMPLOYMENT—JURY QUESTION.

Where the evening before plaintiff's minor son was injured in defendant's employment he advised his mother that he was employed by defendant to work in his gin and to run the gin stand, and such minor had previously been employed around gins, the question whether the mother consented to the employment was for the jury.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Mrs. N. L. Cook, for herself and minor child, against Pete Urban. A judgment for defendant was reversed by the Court of Civil Appeals (167 S. W. 251), and defendant brings error. Judgment of Court of Civil Appeals modified and affirmed, and cause remanded for new trial.

M. Pazara, of West, and Morrow & Morrow, of Hillsboro, for plaintiff in error.

Edgar Harold, of Hillsboro, for defendant in error.

TAYLOR, J. Mrs. N. L. Cook, for herself and as next friend of her minor son, Uarmar Cook, sued the defendant, Pete Urban, for damages arising from personal injuries received by her son. The purpose of plaintiff's suit was to recover damages for herself under her common-law right for the value of her son's services, as well as damages for her son, alleged to have accrued to him.

The defendant was the owner of, and operated, a cotton gin  $3\frac{1}{2}$  or 4 miles distant from plaintiff's home. The defendant, without consulting the plaintiff, employed her son, who at that time was in his eighteenth year, to run the gin stands in said plant and otherwise assist in running the gin. The nature of the employment entailed the performance of dangerous duties on the part of the son. On the second day of his employment at the gin, while removing accumulated trash from one of the gin stands, his hand was caught in the saws. The minor's theory is that the automatic prop supporting the gin breast slipped, causing it to fall and drive his hand into the saws. The defendant's theory is that the breast did not fall, but that the minor carelessly stuck his hand into the saws. The injuries received resulted in the amputation of the minor's right arm at the shoulder.

The plaintiff alleged a failure on the part of the defendant to furnish proper machinery to work with, and a failure to keep it in repair; that the defendant personally directed her son to remove the trash in the manner he was removing it when injured; that the defendant failed to instruct him as to how to perform his duties, and failed to warn him of the dangers incident thereto.

The plaintiff alleged as grounds for recovery in her suit in her own right, in addition to the foregoing, that the son had been employed without her knowledge or consent. Defendant denied all of the allegations, pleaded that the minor was experienced in gin work, that he assumed the risks ordinarily incident to his employment, and was guilty of contributory negligence. The defendant asserted also that the mother knew of the employment of her son, and acquiesced therein.

The trial resulted in a verdict and judgment for the defendant. The Court of Civil Appeals reversed the trial court's judgment and remanded the cause. 167 S. W. 251.

We have carefully examined the questions relied on by the appellant (defendant in error) for a reversal of the case, and have concluded that the Court of Civil Appeals did not err in reversing the judgment and re-

manding the cause for another trial. We have reviewed also all of the questions presented in the plaintiff in error's application for the writ (except the question relating to the motion to amend the transcript, which will doubtless not recur on another trial), and are of opinion that the assignments on which the questions are predicated were properly disposed of by the Court of Civil Appeals, except the third and ninth. These assignments assert that the evidence was insufficient to sustain the charge submitting to the jury whether the plaintiff consented by acquiescence to the employment of her son by the defendant.

The defendant testified he did not see the minor's mother about hiring him. The minor testified as follows:

"I went back home after Pete hired me (the same day) and then my brother taken and drove me over there in about a half mile of the gin in a buggy. \* \* \* When we left home his wife and mamma and my sister were there at home. \* \* \* I told them that Pete Urban had hired me to come over there and run his gin stands for him. \* \* \* That was the night I went over there, about 8 or 9 o'clock. \* \* \* That is when I told my mother and sister-in-law and sister that Pete had hired me to work in the gin, to run the gin stand."

The Court of Civil Appeals held that the testimony was admissible as a circumstance tending to establish acquiescence, and thereby consent, to the employment by appellant, but that as a sole circumstance it is insufficient to raise the issue of consent and authorize its submission; in other words, that as a matter of law, under the facts, the mother did not give her consent to the employment.

In the case of *Hamilton v. G. H. & S. A. Ry. Co.*, 54 Tex. 556, relied on by the Court of Civil Appeals, the mother (plaintiff) who was ill and confined to her bed during the period of her son's employment, testified, denying that she had ever consented, directly or indirectly, to her son's employment by the defendant railway company; and the court, in holding the issue of consent was not raised, stated that her testimony as to consent stood uncontradicted. It may be added also that there is no evidence of any employment of the son in railway service prior to that resulting in his injury. In this case the mother (plaintiff) did not testify. It is also in evidence that the minor had, prior to his employment by the defendant, worked at a neighbor's gin "off and on" for two years, and that of this his mother had knowledge. The uncontradicted evidence of the plaintiff in the *Hamilton Case*, supra, together with the absence of any testimony of the son's employment in railway service prior to that in question, serve to differentiate that case from this.

Whether the plaintiff consented to her son's employment is the basic question in that branch of the case under which recovery is sought by Mrs. Cook in her own right; and the facts, in our opinion were such that the question of whether she consented thereto through acquiescence should have been submitted to the jury, and not determined as a matter of law. *M., K. & T. Ry. Co. of Texas v. Evans*, 16 Tex. Civ. App. 68, 41 S. W. 80 (writ of error denied).

We recommend, therefore, that the judgment of the Court of Civil Appeals reversing the case should be affirmed, and that the cause should be remanded for a new trial in accordance with the opinion of that honorable court as herein modified.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

#### PAYNE v. STATE. (No. 5295.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. WITNESSES $\Leftrightarrow$ 358 — IMPEACHMENT — DETAILS OF OTHER OFFENSES—REDIRECT EXAMINATION.

In a prosecution for burglary, where defense was alibi and state relied on testimony of an alleged accomplice, it was not proper to allow accomplice, who on cross-examination admitted he had been indicted for other offenses, all but one of which were committed on the night of the one involved, but denied that his father-in-law, whom defendant claimed participated in those offenses, was present, to testify on redirect that he was assisted in the commission of such offenses, and to go into the circumstances attending the other cases.

#### 2. CRIMINAL LAW $\Leftrightarrow$ 396(2)—EVIDENCE—ENTIRE CONVERSATION—ADMISSIBILITY.

Where part of a conversation is brought out and the remaining portion of the conversation is necessary to make the preceding part clear or to explain the same, the remainder is admissible.

#### 3. CRIMINAL LAW $\Leftrightarrow$ 396(2) — EVIDENCE—WHOLE CONVERSATION—ADMISSIBILITY.

In a prosecution for burglary, an alleged accomplice who testified against defendant, and to the effect that, when his house was searched, he escaped to the residence of defendant in which were present defendant's wife and sister, should not, because asked what they said when told his house was being searched, have been allowed to testify that the women later requested him to run off so that defendant could escape.

Appeal from District Court, Hale County; R. C. Joiner, Judge.

Bob Payne was convicted of burglary, and he appeals. Reversed and remanded.

W. W. Kirk, of Plainview, for appellant.  
E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, his punishment being assessed at two years' confinement in the penitentiary.

[1] A sufficient statement of the main facts is embraced in the former appeal, which will be found reported in 202 S. W. 958. The case, briefly stated, is: The accomplice Williamson testified for the state to a burglary committed by himself and the defendant. Appellant's testimony was alibi. On cross-examination of the accomplice Williamson, appellant sought to discredit him by showing through the witness himself that he had married the daughter of a man named Smith; that some of the property taken from the alleged burglarized house was found in Smith's house or cellar. The purpose of this cross-examination was to show, by the circumstances attending the relationship of Smith and Williamson, the use of Smith's wagon on the night of the burglary, the fact that property was found in Smith's possession, or in his cellar, that the witness and Smith committed the burglary, and that defendant was not connected with it. This character of investigation was evidently for the purpose, among other things, of strengthening his alibi. In this same connection and during this cross-examination, the witness was asked if he had not been indicted in seven other felonies, all of them committed the same night except one. The witness denied that Smith was with him on the night of the burglary, but did admit that these indictments were pending. The state on redirect, among other things, asked the witness if there was not another party with him on the night of and assisting him in these various burglaries. The bill also shows that witness had testified that appellant was with him and committed the burglary set out in the indictment. The appellant's objection was that these facts being shown, and in this condition of the bill, it was inadmissible to go into an examination of the circumstances attending the other cases. This was based also to some extent on the fact that he only asked the witness with reference to the indictments as a means of impeachment, and, this being true, that this should have ended the matter. We are of opinion upon another trial, if this matter should be investigated, that appellant's position is correct. The witness had denied that Smith was with him, and admitted that he had been indicted in the other cases. This was introduced to show appellant was with the accomplice in the other

felonies. We think the authorities sustain appellant in his contention, and that the court should not have permitted this character of examination by the state. Had the confession of Williamson to the county attorney included the defendant, it would be permissible to show inasmuch as defendant introduced that matter.

[2, 3] Another bill of exception shows that, while the accomplice Williamson was on cross-examination, he was questioned with reference to the officers going to and searching his residence for property supposed to have been taken from the alleged burglarized house. Among other things, he stated substantially that he had escaped from the officers when they went to his house by jumping out of a window, and that in leaving his house he went to the residence of appellant; that appellant's wife and her sister and Simpson were there; that a conversation ensued, and he was asked what he said during the conversation. He replied:

"I don't remember what I did say." He was then asked, "What did they say?" He said: "I think they asked me if my house had been searched. Q. What did you tell them? A. I told them that the officers were there. Q. Then what did you do? How long did you stay there? A. \* \* \* I couldn't say just how long, quite a little bit."

The state was then permitted to elicit from him that while he was there, appellant's wife and her sister told him that appellant's house had been searched and the searching party had gotten the meat they had stolen, and the wife and her sister requested him to run off so that everything would be "laid on the witness" and defendant "would come clear"; that appellant's wife's sister went and brought witness' wife, who objected to his running off. This latter expression seems to have been excluded, though the bill is not right clear upon that question. The remainder of the above conversation remained before the jury. We are of opinion appellant's objection should have been sustained as to what appellant's wife and his sister-in-law said to witness in regard to the witness running away to the end that defendant might come clear. This was said in appellant's absence and not shown in any way, directly or indirectly, to have been instigated by him. In fact, the bill shows this was a voluntary statement or request on their part, if made, without the knowledge or consent of appellant. This was not germane to what defendant asked of the witness, nor explanatory of what was brought out by the defendant. The bill does show that the defendant asked the accomplice what they said, referring to defendant's wife and her sister-in-law; his reply being:

"I think they asked me if my house had been searched, and I told them the officers were there."

It is a familiar rule, and fixed by statute, that where part of a conversation is brought out, and the remaining portion of the conversation is necessary to make the preceding part of the conversation clear, or that it might be explanatory of the preceding part of the conversation, it would be admissible. This redirect examination by the state does not seem to fall within that rule. Appellant had asked nothing that led to the statement either of his wife or his sister-in-law that they desired that the witness should flee the country. It was in no way chargeable to him under the bill of exceptions. It was very damaging testimony, and of a criminative tendency. If appellant had sent his wife or her sister, either or both, to the witness to induce him to leave, or had suggested to them to induce him to leave, it would be a fact against him and introducible; but this bill not only fails to connect him with it, but shows that he knew nothing about it, was not present, and in no way a party to it. It was not germane to that brought out by the defendant from the wife or her sister.

We think this was of such an erroneous nature that this judgment should not be permitted to stand; therefore it is reversed, and the cause remanded.

#### BURKHALTER v. STATE. (No. 5237.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. CRIMINAL LAW §419, 420(8) — ADMISSIONS—HEARSAY—ADMISSIONS BY DEFENDANT.

Evidence of a witness that M., in attendance upon the trial, had told the witness that defendant had admitted to M. that he (defendant) had killed deceased, was hearsay and inadmissible.

#### 2. HOMICIDE §163(1)—REPUTATION OF DEFENDANT—EVIDENCE.

Though defendant had put his reputation in evidence as a law-abiding citizen, objection to evidence of the state that 15 or 20 years before the homicide defendant was given to fighting and was regarded "as a holy terror" should have been sustained; the interregnum between defendant's fighting capacity as a youngster and the time of the killing being too remote.

#### 3. HOMICIDE §170 — EVIDENCE OF SHOE PRINTS—ADMISSIBILITY.

Testimony of county attorney that tracks near the scene of the killing had been made by a shoe about No. 8 or 9 in size, and that in his judgment defendant's boots made the tracks on the ground, held inadmissible in absence of something more definite in the witness' testimony showing proximity of tracks to body of victim.

#### 4. WITNESSES §244(1)—IMPEACHING CHARACTER OF WITNESS.

It was not permissible to impugn the character of a witness by testimony reflecting upon the character of the house he was keeping and his sister-in-law, who was living in his house and had given birth to three illegitimate children.

#### 5. CRIMINAL LAW §656(5) — RULING ON EVIDENCE—COMMENT BY COURT.

The court should not, in sustaining objection to evidence that sister-in-law of a witness whose character was sought to be impugned had given birth to three illegitimate children, have remarked that evidence was not admissible if woman had 700, meaning 700 illegitimate children; the statute explicitly prohibiting the court from indicating his view of the evidence, and making the jury the exclusive judge of facts, weight of testimony, and credibility of witnesses.

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

John Burkhalter was convicted of murder, and appeals. Reversed and remanded.

Woods, Barkley & King, of Houston, A. A. Seale and C. C. Watson, both of Nacogdoches, and B. B. Perkins, of Rusk, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder; his punishment being assessed at five years' confinement in the penitentiary.

This is the second appeal, the first being found reported in 79 Tex. Cr. R. 336, 184 S. W. 221. In a general way, the facts and circumstances developed by this record are as in the former appeal. There is, however, in this record some rather important amended testimony not shown by the former record. Illustrative of this, Mrs. Jones testified on this trial that appellant made a confession or admission to her that he killed deceased. The statement was made under rather peculiar circumstances. It is not intended here to discuss her testimony and the circumstances attending her statement of the confession. On the former trial she testified, as shown by this record, that appellant, in talking to her about the matter, had no reference to the deceased, and that they were not talking about deceased at the time he made the statement. There was a witness named Russell who testified to an indirect confession of defendant, which he said occurred in the fall after the killing of deceased in the early spring or late winter prior to a conversation between him and defendant. This statement comes under rather peculiar circumstances. These matters are mentioned in order to meet appellant's contention that the court was in error in refusing and failing to charge the law applicable to circumstantial evidence. The

testimony of Mrs. Jones in reference to the confession is positive and direct; that of Russell is not. Without the testimony of Mrs. Jones we are of opinion the case would be one of circumstantial evidence, but that matter is not further discussed.

[1] A bill of exceptions recites that, after Russell testified for the state on cross-examination, he was asked, referring to his testimony in regard to appellant's conversation, if he did not state to Jim Manning that the defendant had made a statement to him, the witness, admitting the killing. This the witness Russell denied. It is then shown that the state proved by Russell that Manning told him (Russell) that defendant admitted to him (Manning) that he (defendant) had killed deceased. Manning was in attendance upon this trial, but was not used as a witness. Objection was urged to this testimony, which we think was well taken. If Manning made the statement to Russell that defendant admitted to him that he had killed deceased, it was hearsay and on a most material issue in the case. If defendant in fact made the admission to Jim Manning, Manning could have sworn to it and it would have connected the defendant directly with the homicide, but this could not be proved by a statement of Manning made to Russell. This was clearly hearsay testimony and inadmissible. It is also shown that Manning was present and could have been called as a witness, but was not. See *Murphy v. State*, 65 Tex. Cr. R. 55, 143 S. W. 616; *Kinney v. State*, 65 Tex. Cr. R. 251, 144 S. W. 257; *Herrera v. State*, 75 Tex. Cr. R. 120, 170 S. W. 719.

[2] Another bill recites that appellant put his reputation in evidence as a law-abiding citizen, covering something like 15 years prior to the time of the homicide. The state was permitted then to introduce testimony showing that 15 or 20 years or more before this homicide appellant was given to fighting, and also to prove by one or more witnesses that he was then regarded "as a holy terror." The objection to this testimony should have been sustained. This was too long. The interregnum between his fighting capacity as a youngster and the time of this killing, something like 15 or 20 years, is too remote. See *Bogus v. State*, 55 Tex. Cr. R. 127, 114 S. W. 823, 131 Am. St. Rep. 804; *Hanks v. State*, 55 Tex. Cr. R. 451, 117 S. W. 150; *Brown v. State*, 56 Tex. Cr. R. 389, 120 S. W. 444; *Wesley v. State*, 85 S. W. 802; *Bowers v. State*, 45 Tex. Cr. R. 185, 75 S. W. 290.

[3] Another bill raises objection to the introduction of testimony of the witness Adams in regard to tracks. The record shows in this connection that the homicide occurred in the morning about 9 or 10 o'clock. Quite a crowd of neighbors gathered in and around the body. The justice of the peace from Nacodoches, and the sheriff, deputy sheriff, and

the constable from the town of Garrison were also among those present. There was a good deal of walking around about the scene of the homicide and investigation for tracks and evidences that might lead to the discovery of the party who shot the deceased. It was in a very densely wooded country and a great many leaves upon the ground which rendered it impossible, it seems from the testimony, to find tracks. None were discovered. About seven days afterward some of the officers were upon the ground looking for evidence. Among those present on the latter visit was the county attorney, who was not present on the day of the killing. He testified, among other things, that he found some tracks near the scene of the killing which he described as being made by a shoe about No. 8 or 9 in size, which showed peculiar indentations evidencing that the shoe had some protruding tacks which left an impression in the tracks so found. He testified further that the defendant was with them, and that they went to dinner at defendant's house, which was several hundred yards away, and while there they engaged defendant in conversation as to the character of shoes and boots that he owned. Witness asked the defendant the privilege of seeing his boots or shoes. Defendant told them there was a pair of boots in the room, which they examined, and witness says that these boots had tacks that would make a similar impression to those he saw on the ground near the scene of the homicide, and that he thought these boots were about No. 8 or 9 in size, and that his judgment and conclusion was that these boots made the tracks on the ground. It is further in evidence that the defendant made statements that he was about 250 yards away from the scene of the shooting at the time it occurred; that he did not see either the man who fired the shots or the deceased, and did not know what it meant; he supposed it was some people squirrel hunting, as a good deal of hunting was done in that immediate "bottom"; that he was hunting a cow or his cattle, and paid no further attention to it. He took the witness stand and denied that he shot the deceased, and stated that he had no gun with him with which to shoot. He is borne out by the testimony of several witnesses, some of them state's witnesses, to the effect that he did not have a gun on this occasion. Appellant objected to the introduction of the testimony of the witness Adams as to tracks for want of definiteness, and also there was no comparison made, and the boots were not placed in the tracks found upon the ground, and that witness was stating his conclusion. The question of the introduction of tracks has been the subject of a great many decisions, and it would seem that the admissibility of testimony is largely one of application to the particular case, and



the particular facts and environments as developed on the trial. Quoting from Mr. Branch's Ann. P. C. p. 81, it is stated that:

"Before a witness can give his opinion as to the similarity of tracks found upon the ground and tracks made by the accused the witness must have made some measurement of the tracks found upon the ground and the foot or shoe of the accused, or made some comparison between tracks found upon the ground and shoes known to be those of the accused such as placing the shoe in tracks on the ground, or if there are peculiarities in the tracks made upon the ground, such as worn places or peculiar tracks, and such places or tracks were found upon or were made by the shoe known to belong to the accused, the witness may detail such facts and may then give his opinion as to the similarity between such tracks."

In support of this Mr. Branch cites a great many cases. He again states this rule:

"Where the witness did not measure the tracks nor measure the track or shoe of the accused, it is error to permit him to give his opinion as to the similarity of such tracks based on observing the tracks and afterwards observing the track and foot of the accused."

A great number of cases he cites in support of that rule. It is also held in *Hester v. State*, 51 S. W. 932, that it was error to permit a witness to testify that the track on the ground and the track of defendant's horse was one and the same track; he should have stated the size, similarity, etc. See, also, *Grant v. State*, 42 Tex. Cr. R. 276, 58 S. W. 1025. *Smith v. State*, 45 Tex. Cr. R. 410, 77 S. W. 453, is authority for this statement:

"Where the witness did not take any measurements on the ground and stated that the tracks were of a No. 8 or 9 shoe, broad across the ball, with the heel worn off one side, and that the shoes of the accused appeared to be of that size and were broad across the ball with the heel worn off on one side, his testimony is not certain enough to authorize him to give an opinion upon so vital a question as the similarity of tracks."

See, also, *Tankersley v. State*, 51 Tex. Cr. R. 173, 101 S. W. 234, and *Ballinger v. State*, 63 Tex. Cr. R. 657, 141 S. W. 91. We are of opinion that under the peculiarities of the testimony of Adams the court should not have admitted his opinion that the boots he saw at defendant's house made the tracks he saw in the woods. The defendant testified, and many declarations of his were put in evidence to the effect that he was 250 yards away, or about that distance, at the time of the shooting. If he made these tracks either going to or coming from that place, or at that place, and these tracks were seen by the witness Adams, it would not be sufficiently definite to show his proximity to deceased. The wounds on the body show that the party who did the killing was very close to him. It is also in evidence that between the time of the

killing and the time of these other witnesses' examination for tracks and failure to find same there had been a rain at that immediate point. Under all these circumstances we are of opinion, as this bill and the record shows the matter, the testimony of the witness Adams should not have gone to the jury, and unless there is something more definite in his testimony showing the proximity of the tracks to the body, this testimony should not be admitted. The other witnesses who were with him did not testify as to the tracks. They or some of them testified that they failed to discover any tracks on their first visit to the scene of the homicide, though they searched.

There is an attack made upon the court's charge on alibi and a requested instruction refused. The question came on the former trial, and it seems from the opinion on the former appeal and this record that the charge as given by the court is the same. Judge Harper, in the former opinion, suggested to the court he should give a more ample and complete charge on the question of alibi. We suggest again to the court that this be done.

[4, 5] There is another bill of exceptions which recites that appellant was seeking to introduce testimony which reflected upon the witness Russell, and the character of house he was keeping, and his sister-in-law, who was living in his house and had given birth to three illegitimate children. By this he was seeking to impugn the character of the witness Russell. We are of opinion this testimony was not admissible. The court observed in sustaining the objection that it was not admissible if the woman had 700 (meaning 700 illegitimate children). This will not occur upon another trial, but is mentioned so as to guard the trial court against making remarks of that character in the admission or rejection of testimony. The statute is rather explicit that the court should not indicate his view of the testimony, but simply sustain or overrule the objection when presented. This is in aid of another statute which provides the jury shall be the exclusive judges of the facts, the weight of the testimony, and the credibility of the witness, and was enacted also to prevent the court from conveying his idea of the testimony and the weight to be attached to it so as to impress the jury. We would again suggest to trial courts that it is always safest to follow statutes prescribing rules with reference to the trial of criminal cases. It avoids trouble and complications and the necessity of discussing such questions on appeal. It occurs to us it is about as easy to follow the statute as it is to violate it, and following it is the safest rule, and its violation is always upon dangerous lines.

For the reasons indicated, the judgment is reversed, and the cause remanded.

## RODGERS v. STATE. (No. 5286.)

(Court of Criminal Appeals of Texas. May 21, 1919.)

## HOMICIDE — 309(6) — INSTRUCTIONS—PROVOCATION—EXCLUDING EVIDENCE.

In a homicide prosecution, where defendant, after having been severely beaten in a general fight, fled from the house, and in the face of a threat to shoot him fired a shot which killed a child in the house, it was error in an instruction on manslaughter to limit the provocation to the acts of the person defendant intended to kill.

Appeal from District Court, Shelby County; Daniel Walker, Judge.

Wyatt Rodgers was convicted of murder, and appeals. Reversed and remanded.

Sanders & Sanders, of Center, and Beeman Strong, of Austin, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The appeal is from a judgment condemning appellant to confinement in the penitentiary for ten years for the offense of murder.

The homicide took place at the residence of Ernest Owens. Ernest Owens and appellant's brother, Beeman Rodgers, married sisters, and the wife of Beeman Rodgers was at the home of Ernest Owens when the appellant and his brother, Beeman Rodgers, and the wife of appellant stopped at the home of Owens on their way to Shreveport on a pleasure trip, traveling in an automobile. The purpose of stopping seems to have been in order that the wife of Beeman Rodgers could join them and accompany them on the trip. It was near Christmas time, and there were preparations in progress at Ernest Owens' residence for a Christmas gathering, and the appellant and his companions alighted from the car in which they were riding and went into the residence, and while there a difficulty took place. The evidence is conflicting touching the beginning of the difficulty. It seems, however, to have been immediately preceded by a quarrel between Beeman Rodgers and his wife. Appellant said that during this quarrel Buford Owens, a brother of Ernest Owens, struck Beeman Rodgers over the head with something that looked like an axe handle, and said:

"When he did, Beeman just caught the post and went in on the gallery, and the whole bunch covered him. I started up the steps, and as I went in they turned on me, and I didn't see Beeman any more until the fight was out. The whole bunch, women and all, came right on me. I was in the fight all through the last part of it; I was not in it when it started."

Several witnesses testified to facts in a general way in substance like the appellant. There was evidence that in the fight one of the assailants of the appellant and his brother used a harrow tooth, which was described as a piece of steel with which wounds could be inflicted. It was made clear that after the difficulty the appellant and his brother were examined by a physician, who said that he found six lacerated or torn wounds and one smooth cut wound on appellant's head, nearly all of them going to the skull, and that they were treated and dressed by him 10 or 12 times, and he said that Beeman Rodgers exhibited wounds of substantially the same number and character, except that upon Beeman's body there was a superficial wound in the nature of a scratch, and his shirt was torn or cut in the vicinity of this wound. A very short time after this difficulty the appellant and his wife and Beeman Rodgers and his wife and the driver of the car went to the automobile and started to leave, and just about the time the car started a pistol shot was fired from the automobile which killed a child that was in the house, and the prosecution grows out of this homicide.

Quite a conflict in the evidence developed touching the firing of the shot; the state's witnesses presenting the theory that it was maliciously and purposely fired by the appellant. His own testimony was to the effect that it was accidental. Other witnesses for the state and defendant testified to facts which raised the issues of self-defense and manslaughter, and the theory of negligent homicide was also presented to the jury. The uncontroverted evidence of both the state and the appellant was to the effect that immediately after the fight ended that Ernest Owens laid down the harrow tooth which he had used in the fight and picked up and loaded his shotgun and walked out on the front porch and said to appellant's brother, "Don't come back on here or I will kill you," and that he remained on the porch while the appellant and his party were walking to the car and getting in the car, until the shot was fired. Both the appellant and his brother were quite bloody immediately before they started to get in their car. Appellant claimed that his brother laid a pistol down in the car, and that about that time he heard some one exclaim, "Look out, he is going to shoot!" that he and his brother both grabbed for the gun, and in the scuffle it was discharged; that, hearing the exclamation mentioned, he thought his brother was about to shoot, and he grabbed for the gun to prevent him from doing so.

In charging on manslaughter the court embodied the following:

"It is not enough that the mind is merely agitated by passion arising from some other

provocation, or a provocation caused by some person other than the party the defendant intended to kill."

The appellant in a timely and specific manner objected to this phase of the charge. Prior to the conflict the parties were friends; there was no difficulty furnishing "other provocation," save the fight which took place a few moments before the fatal shot was fired. When it was fired, appellant was suffering from the serious injuries received in the fight, and the incidents of that encounter were not, as a matter of law, to be eliminated in determining the existence of adequate cause, nor were the conditions such as to make the homicide murder, if unlawful and upon provocation caused by some other person than the party appellant intended to kill. His intention, from the state's standpoint, was to kill Ernest Owens, who at the time was armed and near at hand; but in the difficulty in which appellant and his brother were injured. Ernest Owens, Buford Owens, and, according to some of the evidence, others took part, and the provocation upon which appellant acted in firing may have arisen from the acts of any or all of his assailants. Discussing a similar state of facts, the court said:

"We understand the rule to be that, where there is evidence that some other person or persons acted in conjunction with the deceased in giving provocations, it is error for the court to prevent a consideration by the jury of the provocations given by some other party than the party killed." *House v. State*, 75 Tex. Cr. R. 345, 171 S. W. 219.

The condition of appellant's mind as bearing on the issue of manslaughter was to be determined from the evidence showing the entire transaction. The charge complained of, we think, was an unwarranted restriction on appellant's right under the law of manslaughter, and was one which has been held material error in the case mentioned, and in *Garcia v. State*, 70 Tex. Cr. R. 488, 156 S. W. 939; *Byrd v. State*, 39 Tex. Cr. R. 609, 47 S. W. 721; *Stacy v. State*, 48 Tex. Cr. R. 95, 86 S. W. 327.

Judgment is reversed, and the cause remanded.

#### ROSS v. STATE. (No. 5393.)

(Court of Criminal Appeals of Texas. May 21, 1919.)

#### 1. CRIMINAL LAW §721(6), 721½(2)—ARGUMENT—REFERENCE TO FAILURE TO TESTIFY.

Where defendant was jointly indicted with her husband for murder, and a severance was granted, state attorney's argument asking why

defendant, if not guilty of murder, did not call her husband, who was then in court, and as to why she did not call witnesses to prove her innocence, allowed objection, and without reprimand or instruction to disregard it, violated the statute, as being a direct reference to failure of both defendant and her husband to testify.

#### 2. CRIMINAL LAW §1068, 1097(6)—MOTION FOR NEW TRIAL—EXCEPTION—STATEMENT OF FACTS.

Where a motion for a new trial was contested and overruled, and appellant reserved no exception setting up facts heard on the contest, and where no statement of facts in the record showed such evidence, the matter could not be reviewed.

Appeal from District Court, Limestone County; A. M. Blackmon, Judge.

Eliza Ross was convicted of murder, and appeals. Reversed and remanded.

White & White and O. Kennedy, all of Mexia, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was allotted five years in the penitentiary under a conviction for murder.

The case is one of circumstantial evidence. The homicide occurred at night, the deceased having been shot three times. The circumstances would indicate that appellant was present at the shooting. One of the witnesses testified that he recognized her voice, stating that deceased was cutting her. The indictment charged appellant and her husband jointly with having killed deceased. There was a motion for severance, which was granted.

[1] During the argument one of the state's attorneys used the following language:

"If she [meaning the defendant] is not guilty of a diabolical murder, why did not her husband, David Ross, get on the stand and testify for her?"

To these remarks exception was taken. Counsel for state retorted, "Yes, when the shoe pinches you howl." The bill further recites that the court, instead of reprimanding counsel and instructing the jury not to regard the same, remained silent, and all through his argument counsel kept repeating, "If they are not guilty, why didn't they get on the stand and testify," to which remarks the defendant kept excepting, and the only notice the court took of said exceptions was to nod his head. The defendant and her husband, David Ross, were sitting in front of the jury at the time. Counsel's remarks were in effect commenting on defendant's failure to testify. This bill is signed by the trial judge without qualification. Another state's counsel remarked in his closing argu-

ment to the jury, "If she is not guilty, why didn't they put witnesses on the stand and prove it," to which defendant excepted, because the "defendant in a criminal case is not required to prove anything." The evidence seems to exclude the presence at the homicide of every one except defendant and her husband. We are of opinion that these arguments were illegitimate and in violation of the statute, and a reference, not only to the failure of the husband to testify, who was jointly indicted with defendant, but a failure also of defendant to testify.

There are other bills of exception, but they are very indefinite and are not discussed.

[2] To the motion for a new trial are appended a number of affidavits, setting up various things, mainly matters of fact. The state filed what is termed a "contest," which is more in the nature of a general demurrer and general denial. The judgment of the court recites he heard evidence upon the matters and overruled the motion. Appellant did not reserve an exception, and therein set up the facts that were heard on the contest; nor is there a statement of the facts in the record showing what the evidence was on the contest. In this attitude of the record we are unable to revise this matter. The authorities hold that such matters must be perpetuated either in a bill of exceptions, or a statement of facts, which must be filed during the term. Upon another trial, however, these matters can all be produced, and the jury will be in position to pass upon them.

On account of the argument and remarks of counsel, the judgment will be reversed, and the cause remanded.

### CROSBY v. STATE. (No. 5389.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. INTOXICATING LIQUORS $\S$ 236(1)—DELIVERY TO PERSONS IN MILITARY SERVICE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain conviction of procuring and delivering intoxicants to persons enlisted in military forces of the United States, contrary to Acts 35th Leg. (4th Called Sess.) c. 7.

#### 2. CRIMINAL LAW $\S$ 1159(1)—APPEAL—QUESTION OF FACT—VARIANCE.

In prosecution for procuring and delivering intoxicants to persons enlisted in military forces of the United States contrary to Acts 35th Leg. (4th Called Sess.) c. 7, verdict of jury held to solve, in favor of the state, any question of variance as to names of soldiers to whom liquor was given and names charged in indictment.

#### 3. INDICTMENT AND INFORMATION $\S$ 125(31)—DUPLICITY—FOLLOWING LANGUAGE OF STATUTE.

Allegation that defendant "did then and there unlawfully and knowingly, directly and indirectly, purchase for and procure for, and did then and there give and deliver and did then and there cause to be given and delivered," is in the terms of Acts 35th Leg. (4th Called Sess.) c. 7, as to procuring and delivering intoxicants to persons enlisted in military forces of the United States, and contention that indictment is duplicitous because of such allegation cannot be sustained.

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Sophia Crosby was charged with unlawfully procuring and delivering intoxicants to persons engaged and enlisted in the military forces of the United States, and appeals from the judgment. Affirmed.

Turnley & Clark, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. Appellant was charged with unlawfully procuring and delivering intoxicating liquors to persons engaged and enlisted in the military forces of the United States.

The soldiers named in the indictment were W. Koslowsky and J. Malolepszy. The facts show that two United States soldiers, members of the Nineteenth Infantry, were stationed in a barn in care of some horses belonging to the government; that the appellant carried a number of bottles of beer into the barn, and that when officers undertook to enter the lights were extinguished; that the appellant and another negro woman attempted to escape; that a number of bottles of beer were found, part of them empty and part of them partly empty. One of the negro women testified that she had gone to the barn on the suggestion of the appellant; that the appellant after going in came out and went to a store and procured several bottles of beer, which she carried in a basket into the barn, setting the basket on the floor; that the witness took a bottle and a soldier did likewise; that the appellant made no protest when one of the soldiers took the beer; that she, witness, took a bottle, and while she was drinking the officers knocked at the door; that she never heard appellant tell the soldiers to take any. The lieutenant who was with the arresting party said that before going in they heard voices of both sexes, which he described as a jumbled mass of profanity and vulgarity. One of the soldiers had a half empty bottle of beer in his hand. Another witness testified that when the door was opened the light went out; that

appellant ran to the door and tried to get out, but was prevented by the sentry; that two soldiers and the women were drinking; they were under the influence of liquor, the soldiers and the women. There were empty bottles and full bottles there. The lieutenant said he took the names of the two privates; that shortly thereafter he gave the names to the party who wrote the complaint; that on the night of the arrest he took the names down in a little book; that he made the soldiers spell the names out, and he entered them in the book correctly, and correctly gave them to Mr. Levey, who drafted the complaint. The witnesses were unable to correctly spell the names, but without objection the names written down under the circumstances above detailed were introduced, and the paper on which they were written being identified by the witness, and, as thus identified, the names were spelled in the same manner as alleged in the indictment, and the witness, after refreshing his memory, testified that the spelling of the names in the indictment was identical with the spelling of the names given to him by the soldiers and written down by him under the circumstances detailed above.

[1, 2] The only question presented for review is the alleged insufficiency of the evidence. We think the evidence is conclusive that the parties named in the indictment were engaged in the military service of the United States, and that intoxicating liquor was furnished them by appellant, and that the verdict of the jury solved in favor of the state any question of variance as to the names of the soldiers to whom the liquor was given and the names charged in the indictment.

[3] Exception was reserved to the sufficiency of the indictment upon the ground that it was duplicitous in alleging that the appellant "did then and there unlawfully and knowingly, directly and indirectly, purchase for and procure for, and did then and there give and deliver, and did then and there cause to be given and delivered." These are the terms of the statute (Acts 35th Legislature [4th Called Session] c. 7), and we think the criticism is without merit.

The judgment of the lower court is affirmed.

#### GARDNER v. STATE. (No. 5395.)

(Court of Criminal Appeals of Texas. May 21, 1919.)

#### 1. INTOXICATING LIQUORS $\Leftrightarrow$ 158—SUPPLYING INTOXICANTS TO MARINE.

If certain bottles in defendant's possession contained wine which would intoxicate, and defendant left a bottle where his brother-in-law,

a marine in the military forces of the United States, could get it by arrangement, defendant violated Acts 35th Leg. (4th Called Sess.) c. 7, punishing the procuring or furnishing of intoxicating liquors for or to any person in the military service of the United States.

#### 2. INTOXICATING LIQUORS $\Leftrightarrow$ 236(1)—FURNISHING INTOXICANTS TO MARINE—SUFFICIENCY OF EVIDENCE.

In a prosecution for violating Acts 35th Leg. (4th Called Sess.) c. 7, prohibiting the procuring or furnishing intoxicants to any person in the military forces of the United States, evidence held insufficient to sustain defendant's conviction of having supplied intoxicating wine to his brother-in-law, a marine.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Bush Gardner was convicted of purchasing or procuring for a person in the military forces of the United States spirituous, vinous, or malt liquors, and appeals. Reversed, and cause remanded.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the act of the Fourth Called Session of the Thirty-Fifth Legislature (chapter 7), which punishes any person who shall, directly or indirectly, knowingly purchase or procure for, or sell, give, or cause to be given or delivered to any person engaged and enlisted in the military forces of the United States, any spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication. The punishment is from two to five years under said act.

The evidence discloses that appellant and Rishel, the alleged soldier or marine, were brothers-in-law. It also shows that appellant occupied a room in the "Atlantic Rooms," an adjunct to the "Atlantic Hotel," both under the control and management of the witness Foley. In the evening about 8 o'clock, or half past, Foley was on the front gallery of the Atlantic Rooms and saw Rishel; that he inquired for appellant. Foley and Rishel went to appellant's room. It was locked; appellant was absent. Rishel went back across the street, where he remained for a while. Appellant came in an auto. He and Rishel went to appellant's room and remained a short time and emerged, appellant having a "grip," and went away. Foley, becoming suspicious, phoned for the officers. Finally, about 9:30 or 10 o'clock, they came. Foley, having a pass key with which he could open appellant's room, accompanied the officers, and they searched the room, and in it found in the bottom of a dresser drawer two bottles, which he says he judged to be quart bottles. The color of the liquid they contained was red. He did not smell it. These bot-

tles were left where they were found, and the parties returned to the hotel office. Witness says he was under the impression he locked the door of appellant's room. After a while Rishel returned, went to the room, and as he came out in the hallway one of the officers accosted and took him to a room, and in the presence of witness Foley took from Rishel's overcoat a bottle, which was one of the bottles he saw in appellant's room. He speaks of those bottles as bottles of wine. When all this occurred appellant was not present; was not in his room. Something like a half hour later he returned. Rishel testified that he was a brother-in-law of defendant, and knew where appellant's room was, and on the 5th of January went to it by himself. When he went the first time he had not seen appellant. The second time he went alone; that he did not remember what time of the day it was, but supposed it was something like 8 o'clock. Quoting, he said:

"I got a quart of liquor in room 15; a quart of wine. I went there to get that quart of wine because I knew it was there, or supposed to be there, at least; I knew he had it. I had had a conversation with him with reference to the wine a day or two before I went there; I cannot say exactly when. I asked him if he had any wine, and he said, 'Yes.' So I went after it. I had an arrangement with him about pay for the wine; I was to pay \$5 for it; I left the money there under the bedclothes."

He was then asked this question:

"Was or was not that the arrangement you had with the defendant as to where you were to leave the money? A. No, sir. Q. Did you or not afterwards tell him where you left the money? A. No, sir."

He says:

"The first time I went there that night I went to Bush Gardner's room. I did not see Bush Gardner after that before I went the second time."

It was on the second visit he got the bottle. On cross-examination he said:

"Bush did not tell me at this time to leave any money there for this wine. If I wanted any wine I knew where it was, but he didn't tell me to go there and get it. Bush Gardner has, in his lifetime, sold me a bottle of whisky or wine of some character, but not at that room. I went up there and got this wine in Bush's absence, and left \$5 under the bed for him. Bush didn't know anything about that at present, and he didn't know anything about it until after I got it."

On redirect examination he was asked:

"Did you or not have an arrangement with him by which you were to get the wine, if you wanted it, and leave the money for the wine? A. He said he would be there, but he wasn't there, but the wine was. Q. The arrangement was that you were to call for it, and he would

deliver the wine? A. No, sir. He didn't say he would deliver it; he would be at the room, but he wasn't there. How I got in the room was, I opened the door and walked in."

Bolling, one of the officers who was present on that occasion, testified that—

After they waited in the office a while appellant came, and, answering inquiry, said he did not know anything about any whisky. "We found some wine in the room, and he said it was his, that he had bought it; we found two quarts of wine in the room; that was before the soldier came in. The soldier brought it out with him. I didn't see the soldier bring it out with him, but Mr. Webb saw that."

This is the case substantially as made.

[1, 2] The contention is made that this evidence does not support the conviction. This is a case of circumstantial evidence from any viewpoint. From the statements made by these witnesses it must be determined, if appellant is guilty, that he so acted as to willingly permit his brother-in-law to go in his room and get the wine, and was connected with it so as to bring him within the purview of the law as indirectly furnishing it. This must be proved to the exclusion of every reasonable doubt. If that be satisfactorily shown, then it must also be shown that the bottle contained wine. No witness testified as to the contents of the bottle, or that it was open. The only witness testifying in regard to this matter was Foley, who said it was a red-looking liquid, but he did not smell it. There is no evidence that the bottle was opened or any of the contents tested. The bottle was not accounted for at the trial, though the officers said they took both and kept them. The statement that they were bottles of wine would hardly be sufficient to prove contents. If the bottles contained wine, and it was such wine as would intoxicate, and appellant placed it so that Rishel could get it, he would be guilty under that statute. It was easy to ascertain if it was a fact that the bottle contained wine, and that it was an intoxicant. There are too many presumptions and too few facts to justify sending this man to the penitentiary, when the record itself discloses that ample proof could have been produced to show that the bottles contained wine, if such was the fact, and that it was of an intoxicating nature. All this evidence, being in possession of the state, could have been, but was not, shown, nor any reason given why it was not produced. While this act was intended to protect the soldiers and punish those who furnish them with intoxicants, yet there must be evidence upon which to base a conviction, and this of such a satisfactory nature as to overcome the presumption of innocence, and reasonable doubt; and, this being a case of circumstantial evidence, it must be shown to the exclusion of every reasonable hypothesis

except that of guilt that he should be punished.

The judgment is reversed, and the cause remanded.

### GOODMAN v. STATE. (No. 4762.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. CRIMINAL LAW §211(2) — COMPLAINT—OATH ADMINISTERED BY DEPUTY COUNTY ATTORNEY.

In view of Rev. St. 1911, art. 347, giving assistant county attorney the same authority to administer oath as county attorney possesses, complaint was invalid where jurat recited that complaint was sworn to and subscribed before the county attorney by his deputy (following *Arbetter v. State*, 79 Tex. Cr. R. 487, 186 S. W. 769).

#### 2. OATH §2—ADMINISTERING OATH—DEPUTIES.

While the general rule is that a deputy may do what his principal officer might, the deputy cannot verify in the name of his principal where a duty such as taking oaths pertains to the deputy individually.

Appeal from Smith County Court; W. R. Castle, Judge.

Charles Goodman was prosecuted for an offense, and appeals from the judgment. Reversed, and prosecution ordered dismissed.

Hanson & Butler and T. N. Jones, all of Tyler, and Lightfoot, Brady & Robertson, of Austin, for appellant.

E. B. Hendricks, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. [1] It is unnecessary to notice but one question presented. The complaint recites:

"Sworn to and subscribed before me on this 2d day of April, A. D. 1917. H. V. Davis, County Attorney of Smith County, Texas, by Clifford C. Hall, Assistant County Attorney, Smith County, Texas."

It is contended that this complaint is invalid; that it could not be sworn to before the county attorney by his deputy. The case of *Arbetter v. State*, 79 Tex. Cr. R. 487, 186 S. W. 769, is directly in point, and, if correct, this judgment should be reversed, and the prosecution ordered dismissed. Authorities are relied upon by the state.

[2] The deputy may do, under the law, what his principal may do in line of duty devolving upon the principal. This is the general rule, and unless there are stated exceptions the general rule applies, but where the act cannot be so performed, and the

deputy is required to do the act himself, this rule does not apply. If it pertains to him individually, such as taking oaths, he cannot verify in the name of the principal. This seems to be fully recognized by the authorities. This matter underwent investigation in *Palmer v. McCarthy*, 2 Colo. App. 422, 31 Pac. 241; also in *Robinson v. Gregg* (C. C.) 57 Fed. 186. Where the administering of an oath is required, he cannot administer it in the name of the principal. While he derives his authority from the principal in a certain sense, he being a deputy and qualified under the law as such deputy, the oath administered must be by him. He cannot administer it in the name of the principal, nor can he certify that the principal administered the oath through or by him as deputy. Where an oath or affirmation is required, it must be administered by the officer taking it. He cannot administer it through another. The jurat must show the oath taken was by the officer administering it. If the principal administers the oath, it must so recite. If the deputy does it, it must recite it was done by the deputy, not that it was done by the principal through the deputy. The authorities seem to be clear upon the proposition, and draw the distinction. See note in 2 Cyc. 12, and other authorities. This does not militate against the proposition that in ordinary ministerial matters, such as the issuance of process, filing papers, and matters of that sort, same may be issued in the name of the principal through or by the deputy, but this does not apply to taking affidavits or administering oaths. We are of opinion that the court was in error in not sustaining appellant's contention upon this proposition.

The judgment is reversed, and the prosecution is ordered dismissed.

MORROW, J. (concurring). The point made in this case is that the jurat is affected in that it purports to certify that the county attorney administered the oath, which in fact was administered by the assistant county attorney. Under article 347, Rev. Civ. Stats., the assistant county attorney becomes an officer vested with the same authority to administer oaths that the county attorney would under the law possess. He has authority to take the oath of one making a complaint and to attach a jurat thereto, but the jurat should be a certificate showing that he, the assistant county attorney, administered the oath.

The authorities touching a jurat like the one in question are conflicting, some of them holding the sufficiency of that involved in this case; and if the question were an open one in this state, the writer would be disposed to view the jurat as sufficient. The decisions of other states supporting the opposite idea appear to have controlled the court in the decision of *Arbetter's Case*, 79 Tex. Cr. R. 487,

186 S. W. 769, and in deference to the ruling there made, I do not dissent from the conclusion reached by the Presiding Judge in this case.

Ex parte SPANELL. (No. 5397.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### HABEAS CORPUS — 3 — OTHER REMEDY.

Where relator, after being acquitted of one charge of murder, was indicted on another, he cannot by habeas corpus raise the issue of autrefois acquit; the appropriate remedy being by special plea entered in the court in which the second indictment was pending.

Original application by H. J. Spanell for writ of habeas corpus to obtain his discharge from the custody of the sheriff, by whom he was held under a capias issued in a case wherein relator was charged with murder. Writ dismissed, and relator remanded.

See, also, 203 S. W. 357.

Anderson & Upton, of San Angelo, L. A. Dale, of El Paso, Williams & Williams, of Waco, and Critz & Woodward, of Coleman, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case relator, Harry J. Spanell, in an original application for habeas corpus, seeks to be discharged from the custody of the sheriff of Coleman county, Tex., by whom he is held under a capias issued in a case pending in the district court of said county wherein relator is charged with the murder of M. C. Butler. The ground for the relief sought is that relator has heretofore been placed in jeopardy and acquitted of the murder of Crystal Spanell, it being alleged in the application that the act, volition, and transaction for which he has so been in jeopardy and acquitted was one and the same as that now charged against him, and that the evidence in support of said charge was, and will be, the same as that upon which he was formerly tried, and that, unless he be discharged under this writ, he will again be placed on trial and in jeopardy, in violation of his legal and constitutional rights.

It is objected by the state in limine that a writ of habeas corpus will not lie in such case, and that any action in the premises on our part would be a trespass upon the jurisdiction of a court of existing and competent jurisdiction, to wit, the district court of Coleman county. This question is by no

means a new one, either in this or the other states of the Union.

In the Pitner Case, 44 Tex. 578, same being a case in which the only issue was the right to a discharge on habeas corpus, upon a plea of former acquittal, Chief Justice Roberts upheld the action of the lower court in refusing such relief, and says:

"That habeas corpus is not the proper remedy in such a case has been decided substantially by this court in accordance, it is believed, with well-established authority."

This case is cited with approval in the Brill Case, 1 Tex. App. 152, in which similar relief was sought and denied, Judge Winkler holding in that opinion:

"Agreeable to the case made by the record, habeas corpus is not the remedy for the wrong complained of. *Perry v. State*, 41 Texas, 488. The writ of habeas corpus is not the proper remedy to try the issue of autrefois acquit; the appropriate remedy is by special plea entered in the court in which the indictment is pending under which the party is held. *Pitner v. State*."

In *Ex parte Rogers*, 10 Tex. App. 655, the *Pitner Case* is again approved, and Presiding Judge White there says:

"While we do not feel called upon to decide whether or not the same rule applies to a plea of former jeopardy, we feel authorized in saying that the pleas have many characteristics in common, and much of the same reasoning is applicable and strong in support of both."

In the *Griffin Case*, 5 Tex. App. 457, in an opinion by Judge White, it is held:

"The writ of habeas corpus is not designed to effect an appeal or operate as a writ of error or certiorari; and the court, on habeas corpus, will not, for the purpose of discharging the applicant, consider the sufficiency of facts relied on as evidencing a former acquittal for the same offense for which he is in custody."

In *Ex parte Crofford*, 39 Tex. Cr. R. 547, 47 S. W. 533, the present presiding judge of this court, in a case in which the only question was that presented here, sustained the same position in an opinion, the gist of which is tersely expressed in the syllabus as follows:

"The writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy."

This rule of the courts is in consonance with sound reason and is adhered to by the courts of most of the states of the Union whose opinions are before us. *State v. Sheriff*, 24 Minn. 87; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272; *Ex parte Hartman*, 44 Cal. 32; *Steiner v. Nerton*, 6 Wash. 23, 32 Pac. 1063; *In re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224; *In re Mahany*, 29 Colo. 442, 68 Pac.



235; In re Terrill, 58 Kan. 815, 49 Pac. 158; State v. Crim. Sheriff, 45 La. Ann. 316, 12 South. 307; Ex parte Barnett, 51 Ark. 215, 10 S. W. 492; State v. Sistrunk, 138 Ala. 68, 35 South. 39; Commonwealth ex rel. Norton v. Deacon, 8 Serg. & R. (Pa.) 72; Ex parte Bigelow, 113 U. S. 828, 5 Sup. Ct. 542, 28 L. Ed. 1005; Ex parte Johnson, 1 Okl. Cr. 286, 97 Pac. 1023, 129 Am. St. Rep. 860; In re Belt, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; Ex parte Ruthven, 17 Mo. 541.

To the same effect appears to be the law as written in the text-books and encyclopedias. 21 Cyc. 805; 9 Encyc. P. & P. 632; Church on Habeas Corpus (2d Ed.) § 253; 1 Bishop's New Crim. Proc. § 821.

There is but one authority in this state known to us which seems to hold contrary to the doctrine of the above citations, same being the Ex parte Davis Case, 43 Tex. Cr. R. 644, 89 S. W. 978, 122 Am. St. Rep. 775. A careful examination and analysis of this case convinces the writer of this opinion that in the conclusions reached the said opinion is not sound either in holding that the admitted case showed one in which the relator was entitled to have his plea of autrefois acquit sustained, or that this court had power or authority to so decide in said case and to discharge.

A plea of former acquittal, or conviction, or jeopardy is one of fact as well as law, and the only proper place to have the same originally presented and determined is in a trial court upon a plea duly presented and supported. This is an appellate court, and not a trial court, and will not take cognizance of questions of law or fact determinable in some court of competent jurisdiction in which a cause involving such question may be pending. The writ of habeas corpus was never intended to interrupt the due and orderly administration of the criminal law. The reason is very easily apparent. How could this court know, except the evidence be introduced before it, that the issues of fact and law arising on a future hearing will be identical with those already determined? Could the identity of such facts be admitted in advance? It is impossible; and, even, if possible, a decision in such case would become a moot question in which this court would in no event attempt to take jurisdiction or render a binding judgment. We further observe that the law of this case was announced in this majority opinion on the former appeal, and should be in all things followed by the trial court without speculation as to what may be done at any future time, and without regard to any change in the complexion of this court.

For the reason stated, the writ is dismissed, and the relator is remanded.

# Ex parte COOTS. (No. 5386.)

(Court of Criminal Appeals of Texas. May 21, 1919.)

## CRIMINAL LAW — 982 — SUSPENDED SENTENCE.

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865c, 865e, and in view of articles 865d and 865g, as well as Vernon's Ann. Pen. Code 1916, art. 2, one convicted of a felony, whose sentence is suspended by the jury, cannot, after the period of suspended sentence has expired, be imprisoned on that sentence because of a later charge of another felony; for that would violate the purpose of the suspended sentence statute.

Original application by Bill Coots for writ of habeas corpus. Writ granted, and relator ordered released.

H. R. Debenport, of Big Springs, for relator.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is an original application for a writ of habeas corpus. The pertinent facts upon which a discharge from custody is sought show that relator was convicted of a felony and given a term of three years in the penitentiary by the verdict of the jury, upon which the court entered judgment. The jury also at the same time gave him the benefit of a suspended sentence. Three years and a half later he was charged with another felony. Under this charge he was convicted, sentenced, and has served the term. When the court entered judgment upon the last verdict, he also forfeited the suspension of sentence under the former conviction, sentenced relator, and cumulated that sentence with the last sentence.

Relator contends that, inasmuch as more than three years elapsed from the time of the suspension of sentence until the violation under which he was convicted on the second trial, this exonerated him from sentence under the first judgment. The question therefore presented is: Can the judge or court legally sentence for the first conviction, where suspended sentence is granted, when the term fixed by the jury has expired before the occurrence which predicates the second conviction? In other words, under the statute awarding suspended sentence, does the judgment cease to operate at the expiration of the term fixed by the jury and upon which suspended sentence is awarded, or does it run indefinitely? If the judgment and suspension run indefinitely, at what time would it expire, or would it ever expire?

Article 865c, Vernon's Crim. Stats. (Code Cr. Proc.), provides that, where suspended sentence is awarded, "neither the verdict of conviction nor the judgment entered thereon

shall become final, except under the conditions and in the manner and at the time provided for by section 4 of this act." Section 4 of said act is found in 2 Vernon's Crim. Stats. as article 865e. It provides that:

"Upon the final conviction of the defendant of any other felony, pending the suspension of sentence, the court granting such suspension shall cause a *capias* to issue for the arrest of the defendant, if he is not then in the custody of such court, and upon the execution of a *capias*, and during a term of the court shall pronounce sentence upon the original judgment of conviction, and shall cumulate the punishment of the first with the punishment of any subsequent conviction or convictions, and in such cases no new trial shall be granted in the first conviction."

So it will be seen that the finality of such conviction is made to depend upon said section 4, which authorizes the court to pass sentence by virtue of the first conviction if the final conviction in the second case occurs pending the suspension of sentence in the first. This can only occur under the terms of that statute pending such suspension. This is the power stated and granted by the Legislature, which authorizes the sentence under the first conviction. This carries with it the limitation specified. What is meant by the term "pending the suspension of sentence" above stipulated is defined and set forth in article 865d, Vernon's Ann. Crim. Stats. It provides that:

"When sentence is suspended the judgment of the court on that subject shall be that sentence of the judgment of conviction shall be suspended during the good behavior of the defendant. By the term 'good behavior' is meant that the defendant shall not be convicted of any felony during the time of such suspension."

In other words, that the determination of the suspended sentence, or its cessation, shall depend upon the "good behavior" of defendant, which is that he shall not during such suspension be again convicted of felony. If he again be so convicted, he forfeits all benefits of such suspension.

This would seem to make it sufficiently clear that the suspension of the sentence and the term of conviction coincide and co-exist; that the suspension begins with the judgment and ends with the time fixed in the verdict by the jury. The suspension is fixed by the jury; they alone having that right. The court is powerless to interfere with the suspended sentence, either to grant or refuse. This is exclusively the province of the jury. When this has been done the court must carry into the judgment the suspension. It is suspended for the time allotted by the jury in their verdict. This is the fair and just interpretation of the legislative act. If this is not true, the legislative intent and purpose would be defeated. This view is emphasized and, it seems, rendered

clear by the provisions of article 865g, which provides as follows:

"If at the expiration of the time assessed by the jury as punishment, there be pending against the defendant any other charge of felony, the court shall, upon application of the defendant (which shall be in writing, and shall state under his oath that he is not guilty of such charge), further suspend the sentence to await the final disposition of such other prosecution."

This language seems sufficiently clear to carry with it the idea that the charge against the accused in the second case must have occurred before the expiration of the time fixed by the jury in the first case. This would authorize and require the court to continue the suspension of the sentence until the final disposition of the second case. If he be found not guilty, the second charge would be found by the jury to be untrue, and would relieve of punishment under the first conviction. If he be found guilty, he would forfeit all rights under such suspension. The court has no authority to deal with the suspension of the sentence further than as it pertained to the first conviction. If there be no second conviction, there can be no cumulative sentence. Independent of the statute, the court has no authority to deal with the suspension of the sentence. The law determines that and fixes the status and conditions. The court has no authority outside the statute to act, either to curtail or extend the suspension. This depends upon and inheres in the verdict of the jury. The defendant alone by his acts may bring about conditions which forfeit his rights. It takes the verdict of the jury finding him guilty in the second case to forfeit his rights under the suspension of the sentence in the first case. The court can sentence and cumulate when the second felony conviction occurs. Without the provisions of that statute the court would be powerless to act as therein stipulated. This statute was enacted to prevent a forfeiture of the suspended sentence until the jury in the second case had determined that the defendant was guilty in the second case. This view correlates and harmonizes with and is strengthened by the general proposition pervading our entire criminal jurisprudence of reformation of the offender. This idea of reformation is one of the two great basic principles upon which the Penal Code is based: (1) The suppression of crime; (2) the reformation of the offender. Penal Code, article 2.

The state through its Legislature holds out to the declared offender that, though he may have offended in the particular instance, yet the jury may for the first offense suspend punishment dependent upon his future "good behavior" during the term for which they assess such punishment. It gives the accused the opportunity to reform, and is intended as encouragement to change his

ways and become a good and useful citizen. Such was the intent and purpose of the suspended sentence legislative action. The "good behavior" is made to depend upon the conduct of the convicted party, and it is held out to him as inducement to make a good citizen and become a useful member of society. If he has so acted during the term fixed by the jury, the judgment ceases, and his discharge from the allotted punishment follows as a legal consequence.

This view of the law entitles applicant to release under the facts, which is ordered.

### McKNEELY v. ARMSTRONG et al. (No. 6225.)

(Court of Civil Appeals of Texas, Galveston.  
April 17, 1913. Rehearing Denied  
May 15, 1913.)

#### 1. APPEAL AND ERROR $\S$ 51—COURT OF CIVIL APPEALS—JURISDICTIONAL AMOUNT.

In suit by a railroad's employe for a month's wages of \$84.74, wherein the railroad cited in an assignee of plaintiff's wages, who filed cross-bill seeking to recover, not only the month's wages sued for by plaintiff, but the balance of \$142.90 claimed by him under plaintiff's assignment, \$142.90 was the amount in controversy, and the Court of Civil Appeals has jurisdiction of the appeal.

#### 2. ASSIGNMENTS $\S$ 13—FUTURE WAGES.

An assignment of "any sum of money due, or which may become due, me as salary or wages for any subsequent month, or months, within the period of four years from the date of this instrument, from any person, firm, or corporation whosoever for whom I may work," was not valid as to wages earned in an employment other than that in which the servant was when he executed the assignment, and not then anticipated.

#### 3. ASSIGNMENTS $\S$ 12—FUTURE WAGES.

When wages to be earned under an existing or known and identified employment are assigned, there may be a reasonable expectation by the parties that the wages will be earned, and such possibility or expectancy being coupled with an interest, the thing assigned has a potential existence, and the assignment is valid.

Appeal from Harris County Court; Clark C. Wren, Judge.

Suit by O. Armstrong against the Houston Belt & Terminal Railway Company and O. E. McKneely. Judgment for plaintiff, and defendant McKneely appeals. Affirmed, in conformity to answers to certified question. 210 S. W. 192.

J. V. Meek, of Houston, for appellant.  
Andrews, Ball & Streetman, of Houston, for appellee Houston Belt & T. Ry. Co.

Tom C. Rowe and W. H. Nall, both of Houston, for appellee Armstrong.

PLEASANTS, O. J. Appellee brought this suit in the justice court of precinct No. 1 of Harris county against the Houston Belt & Terminal Railway Company to recover the sum of \$84.74 due him by said company as wages earned in the service of the company during the month of September, 1910. The defendant company answered that it owed the sum of \$84.74 wages earned by plaintiff as alleged in his petition, but that appellant claimed said wages under an assignment made to him by plaintiff, and having deposited the said sum in court, defendant prayed that appellant be made a party to the suit, and that it have judgment protecting it from further claim by either plaintiff or the said McKneely. The defendant McKneely, having been duly cited, appeared and answered, claiming the amount deposited in the court under an assignment of wages executed by the plaintiff on February 16, 1910, assigning to said defendant \$142.90 of the wages then earned or to be earned by him in the employment of the Texas & New Orleans Railway Company, in which assignment he expressly agreed that, in event said sum was not paid to defendant out of the wages earned by plaintiff from said Texas & New Orleans Railway Company, said sum was assigned to defendant out of any wages plaintiff might earn during a period of four years in the employment of any person, firm, or corporation.

The trial in the justice court resulted in a judgment in favor of plaintiff for \$84.74 against both of the defendants, and adjudging all costs against the defendant McKneely. Upon appeal to the county court, and a trial de novo therein, a like judgment was rendered. The amended pleading filed by defendant McKneely in the county court, and upon which the cause was tried, omitting the formal portions, is as follows:

"That heretofore, to wit, on the 16th day of February, 1910, that plaintiff, Odine Armstrong, for a valuable consideration to him paid, did then and there make, execute, and deliver to this defendant, C. E. McKneely, an assignment of his wages to the extent of \$142.90. Said assignment is hereto attached, marked 'Exhibit A,' and made a part hereof. This defendant shows that on the day said assignment was made, plaintiff, O. Armstrong, at that time was in the employ of the Texas & New Orleans Railway Company, that plaintiff was a railroad man, and had been for many years, and that, after he made the assignment, aforescribed, plaintiff continued in said railroad company's employ for some time; and defendant shows that said plaintiff, although he had assigned to this defendant the sum of \$142.90 of his wages earned and to be earned while in the employ of the Texas & New Orleans Railroad Company, yet, as a matter of fact, said plaintiff drew his said wages earned from said railroad company and appropriated same to his own use and benefit, and he failed and refused to pay

this defendant any part of said wages; that thereafter the said plaintiff quit the employ of the Texas & New Orleans Railroad Company, and entered the employment of the Houston Belt & Terminal Railroad Company, and this defendant shows that in said assignment it is and was specially agreed and understood that, if this defendant was not paid the said sum of \$142.90 by the plaintiff out of the moneys earned while in the employ of said Texas & New Orleans Railroad Company, then it was further provided that this defendant should have, and there was transferred and assigned to him, any moneys due plaintiff as salary or wages for any subsequent month or months within the period of four years from the date of said instrument from any person, firm, or corporation whomsoever for whom plaintiff might work, or so much of said sum as would be required to satisfy the said assignment. Defendant shows that, after plaintiff began to work for the Houston Belt & Terminal Railroad Company, this defendant served said company with notice of the fact that he held the assignment hereto attached and made a part hereof, by giving said company a copy thereof, and at that time the company owed plaintiff the sum of \$84.74, and said company owed plaintiff said amount at the time plaintiff quit its employ, being salary or wages earned by plaintiff, which sum this defendant is entitled to a judgment for, as well as a judgment declaring said assignment a valid assignment of wages to be earned by Odine Armstrong from any person, firm, or corporation for whom he may labor during a period of four years, to an amount sufficient to satisfy, pay off, and discharge said assignment.

"Wherefore this defendant files this plea and cross-action against both Odine Armstrong and the Houston Belt & Terminal Railroad Company, and upon final trial he prays judgment against the Houston Belt & Terminal Railroad Company and Odine Armstrong for said sum of \$84.74, now on deposit in this court. He also prays that he have judgment establishing the balance of his claim against the plaintiff, Odine Armstrong, and judgment that he have a right to wages to be earned by said Odine Armstrong from any person, firm, or corporation for whom he may work within a period of four years from the date of said assignment, to an amount sufficient to pay off and discharge the balance of said assignment, which amounts to \$58.16, and for costs of court, and for general and special relief, as in law or equity to which he may be entitled to receive, for all of which he will ever pray."

The assignment of wages under which appellant claims, and which was attached as an exhibit to his cross-bill, is as follows:

"The State of Texas, County of Harris.

"Know all men by these presents that I, Odine Armstrong, of Harris county, Texas, for and in consideration of one hundred and twenty-nine and 50/100 dollars to me in hand paid by C. E. McKneely, of Houston, Harris county, Texas, and other valuable considerations, have sold, alienated, and transferred, and by these presents do sell, alienate, and transfer, to the said C. E. McKneely the sum of one hundred and forty-two and 90/100 dollars out of the salary or wages due or to become due

me from T. & N. O. R. R. Co., for the month of February, A. D. 1910.

"In case said sum of one hundred and forty-two and 90/100 dollars is not satisfied out of said month's salary or wages, then all moneys, claims, or demands accruing thereafter to me from said T. & N. O. R. R. Co., as wages or salary, up to said amount of one hundred and forty-two and 90/100 dollars, are to become the property of the said C. E. McKneely, and said C. E. McKneely is hereby authorized and empowered to ask for, collect, and sue for same in either my name or its or his own name as he elects, and I hereby direct that said T. & N. O. R. R. Co. pay to said C. E. McKneely the sum of one hundred and forty-two and 90/100 dollars, and if same is not paid to said C. E. McKneely, and this assignment is placed in the hands of an attorney to collect the said sum, or if suit is brought on same, then, in either event, I do assign and transfer to said C. E. McKneely the sum of eight dollars that may be due or to become due as wages, as attorney's fees and court costs, and said C. E. McKneely is authorized to collect and receipt for same, and, if not paid, it or he may recover same by suit.

"If the above amount is not paid to C. E. McKneely by the party for whom I am now working, then, in addition to the above, I further transfer and assign to said C. E. McKneely any sum of money due, or which may become due, me as salary or wages, for any subsequent month or months, within a period of four years from date of this instrument, from any person, firm, or corporation whomsoever for whom I may work, or so much of said sum or sums as may be required to satisfy said sum of one hundred and forty-two and 90/100 dollars, and attorney's fees and court costs, if any, and the said C. E. McKneely is hereby authorized to collect and receipt for same, and said receipt shall be absolutely binding and conclusive upon me.

"Witness my hand at Houston, Texas, this the 16th day of February, A. D. 1910.

his  
"Odine X Armstrong.  
mark

"Witness: C. E. McKneely. Josie Matheny."

The trial court sustained a general demurrer presented by plaintiff to this cross-bill of defendant McKneely.

Appellee has filed a motion to dismiss this appeal on the ground that the amount in controversy is less than the amount necessary to give the right of appeal to this court. This motion is based upon the contention that the amount in controversy is only the sum of \$84.74, the amount deposited in the court below.

[1] We do not think that this contention is sound. The cross-bill before set out seeks not only to recover the amount of the deposit, but prays for judgment against the appellee, establishing appellant's right to the balance of the \$142.90 claimed under the assignment. The fact that appellant, even if the assignment was valid, might not be entitled to any judgment, except one awarding him the amount of the deposit, does not settle the question of the amount in contro-

veray in the suit. The amount claimed by him against the appellee was \$142.90, and his right to have judgment for this amount as prayed for in his cross-bill is the very question that was in controversy in the court below, and to determine which this appeal is prosecuted. The amount in controversy being \$142.90, this court has jurisdiction of the appeal, and the motion to dismiss is overruled.

[2] Upon the merits of the appeal we think the trial court was correct in holding that the assignment of wages under which appellant claims was void as to any wages thereafter earned by appellee in any other employment than that in which he was engaged at the time the assignment was executed. To constitute a valid sale of property the description of the thing sold must be sufficiently definite to identify and distinguish it from all other and like property, and there can be no sale of property unless both the buyer and seller knows and can identify the thing sold. Courts of equity will uphold the sale of property not in esse only when it is clear that at the date of the sale the parties anticipated the acquisition by the grantor of the identical property which he thereafter acquired, and which is sought to be brought within the contract of sale, and intended that such identical property should be the subject-matter of the sale. The description in the assignment before set out does not meet this test:

"Any sum of money due or which may become due me as salary or wages for any subsequent month or months within the period of four years from the date of this instrument from any person, firm, or corporation whomsoever for whom I may work, or so much of said sum or sums as may be required to satisfy said sum of \$142.90, and attorney's fees and costs, if any."

This language does not describe anything having an actual or potential existence, nor is there anything in the language which tends to show that it was anticipated by the parties at the time said assignment was made that the particular wages in controversy would be earned by the appellee and these identical wages were intended to be assigned.

In the case of *McDavid v. Phillips*, 100 Tex. 73, 94 S. W. 1131, our Supreme Court, in passing upon the sufficiency of a crop mortgage which described the crop as follows:

212 S.W.—12

"It is agreed and understood that, if from any cause whatever I fail to cultivate the above [specifically] described lands, then this mortgage shall cover the land I do cultivate, until this mortgage is paid in full"

—says:

"That language neither discloses property in existence, which is a proper subject of contract, nor does it give any description by which the thing that was in contemplation of the contracting parties could be identified at that time. \* \* \* The terms of this mortgage do not point out anything which the parties to it could at that time know to be the subject of that contract, nor was the crop which was sought to be subjected to the mortgage here the product of anything which was at the time of the making of the mortgage capable of being identified and in which the mortgagor had an interest."

We think what is said in the above quotation in regard to the mortgage under consideration applies to the assignment under which appellant claims.

[3] The case of *Richardson v. Washington*, 88 Tex. 339, 31 S. W. 614, also sustains the views above expressed. A mere expectancy or possibility is not assignable, and we have found no case in which an assignment of wages to be earned in the future has been sustained, unless the wages so assigned were to be earned under an existing engagement or employment of the grantor, or the future employment is known and identified at the time the assignment was made. When wages to be earned under an existing or known and identified employment are assigned, there may be a reasonable expectation on the part of the parties that such wages will be earned, and such possibility or expectancy being coupled with an interest, the thing assigned has a potential existence, and the assignment is valid. *Lehigh Valley Ry. Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; *Metcalf v. Kincaid*, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 891; *Manly v. Blitzer*, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242.

We are of opinion that the judgment of the court below should be affirmed.

Affirmed.

**BARROW et al. v. MURRAY et al.**  
(No. 7573.)

(Court of Civil Appeals of Texas. Galveston.  
March 5, 1919. Rehearing Denied  
April 3, 1919.)

**1. BOUNDARIES**  $\Leftrightarrow$  35(3), 36(3), 5) — **FIELD NOTES — AMBIGUITY — ADMISSION OF OTHER EVIDENCE.**

In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, *held* that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant, and an ambiguity appeared, court did not err in admitting original English field notes, maps, plats, and field notes of adjoining grants, and evidence of surveyors as to the true location of the east boundary line of the leagues.

**2. BOUNDARIES**  $\Leftrightarrow$  6 — **TRACING FOOTSTEPS OF SURVEYOR — POINT OF BEGINNING.**

Contention that to trace the footsteps of the original or locating surveyor one must begin at the corner at which he began, or the point ascertained to be approximately near said corner, rather than at a well established and known corner of an adjoining survey called for by the locating surveyor in fixing the boundaries is question, is untenable.

**3. BOUNDARIES**  $\Leftrightarrow$  36(3), 5) — **ORIGINAL ENGLISH FIELD NOTES AND MAPS — ADMISSIBILITY.**

The original English field notes and maps prepared by the surveyor to locate surveys are part of the original title, and may be considered in aid of description contained in the grant, and to supply what is omitted therefrom.

**4. BOUNDARIES**  $\Leftrightarrow$  37(3) — **EVIDENCE — SUFFICIENCY.**

In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, evidence *held* to justify court's finding that the east boundary line of leagues was at the place contended for by appellees claiming adversely to plaintiffs.

Appeal from District Court, Brazoria County; Samuel J. Styles, Judge.

Cause consolidating cases styled respectively Minnie F. Lawson v. Emma M. Murray, Norton v. Barrow and Others, and Murray v. Barrow, in which consolidated case R. H. Barrow and wife became plaintiffs, and all the other parties joined adversely to them. Judgment contrary to contention of plaintiffs, and they appeal. Affirmed.

Maco & Minor Stewart and R. W. Houk, all of Houston, for appellants.

J. T. Loggins, W. S. Sproles, Munson & Williams, and Elmer P. Stockwell, all of Angleton, for appellees.

LANE, J. This is an appeal from a judgment of the district court of Brazoria county in a cause consolidating cases Nos. 9820, 10386, and 10654, styled, respectively, Minnie F. Lawson v. Emma M. Murray, Norton v. Barrow et al., and Murray v. Barrow, in which said consolidated case R. H. Barrow and wife became plaintiffs and are so recognized by all the parties to this appeal, but for some reason referred to in the briefs of all parties as defendants. All other parties, appellees, join adversely to the Barrows. We shall refer to the two sets of parties as the Barrows and appellees, respectively.

On the 7th day of July, 1824, a league of land on the east bank of the Brazos river in Brazoria county was granted to James B. Bailey. It was surveyed by Horatio Chrisman, under the direction of the Commissioners Baron de Bastrop and Empresario Stephen F. Austin, and described as follows:

"Beginning on the east bank of the Brazos river at a stake from which an elm 8 in. dia. brs. N. 51° E. 5 bars, a do. 4 in. dia. brs. 8 60° E. 3 bars, marked J. B. B.; thence east 4,500 bars to a post; thence south 3,700 bars to a post, pecan bears N. 41° W. 5½ bars, marked J. B. B.; thence west at 8,968 bars, intersected Samuel Carter's beginning corner on the river; thence up the river with the meanders thereof to the place of beginning, comprehending in these limits one league of land."

The field notes of the north line of the Stephen F. Austin survey, made at the same time, which survey was later abandoned, were as follows:

"Commencing at the N. E. corner of J. B. Bailey's tract in the prairie; thence east 700 B. to the timber, 3,570 a lake, 263 B. wide, 5,130 a creek 50 L. wide, running S. W. 6,970 prairie, 7,083 to a cluster of live oaks marked, the south one of them, S. F. A.; thence S. 25° E. 900 B.; thence S. 21° W. 7,820 B. to the first-mentioned post in the prairie."

On the 8th day of July, 1824, the same surveyor surveyed a league of land under the direction of the same authorities, which was granted to William Roberts, described as follows:

"Beginning on the east bank of the Brazos river at an elm marked 1 E. R.; thence east 14,224 bars to corner a post and mount; thence south 1,961 bars to a stake; thence west 1,005 bars to a stake the N. E. corner of Stephen F. Austin's tract; thence west 11,625 bars to stake at Bailey's upper corner; thence up the river with the meanders thereof to the place of beginning, comprehending in all one league of land."

The original English field notes of the William Roberts league by Surveyor Dixon, on file in the land office, describes the same substantially as follows:

"Beginning at an elm marked No. 1 E. R. on the east bank of the Brazos river; thence east between leagues Nos. 1 and 2 (No. 1 being the Wm. Roberts and No. 2 the Bradley) at 970 bars a creek, 2,790 a prairie, 3,000 bottom, 3,200 prairie, 3,450 timber, 5,370 prairie, 5,660 timber, 8,220 a lake, 9,600 a bayou, 11,070 a lake, 11,630 a creek, 13,660 prairie, 14,244 set a post and raised a mound; thence south 1,961 bars set a post and raised a mound; thence west 1,095 bars to the N. E. corner of S. F. Austin's tract on the standard line."

The field notes in the grant to William Roberts are as follows:

"The surveyor commenced the survey of said league at a point on the eastern margin of the Brazos river, where a landmark was set at the side of an elm marked 1 E. R.; thence he measured 14,244 varas east where another landmark was set in the prairie; thence south 1,961 varas where a landmark was set in the prairie; thence west 12,720 varas to the said river at the landmark where the survey of the adjoining owner, James Bailey's, league was begun; thence following the meanders of the river upwards to where the first line began."

The field notes of the John Bradley league made by Horatio Chrisman, which was granted to Bradley August 10, 1824, are as follows:

"Beginning on the east bank of the Brazos river at a post from which a pecan 20 in. dia. bra. N. 7° E. 4 bars, marked No. 3 E. R. a do. 14 in. dia. bra. S. 65° E. 5 bars, marked 2 E. R.; thence east 10,394 bars to a mound in the prairie; thence south 2,000 bars to a mound in the prairie; thence west 13,200 bars intersected the Brazos river at the upper corner of William Roberts league; thence up the river with the meanders thereof to the place of beginning, comprehending in these limits one league of land surveyed by me, Horatio Chrisman."

A labor of land granted to Andrew Roberts April 10, 1838, is described as follows:

"Beginning at the northeast corner of C. Smith's league; thence east 1,000 varas to a stake and mound; thence north 1,000 varas to a stake and mound; thence west 1,000 varas to a stake and mound; thence south 1,000 varas to the beginning—containing in the above-described boundary one labor of land."

The southwest corner of this labor is shown by all the old maps introduced in evidence to be the southeast corner of the William Roberts league, and its west line is a part of the east line of the William Roberts league.

A tract of 4,605 acres of land was granted to the assignees of Jose de Jesus Valderas in 1873, and in the original grant is described as follows:

"Beginning at the S. W. corner of a tract surveyed by virtue of certificate to J. W. Cloud a post and mound on the back line of the George Robinson league; thence south 1,944 vs. to a post and mound in the prairie, the S. E. corner

of sd. league; thence west 2,006 vs. to the N. E. corner of the John Bradley league a post in the prairie; thence south 2,000 vs. J. Bradley's S. E. corner the upper line of the Wm. Roberts league; thence with sd. upper line east 1,024 vs. to the N. E. corner of sd. league; thence south 961 vs. to the N. W. corner of the A. Roberts labor; thence with line of sd. labor east 1,000 vs. to post; thence south 1,016 vs. to the N. W. corner of the H. H. Cornwall tract; thence east 4,172½ vs. to a post and mound in the prairie; thence north 5,022 vs. to a post and mound for N. E. corner on the lower line of the said Cloud tract; thence with sd. lower line west 4,201 vs. to place of beginning."

On the 11th day of November, 1892, the parties owning any parts of the land contiguous to the boundary line between the Wm. Roberts and the Valderas surveys, entered into the following agreement:

"Whereas, there is an uncertainty as to the correct boundary line of the Wm. Roberts league and the A. Roberts labor on the west and the Jose de Jesus Valderas sur. on the east, the parties whose names are signed to this instrument and who are all the persons who at this time are the owners in fee simple of said tracts of land above named, for the purpose of advertising and settling said boundary lines and fixing the same on the ground forever so that it may be binding on them, their heirs, assigns, and legal representatives, forever, do now establish, fix, and declare said lines to be as follows, viz.: Beginning at a live oak post set in the ground (about 8 inches square and 8 feet high), being the point herein recognized as the S. E. cor. of Wm. Roberts lea. the S. W. cor. of the A. Roberts labor, the N. E. cor. of the Cornelius Smith lea. and of the N. W. cor. of the Noel F. Roberts sur. from which a double live oak the south prong of which is 12 in. in diameter and marked = on each side (very old marks) and the north prong of which is 14 in. in dia. standing on the east bank of a slough in the south line of the Wm. Roberts League bears due west (variation 8 deg. 20' east) 1,242.7 varas and a hackberry 10 in. in dia. marked = (new bearing south 38 deg. 10' E. 86°/10 vs.); thence north (variation 7 deg. 59' E.) at 1,141°/10 vs. pass a mulberry post about 5 ft. high and 5 in. in dia. being the herein recognized N. W. cor. of A. Roberts labor at 1,746 vs. pass a live oak post being the S. W. cor. of a tract of 50 acres, sold by Walter Phelps to S. J. Jamison and the N. W. cor. of a tract of 100 acres sold by said Phelps to Sloan Jamison at 2,100°/10 vs. to an iron pipe 2 in. in dia. and 3 ft. long which stands along side of a live oak post about 5 feet high being the N. W. corner of the aforesaid S. J. Jamison 50-acre tract in the south line of a tract of 100 acres sold by said Phelps to Sam and Sloan Jamison, which iron pipe and post are recognized herein as being the N. E. cor. of the Wm. Roberts lea.; thence S. 88 deg. 37' W. 1,208°/10 varas to a cedar stake alongside of which is an old cedar post marked S o E, cor. of J. B. — L. from which an umbrella-shaped live oak 12 in. in diameter bears N. 23 deg. W. 192°/10 varas, and another live oak 4 in. in diameter bears S. 64 deg. W. 1,141°/10 varas, this last-described point being considered

and accepted by the parties hereto as the S. E. cor. of the Jno. Bradley league; the foregoing described line has been agreed upon by the parties hereto because of the fact that the beginning point, namely, the live oak post set in the ground and about 8 feet high has been recognized by the parties living in its vicinity and claimed by the owners of lands adjacent to said line above described for the past 40 years as the true and common corners of the A. Roberts labor, the Wm. Roberts lea., the Cornelius Smith lea., and the Noel F. Roberts sur."

On the 2d day of August, 1894, Ira H. Evans, president of the New York & Texas Land Company, made an affidavit as follows:

"The State of Texas, County of Travis.

"Before me, A. B. Langemann, a notary public in and for the county and state aforesaid, on this day personally appeared Ira H. Evans, president of the New York & Texas Land Company, Limited, who, being duly sworn, states upon oath the Jose de Jesus Valderas survey in Brazoria county, patented to Sam'l. A. Maverick, assignee by patent No. 332 in volume 19, was conveyed to said land company by properly authenticated deeds, and said land company has not sold or alienated said survey, except some parts thereof which are wholly situated within the limits of the corrected survey of said land lately made by J. A. Donaldson, and now on file in the general land office of the state. Ira H. Evans, President New York & Texas Land Company Limited.

"Sworn to and subscribed before me this 2d day of August, A. D. 1894. A. B. Langemann, Notary Public, Travis County, Texas."

This affidavit was filed in the general land office of Texas as file 65, August 7, 1894. There was an indorsement on the wrapper of this affidavit as follows:

"Patent No. 332, vol. 19, returned and canceled on the record on account of conflict with old and valid surveys. August 8, 1894.

"W. L. McGoughey, Commissioner.

"Patented Aug. 30/94."

Presumably basing his action upon the before-mentioned agreement and affidavit, the state land commissioner in 1894 made and filed in the land office the following paper:

"The State of Texas, County of Brazoria.

"Corrected field notes of survey of 4,120 $\frac{7}{16}$ /100 acres of land made by virtue of a certificate issued by the district court of Bexar county to Samuel Maverick, assignee of Jose de Jesus Valderas on June 17, 1852, situated in Brazoria county east of the Brazos river about 11 miles N. 42 deg. E. of the town of Brazoria and beginning at iron pipe 2" in dia. set in an east line of the George Robinson league for the S. W. corner of the J. W. Cloud survey; thence south 1,007 vrs. to an iron pipe 3"x2" set at the S. E. corner of said Robinson league; thence West at 612 $\frac{1}{2}$  vs. X the center line of the track of the Velasco Terminal Ry. 1,356 vs. to a pine post 4"x4" set for the N. E. corner of the James Bradley league; thence south 2,082 vs. to a cedar stake along side of which is an old cedar post marked 'S. E. cor. of J.

B. L.' from which an umbrella-shaped L. O. 12" in dia. bears N. 22 deg. 14' W. 172 $\frac{4}{10}$  vs. and another L. O. 4" in dia. bears S. 64 deg. 46' W. 114 $\frac{4}{10}$  vs. being the recognized S. E. corner of the James Bradley league; thence N. 87 deg. 51' E. 1209 vs. to an iron pipe 2" in dia. & 3 feet long standing alongside of a live oak post 5 feet high the N. E. corner of the Wm. Roberts league; thence S. O. deg. 46' W. 968 vs. to a mulberry post set at the N. W. corner of the A. Roberts labor; thence east 1,009 vs. to a post set at the N. E. corner of said labor; thence south 1,016 vs. to a post the N. W. corner of the H. H. Cornwall survey; thence S. 89 deg. 41' E. at 2,151 vs. X the center line of the Velasco Terminal Ry. 3,361 vs. to an iron pipe 3"x2" set for the S. E. corner of this survey; thence north 5,042 $\frac{1}{2}$  vs. to an iron pipe 3"x2" for N. E. corner of this survey; thence N. 89 deg. 56' W. 4,209.3 vs. to the place of beginning.

"Resurveyed May 20th, 1894."

In April, 1910, Mrs. R. H. Barrow, contending that there was a vacancy between the Wm. Roberts and J. Bradley surveys on the west and the A. Roberts labor and the Valderas survey on the east, aggregating 800 acres of land which constituted state school land, caused the same to be surveyed, and thereafter procured from the state an award therefor, this being the land for which the Barrows sue in this cause, their claim being based upon said award.

The contention of appellees is that the Wm. Roberts league extends east to the west boundary line of the A. Roberts labor and the Valderas survey as agreed upon by the owners of the land on each side of said line in 1892, and that the Bradley league extends east to the west boundary line of the Valderas as established by said agreement in 1892. They contend that the line agreed upon was in fact the original east boundary line of the Wm. Roberts and Bradley leagues, and that the junior surveys (the A. Roberts and Valderas) west boundary line was not changed by the corrected field notes made in 1894, as both sets of field notes call for and establish the east line of the Wm. Roberts and Bradley as the west line of the A. Roberts and Valderas; in other words, both the original and corrected field notes call for the east lines of the Wm. Roberts and Bradley as the west line of the Valderas. The effect of this contention, of course, is that there is no vacancy lying between the Wm. Roberts and J. Bradley leagues on the west and the A. Roberts labor and Valderas survey on the east, as claimed by the Barrows, but that such land is part of the Wm. Roberts and J. Bradley leagues, and could not be lawfully awarded to Mrs. Barrow.

It is shown by the evidence that shortly after the original survey was made in 1824 by Dixon and Horatio Chrisman, upon which the original grant was issued to the J. Bradley league, the league was divided into the upper and lower halves by the same survey.



or, Horatio Chrisman, by running a line practically through the center of the league from west to east; that in making this survey Chrisman called for the south line of the Bradley to begin at its original S. W. corner on the river and run east 14,110 vs. to its N. E. corner. It is shown that in less than one year after Chrisman had made the original survey, and the survey dividing the league, he subdivided the south half of the league, and in surveying a tract for one James Frazier along the south line of said league he began at the original S. W. corner of the league and ran east 7,268 varas, and in surveying another tract out of the same half league, lying just east of the first tract, he ran along the south line 6,845 varas to the S. E. corner of the league, making the length of the south line 14,113 varas, practically reaching the point contended for by appellees as the S. E. corner of the Bradley. In these last two surveys Horatio Chrisman, the same surveyor who made the original survey for the grant, calls for the common corner of the Wm. Roberts and J. Bradley leagues on the Brazos river; calls for the same elm tree marked 1 E. R. for the beginning corner of the Wm. Roberts, and says it is the corner established by the English field notes made by Dixon. He calls for trees, marks, streams, etc., in a most accurate way, showing that he must have made an actual survey of the ground and that he had reached the S. E. corner of the Bradley league where he had placed it less than a year theretofore at a distance of 14,110 varas from its S. W. corner on the east bank of the river.

It is further shown that, prior to the agreement between the owners of the land on the Wm. Roberts and J. Bradley and those owning land on the Valderas fixing the boundary lines between the Roberts and Bradley on the west and Valderas on the east, various parties had purchased and improved small tracts in the east portion of both the Roberts and Bradley, and had been in possession of their several tracts for from 40 to 60 years, and that the line as contended for by appellees had been generally recognized by the oldest inhabitants in that community as the true east lines of the Roberts and Bradley leagues.

It was further shown by the testimony of E. S. Atkinson and J. L. Chambers, two competent surveyors, that they had been called upon to survey and had in fact made surveys of the Wm. Roberts league, and had made careful and diligent search for the original corners and boundary lines of the same. They testified that, after careful search for the original corners of the Bailey, Wm. Roberts, and J. Bradley surveys, they had not been able to definitely locate any one of them, but that they had definitely located the original N. E. corner of the

S. F. Austin abandoned survey, called for in the English field notes made by Dixon describing the Wm. Roberts, and also called for by Chrisman in his field notes made in 1824, by which the Roberts was located and granted. They also testified that this original N. E. corner of the S. F. Austin is located about 1,095 varas south of the S. E. corner of the Roberts as contended for by appellees.

They further testified that a line run course and distance from the east bank of the Brazos river along the north line of the Roberts league, to wit, "east 14,224 varas and thence south 1,961 varas to the standard line, the point reached on said standard line would be about 224 to 227 varas west of the S. F. Austin N. E. corner called for in the English field notes and the Chrisman field notes to be 1,095 varas west of the S. E. corner of the Roberts."

It is clearly shown from the evidence that in 1824 Dixon surveyed and located both the Wm. Roberts and J. Bradley leagues by what is designated by the parties to this suit as the "old English field notes," and that shortly thereafter Horatio Chrisman was directed by Commissioner Baron de Bastrop and Empressario Stephen F. Austin to make the survey for the issuance of the grants. We think it is also clearly apparent from the evidence that on the 7th day of July, 1824, Chrisman, complying with said directions, adopted the survey made by Dixon and filed the same in the proper archives, and that in due time the same were filed and are now found in the proper records of the general land office of this state. It is also shown that both Dixon and Chrisman are dead. The grants to Roberts and Bradley both recite that the grants were issued upon the surveys made by Chrisman.

We deem the foregoing statement of the facts sufficient to properly discuss and dispose of the issues presented by this appeal, and while there were other facts proven tending to support the judgment of the court we deem it unnecessary to set them out here.

Upon the issues and facts stated, the cause was tried by the court without a jury, and judgment was rendered for appellees against the Barrows. From this judgment the Barrows have appealed.

It is apparent from what has been said that the main and controlling issue to be decided is: Was there a vacancy between the Wm. Roberts and Bradley leagues on the west and the A. Roberts labor and the Valderas survey on the east? Appellants admit that, if there is no such vacancy, appellees should recover.

[1] The substance of the several assignments of plaintiffs in error, the Barrows, is that the court erred in admitting in evidence the English field notes by Dixon and the field notes by Horatio Chrisman, describ-

ing the Wm. Roberts and J. Bradley leagues, made in 1824, which formed the basis for the issuance of the grants to the land embraced within the boundaries of the same, as shown on the face of the grants, and in submitting in evidence maps, plats, and field notes of other grants adjoining said Roberts and Bradley leagues made about the same time as those made for the location of the Roberts and Bradley by the same surveyor, and in admitting in evidence the testimony of Surveyors Atkinson and Chambers as to the true location of the east lines of the Roberts and Bradley leagues, which tended to show that the east boundary lines of the Roberts and Bradley leagues were actually located by the locating surveyor at a greater distance east from the Brazos river than the distance called for in the grants of said two leagues, and upon such evidence finding that such lines were further east than called for in the grants, because there was no ambiguity in the field notes inserted in the grants fixing the boundaries of said leagues, and because such field notes, maps, plats, and testimony furnished no evidence tending to show the footsteps of the surveyor who originally located said leagues, or that he located the east boundary line thereof further east than they would be located by following course and distance from the river as called for in the field notes in the grant.

The Barrows, plaintiffs in error, concede that, if the field notes in the grants were ambiguous, extraneous evidence, such as was admitted, would be admissible as tending to show where the boundary lines were actually located by the locating surveyor; but they contend that there was no such ambiguity. Such contention, however, we think is untenable. The evidence shows that neither the original beginning corner, or any other original corner of either of the Wm. Roberts or Bradley leagues, can now be found on the ground, and that neither of the leagues could be located on the ground by the use of the field notes in the grants, and that to enable any one to locate either of said leagues it would be necessary to resort to the field notes prepared by Dixon and Chrisman, filed in the proper archives as evidence of the rights of grantees to the land granted. The Barrows admit that without the use of the English field notes prepared by Dixon the beginning corner of the Wm. Roberts league could not be even approximately located. In their brief they insist that these field notes should be resorted to to locate the beginning corner of the Wm. Roberts, and that, if such resort is had, then the point where the original beginning corner is located can be approximately determined—that is to say, within 100 or 200 varas of its original location. Now, if we resort to the field notes prepared by either Dixon or

Chrisman to locate the boundaries of the league, we find but one natural or artificial object called for in either of them which can now be located on the ground. Both of these surveys call for the northeast corner of the S. F. Austin abandoned survey, shown to be a group of live oak trees, which they locate at 1,095 varas west of the southeast corner of the Roberts league. All the evidence shows that this northeast corner of the S. F. Austin is now to be found and definitely located. With this evidence before the surveyors, who undertook to locate the east boundary line of the Roberts league, and who testified as witnesses, they say they began at a point on the east bank of the Brazos river where the north line of the Roberts intersects said river; they then ran 14,224 varas east, called for in the grant field notes, and also in the Dixon and Chrisman field notes; they then ran south 196 varas called for in all of said field notes, and they found that the S. F. Austin N. E. corner, which, according to the location field notes by Dixon and Chrisman, should be 1,095 varas west of the S. E. corner of the Roberts league, was in fact 224 varas east of the point which they had reached by following course and distance calls in the grant field notes.

Without going into further details, we find that, when an attempt is made to locate the boundaries of the Roberts league on the ground by the field notes in the grant, an ambiguity at once appears, and that the court did not err in so concluding and in admitting the evidence complained of.

The S. F. Austin corner called for in the locative field notes of Dixon and Chrisman above mentioned, being now found on the ground, should, we think, have constituted the pivotal point to begin a resurvey to determine where the original boundaries of the Roberts league were located. If this be done, the N. E. corner and the east boundary line of the Roberts will be found to be about 1,300 varas east of the location contended for by the Barrows and at the place contended for by appellees.

[2] The Barrows seem to take the position that they could use the old English field notes of the Roberts league as evidence to establish, or approximately establish, the location of the original beginning or N. W. corner of said league, but that such field notes could not be used by appellees in an effort to show that the original S. E. corner of the league was 1,095 varas east of the S. F. Austin N. E. corner. Such contention is inconsistent and contradictory, and, of course, cannot be sustained. The Barrows seem also to insist that to trace the footsteps of the original or locating surveyor one must begin at the corner at which the locating surveyor began his survey, or

at a point ascertained to be approximately near said corner, rather than at a well established and known corner of an adjoining survey called for by the locating surveyor in fixing the boundaries in question. This contention is also untenable and cannot be sustained. *Thatcher v. Matthews*, 101 Tex. 122, 105 S. W. 317; s. c., 105 S. W. 1006; *Hermann v. Thomas*, 168 S. W. 1044, 1045; *Matador Land & Cattle Co. v. Cassidy-Southwestern Com. Co.*, 207 S. W. 480; *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732. In the case last cited it is said:

"The call for the beginning corner of the Morgan in the north line of the Nash is of no greater dignity than other calls in the field notes."

We think it must be conceded by the Barrows that the surveys made by Dixon and Chrisman in 1824 were the only surveys made prior to the issuance of the Roberts and Bradley grants, and that there were no field notes of other surveys filed in the proper archives authorizing the issuance of the grants.

[3] It is well settled that original English field notes and maps prepared by the surveyor who located surveys are parts of the original title and may be considered in aid of the description contained in the grant and to supply what is omitted therefrom. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 899, and authorities there cited; *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768; *Cook v. Dennis*, 61 Tex. 246; *Cottingham v. Seward*, 25 S. W. 797; *Ayers v. Watson*, 137 U. S. 594, 595, 11 Sup. Ct. 201, 34 L. Ed. 808.

In *Wilkins v. Clawson*, supra, Judge Pleasants speaking for this court, referring to the field notes embraced in the grant, said:

"But we must not look alone to these field notes in determining the sufficiency of the description. The original English field notes and the plat or map prepared by the surveyor who located the survey are a part of the original title, and must be considered together with the field notes embodied in the grant for the purpose of identifying and fixing the location of the survey. *Welder v. Carroll*, 29 Tex. 381; *Cook v. Dennis*, 61 Tex. 248; *Irvin v. Bevil*, 80 Tex. 338, 16 S. W. 21."

[4] It is apparent from what has been said that we have reached the conclusion that the trial court did not err in admitting the evidence complained of and in finding from the evidence that the east boundary lines of the Roberts and Bradley leagues were at the place contended for by appellees. Having reached such conclusion the judgment of the trial court is affirmed.

Affirmed.

# AMERICAN INDEMNITY CO. v. ZYLONI et al. (No. 7551.)

(Court of Civil Appeals of Texas. Galveston. March 29, 1918. On Motion for Rehearing, March 21, 1919. Appellant's Motion for Rehearing Denied April 17, 1919.)

## 1. MASTER AND SERVANT $\S$ 417(3%)—WORKMEN'S COMPENSATION ACT—BINDING FORCE OF ORDER OF ACCIDENT BOARD—RIGHT TO APPEAL.

A workmen's compensation insurer which voluntarily contested the claim of the deceased servant's brothers before the Industrial Accident Board was not bound by the board's final award, and has an appeal therefrom where the board did not direct payment of the award to the brothers or find them in fact beneficiaries, but merely fixed the amount due, and ordered payment to the "legal beneficiaries," and where there was no express agreement the parties should be bound by action of the board.

On Motion for Rehearing.

## 2. MASTER AND SERVANT $\S$ 388—WORKMEN'S COMPENSATION ACT—BROTHERS AS "BENEFICIARIES."

The brothers of a deceased servant were "beneficiaries" within the meaning of Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5248kk).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficiary.]

## 3. MASTER AND SERVANT $\S$ 398—WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY AND CLAIM.

Brothers of deceased servant, his beneficiaries, through the attorney for the elder, held to have given the notice of injury and made the claim for compensation required by Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5249ppp), though the first letter of the attorneys in relation to the matter was sent to the employer, and they were referred to the insurer, to which they wrote inclosing a copy of their first communication.

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Suit by John Zyloni and another against the American Indemnity Company to recover compensation under the Workmen's Compensation Act. From judgment for plaintiffs, defendant appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, for appellant.

Cole & Cole, of Houston, and McDonald & Wayman, of Galveston, for appellees.

GRAVES, J. This concededly correct statement of the nature and result of the suit is taken from appellant's brief:

"This suit was brought by John Zyloni and Kazmiers Zyloni, the brothers of Peter Zyloni, to recover for compensation alleged to be due

them under the Workmen's Compensation Act of Texas of 1913 (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h-5246zzzz]). The appellees were residents of Erie county, Pa. Peter Zyloni met his death while in the employ of James Stewart & Co., which was a 'subscriber' under the Compensation Act of 1913, and appellant was the 'association' writing the insurance guaranteeing the payment of the compensation to the representatives of the deceased employés of James Stewart & Co. Peter Zyloni received the injuries which resulted in his death while in the course of his employment with James Stewart & Co. The court below rendered judgment in favor of appellees against appellant for \$801.36, being the amount of compensation which he found appellees were entitled to up to the date of the judgment, and provided by his judgment that it should be without prejudice to the right of appellees to sue for installments of compensation which might become due after the date of the judgment. From this judgment appellant has duly perfected its appeal."

By its first two assignments appellant attacks the trial court's conclusion of both fact and law that, having voluntarily contested this claim before the Industrial Accident Board, without indicating any intention not to abide by the board's final award, it was bound by and had no appeal therefrom.

[1] In the view we take of the case, there was neither *res adjudicata* in that board's action upon nor estoppel under its agreement preventing appellant from further contesting the question whether appellees were legal beneficiaries of their deceased brother, for two reasons: (1) The Industrial Accident Board did not direct payment of its award to the appellees, or find them in fact to be beneficiaries, but merely fixed the amount due, and ordered appellant to pay that sum to "the legal beneficiaries of Peter Zyloni, deceased," without naming them; (2) as found by the trial court, "there was no express agreement that the parties would be bound by the action of said board. Nothing was said by either party prior to said hearing as to whether they would or would not be bound by the decision of such board. After the making of said award, defendant notified plaintiffs that it would not be bound by said award, whereupon plaintiffs filed suit."

We therefore think the trial court was not without authority to determine in this suit whether or not appellees were legal beneficiaries of Peter Zyloni, as it did do notwithstanding the conclusion complained of in these assignments, but that it erred in holding them to be such.

In other words, we sustain the contention of appellant, presented under its third, fourth, and fifth assignments, that appellees, being the brothers of the deceased employé, came within none of the classes entitled to receive benefits under the Compensation Law.

This conclusion determines the case, and renders wholly academic any further question

as to whether or not they gave the notice of injury and made the claim for compensation required by that statute (article 5246ppp). It accordingly becomes unnecessary to pass upon assignments 6 to 10, inclusive, relating to that issue.

Appellees, with much force and ability, insist that, under our Compensation Law of 1913, the beneficiaries to whom the right of action survives are the heirs of the deceased under the statutes of descent and distribution (article 2461 et seq.), and they, being the sole heirs under these statutes in this instance, are entitled to the compensation awarded by the act. As a part of their discussion they have filed here copies of an able argument presented by some of their attorneys and others to the Supreme Court in the case of *Vaughan et al. v. S. W. Ins. Co.*, now pending in that court upon writ of error to the Court of Civil Appeals for the Ninth District. See 206 S. W. 920. We have read it with much interest, but are yet unable, as we have heretofore been, to yield to the view it so persuasively presents.

This court, in the case of *Cole v. Mallory Steamship Co.*, 197 S. W. 328, followed the prior holding of the Court of Civil Appeals for the Ninth District at Beaumont that the Compensation Law did not enlarge the beneficiaries named in the pre-existing death injury statute, and therefore, since the surviving husband, wife, children, and parents of the deceased were made sole beneficiaries under the latter, brothers could not be such under the former. The matter is fully discussed in the *Cole* case, and in the *Vaughan Case* (*Vaughan et al. v. S. W. S. Ins. Co.*, 196 S. W. 261), which it follows, and in which the Supreme Court has granted a writ of error.

So far as we are advised, the two cases mentioned are the only ones in which the question has been directly decided by the appellate courts of Texas. In these circumstances while we refrain from extended further discussion if it here, recurrence is made to the case of *Smith v. So. Surety Co.*, 193 S. W. 204, decided by this court prior to both the *Vaughan* and *Cole* Cases. In that case it was held that, by the terms of the Compensation Act, its benefits vest absolutely in the legal beneficiaries of the deceased immediately upon his death, and not in his estate; hence the administrator of his estate, having no interest in the fund, could not maintain an action to recover it. While the point now before us was not then involved, and although the term "heirs" was unintentionally used for "legal beneficiaries" which was later corrected in the *Cole Case*, the conclusion reached in the *Smith Case* that the fund created by the operation of the compensation statute vested at once upon the death of the insured, after the manner of other insurance, in his legal beneficiaries, is

likewise our continuing conception of the general purpose and effect of that legislation; and if that was the Legislature's purpose in so providing this new fund and terming it "compensation" to some particular class of persons then in mind for the loss of benefits they would otherwise have received from the deceased, there could not at the same time have been the intention to also make it a part of his estate and descendable as his other personal property. The one disposition excludes the other. Moreover, such an estate would not only be subject to administration, but would pass to the heirs of the deceased chargeable with his debts, whereas by the express terms of the Compensation Act creditors of the deceased employé cannot reach the money thereby provided, except in instances where there are no legal beneficiaries at all.

That this character of estate was created, however, seems to be the contention of appellees, and upon such foundation largely is built their argument that the statutes of descent and distribution must be looked to in determining who are the beneficiaries.

It may be that in a theoretical or philosophical sense the fund intended to be created by this new system was in a certain way regarded as belonging to the deceased, by considering part of his currently earned wages as being withheld until after his death, and then paid in installments for a fixed period; in other words, by applying practically to economic affairs the spiritual principle that, "though dead, his works live after him," and so indulging the fiction that he was still earning money.

We cannot think that either the purpose or effect of the Act. It seems to us, as to beneficiaries, the Compensation Law, subject only to the contingencies therein specified, was merely intended to take the place of our death injury statute, and that the benefits of the former were expressly created for the personal use and benefit of those named in the latter, just as, in the absence of the new system, would have passed the right under the death injury statute to damages resulting from negligence. Nor does the provision that the compensation "shall be distributed according to the law providing for the distribution of other property of the deceased" inveigh against this conclusion, we think, because that merely directs or explains what divided interest each of the beneficiaries shall have in the fund, thereby prescribing a method of apportioning it among members of a class otherwise designated.

But, if the view indicated be at all permissible, it is only theorizing as to the origin or economic basis of the compensation idea, as distinguished from liability resulting from negligence, and cannot be so applied to the result and effect of what was actually enacted by our statute on the subject as to defeat the evident purpose of its direct and

plain provisions; that is, to compensate those expressly designated for loss resulting to them from the employé's death. It follows that, in our view, the judgment below was fundamentally erroneous in decreeing that brothers might recover the benefits in question, and must accordingly be reversed and here rendered for appellant, and that order has been entered.

Reversed and rendered.

#### On Motion for Rehearing.

[2] Under a holding that brothers were not beneficiaries within the meaning of the Workmen's Compensation Act of 1913 (Vernon's Sayles' Statutes, art. 5246kk), this cause was originally reversed and rendered in appellant's favor. The question having in the meantime reached the Supreme Court, in the case of *Vaughan et al. v. S. W. S. Ins. Co.*, action upon the motion for rehearing filed by appellees was postponed to await a disposition of the *Vaughan Case*. That has since been made; the Supreme Court, in an opinion rendered December 11, 1918 (206 S. W. 920), having decided the matter adversely to our view. Accordingly, in recognition of superior authority, it is now held that the appellees did come within the terms of the statute referred to.

[3] The further question of whether or not they gave the notice of injury and made the claim for compensation required by article 5246ppp of the same act was not passed upon before, because rendered immaterial by the conclusion that they could not in any event become beneficiaries.

Now, however, that matter must be determined. The insistence that no such notice was given nor claim made is presented under assignments 6 to 10, inclusive, of appellant's brief. After careful consideration of them, we conclude that they cannot prevail, and that the trial court did not err in holding the letter of September 8, 1915, from Brooks and English to James Stewart & Co. to be a sufficient notice and claim under the provisions of the last-mentioned section of the act—that is, article 5246ppp—which requires the notice to be given as soon as practicable after the injury, and the claim for compensation to be made within six months after the death of the employé. The undisputed facts about and following the letter are reflected in these findings of the court:

"Claim for compensation was made upon James Stewart & Co., the subscriber, within six months after the death of Peter Zyloni, as required by the Compensation Act of Texas, said claim being embodied in a letter dated September 8, 1915, written by Messrs. Brooks & English, attorneys at law, of Erie, Pa., a copy of which is as follows:

"September 8, 1915.

"James Stewart & Co., Care S. A. R. Ry. Company, Galveston, Texas—Gentlemen: On March 28, 1915, at about 9:30 a. m., as we are

informed, P. Zyloni, or Pete Zeurlaines, while in your employ was killed, his neck being broken by the falling upon him of a gin pole. From the evidence which has been furnished us and as offered at the coroner's inquest, this appears to be a case of liability on your part. A friend of the deceased, who is familiar with the facts in the case, is very anxious to have the brother, who resides in Erie, put his case in the hands of an attorney in Galveston. Realizing that perhaps you have an insurance company we are writing to ascertain whether you or the company desire to adjust this matter without litigation, and if so, to give you an opportunity to do it through us as attorneys for the estate of the deceased.

"Unless we hear from you, or some one representing you within ten days, we take it for granted you do not care to negotiate.

"Yours very truly."

"On September 14, 1915, the said subscriber, James Stewart & Co., wrote the said Brooks & English, acknowledging receipt of their letter of September 8th. On September 27, 1915, Brooks & English wrote a letter to the American Indemnity Company reading as follows: 'On September 8th, we wrote a letter to James Stewart & Co., a copy of which is inclosed, and they have referred us to you for adjustment of same.'

"This letter was received by the American Indemnity Company on September 30, 1915. On September 30, 1915, defendant wrote and mailed to Brooks & English (and which they received) a letter, a copy of which is as follows:

"Galveston, Texas, September 30, 1915.

"Messrs. Brooks & English, Attorneys at Law, Erie, Pennsylvania—Gentlemen: Re LC-3219 Peter Zyloni v. James Stewart & Co. We have for acknowledgment your favor of the 27th inst., transmitting copy of letter of the 8th instant, addressed to Messrs. James Stewart & Co., at Galveston, concerning the injury and death of the above party. You are correct in your statement that Zyloni was killed while in the employ of James Stewart & Co., but we do not believe you are correct in your belief that there is liability on the part of our policy holder.

"Under the provisions of our policy and the law under which it was written we are agreeable to handling the claim with you, but before giving you any definite advice, we will request that you kindly advise us if there are any other surviving relatives than the brother to whom you refer. At the time of the death an effort was made to get in touch with this party's brother, who was then in Shenandoah, Pa.

"If you can consistently do so, please let us have the desired information and upon receipt of same we shall be glad to write you further.

"Very truly yours,

"J. H. Booth, Claims Superintendent."

"On October 11, 1915, Brooks & English replied to such letter of defendant, giving the information requested by defendant as to identity of relatives of Peter Zyloni, reading as follows: 'Replying to your letter of the 30th ultimo, will say that the only relative of Cassmer Zyloni, whom we represent, is a brother John Zyloni, living at Scranton, Pennsylvania. My

client, however, is the older one and would be entitled to take out letters of administration, but if a satisfactory settlement with these two brothers could be agreed upon their release would be sufficient.'

"On October 14, 1915, defendant acknowledged receipt of the Brooks & English letter of the 11th inst., thanking them for the information contained therein, and for the first time declining to entertain any claim on account of the death of Peter Zyloni, asserting that Zyloni was killed March 23, 1915, and that no person had made claim for compensation as provided by the Texas Employers' Liability Act within six months after the date of death, and asserting that any claim was now barred."

The main assault upon the sufficiency of this letter as constituting compliance with the statute lies in the contention that, since it was neither sent nor presented to appellant direct, and nowhere in its body purported to claim compensation, it could not be construed to be such, nor would it as notice inure to the benefit of appellees, because it did not emanate immediately from themselves. Neither objection is thought to be tenable.

Under the authorities generally, so far as we are advised, a claim for compensation does not have to be preferred in any particularly set or formal manner. It is said in Glass Workmen's Compensation, subd. E, p. 85:

"'Claim for compensation' means, not the institution of proceedings before the tribunal by which the compensation is to be assessed, but a notice of claim of compensation sent to the workman's employer. The claim need not be for a definite sum nor in writing. A request for arbitration is a sufficient 'claim for compensation,' and a letter containing a notice of the accident and a description of the injuries and a request to know what compensation would be allowed, and a further request for an immediate answer, is a claim for compensation. So a document wherein a workman made a claim for compensation for an injury received upon a designated day, 'as per claim in the Employer's Liability Act,' is a valid claim."

See 1 Honnold's Workmen's Compensation, § 212, pp. 762, 763.

As to the matter of notice, the undisputed facts here showed not only that both the employer and the insurer knew of the employee's death within two days thereafter, but that the insurer gave notice thereof to his relatives. In those circumstances, it would seem foolish, or at least a useless thing, to nevertheless require a further and direct notice of that same occurrence from his beneficiaries to the insurer before they could be said to be in position to claim the compensation provided. We do not think this statute should be so construed, concluding rather that notice from attorneys in the manner shown in the Brooks & English letter would be sufficient.

We do not find it necessary to determine

the question of whether the finding of the Industrial Accident Board was res adjudicata of the whole controversy, and do not do so, because the trial court independently found all the facts, which are not as such anywhere attacked, entitling appellees to the judgment obtained, as follows:

"Apart, however, from said decision and award of said board and independent thereof, I find that the plaintiffs are entitled as the legal beneficiaries of said Peter Zyloni, deceased, to have and recover of and from the defendant said compensation for the death of said Peter Zyloni the sum of \$7.20 per week, the same being 60 per cent. of the average weekly wage of the said Peter Zyloni, for the full period of 360 weeks from and after March 26, 1915, such compensation being payable in the sum of \$756 principal and \$45.36 interest, making in all \$801.36, being the total weekly compensation which has accrued up to this time, and the further compensation, hereafter to be payable each week, at the rate of \$7.20 per week until the expiration of the full period of 360 weeks from and after March 26, 1915."

Since, therefore, this recovery may rest upon the separate determination of the necessary facts by the court below, it becomes unnecessary to decide whether or not that court was under the duty of doing what the record thus affirmatively shows it did do, that is, of accepting as final and binding the conclusions of the Accident Board, without itself going into these fact issues. This deduction applies with like effect to the court's other and antecedent conclusion that appellees were in fact the legal beneficiaries of their deceased brother, that matter also having been in the quoted findings disposed of independently of the Board's action; so that, even if the Accident Board had specifically adjudged appellees to be the legal beneficiaries, which our original opinion shows was not done, there would still be no necessity of a holding upon the question of whether or not its decree in that respect was res adjudicata. If any expressions in our former opinion may be taken as indicating a contrary view, they are accordingly now so modified as to accord with the conclusion here stated.

The motion for rehearing is granted, our former judgment set aside, and that of the court below is in all things affirmed.

Motion for rehearing granted, and trial court's judgment affirmed.

#### TEMPLEMAN et al. v. CLOSS. (No. 7640.)

(Court of Civil Appeals of Texas. Galveston.  
March 6, 1919.)

#### 1. SALES $\Leftrightarrow$ 85(1) — AGREEMENT TO MAKE SECURITY DEPOSIT—FAILURE.

Where the seller of cotton left the contract in the hands of the buyer's agent, who nego-

tiated it, with the understanding by both parties that it should not become effective as a binding agreement until each party had made deposit of an agreed amount as security, the failure of either party to make the deposit released the other from the obligation of the contract.

#### 2. CONTRACTS $\Leftrightarrow$ 42—DELIVERY OF CONTRACT —COPY TO SELLER.

The validity of a contract for the sale of cotton was not affected by the fact that the seller did not obtain a copy thereof, and it was not a condition to the buyer's recovery, as for seller's breach, that seller have obtained such copy; the general rule as to delivery of written instruments not requiring that a copy or duplicate of a mutual agreement be delivered to each of the parties to render the agreement effective.

#### 3. SALES $\Leftrightarrow$ 89 — RIGHT TO SECURITY DE- POSIT—GUARANTY.

If there was no agreement by the seller of cotton to accept a third person's guaranty in lieu of a deposit by the buyers, he was not required, to preserve his right to insist on the deposit, to reply to the letter of the buyers' agent inclosing a purported copy of the contract signed by the third person as guarantor, and the agent could not assume, from the seller's failure to reply to the letter, that he had accepted the guaranty in lieu of the deposit.

Appeal from District Court, Madison County; S. W. Dean, Judge.

Suit by R. B. Templeman and Ward Templeman against J. T. Closs. From judgment for defendant, plaintiffs appeal. Reversed and remanded.

W. W. Meachum, Jr., L. C. Kemp, and McDonald Meachum, all of Houston, for appellants.

T. J. Ford, of Madisonville, and Dean, Humphrey & Powell, of Huntsville, for appellee.

PLEASANTS, C. J. This suit was brought by appellants against appellee to recover damages for the alleged breach by appellee of a contract executed by appellee and A. H. Keefer, as agent for appellants, for the sale and delivery of 50 bales of cotton. The contract was as follows:

"North Zulch, 8-4-1915.

"Bot of Tom Closs 50 bales of cotton, delivered North Zulch during October, 1915, at 8c middling basis. [Signed] A. H. Keefer. Guaranty, A. L. Lipscomb. Witness: W. Garland. Affirmed by J. T. Closs."

Appellants allege substantially that by the execution and delivery of the said contract they purchased, through their said agent, of appellee 50 bales of cotton at 8 cents per pound, basis middling, and the said appellee sold the same to appellants at the stipulated price of 8 cents per pound, basis middling, appellee to deliver said cotton to their

agent at North Zulch in Madison county, Tex., during the month of October, 1915; that appellants were cotton buyers, and at the date aforesaid and long prior thereto were engaged in buying and selling cotton, having their principal place of business at Navasota, Tex., but their agent, A. H. Keefer, was located at North Zulch in Madison county, Tex., where the contract was made; that appellee had been growing and selling cotton in the bale for many years prior to said contract in Madison county and adjacent counties; that under the general custom and long-established usage among buyers and sellers of cotton in Madison and adjacent counties it was understood that a bale of cotton when sold for future delivery meant 500 pounds of cotton, or a total for the 50 bales set forth in the contract of 25,000 pounds; that appellants agreed to pay appellee 8 cents per pound for said cotton, basis middling, a total of \$2,000; that the market price of said cotton at the time and place when and where appellee agreed to deliver the same was 11 $\frac{1}{8}$  cents per pound, or a total price upon the said 50 bales of \$2,843.75, leaving a balance due and owing appellants by appellee upon said contract, by reason of his alleged breach thereof, the sum of \$843.75. Appellants further allege their ability and willingness to have taken and paid for said cotton under the contract and the failure and refusal of appellee to deliver the same as required by said contract.

The appellee answered by general demurrer and general denial, and specially denied that Keefer was the agent of appellants in making said contract, and denied the right of appellants to recover thereon. He further pleaded:

"For further special answer to said petition, the defendant says that it is true that, on or about the 4th day of August, A. D. 1915, one A. H. Keefer did prepare a memorandum of an agreement which the said Keefer proposed to enter into with this defendant for the purchase of 50 bales of cotton in terms as follows:

"North Zulch, Texas, 8-4-15. Bot of Tom Closs 50 bales of cotton, delivered North Zulch during October, 1915, at 8c middling basis. [Signed] A. H. Keefer. Affirmed by [Signed] J. T. Closs."

"But the defendant avers that the said memorandum, at the time it was written and signed by the said Keefer and affirmed by this defendant, was not then guaranteed by A. L. Lipscomb, as set forth in plaintiffs' petition; nor was the same then or thereafter delivered to this defendant; nor did this defendant agree to accept the guaranty of A. L. Lipscomb to assure performance of said contract by said Keefer; and the defendant further alleges that said contract was not to be delivered or to become effective as a contract unless and until both the said A. H. Keefer and this defendant deposited the sum of \$5 per bale on the 50 bales of cotton referred to therein; that is to say, until the said A. H. Keefer and this defendant had each deposited as a guaranty of his good faith and

to assure compliance with said memorandum the sum of \$250; and it was understood and agreed, by and between the said Keefer and this defendant, that such mutual deposit of \$250 each by them was condition precedent to the taking effect of said contract. In this connection this defendant avers that neither the said Keefer nor himself ever made any deposit of the \$250 as agreed upon between them to make said contract effective. Wherefore said contract did not become effective at all, and is not in fact a contract, and the plaintiffs are not entitled to recover anything herein of this defendant based upon the alleged breach of said contract, and of this the defendant puts himself upon the country and prays judgment of the court that he go hence without day and recover of plaintiffs all costs in this behalf incurred."

The trial in the court below with a jury resulted in a verdict and judgment in favor of the defendant.

The undisputed evidence shows that appellee and Keefer executed the written instrument declared on by the petition. Appellee testified in substance that at the time he signed the contract and left it in Keefer's possession it was understood and agreed that it was not to become effective or binding upon either party until each had deposited the sum of \$5 per bale on said 50 bales of cotton to guarantee the performance of the contract, and that he did not agree to accept the guaranty of Mr. Lipscomb in lieu of the deposit of \$5 per bale. Keefer testified that the first agreement between him and appellee was that each would make the deposit of \$5 per bale, but that at the time the contract was signed by appellee and left with him appellee agreed to take Lipscomb's guaranty in lieu of the deposit. Appellee says that Keefer proposed to him to have the contract guaranteed by the bank, but did not mention Lipscomb's name, and that he, appellee, did not agree to accept any guaranty in lieu of the deposit, and that when he signed the contract and left it with Keefer the understanding was that "I was to come back over there and put up the money." Appellee did not return to North Zulch to make his deposit, and no deposit was made by either party.

On the same day the contract was signed, and a very short time thereafter Keefer procured Lipscomb's guaranty of the contract. About three weeks after the contract was signed Keefer wrote appellee the following letter:

"North Zulch, Texas, 8-27-1915.

"Mr. J. T. Closs, Bryan, Texas—Dear Sir: I herewith confirm contract given me 4th day of Aug. for fifty bales delivered during Oct. 1915.

"Contract.

"North Zulch, Texas, 8-4-1915.

"Bot of T. J. Closs 50 bales cotton delivered North Zulch, Texas, during Oct. 1915 at 8c basis middling Galveston differences at time of delivery for grades above and below. [Signed]



A. H. Keefer. Guaranty: A. L. Lipscomb.  
Witness: W. Garland.

"This is duplicate of one signed while you were here and am having the cashier of this bank guarantee same for me as per your request.

"The reason I have not sent this sooner was I was looking for you over here. You may keep this for your guarantee.

"A. H. Keefer."

Appellee testified that in August, 1915, a few days after the receipt of this letter, he informed Keefer that he was not bound by the contract, and would not deliver the cotton. Keefer testified that he heard nothing from appellee, and did not know that he would not deliver the cotton until after the time for its delivery had passed.

Appellee failed to deliver the cotton in accordance with the terms of the contract.

The market price of cotton in North Zulch during the month of October, 1915, was several cents per pound higher than the price named in the contract of sale.

For the purpose of making clear the questions hereinafter discussed and decided, the foregoing is believed to be a sufficient statement of the pleading and evidence. We shall not discuss in detail the various assignments of error presented in appellants' brief, and will only decide what we regard as the material question presented by the record.

We cannot agree with appellants that upon the pleading and evidence above set out the trial court should have instructed a verdict in their favor.

[1] Notwithstanding the fact that the contract, which was unambiguous and complete in so far as the terms of the sale were concerned, was signed by both parties and was left by appellee in the possession of Keefer, if it was understood by both parties at the time the contract was executed that it should not become effective as a binding agreement until each party had made deposit of the agreed amount as security for its performance, the failure of either party to make the agreed deposit would release the other from the obligations of the contract. The obligations to make the deposit being the same as to each of the parties, if neither complied therewith, the contract never became binding as to either. If the contract had been left in possession of a third person under the agreement pleaded by appellee, it would hardly be questioned that it would not have become a binding contract until the agreement as to the deposits had been complied with, and we do not think the fact that, instead of placing it in the hands of a third person, appellee left it in the possession of Keefer would have the effect of destroying or rendering nugatory the agreement that it should not become binding unless the deposit was made.

In submitting the case to the jury the court gave them the following instruction:

"If you find from a preponderance of the evidence that the defendant, J. T. Closs, agreed at the time of the execution of the alleged contract, or prior thereto, that he would accept A. L. Lipscomb as guarantor of the said alleged contract, and that upon the signing of same by A. L. Lipscomb as guarantor the said alleged contract was complete, then you are directed to find for the plaintiff, unless you find that the said alleged contract was to be delivered to the defendant, but, if you so believe, you will find for the defendant, unless you find that the letter and purported copy of said alleged contract, dated August 27, 1915, was a substantial copy of the same, and put the defendant, J. T. Closs, on notice that the said alleged contract of date 8/4/1915 between A. H. Keefer and J. T. Closs had been guaranteed by the said A. L. Lipscomb."

The court refused to give the jury the following special instruction requested by plaintiffs:

"You will not consider any alleged defense on the part of the defendant to the effect that the alleged contract was not, at the time it was written and signed by A. H. Keefer and affirmed by the defendant, or thereafter delivered to the defendant, as under the facts of this case such alleged defense would afford no ground which would authorize you to find for the defendant."

Under appropriate assignments of error the appellants complain of the charge given by the court above set out, and of the refusal of the court to give the requested instruction. We think both of these assignments should be sustained.

[2] No delivery of the contract or a copy thereof to the defendant was required to make it a binding obligation. The general rule as to delivery of written instruments does not require that a copy or duplicate of a mutual agreement be delivered to each of the parties in order to render the agreement effective. *Weaver v. Simmons*, 15 Tex. Civ. App. 154, 38 S. W. 1140. There was no allegation in defendant's pleading that it was agreed by the parties that the contract should not become effective unless defendant was furnished a copy thereof, and no evidence of such an agreement. There is some testimony to the effect that defendant thought the contract would not be binding unless he had a copy, and Keefer testified that he did not know there was any understanding that he was to give the defendant a copy of the contract, "but he was to come up the next week and receive a copy of it." It was doubtless understood by both parties that appellee should have a copy of the contract, but the validity of the contract would not be affected by the fact that appellee did not obtain a copy thereof, and the charge placed a condition upon appellants' right to recover not sanctioned by the law nor supported by the pleading or evidence.

[3] The court did not err in refusing to instruct the jury to find for the plaintiff on

the ground that defendant had waived or was estopped from asserting the defense that the contract was not to become binding unless the deposits were made. Plaintiffs did not plead waiver or estoppel, and if such plea had been presented there was no evidence to support it. If there was no agreement on the part of defendant to accept Lipscomb's guaranty in lieu of the deposit, he was not required, in order to preserve his right to insist on the deposit, to reply to Keefer's letter inclosing a purported copy of the contract signed by Lipscomb as guarantor, and Keefer could not assume from defendant's failure to reply to the letter that he had accepted the guaranty in lieu of the deposit.

What we have said disposes of all the material questions presented by the record.

Because of the error in the court's charge above pointed out we are of opinion that the judgment of the court below should be reversed, and the cause remanded, and it has been so ordered.

Reversed and remanded.

#### SUGARLAND RY. CO. v. DEW BROS. (No. 7731.)

(Court of Civil Appeals of Texas. Galveston.  
April 30, 1919. Rehearing Denied  
May 22, 1919.)

#### 1. CARRIERS ⇨134—CARRIAGE OF FREIGHT— RECEPTION FOR TRANSPORTATION — SUFFI- CIENCY OF EVIDENCE.

Evidence held to show that defendant railway company, sued for the loss of cotton by fire, had in fact accepted such cotton for transportation, to initiate its liability as carrier.

#### 2. CARRIERS ⇨139—CARRIAGE OF GOODS— LIABILITY AS CARRIER.

Where a railroad had received cotton for transportation, and its failure to issue bills of lading for and to move it promptly was due to the action of its agent, the conductor of train, for his own convenience, and not for the benefit of the shippers, nor because of lack of information as to destination or consignees, the road's liability was that of carrier, rather than a mere warehouseman, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 709, 710.

#### 3. APPEAL AND ERROR ⇨1053(5)—HARMLESS ERROR—EVIDENCE.

In action for loss by fire of cotton shipped, admission in evidence of bills of lading covering consignments not embracing cotton in suit held harmless to railroad, in view of fact jury merely passed on value of cotton at time of destruction, and were not asked to determine whether or not it had been received by railroad for shipment.

#### 4. APPEAL AND ERROR ⇨1050(1)—HARMLESS ERROR—EVIDENCE.

The improper admission of testimony on an essential point of fact does not furnish ground for reversal, where another witness properly testified to the same fact.

#### 5. EVIDENCE ⇨543(4)—OPINION TESTIMONY —QUALIFICATION OF EXPERT ON COTTON.

In an action against a railroad for the destruction by fire of cotton in transit, a member of plaintiff firm, long experienced in handling, buying, and selling cotton, held qualified to give an opinion as to quality of the cotton.

#### 6. CARRIERS ⇨136—CARRIAGE OF GOODS— VALUE OF COTTON—QUESTION FOR JURY.

In an action against a railroad for destruction by fire in transit of cotton shipped over its line, question of value of cotton held for the jury.

Appeal from District Court, Ft. Bend County; Samuel J. Styles, Judge.

Suit by Dew Bros. against the Sugarland Railway Company. From judgment for plaintiffs, defendant appeals. Affirmed.

D. R. Peareson, of Richmond, and A. M. Waugh, of Sugarland, for appellant.

T. H. Stone and E. P. Phelps, both of Houston, for appellees.

GRAVES, J. Dew Bros. sued the Sugarland Railway Company as a common carrier for the reasonable market value of nine bales of cotton, upon substantially this allegation as to its liability:

"That on or about the 30th day of August, 1917, plaintiffs tendered and delivered to, and defendant accepted for transportation and shipment at De Walt, Ft. Bend county, Texas, nine (9) bales of cotton, aggregating in weight five thousand (5,000) pounds, which said cotton was loaded into a car, furnished by defendant for said purpose, and which was standing upon the tracks of defendant company, and that after delivery to the defendant by plaintiffs and after acceptance by the defendant for transportation and shipment, in the usual course and way, as per shipping directions of the plaintiffs, the said car in which said cotton was stored, while in the possession of defendant for transportation and shipment, caught fire, and the said nine bales of cotton were entirely consumed and destroyed."

The railway company answered by demurrer and denial, both general, and by special denial that the cotton was in its hands for transportation, averring that the loss had not resulted from any negligent act or omission upon its part, but that the fire was due to inherent defects in the cotton, or to the negligence of plaintiffs. The cause was submitted to a jury upon two special issues, merely embodying an inquiry as to what was the reasonable market value of the cotton at De Walt on August 30, 1917. Upon

the jury's returning answers fixing the value, the court entered judgment for plaintiffs, in the sum of \$1,039.11 and interest, from which the railway company appeals.

[1] Through several assignments it is first contended that no liability was established against the railway company, in that it was sued as a common carrier, not as a warehouseman, without any charge of negligence upon its part, and the evidence showed it was never notified of the destination or consignee of the cotton, and had not accepted it for shipment. It is true there was no charge that appellant was negligent, as the quoted averment of the basis of its liability discloses, nor prior to the burning was it furnished the particular destination or name of the consignee of the cotton, consequently this claim of a failure to fasten the liability of a carrier upon it might be correct, if the evidence further showed that it had not received and accepted the goods for shipment; but a careful examination of the statement of facts impels a finding that it had in fact accepted the cotton for transportation, substantially in accord with the way it was usually done at that point, had sealed the car, and started it upon its course. While it is not thought essential that the evidence be fully detailed here, its outstanding features, all of them mutually conceded to be correct, were:

The railway company, a common carrier of freight, with its line of road extending from Sugarland, on the Galveston, Harrisburg & San Antonio southward through De Walt and other stations to railroad connections in that direction, had no agent at De Walt; that being only a flag station. Bills of lading were signed by the conductor of the train receiving freight there, but were sometimes made out by him and sometimes by the agent of Dew Bros., Mr. Hutchings, perhaps usually by the latter. In this instance the cotton was loaded into a car furnished by the railway company for that purpose, on its side track at De Walt; what subsequently occurred being thus stated by the conductor himself:

"When I reached De Walt, I had some employees to put in where these cars were, and I stopped there to move the loaded cars. Mr. Walter Dew told me that they were ready, so I sealed the cars and pulled them out. When we arrived there the doors of this car were open, and before leaving we closed and sealed the doors. This car was put on the main line and put in the train. We were going to move it south with us, and set it out further down the line, to be delivered wherever it would go to. I moved this car to the main line—from the gin to the main line.

"Q. (interposing). What did Walter Dew want when he said the car was ready? A. I suppose he wanted us to move it. He meant it was ready for shipment, and therefore we sealed the doors. Yes, sir; we sealed the doors when we received the cars for shipment; then we

pulled the car, and set it out with the train I had. When I went into the store to get the bills of lading, which were not ready, I might have told Mr. Hutchings that I would sign the bills of lading on my way back; but I don't remember that I told him that. I won't deny it, one way or the other; they were ready to move."

He did not testify that, before so sealing and placing the car containing this cotton in his train, he offered to make out the bills of lading himself, or to wait until Mr. Hutchings could do so, nor, indeed, that he made any inquiry as to the point of destination or the name of the consignee, but further said that, if the bills of lading had been ready, he would have signed them and carried the cars on with him. It seems there were other consignments of cotton to go at the same time, necessitating the preparation of ten bills of lading altogether, two of them covering the cotton here involved, all of which on this occasion appear to have been left to Mr. Hutchings to make out. Both Messrs. George L. Dew and Hutchings, after explaining that the train doing the switching in this instance was not the one to move the car to its destination, but on its south-bound trip would set it in on a track from where the north-bound train for Houston would come along and pick it up, testified that the conductor, Mr. Reading, part of whose testimony has above been quoted, came into Dew Bros.' office before starting south, and, when told that Mr. Hutchings lacked three billings of having these ten bills of lading completed, said he would get and sign them all on his return trip. Mr. Hutchings' statement about the matter was this:

"I generally made out the bills of lading for the conductor to sign for shipments made from De Walt. It was my custom to make them out. I did not represent the Sugarland Railway Company, but I made out the bills of lading merely as an accommodation, and the conductor of the Sugarland Railway Company signed the bills of lading for all freight shipped from De Walt. The conductor of the Sugarland Railway Company did not sign bills of lading for the car of cotton that was burned the day in question, because when he returned to De Walt on his way back to Sugarland the car had burned up and he wouldn't sign it then. The bills of lading for this car of cotton were tendered to him on his south-bound trip, with the exception of three billings which we had not finished when he arrived, and he said he would get them and sign them on his return trip, and between the time that he went south and the time he came back the car was destroyed. When he came back, I presented the bills of lading to him; but he didn't sign them, assigning as his reason for not signing that he couldn't sign for the cotton when it was not there—it had burned up."

[2] It thus clearly appears, we think, not only that there had been a previous receipt

of the cotton for transportation, but that the failure to issue bills of lading for and to promptly move it was due to the action of appellant's agent, the conductor of its train, taken for his own convenience, and not for the benefit of appellees, nor because of any lack of information as to destination or name of the consignees. In such circumstances the liability would be that of a common carrier, rather than of a mere warehouseman. *Articles 709 and 710, Vernon's Sayles' R. S. 1914; Railway Co. v. Lowery, 155 S. W. 993; Railway Co. v. D. S. Cage & Co., 174 S. W. 859; Railway Co. v. Edwards, 56 Tex. Civ. App. 643, 121 S. W. 574.*

After the loading of this cotton into the car under the conditions shown no manner of control over it was retained by the shippers, nothing remained to be done by them as such before it could be sent on its way, delivery to the carrier for shipment being complete; under the statutes cited it was then the duty of the railway company to transport it and to give the shippers bills of lading therefor; not having done so solely for purposes of its own, it cannot escape liability as a common carrier upon the belated claim that no specific shipping directions were given it. There is not a suggestion in the record that these were not readily available, nor that they would not have been promptly furnished, but for the conductor's preference that his work in making out the bills of lading, which were to contain them, be done by the shippers' agent, to avail himself of which he deferred the transportation. These conclusions necessitate the overruling of the first six assignments, as well as the eleventh and last one presented.

[3] Other assignments call in question the court's action in submitting to the jury the question of the value of the cotton destroyed, and in admitting in evidence two bills of lading covering some of the ten consignments before mentioned, but not shown to embrace the cotton in suit, along with testimony of different witnesses to the effect that this cotton was of the grade of "middling," or better, and that certain other cotton shipped about the same time by the appellees to Houston parties had been by the latter so graded. These objections are all predicated upon the claim that no competent evidence of the grade and value of the cotton destroyed was before the jury.

After a careful consideration of all the rulings thus complained of, the conclusion is reached that none of them disclose reversible error. Conceding that the admission of these bills of lading before the jury was erroneous, it was clearly immaterial and harmless, in view of the fact that they merely passed upon the value of the nine bales of cotton at the time of its destruction, and were not asked to determine whether or not it had been received by the railway company for shipment.

[4] As to the evidence concerning the grade of the cotton, especially the testimony of George L. Dew, the objection that his estimate was shown to be solely based upon the account of sales of other cotton sold about the time that here involved was ginned and burned, even if well founded, would not necessarily furnish ground for reversal, because the witness J. S. Hutchings testified to the same facts Dew said the account sales showed, and Hutchings' knowledge neither appeared to have been derived from the account sales nor is any question raised here about its sources.

[5, 6] Dew's further statement that he thought the cotton would grade middling, or better, did not rest entirely upon any such accounts or reports of what similar cotton had been sold or classed as, but was in the nature of an opinion, in part, at least, formulated from and based on his long experience in raising, handling, ginning, buying, and selling cotton produced, prepared, and put into the channels of trade at the same place and under well-nigh the precise conditions applying to that he was testifying about, together with added fact of having seen and been familiar with that particular cotton itself; in these circumstances, we think it was permissible for him to give an opinion as to its quality, and that the objection was one going to the weight rather than the admissibility of his testimony. 17 Cyc. 112, 113. In a word, it is thought there was ample admissible uncontradicted evidence to take the question of the value of the cotton to the jury, and that no such denial of the rights of appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment against it has been shown. Rule 62a (149 S. W. x). An affirmance has therefore been ordered.

Affirmed.

WHITE et al. v. FAHRING et al. (No. 7651.)

(Court of Civil Appeals of Texas. Galveston.  
March 20, 1919. Rehearing Denied  
April 17, 1919.)**1. WATERS AND WATER COURSES §216 —  
IRRIGATION DISTRICTS — TAXES — CONSTITUTIONAL LIMITATIONS.**

Acts 29th Leg. c. 122, §§ 34, 48, providing for assessments in irrigation districts organized under the act, in addition to bonds that may be issued, cannot be held invalid simply because limitations under Const. art. 3, § 52, as to amount of obligations that district may assume, are not stated in the sections, the constitutional limitations being binding, though not stated.

**2. CONSTITUTIONAL LAW §48 — CONSTRUCTION OF STATUTE — FAVORING VALIDITY.**

If an act is susceptible of two constructions, one which makes it valid and the other invalid, that construction should be adopted which will sustain validity.

**3. CONSTITUTIONAL LAW §48 — VALIDITY OF STATUTE — LEGISLATIVE INTENT — PRESUMPTION.**

It will not be presumed that the Legislature intended to pass an act in violation of the Constitution, and an act will not be so construed when it is susceptible of a different construction.

**4. EVIDENCE §83(1) — OFFICERS — VIOLATION OF CONSTITUTIONAL PROVISION — PRESUMPTION.**

It will not be presumed that defendants, board of directors of irrigation district in question, will ever attempt to violate any of the provisions of the Constitution limiting the taxing powers of the district in the amount of indebtedness it may incur.

**5. WATERS AND WATER COURSES §231 — IRRIGATION DISTRICTS — ESTABLISHMENT — STATUTE.**

Acts 29th Leg. c. 122, §§ 34, 48, providing for assessments in irrigation districts organized under the act in addition to bonds that may be issued, were not intended to authorize additional taxation within the constitutional sense of that term, but to authorize assessments based on property benefits, and are ineffectual in that they do not provide for any hearing for determination of benefits accruing to property upon which assessments are made.

**6. STATUTES §64(5) — INVALIDITY IN PART.**

The presence in Acts 29th Leg. c. 122, of sections 34, 48, which are inoperative because they do not provide for any hearing for determination of benefits, to property within irrigation districts, does not render the whole act violative of the Constitution, since the main purpose of the act can be given effect without regard to the sections, and must be upheld, the subsequent acts of Legislature (Acts 33d Leg. c. 172, § 95 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5107-95]; Acts 35th Leg. c. 87, § 95 [Vernon's Ann. Civ. St. Supp. 1918, art. 5107-95]) having cured the defects.

**7. WATERS AND WATER COURSES §216 — IRRIGATION DISTRICTS — INDEBTEDNESS — CONSTITUTIONAL PROVISIONS.**

The \$2,000 indebtedness for organization purposes of irrigation districts authorized by Acts 29th Leg. c. 122, § 50, is to be paid out of assessments which can only be made after being authorized by two-thirds of the voters of the district, and the section, when so construed, is not in violation of Const. art. 3, § 52, as to two-thirds vote being required to lend credit of district.

**8. STATUTES §64(4) — INVALIDITY IN PART.**

Though section 20 of Acts 29th Leg. c. 122, violates Const. art. 16, § 30, in that it fixes the term of office of the board of directors of irrigation districts at four years, the other provisions of the act are not so dependent on, or connected with, provision fixing the terms of office as to render them invalid.

**9. WATERS AND WATER COURSES §216 — IRRIGATION DISTRICTS — CURING DEFECTIVE STATUTE.**

The Legislature having by timely enactment (Acts 33d Leg. c. 172, § 72 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5107-72]) remedied the defect in Acts 29th Leg. c. 122, § 20, fixing terms of office of members of board of directors of irrigation districts at four years, contrary to Const. art. 16, § 30, before any of the directors of district in question had served two years, and having in express terms validated districts created under the act of 1905, and the acts of the directors and officers of such districts, no one can complain of section 20.

**10. WATERS AND WATER COURSES §216 — IRRIGATION DISTRICTS — BONDS — POWER OF LEGISLATURE.**

Const. art. 3, § 52, authorizing the granting of credit by the district for the construction and maintenance of pools, lakes, reservoirs, dams, canals, and waterways for the purpose of irrigation, authorizes an act of the Legislature (Acts 29th Leg. c. 122) permitting irrigation districts to issue bonds for the purpose of constructing irrigation works, and acquiring the necessary property and rights therefor, and for the operation of an irrigation plant.

**11. WATERS AND WATER COURSES §225 — IRRIGATION DISTRICT — LEGAL EXISTENCE — FORFEITURE.**

Evidence held to show due diligence on the part of an irrigation district organized under Acts 29th Leg. c. 122, to carry out the purpose of its organization, so that its legal existence had not been forfeited on that account.

**12. WATERS AND WATER COURSES §230(3) — IRRIGATION DISTRICTS — CANCELLATION OF BONDS — SUIT — CONDITION PRECEDENT.**

A taxpayer cannot maintain a suit to cancel bonds of an irrigation district without alleging and proving that the board of directors of the district has refused to institute such suit.

**13. WATERS AND WATER COURSES §230(4) — IRRIGATION DISTRICTS — SALE OF BONDS FOR LESS THAN FACE VALUE.**

Where sale of \$40,000 of bonds of irrigation district for 90 per cent. of their face val-

ue was properly advertised and conducted, and the purchaser did not know that the statute prohibited sale for less than face value, the court did not err in validating the title to purchaser to \$36,000 par value of said bonds, and requiring surrender of the \$4,000 par value.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Suit by R. M. White and others against G. H. Fahring and others. From the judgment rendered, plaintiffs appeal. Affirmed.

Smith & Crawford and Crook, Lord, Lawhon & Ney, all of Beaumont, for appellants.

C. R. Wharton and S. A. McMeans, both of Houston, and A. W. Marshall, of Anahuac, for appellees.

PLEASANTS, C. J. The appellants, who are owners of lands situated in Trinity River Irrigation District No. 12, Chambers county, brought this suit against the officers of said district and the holders of irrigation bonds issued by the district, seeking to have the district declared invalid and without lawful existence, and said bonds to be decreed void and unenforceable, and to restrain the defendant officers from assessing or collecting, or attempting to assess or collect, any taxes upon any property within the district, and the defendant bondholders from collecting, or attempting to collect, said bonds, or asserting same as a claim against the district.

The trial in the court below without a jury resulted in a verdict sustaining the lawful organization and existence of the district, and the validity of the bonds issued thereby, but adjudging that the defendant Anahuac Canal Company only acquired title to \$36,000 of the \$40,000 in bonds of the district issued to it, and requiring said defendant to surrender \$4,000, par value, of said bonds.

The record discloses that the Trinity irrigation district was organized on October 30, 1911, under the provisions of the Irrigation Act of 1905 (chapter 122, Acts of 29th Legislature), and an order of the commissioners' court of Chambers county made and entered in accordance with the provisions of said act. There is nothing in the record showing that the provisions of said act were not complied with in the organization of the district. For the purpose of raising the money necessary to procure an irrigation system for the district in accordance with plans adopted by the district, the board of directors of the district, on October 12, 1912, acting under the provisions of the statute above mentioned, issued bonds of the district in the sum of \$125,000. The bonds were issued under the following order of the board of directors:

"It is hereby ordered by the board of directors of the Trinity River Irrigation District \* \* \* that the bonds of the said district be

issued on the faith and credit of said district as established by the orders of the commissioners' court of Chambers county, Tex., \* \* \* for the purpose of providing funds to be used in providing the district a fresh-water reservoir which shall include Turtle Bay and such other bodies of water as it may be practicable to include within such reservoir, together with a connection between such reservoir and the Trinity river as far above the mouth of that stream as may be deemed practicable, and such works as may be necessary to procure for the district an assured fresh-water supply and distribute the same among all of the lands of the district. \* \* \* Each of said bonds shall recite upon its face that it is issued by authority of an act of the Twenty-Ninth Legislature of Texas, which became a law without the approval of the Governor on the 15th day of July, 1905, being chapter 122 of the Acts of Regular Session of the Twenty-Ninth Legislature, entitled 'An act to provide for the organization and government of irrigation districts and to provide for the acquisition and construction thereby of works for the irrigation of lands embraced within such districts, and to issue bonds in payment therefor, as authorized under the Constitution; and also to provide for the distribution of water for irrigation purposes, and to furnish water for mechanical purposes.' \* \* \* The said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the property of the district, and all of the property of the district shall be and remain liable to be assessed for such payments, as provided in the act thereinbefore referred to."

As required by this order, each of the bonds issued thereunder recites that it is issued for the purposes and under the authority stated in the order.

Thereafter, on January 30, 1916, additional bonds in the sum of \$30,000 under an order of the board of directors, made and entered on November 27, 1915, were issued. These last-mentioned bonds were issued for the purpose of obtaining funds to repair damage to the irrigation system caused by the storm of August, 1915, and for further improvement of the system.

The district began work of establishing an irrigation system in June, 1918, when it commenced to build a bulkhead across the mouth of Turtle Bay to keep out salt water and provide a fresh-water reservoir. It has also built a levee along the bank of the Trinity river to assist in impounding the water therefrom. The bulkhead in Turtle Bay was partially destroyed by the storm of 1915, but has since been rebuilt. No canals, laterals, or flumes have been constructed; nor has any pumping plant been erected, or any site therefor, or site for a dam for irrigation purposes been acquired. Since the filing of this suit on May 17, 1917, nothing has been done toward completing or improving the system.

The fresh water which has been acquired for the use of the district by the means be-

fore stated is being distributed in portions of the district by canals owned and operated by private corporations.

The defendant Anahuac Canal Company purchased \$40,000 of the bonds issued by the district for 90 per cent. of their face value. There is no evidence showing the payment of any interest on these bonds by the district.

Under appropriate assignments of error the appellants attack the lawful existence of the district, and its right to exercise the power of taxation, upon the ground that the Irrigation Act of 1905, under which the district was organized and the first series of bonds of \$125,000 issued, is invalid because its provisions are in conflict with the Constitution of this state.

[1] Under the first assignment it is contended that the act is invalid because it authorizes irrigation districts created thereby to incur obligations in an unlimited amount, in contravention of the provision of the statute which restricts the amount of such obligations to one-fourth of the assessed valuation of the real property of the district.

Article 3, § 52, of the amended state Constitution is as follows:

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: Provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the state, or any defined district now or hereafter to be described and defined within the state of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit to any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to wit: \* \* \*

"(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof."

Section 30 of the Irrigation Act of 1905, p. 243, provides for the issuance of bonds of the irrigation district to any amount not to exceed one-fourth of the assessed valuation of the real property of such district.

Section 34 of the Act of 1905 provides that—

"in case the money raised by the sale of bonds issued be insufficient, or in case the bonds be unavailable for the completion of the plan of canal and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessments therefor."

Section 48 of the act provides that—

"the board of directors may at any time, when in their judgment, it may be deemed advisable, call a special election and submit to the qualified electors of the district the question of whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this act. \* \* \* If two-thirds or more of the votes cast are 'Assessment, Yes,' the board shall at the time of the annual levy hereunder levy an assessment sufficient to raise the amount voted."

Sections 35, 35a, and 39 provide for the manner of levying, assessing, and collecting of taxes on property within the irrigation district; and section 33 provides that the bonds and interest thereon shall be paid by revenue derived from an annual assessment on the property of the district, and that all of the property in the district shall be and remain liable to be assessed for such payments as provided in the act.

It appears from section 30 of the act above quoted that the district is only authorized to issue bonds to the amount of one-fourth of the assessed valuation of the real property of the district. In sections 34 and 48 of the act provision is made for assessments, in addition to the bonds that may be issued, without any express limitation in the act as to the amount of such assessments. It is the absence of this limitation that appellants insist renders the act unconstitutional. We do not think the statute should be construed as authorizing an assessment which would make the obligations of the district exceed the limit fixed by the Constitution. To assume that the Legislature so intended would render the provisions for assessments unconstitutional.

[2] It is a well-settled rule that if an act is susceptible of two constructions, one of which makes it valid and the other renders it invalid, that construction should be adopted which will sustain its validity.

[3] It will not be presumed that the Legislature intended to pass an act in violation of the Constitution, and an act will not be so construed when it is susceptible of a different construction.

The constitutional limitation as to the amount of the obligations that the district can assume is just as binding upon the district as it would be if written in the statute, and therefore it was unnecessary to insert it in the statute, and the failure of the Leg-

lature to place it in the statute does not subject the act to the construction that it authorizes the district to assume obligations in excess of the amount permitted by the Constitution.

[4] There is no claim that any indebtedness has been created by this district in excess of the amount allowed by the Constitution, or that any tax has been levied in violation of any provision of the Constitution; and it will not be assumed that the board of directors in performing the duties of their office will ever attempt to violate any of the provisions of the Constitution limiting the taxing power of the district in the amount of indebtedness it may incur. If they should ever make such attempt, the Constitution can serve just as effectively to protect the property owners of the district as it could if its limitations were expressed in the statute, and the act cannot be held invalid because the constitutional limitation of the powers conferred upon the district are not stated therein.

[5] We also think it manifest from the act as a whole that the provisions as to assessments were not intended to authorize additional taxation in the constitutional sense of that term, but to authorize assessments based upon property benefits. Considered as intending to authorize assessments as contradistinguished from taxes, these provisions are inadequate and ineffective, in that they fail to provide any hearing for the determination of the benefits accruing to the property upon which the assessments may be made.

[6] When so considered, these provisions are but an imperfect exercise of a power possessed by the Legislature, and therefore inoperative, but their presence in the act would not render it violative of the Constitution.

The main purpose of the act can be given effect without regard to these imperfect provisions, and the statute must therefore be upheld. Subsequent acts of the Legislature, in 1913 and 1917, cure these defects in the act of 1905. Acts 1913, c. 172, p. 405, § 95 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5107—95); Acts 1917, c. 87, p. 202, § 95 (Vernon's Ann. Civ. St. Supp. 1918, art. 5107—95).

[7] The validity of the act of 1905 is next assailed on the ground that section 50 of said act authorizes the board of directors to incur an indebtedness not exceeding \$2,000, and to issue warrants of the district therefor bearing 6 per cent. interest per annum, without submitting the question of such indebtedness to a vote of the property tax payers of the district. Acts 1905, p. 250. This section of the statute is as follows:

"The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of the express provisions

shall be and remain absolutely void, except that for the purposes of organization or for any of the purposes in this act the board of directors may, before the collection of the first assessment, incur an indebtedness not exceeding in the aggregate the sum of \$2,000, and may cause warrants of the district to issue therefor bearing interest at six per cent. per annum."

It is, we think, clear that the \$2,000 indebtedness for organization purposes authorized by this section of the act is to be paid out of assessments, which can only be made after being authorized by two-thirds of the votes of the district in an election held under the provisions of section 48 of the act. When so construed this provision of the act is not in conflict with section 52, art. 3, of the Constitution, before quoted. If this section of the act could be held subject to the objection urged by appellants, it is not so essential a part of the act that its invalidity would destroy the whole statute, and it cannot be assumed that the Legislature would not have passed the act without having this section embodied therein.

[8, 9] The third assignment assails the act as invalid because the terms of office of members of the board of directors provided for in this act are fixed at four years, in violation of section 30, art. 16, of the Constitution, which fixes the terms of all officers in this state, not otherwise fixed by the Constitution, at two years. The act fixes the term of office at four years, and was in this respect violative of the provision of the Constitution above mentioned. We do not think the other provisions of the act are so dependent upon, or connected with, the provision fixing the terms of office of the members of the board of directors at four years, that to hold this provision void would render the act ineffectual for the accomplishment of its purposes, and therefore cannot say, as was said by our Supreme Court in the case of Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120, that "it is evident the Legislature would not have passed the law without the void provision," and we must therefore hold that this provision does not render the whole act void.

In addition to this, the record shows that the Trinity River Irrigation District was organized in 1912, and that within less than a year thereafter the Legislature passed the irrigation act of 1913, before cited, which act in express terms repealed the act of 1905, and validated all proceedings in the creation of irrigation districts under the repealed act. This act of 1913, § 72 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5107—72), fixes the term of directors at two years, which is the constitutional period. Section 71 of the act of 1917, (Vernon's Ann. Civ. St. Supp. 1918, art. 5107—72), which is now in force, does the same thing. The Legislature, therefore, has by timely enactment remedied the defect in the statute of 1905. It had authority in the first



instance to fix the term of these directors at any period within two years, and having, by appropriate legislation, remedied the former statute long before this suit was filed and before any of the directors had served as much as two years, and having in express terms validated the creation of these districts and the acts of the directors and officers of such districts under the act of 1905, no one can now complain on account of section 20 of the act.

[10] Under the assignments of error from the fourth to the ninth, inclusive, appellants attack the act and the bonds issued thereunder on the ground that both are invalid because the act authorizes the issuance of bonds, and the bonds issued by the district were issued for purposes not authorized by the Constitution. This contention is based upon the assumption that the provision of the Constitution authorizing the lending of credit by the district for "the construction and maintenance of pools, lakes, reservoirs, dams, canals, and waterways for the purposes of irrigation," does not authorize an act by the Legislature permitting irrigation districts to issue bonds for the purpose of constructing irrigation works and acquiring the necessary property and rights therefor, and for operating an irrigation plant.

We think the learned trial judge sufficiently answered these objections questioning the validity of the statute and the bonds in the following portion of his opinion filed in the court, which we adopt:

"It is objected that the act of 1905 is not authorized by the Constitution because it provides not only for the organization of irrigation districts, but also for their acquisition or purchase and operation. The general purpose of the Constitution was to enable people to form irrigation districts, and it is a sound rule of constitutional construction that the language used must be interpreted in the light afforded by such purpose. The operation of irrigation canals may not be a necessary incident of ownership, but it is the natural and usual incident thereof. The words used in the act are consistent with the context and in harmony with the purposes of the adoption by the people of the section of the Constitution quoted. *Halbert v. San Saba Land, etc., Ass'n*, 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193; *Morton v. Gordon, Dallam, Dig.* 396; *Maddox Bros. v. Covington*, 87 Tex. 454, 29 S. W. 465; *Aranzas County v. Coleman*, 108 Tex. 216, 191 S. W. 553. 'The voters as a rule are unlearned in the law, and, as persons of that class would reasonably construe the Constitution upon which they vote, such ought to be the construction of the courts.' *Brady v. Brooks*, 99 Tex. 378, 89 S. W. 1056.

"The foregoing general rules apply both to the terms 'acquisition' or 'purchase and operation.' The term 'operation' is included in the term 'maintenance.' See *Dallas County v. Plowman*, 99 Tex. 509, 91 S. W. 221; also 88 S. W. 252. There have been drainage district laws in Texas for fifty years. They have

been uniformly recognized as within legislative power. There never was occasion for any constitutional grant of power for their enactment, except that the power to issue bonds, pledge credit, etc., was expressly denied by the Constitution of 1876, and can now only be extended by virtue of the amendment in 1904 to section 52, art. 3, quoted in the first part of this opinion. Such previous acts are believed always to have authorized operation. See *Imperial Nav. Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322."

[11] Under the tenth and eleventh assignments it is contended that the district had been ipso facto dissolved under the provisions of the irrigation act of 1918, prior to the issuance of the \$30,000 of bonds on January 31, 1916, because it did not, within the two years after its creation, "begin to acquire the necessary canals, ditches, flumes, laterals, reservoirs, etc., and all other things necessary to the successful operation of an irrigation district," and therefore said bonds are void and said district has now no legal existence.

These assignments are not supported by the facts which we have before set out, showing what has been done by the district in its effort to establish and successfully operate on irrigation district. We think the trial judge correctly held that the evidence shows due diligence on the part of the district to carry out the purposes of its organization, and that its legal existence has not been forfeited.

[12] We do not think the court erred in failing to cancel the sale of all of the \$40,000 of bonds sold by the district to the defendant Anahuac Canal Company. So far as this record shows the sale was properly advertised and conducted, the only illegality being that the bonds were sold for less than face value and accrued interest, and it is shown that the purchaser did not know that the statute prohibited the sale of irrigation bonds for less than their face value. There was no actual fraud in the transaction. In these circumstances, we can see no reason for holding that the sale of all of the bonds should be canceled. Certainly equity would not permit this, and allow the district to retain the money paid by the purchaser in good faith. Upon this issue the trial court entered the following judgment:

"But it appearing to the court that the Anahuac Canal Company, a corporation, has purchased and is the holder of \$40,000 of the bonds of the Trinity River Irrigation District No. 1, and that it purchased the same for a sum less than the par value of the bonds, to wit, 90 cents on the dollar, it is further ordered that (the defendant Trinity River Irrigation District having filed its trial amendment praying for such relief) the defendant Anahuac Canal Company be, and it is hereby, perpetually enjoined against the collection from the defendant Trinity River Irrigation District No. 1 the bonds so held by the defendant Anahuac Canal Company, or any interest due or to become due

thereon, until and unless the said defendant Anahuac Canal Company shall surrender unto the registry of this court, for the use and benefit of the Trinity Irrigation District, \$4,000 par value, retaining bonds at par value of \$36,000, but the title of the Anahuac Canal Company to \$36,000 par value of said bonds is recognized and here now fully validated."

It seems to us that this disposition of the matter by the trial judge sufficiently vindicates the law and protects the taxpayers of the district.

There is no evidence that the bonds are worth, or were ever worth, more than their face value, and no evidence that any interest has ever been paid the Anahuac Canal Company on said bonds.

[13] If, however, we are wrong in our conclusion upon this matter, we do not think a taxpayer could maintain a suit to cancel the sale of the bonds, unless he should allege and prove that the board of directors of the district had refused to institute such suit, and there is no such allegation in the petition on this case. *Joy v. Compress Co.*, 24 Tex. Civ. App. 94, 53 S. W. 173; 10 Cyc. 963.

All of appellants' assignments of error have been duly considered, and in our opinion none of them can be sustained. It follows that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

#### HOUSTON ELECTRIC CO. v. MAYOR AND CITY COUNCIL OF CITY OF HOUSTON. (No. 7804.)

(Court of Civil Appeals of Texas. Galveston. March 27, 1919. Dissenting Opinion, April 4, 1919. Rehearing Denied April 10, 1919.)

#### 1. APPEAL AND ERROR $\S$ 954(1) — INJUNCTION $\S$ 135—DISCRETION OF TRIAL COURT—REVIEW.

The granting or refusing of a temporary injunction is largely within the sound discretion of the trial court, the exercise of which will not ordinarily be interfered with upon appeal, unless there has been a clear abuse of power.

#### 2. INJUNCTION $\S$ 144—TEMPORARY INJUNCTION—PLEADING—CONSTRUCTION.

A bill asking for temporary injunction, contrary to the rule in ordinary actions, will be taken most strongly against the applicant, and must negative any reasonable inference from the facts stated that he may not be entitled to the recovery sought.

#### 3. INJUNCTION $\S$ 119—MANDAMUS $\S$ 164(3)—PLEADING $\S$ 129(1)—ADMISSIONS—FAILURE TO DENY.

In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true.

#### 4. MUNICIPAL CORPORATIONS $\S$ 63(1)—ORDINANCES—REVIEW BY COURT.

A city council, when acting upon subjects over which it has the power to legislate, is an entirely independent lawmaking body, and cannot be interfered with or subjected to inquiry by the courts as to its motives, reasons, or purposes in enacting ordinances.

#### 5. APPEAL AND ERROR $\S$ 856(1)—REVIEW OF JUDGMENT BASED ON ERRONEOUS GROUND.

If a decree refusing to grant an injunction was permissible under the verified pleadings of the parties, and did not constitute a clear abuse of discretion, its validity is not affected, nor will it be reversed on appeal, merely because the trial court based his decision upon an erroneous ground.

#### 6. CARRIERS $\S$ 12(5)—STREET RAILWAY COMPANIES—ORDINANCES FIXING RATES—CONFISCATION—REASONABLENESS.

In order to enjoin enforcement of an ordinance reducing fares to be charged by a street railway, it was not incumbent upon the railway company to show that the reduced rate was confiscatory within the meaning of the federal Constitution, being entitled to restrain its enforcement, where the reduced rate is unreasonable, unjust, and insufficient to maintain a fair return upon the value of the property.

#### 7. CARRIERS $\S$ 12(5) — STREET RAILWAYS—FARES—REASONABLENESS.

In a proceeding by a street railway to restrain a city from enforcing an ordinance reducing fares, bill held not to show that reduced fare was unreasonable, unjust, or insufficient to maintain and pay a fair return upon the value of the property.

#### 8. INJUNCTION $\S$ 146 — MOTION ON PLEADINGS—EFFECT OF ANSWER.

On motion for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true, and if in such answer, under oath, the facts constituting the claim of the plaintiff for the interposition of the court are controverted by defendant, the court will not generally interfere, but will deny the injunction.

#### 9. CARRIERS $\S$ 18(6) — RATES — MUNICIPAL ORDINANCES — STREET RAILWAYS—INJUNCTION.

Where, on account of the war, a city passed an ordinance increasing street railway fares, it cannot be said that the court abused its discretion in refusing an injunction to restrain city from enforcing an ordinance repealing the ordinance, where the city officials made affidavit that when armistice was signed most of material necessary for operation of street railway had declined, and that conditions which impelled council to grant temporary relief had ceased to exist, and that the "jitney" menace had then become so nearly obliterated that earnings of company had reached practically the highest point in its existence, the street railway not having shown in its bill the actual statistics to support its allegation that the normal fare was unreasonable.

Pleasants, C. J., dissenting.

Appeal from District Court, Harris County; Henry J. Dannenbaum, Judge.

Suit by the Houston Electric Company against the Mayor and City Council of the City of Houston. Judgment for defendant, and plaintiff appeals. Affirmed.

C. R. Wharton, of Houston, for appellant.

W. J. Howard and Kenneth Krah, both of Houston, for appellee.

GRAVES, J. This appeal proceeds from an order entered in chambers by the judge of the Sixty-First district court refusing the Houston Electric Company's application for a temporary injunction and for a peremptory writ of mandamus. By that means the company had sought to have the mayor and city council of the city of Houston not only restrained from enforcing an ordinance of November 6, 1918, fixing street car fares upon its lines at five cents, and from interfering with it in collecting instead six-cent fares, claimed to be permissible under a prior ordinance of September 19, 1918, but also required through the writ of mandamus to exercise their judgment and discretion as manifested in this last-mentioned ordinance, and not to attempt to delegate their rate-making powers to any other agency. In other words, the objective was to have the five-cent fare enactment declared invalid and inoperative, and that prescribing six cents held to be and kept effective in place of it.

No evidence was offered, the hearing being solely upon the petition of the Electric Company and the answer of the city, both of which were verified by affidavit, the court's judgment thereon being couched in these terms:

"In Chambers.

"On this February 10, 1918, came on to be heard in chambers the petition of the plaintiff for injunction and peremptory writ of mandamus, and the court having heard and considered the plaintiff's bill for injunction and mandamus, and no evidence being offered to show that the rate fixed in the ordinance of November 6, 1918, was confiscatory within the meaning of the federal Constitution, the court is of the opinion that the plaintiff should be denied all and singular the relief asked in said bill, and the application for temporary injunction and mandamus is hereby in all things refused and denied, to which judgment the plaintiff then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals at Galveston.

"Henry J. Dannenbaum, Judge."

Before special consideration of the particular case presented, however, it may not be amiss to bear in mind at least two well-settled general principles applicable to preliminary or temporary injunctions:

[1] (1) The granting or refusal of them

is a matter that rests very largely within the sound discretion of the trial court, the exercise of which will not ordinarily be interfered with upon appeal; not, indeed, unless there has been a clear abuse of power. *S. O. & G. Co. v. M. O. & G. Co.*, 186 S. W. 446; 14 Ruling Case Law, p. 312, pars. 11 and 12.

In the Oil & Gas Company Case cited this rule is thus stated by the Court of Civil Appeals at Dallas:

"The granting of a temporary injunction is a matter resting very largely in the sound discretion of the court, and its refusal, especially when asked for on the sworn petition of the complainant unsupported by other testimony, will not be disturbed on appeal, unless it clearly appears that such discretion has been abused."

[2] (2) The averments of the bill by which so drastic a remedy is asked, contrary to the rule in ordinary actions, will be taken most strongly against the applicant, and must negative any reasonable inference from the facts stated that he may not be entitled to the recovery sought. *Miller v. City*, 204 S. W. 1174 (2); *Ross v. Veltmann*, 161 S. W. 1073, and cited authorities.

The sworn pleadings of the parties having thus exclusively formed the basis for the action below, under application of the two familiar rules mentioned, the sole question upon appeal must be: Did the appellant's bill, after proper appraisal of the effect of the city's answer, so clearly show it entitled to the extraordinary writs prayed for as deprived the district judge of all discretion in the matter and required the granting thereof as a matter of right?

By appropriate assignments, and through distinguished counsel, the Electric Company very ably presents in this court two main contentions:

(1) "It appears from the undisputed facts recited in plaintiff's bill that the ordinance passed on the 6th day of November, 1918, repealing the six-cent fare ordinance passed on the 19th day of September, 1918, and the further ordinance passed on November 6, 1918, re-enacting the five-cent fare ordinance, were arbitrary, unreasonable, and unjust, and, this fact being made to appear by recitations in plaintiff's bill which are undisputed, this court should have granted the temporary injunction as prayed for."

(2) "The trial court should have granted a mandamus, because the city council had fully exercised and exhausted its discretion in passing the ordinance of September 19, 1918, and it was its duty to carry out that discretion, and not delegate it to some one else. Where the thing to be done imposes a positive and absolute duty, a mandamus will lie to compel performance of that duty."

[3] While in the condition of the record here neither of these positions is thought to be well taken, it is deemed preferable to dis-

pose of them in an order inverse to that of their statement. The material allegations of the bill—in the view here taken upon that feature of the case—relating to the passage by the city council of the two ordinances involved, which are not specially denied under oath, and must therefore be taken as true, may be quickly stated: On September 19, 1918, the council passed the first of these ordinances, fixing fares which might be charged at six cents, in lieu of the pre-existing rate of five cents, section 3 thereof being as follows:

"The rate of fare fixed in the last two preceding sections shall become effective on and after September 30, 1918, midnight, and be lawful until January 1, 1919, and thereafter until same shall be changed by proper orders of the city council of the city of Houston, and the city, on passing this ordinance and permitting these fares, reserves the right to regulate and change such fares, either increasing or diminishing the same as future conditions may warrant, and such changes shall be made from time to time as seems fair and just to the said council after giving notice for at least ten days to the person, firm, or corporation affected by said change."

On the date of its passage the mayor and city commissioners issued a statement, saying that the ordinance had been passed for the temporary emergency relief of the company during the war, on account of the increased cost to it of labor and materials occasioned by war conditions. Thereafter, and before it became by its terms effective, pursuant to articles 7a and 7b of the 1913 amendment to the Houston City Charter of 1905, known as the initiative and referendum clauses, this ordinance was first suspended, and the question of whether it should become effective at all then submitted to a popular vote of the qualified voters of the city, a majority of whom declared against it. Thereupon, on November 6, 1918, the next day after this election, the council repealed the six-cent ordinance, and re-enacted the old one, carrying the five-cent rate. No reason, however, was recited therein for the passage of the two latter enactments, and no reference was made to any vote of the people as an inducing cause, there being merely recitations that an emergency requiring their final passage on that date existed.

Further public statements of the mayor and different members of the council from time to time between the passage of the six-cent fare ordinance on September 19th and the election held on November 5th, purporting to give the reasons of those officials for passing that ordinance, and particularly quoting the mayor as having said on the eve of the election that the city council would treat and observe its result as an instruction in the matter, were attached as exhibits to the petition.

[4] The Electric Company's claim that, in the circumstances thus presented, it was entitled to a decree of the court declaring the six-cent fare ordinance to be still in full force and effect, and ordering through the requested writs its observance as such by the city council—notwithstanding the temporary character and the formal repeal thereof in the manner shown, not to mention the adverse vote of the people thereon—is merely tantamount to saying that the court could control the exercise by that body of its legislative function. We do not understand that to be the law. Upon the contrary, in so far as the passage of ordinances is concerned, as distinguished from the matter of their enforcement, our understanding is that it has been uniformly held that a city council, when acting upon subjects over which it has the power to legislate, is an entirely independent lawmaking body, and cannot be interfered with nor subjected to inquiry by the courts as to its motives, reasons, or purposes in enacting ordinances. 14 Ruling Case Law, p. 437, par. 139; Gray v. Lumber Co., 197 S. W. 233 (3); McQuillin on Municipal Corporations, vol. 2, p. 1527, par. 703 et seq.; City of Dallas v. Railway, 105 Tex. 337, 148 S. W. 292.

By its express terms this six-cent fare ordinance was for emergency purposes and only to remain in effect until January 1, 1919, or until changed by the city council. That having been done on November 6, 1918, before the filing of this suit, the resulting situation was the same as if it had never been passed by the council, and, under the authorities last cited the court was without power to enter the legislative domain exclusively occupied by the city's lawmaking body, and compel the re-enactment of a measure it had just repealed.

This conclusion eliminates all issues raised as to the validity and effect of the referendum election, or as to whether it may have induced or contributed to the repealing act of November 6th, and obviates any necessity for determining whether the city council could have lawfully delegated its rate-making power to the qualified voters of the city at large.

If, then, the city council was in the proper exercise of its legislative prerogative in repealing the ordinance thus temporarily and provisionally permitting the increased rate and in re-enacting that carrying the lower one, should the court nevertheless have enjoined, pending a full hearing upon all the facts, the enforcement of the five-cent rate, merely upon the company's claim, as embodied alone in its sworn application, that such a rate was unreasonable, unjust and not sufficient to enable it to pay operating expenses, keep up its property, and pay a fair return upon its investment?

This presents a question not without its difficulties. The learned trial judge, as the terms of his above-quoted order disclose, gave as his reason for denying the relief asked for that appellant had presented no evidence showing the five-cent rate to be confiscatory within the meaning of the federal Constitution. Even if it be conceded, as we think must be done, that refusal of the injunction asked could not properly be grounded upon that consideration alone, the judgment would not on that account necessarily be wrong, but might, and a majority of the court think did, present an instance of an insufficient reason being given for a correct decision. *Texas B. Co. v. Henry*, 197 S. W. 227 (10), 4 C. J. par. 2557; *Calvin v. Neel*, 191 S. W. 791.

[5] In other words, if the decree entered was a permissible one under the verified pleadings of the parties, and did not constitute a clear abuse of a rather far-reaching discretion, its validity is not affected, nor will it be reversed upon appeal, merely because the trial court based his decision upon an erroneous ground. *Corpus Juris*, vol. 4, par. 2557, footnotes 92 and 97 and collated authorities.

[6] As already indicated, it is not thought to have been incumbent upon the Electric Company to show the five-cent rate to be confiscatory within the meaning of the federal Constitution, but that it would have been entitled to restrain its enforcement, had it actually shown that rate to be unreasonable, unjust, and insufficient to maintain and pay a fair return upon the value of the property. As we understand the authorities, such is now the accepted rule. *Dillon on Municipal Corporations*, vol. 1, §§ 589, 591; *City of Austin v. Cemetery Ass'n*, 87 Tex. 338, 28 S. W. 528, 47 Am. St. Rep. 114; *Railway v. City of Dallas*, 98 Tex. 417, 84 S. W. 648, 70 L. R. A. 850; *City of Brenham v. Seelhorst*, 153 S. W. 348; *Royal Indemnity Co. v. Schwartz*, 172 S. W. 583.

[7] Did appellant's bill declare upon such a plain, clear, and independent case of that character as left the trial court, in the exercise of a sound judicial discretion, after giving due weight to the answer of the appellees, no alternative than to grant it? We think not, mainly upon these considerations: From preamble to invocation the bill may be finely combed without discovery of a single direct, unequivocal, and independent general averment, even that the five-cent rate was at that time, December 27, 1918, unreasonable, and not sufficient to enable the company to pay operating expenses, keep up its property, and have a fair return upon its investment; much further is it from containing a full, clear, and plain statement of any specific and then existing facts claimed to show such a result to be then flowing

from operation under that rate as an actual consequence. The nearest approach to such an averment is found in paragraph 19, reading as follows:

"The plaintiff further alleges that the ordinance passed by the city council of the city of Houston on November 5, 1918, repealing the six-cent fare ordinance and copied in paragraph eleven thereof, and the ordinance passed by the city council on the same date and copied in paragraph twelve hereof, are part and parcel of the same transaction, and grew out of, and are inseparately connected with, the prior ordinance of September 19, copied in paragraph eight hereof; that it conclusively appears from the face of these proceedings and from the recitations in these ordinances that both of the ordinances passed and enacted on November 6th are unreasonable and arbitrary and wrong, and that they deprive this plaintiff of a common right, to wit, the right to earn a sufficient sum of money to pay operating expenses and keep up its property and to have a fair return upon its investment."

It thus appears that the dominating allegation and idea throughout the entire petition is that the acts repealing the six-cent rate and reinstating the old five-cent one are shown to be unreasonable by the recitations of the six-cent fare ordinance itself, of which they are said to be in reality part and parcel, and not by reason of any present, independent, and outstanding facts; indeed, this is necessarily the effect of the quoted averment, because, as previously indicated, neither of these two acts of November 6th contained any reference to the passage of the one of September 19th fixing the fare at six cents, or the statement of any other matter which could possibly make either unreasonable upon its face, both merely reciting that an emergency demanded their immediate passage, while that last mentioned, the one of September 19th, did contain, among similar ones, the statement that "the said company is not receiving from the present rate of fares sufficient return to pay its operating expenses and maintain its property in an efficient condition."

So that the net purport of this pleading is an assertion that appellant was on February 10, 1919, the date of the hearing, entitled to restrain the enforcement of a regularly enacted and in itself unobjectionable public ordinance of the city of Houston of November 6, 1918, fixing street car fares at five cents, as being unreasonable, solely because a provisional measure of September 19, 1918, which never became effective by reason of its subsequent repeal, recited in its preamble that the Electric Company was at that time not receiving from the rate then prevailing enough to pay operating expenses and keep up its property.

The only other parts of the bill cited in the arguments in this court as presenting allegations of unreasonableness are para-

graphs 6 and 7 and that portion of 20 reading as follows:

"The plaintiff avers that there was no change in the condition of affairs discussed in its application of September 4th, set out in the 7th paragraph hereof, between that date and the 6th of November, 1918; that all the unfavorable and adverse conditions surrounding the operation of its properties with reference to the price of labor and material obtained on the last date as they did on September 4th; that there has been no change of these conditions since that time; that the temporary cessation of hostilities and the approach of peace has not bettered any of these conditions, or reduced any of these prices, or in any way reduced operating expenses for the plaintiff company."

But here again the averment proves to be, not a direct and plain statement of any then subsisting facts rendering the five-cent fare ordinance of November 6th unreasonable when standing alone, but merely links in a narrative chain of allegations constituting in final substance a charge that it was shown to be so upon the face of the group of ordinances of which it was said to be a part and parcel; that is likewise necessarily the boiled down effect of this part of the petition also, because, when preceding paragraph 7 is looked to, to determine what was there set out about "the condition of affairs discussed in its application of September 4th," it is found to contain a mere recitation that the city authorities, following the filing of its application for increased rates of June 1, 1918, had a full inquiry into the facts therein stated and into its affairs made, and while that application was still pending undisposed of, the company addressed a further petition to the city council in which certain statements, copying them at length, were contained. That is all; nowhere does "a plain and intelligent statement," to use the language of our statute, appear that any particular facts contributing to the conditions it thus directly avers it discussed in the applications to the city council of June 1 and September 4, 1918, were at that very time still existing, and that these specific and then prevailing things were such as would render enforcement of the five-cent rate an unreasonable invasion of appellant's common rights.

The same thing may be said of paragraph 6, the first recitation of which is this:

"That because of the advances in wages and increase in prices and other unfavorable operating conditions which beset the company, it applied to the city of Houston on June 1, 1918, for an increase in fares of from five to six cents for adult passengers, and to three cents for half fares, filing with the city the following formal application for increase in fares."

It then concludes with setting out a full copy of the statement referred to of date

June 1, 1918, purporting to show a deficit in the operations for 1918 of \$131,000, without further averment of any kind.

It may have been in the mind of the pleader to charge that all the detailed and statistical conditions "discussed" in the company's application to the city council of June 1 and September 4, 1918, respectively, obtained in unchanged measure and form on December 27, 1918, when the bill was filed, and on February 10, 1919, when it was presented to the court, and that the indulgence of every fair inference and reasonable intendment in its favor would give it that effect; but, under the rules of pleading applying in injunction suits, that may not be done.

Aside, however, from the mere form of its pleading here, and looking to the grounds on which the company thus in June and September of 1918 asked the privilege of increasing the rates of fare, it is disclosed that the only causes assigned for its inability to meet operating expenses were:

(1) That for the years 1914 to 1918, inclusive, the operation of "jitneys" in competition with it reduced its earnings in certain specified sums for each year.

(2) That since the beginning of the World War the cost of materials and labor used by it had continuously and rapidly increased, and that the added amounts paid its employees in wages since January 1, 1915, aggregated \$363,876 per annum.

There is no specification as to the amounts or proportions by which the cost of material had increased, while, as to the advances in wages of employees, it is positively averred in paragraph 8 of the bill that these were granted solely because of the passage of the six-cent fare ordinance, and neither could nor would have been accorded but for that action; but it is nowhere alleged either that the properties could not be operated without payment of such increases, or that they might not have been reduced following repeal of the ordinance.

To meet the case presented, as thus in substance outlined, the city, after demurrers, special exceptions, and a general denial upon information and belief that the aggregate value of the company's properties was as alleged, interposed the following special answer, verified by the mayor's affidavit:

"V. Further answering, these defendants deny the allegations in paragraph 20 of plaintiff's bill, that there has been no change in conditions of affairs discussed in said bill and affecting the cost of operating the said street railway since September 4, 1918, and says that the fact is that the said ordinance of date September 19, 1918, was passed for the purpose of granting temporary relief to the plaintiff on account of the temporary conditions brought about by war that was then in progress; that since said date the armistice has been signed and hostilities have ceased, and some, if not all, of the material necessary for the operation of said

street railways have declined in price; and these defendants have reason to believe that the conditions will be much more favorable in the near future, and that the purposes which moved and impelled the council to pass the said ordinance of September 19, 1918, have now ceased to exist.

"VI. Further answering, these defendants say that it is a fact, as appears from plaintiff's bill, that its difficulty in realizing sufficient earnings was brought about and occasioned by what is known as the jitney competition that began in the latter part of the year 1914, and continued during the years 1915, 1916, 1917, and 1918, but that since the year 1915 such competition has greatly decreased, until at this date it amounts to but very little, and the earnings of the company have again reached its highest point, or practically the highest point, in its existence; and with the increased earnings brought about by the elimination of such jitney competition, and the probability of falling prices due to the cessation of hostilities and the termination of the war, the said plaintiff should and could be able to earn sufficient to pay its fixed charges, set aside a reasonable replacement fund, and pay a reasonable net earning upon the amount invested."

Even if it were conceded, as appellant insists must be done, but in which position we are unable to concur, that as a special denial under oath this answer is insufficient to "swear away the equities of the bill," under the rule announced in *McAmls v. Railway Co.*, 184 S. W. 332, and authorities there cited, still it did state facts, we think, clearly bringing it within this further rule quoted by the court in that opinion.

[8] "On motion for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true, and, if in such answer under oath the facts constituting the claim of the complainant for the interposition of the court are controverted by defendant, the court will not generally interfere, but will deny the injunction." 22 Cyc. 945, 946.

[9] In other words, if at the time of trial, February 10, 1919, the war had ended, most of the material necessary for the operation of the street railway had declined, the conditions which impelled the council to grant the temporary relief of September 19, 1918, had ceased to exist, and the "jitney" menace had then become so nearly obliterated that the earnings of the company had again reached practically the highest point in its existence, a state of things was interposed which required something more than the mere ipse dixit of the applicant therefor to entitle it to the far-reaching writ sought; to say the least, it is thought a refusal below, under such conditions, would not constitute a plain and clear abuse of the wide discretion so wisely vested in the trial court.

This court, therefore, must decline to interfere.

The judgment has been affirmed, with PLEASANTS, C. J., dissenting.  
Affirmed.

PLEASANTS, C. J. (dissenting). I am unable to agree with my Associates in the conclusion that the judgment of the trial judge, refusing appellant's application for a temporary injunction, should be affirmed.

I concur in the opinion of the majority that the ordinance passed by the city council of the city of Houston repealing the ordinance of September 19, 1918, authorizing the appellant to collect a fare of six cents, cannot be questioned on the ground that in passing said repealing ordinance the council did not exercise its discretion, but surrendered its judgment and discretion in the matter to the dictation of a majority of the voters who voted in the referendum election upon the question of whether the six-cent ordinance should become effective. The fact that the six-cent ordinance was repealed in obedience to the expressed will of the majority of the voters at the referendum election is shown by the undisputed evidence, but in enacting the repealing ordinance the council exercised a power vested in it by the law, and this exercise of its legislative function cannot be interfered with by the courts on the ground that in passing the ordinance it acted from improper motives. The motives or influences inducing legislative action cannot be inquired into by the courts, except for the purpose of construing a legislative act. See authorities cited in majority opinion.

I also agree with counsel for appellant that the question of what is a just and reasonable fare to be charged for transportation of its passengers by the appellant is not one that can be properly determined by a popular vote. The nature of the question is such that its proper determination requires an investigation of facts, a consideration and weighing of evidence, and the exercise of an impartial, unbiased judgment, which could rarely, if ever, be obtained by submitting the question to a popular vote. As said by our Supreme Court in the case of *Telephone Co. v. City of Dallas*, 104 Tex. 121, 134 S. W. 323:

"In the exercise of the power to regulate and fix rates, etc., there must be a body who can hear evidence and decide upon the reasonableness and unreasonableness of the rate or regulation, and if that cannot be done by the initiative—the popular vote—then the authority cannot be exercised in that manner. Can it be necessary to offer argument to show to any man that such hearing as the law provides could not be had in a campaign before the electorate of the city? It is too manifest for controversy."

There is much force in appellant's contention that, the governmental function of fixing rates for public utilities having been delegated by the Legislature to the city council, it

cannot be redelegated by the council, and can only be exercised by the council. *City of Corpus Christi v. Wharf Co.*, 8 Tex. Civ. App. 97, 27 S. W. 803.

While I am strongly inclined to the opinion that the referendum provisions of the charter of the city of Houston were not intended to apply and should not be invoked upon the rate-making power of the council, it is unnecessary to decide the question, because, as before stated, the city council, in the exercise of a power which cannot be questioned, has repealed the ordinance. It follows from this conclusion that I agree with the majority in the holding that the trial court correctly refused the mandamus prayed for by appellant. But the question of whether the six-cent ordinance is still in force or should be ordered reinstated is entirely different from the question of whether the appellant has shown itself entitled to relief against the enforcement by the city of the ordinance requiring it to charge only a fare of five cents.

There is no disagreement between the majority and myself as to the general principles which should control in the determination of this question.

If the operation of the ordinance will require appellant under the severe penalties therein provided, to furnish the means of transportation for the people of the city of Houston for a fare or rate of compensation insufficient to enable it to provide such means of transportation, and to earn a reasonable return upon the money reasonably invested by it in such undertaking, the ordinance should not be enforced. This proposition, which is only a specific application of the general principle that, except as a punishment for crime, no individual's property or labor should be taken or used for public benefit without fair compensation, is so just, so uniformly recognized in the laws of free peoples, and so embedded in our Constitution and laws, that citation of authorities in its support is unnecessary.

It seems to me that the majority opinion fails to give to the allegations of plaintiff's petition the effect and meaning which fair and reasonable interpretation of the language of the pleader requires.

The rule that the allegations of a bill for injunction, in order to entitle the applicant to the injunction, must be clear and plain, does not authorize a court, in order to justify a refusal of the injunction, to place a strained and unreasonable construction upon the allegations of the bill; but the common-sense rule that the allegations of the petition must be given the meaning which is reasonably and naturally conveyed by the language used applies with the same force to bills for injunction as to any other kind of pleading.

The petition, after reciting the various grants of franchise under which appellant is and has been for a number of years operating its street cars in the city of Houston, alleges that up to December 31, 1917, it had invested in establishing and improving its transportation system in said city the sum of \$5,655,605, and that its properties on said date were reasonably worth said sum, and that until said date it had, under the fare it was permitted to charge, earned some annual return on its investments. It then alleges that in 1914 its gross earnings began to be reduced by competition from persons and companies operating jitneys over the streets of said city. These yearly reductions in gross earnings are stated to be: 1914, \$28,000; 1915, \$400,000; 1916, \$300,000; 1917, \$250; 1918, \$175. It further alleges that since the beginning of the World War in 1914 there has been a continuous advance in the price of all the material required and purchased by it for the maintenance and operation of its business, and a much more rapid increase in the cost of such material, and in the wages paid its employes, has occurred since the entry of this country into the war in 1917, and that the increase in such wages alone since January, 1915, amounted to \$363,876 per annum.

It then alleges that on June 1, 1918, it applied to the city council of the city of Houston for permission to raise the fares charged by it from five cents for adults and two and one-half cents for children to six and three cents, respectively, and in its said application, which is set out in full, it made a full itemized statement of its earnings and expenses of operation for the year 1918. The application containing this itemized statement is set out in full in the petition, and shows that that by the operation of the cars for the year named it cost the company \$131,763 more than it earned. This application not having been acted upon by the city council, on September 4, 1918, appellant filed an additional application asking for a further increase in fares on the ground that since the filing of the first application the price of material had steadily increased, and that the company had been constrained, in order to satisfy its employes and give them a living wage under existing conditions, to increase said wages \$54,000 per annum, and that the National War Labor Board had recommended a still further increase, which would cost the company approximately an additional \$110,000, and that the company had stated to its employes that it desired to grant this increase, but was unable to do so unless its fares should be increased. In view of these additional demands upon the earnings of the company the council was asked to authorize a fare of seven cents for adults and three and one-half cents for children. It is also alleged that the "mayor and city commissioners caused a full, complete, and diligent inquiry



to be made into the affairs of the company, and in the facts recited in its petition of June 1, 1918," and thereafter, on September 19, 1918, the city council passed an ordinance amending the existing ordinance regulating street cars so as to authorize appellant to charge a fare of six cents for adults and three cents for children. This ordinance contains the following recitals:

"Whereas, the Houston Electric Company now owns and operates all the lines of street railway operated in the city of Houston and which will be affected by the following ordinance; and,

"Whereas, said company has applied to the city council of the city of Houston for an increase of fares to seven cents in order to meet financial conditions brought about by the war; and,

"Whereas, the city council, after full, careful, and complete investigation of the facts and conditions upon which said application is based, has found that, on account of the war, materials which the said company is required to purchase in order to operate said line of street railway have advanced in price from twenty-five per cent. to three hundred per cent. above normal and prewar prices, together with the fact that said company has granted to its employees several raises of wages during the present year on account of war conditions, and, further, in order to meet the scale of wages fixed for street railway employees by the War Labor Board it will be necessary to make a still further advance in said wages, whereby operating expenses of the said company will be very greatly increased, and the prewar scale of wages will be practically doubled, and that in view of these conditions the said company is not receiving from the present rate of fares sufficient return to pay its operating expenses and maintain its property in an efficient condition, and an emergency has arisen necessitating the granting in part of said petition of the company, and affording it temporary relief from the conditions set out in the following ordinance, in order to permit said company to meet said extraordinary and abnormal conditions.

"Now, therefore, be it ordained by the city council of the city of Houston," etc.

This ordinance, in addition to fixing the street car fares at six and three cents from and after September 30, 1918, until January 1, 1919, and thereafter until changed by the city council, contained provisions requiring the appellant to permit a representative of the city, to be selected by the city council, to have access at all times to the books and records of the company and be present at all meetings of the board of directors. It also prohibited any capital expenditures by the company without first consulting with the city council or its representatives, limited the dividends that might be paid to the stockholders, and provided that the city could at any time cause an appraisal and valuation of the properties of the company to be made at the expense of the

company for the purpose of ascertaining and fixing such fares as would be reasonable. The two last sections of the ordinance are as follows:

"Sec. 8. This ordinance shall not become effective until the said Houston Electric Company has filed with the city secretary an acceptance stating that it will pay the financial obligations imposed upon it by this ordinance.

"Sec. 9. There being a public emergency requiring that this ordinance be passed finally on the date of its introduction, and the mayor having in writing declared the existence of such emergency and requested such passage, this ordinance shall be passed finally on the date of its introduction, this the 19th day of September, 1918, and shall take effect immediately upon its passage and approval by the mayor."

This ordinance was approved by the mayor on the date of its passage, and thereafter, on September 21, 1918, appellant filed its acceptance in writing in compliance with section 8 of the ordinance before set out, and, believing that it would get the increase in fares provided in the ordinance, granted the request of its employees for the increase mentioned in its application.

Paragraphs 19 and 20 of the petition are as follows:

"The plaintiff further alleges that the ordinance passed by the city council of the city of Houston on November 6, 1918, repealing the six-cent fare ordinance and copied in paragraph eleven hereof, and the ordinance passed by the city council on the same date and copied in paragraph twelve hereof, are part and parcel of the same transaction, and grow out of and are inseparably connected with the prior ordinance of September 19th, copied in paragraph eight hereof; that it conclusively appears from the face of these proceedings and from the recitations in these ordinances that both of the ordinances passed and enacted on November 6th are unreasonable and arbitrary and wrong, and that they deprive this plaintiff of a common right, to wit, the right to earn a sufficient sum of money to pay operating expenses and keep up its property and to have a fair return upon its investment; that, since these facts conclusively appear on the face of the ordinances aforesaid, they are invalid, and the city council should be restrained from enforcing the five-cent fare ordinance, copied in paragraph twelve hereof, or from further attempting to change, set aside, or modify the ordinance of the 19th of September, 1918, until it is made to appear that such modification or changes therein are fair and just, and until notice of said proposed change has been given to this plaintiff as required by said ordinance."

"The plaintiff avers that there was no change in the condition of affairs discussed in its application of September 4th, set out in the seventh paragraph hereof, between that date and the 6th of November, 1918; that all the unfavorable and adverse conditions surrounding the operation of its properties with reference to the price of labor and material obtained on the last date as they did on September 4th; that there has been no change of these conditions since that time; that the temporary cessation of hos-

ilities and the approach of peace has not bettered any of these conditions, or reduced any of these prices, or in any way reduced operating expenses for the plaintiff company; that the plaintiff's manager and other persons interested in its properties have made diligent inquiry for the purpose of determining whether it is reasonably probable that there will be any improvement in these conditions, and, with the very best information obtainable, the plaintiff is led to believe that there will be no decrease in the price of labor during the ensuing year or two years, nor will there be any appreciable decrease in the price of materials or operating expenses of any character during the ensuing year; that the vast amount of men and material needed for reconstruction work at home and abroad will overload the capacity of the country to such an extent that this company cannot expect any reduction in the price of either labor or material in the near future; that, if any change whatever is brought about at the approach of peace, it will rather be a decrease in the earnings of this company because of the removal of the army camps from the vicinity of Houston, and the consequent loss of the patronage of the great number of soldiers who have been in these camps, and who have used the company's facilities of transportation during the last year; that the number of these soldiers has varied from 5,000 to 40,000, and their presence in the city of Houston and its suburbs has increased the fares which this company has received during this period of time; that their removal, which is now imminent, may materially decrease the company's income."

From the foregoing accurate statement of the allegations of the petition I think it clear that appellant does, in plain and explicit language, set out definite facts which show that under a five-cent fare it not only could not maintain and operate its transportation system in the city of Houston and earn any return upon the money invested therein, but that such maintenance and operation was costing the appellant, in money necessarily paid by it to fulfill its transportation obligations to the citizens of Houston, a sum largely in excess of its gross earnings. These allegations are not general, but specific. An itemized statement of the gross earnings, and the necessary expenditures of the company for the year 1918, is set out, and this statement shows that the deficit for that year was \$131,763, without including an advance of wages to its employes made subsequent to June 1, 1918, of more than \$100,000. This itemized statement showing the actual loss to appellant from the operation of its street car system was contained in the application made to the city council in June, 1918, for permission to charge a six-cent fare, and the council, which was then, as now, composed of the five citizens of Houston, who are the defendants in this suit, after, according to their own statement made under their official oath,

"full, careful, and complete investigation of the facts and conditions upon which said appli-

cation is based, has found that, on account of the war, materials which the said company is required to purchase in order to operate said line of street railway have advanced in price from twenty-five per cent. to three hundred per cent. above normal and prewar prices, together with the fact that said company has granted to its employes several raises of wages during the present year on account of war conditions, and, further, in order to meet the scale of wages fixed for street railway employes by the War Labor Board, it will be necessary to make a still further advance in said wages, whereby operating expenses of the said company will be very greatly increased, and the prewar scale of wages will be practically doubled, and that in view of these conditions the said company is not receiving from the present rate of fares sufficient return to pay its operating expenses and maintain its property in an efficient condition."

It was further expressly alleged—

"that there was no change in the condition of affairs discussed in its application to the city council of date September 4, 1918, between said date and November 6, 1918 (when the ordinance repealing the six-cent fare ordinance was passed); that all the unfavorable and adverse conditions surrounding the operation of its properties with reference to the price of labor and material obtained on the last date as they did on September 4th; that there had been no change of these conditions since that time."

Facts are then stated upon which the conclusion is based that the cost of material and operation will not decrease in the near future, and the earnings of the company will probably decrease.

I cannot see how there could well be more explicit and positive allegations of facts showing the unreasonableness and injustice of requiring the appellant to continue to operate its street cars under an ordinance prohibiting it, under severe penalties, from charging more than a five-cent fare. The fact that the proceedings of the city council, and the several ordinances set out in the petition, may not on their face show "that both of the ordinances passed and enacted on November 6th are unreasonable and arbitrary and wrong, and that they deprive this plaintiff of a common right, to wit, the right to earn a sufficient sum of money to pay operating expenses and keep up its property and to have a fair return upon its investment," does not destroy the effect of the other allegations of the petition before set out, nor is the effect of these allegations in any way lessened by the narrative form of the petition.

Before appellant was entitled to relief from the courts it was required to exhaust its remedy by appeal to the city council, and it was entirely proper to allege all of the proceedings had by it with the council. In order to do this, it properly set out in detail the facts presented by it to the council and the

action of the council on its application. After doing this, it alleged that the facts presented by it to the council still existed, and in addition thereto alleged other facts showing that it could not maintain and operate its cars for a fare of five cents without serious loss.

Unless the equities thus shown by the bill were sworn away by the answer of the defendant, appellant was entitled to relief, and I think appellees' answer was clearly insufficient to justify a refusal of appellant's application.

The only effect of a general denial in any case is to put plaintiff upon proof of the facts necessary to entitle him to relief, and, on application for temporary injunction, a sworn petition is sufficient proof. 22 Cyc. 942; Vernon's Sayles' Civil Statutes, art. 4649.

An answer sufficient to defeat the right to relief by temporary injunction must be positive in its averments of fact, and not consist of mere general allegations or conclusions based on information and belief, and must contain a full and unequivocal denial of the material allegations of the petition. Dawson v. Baldridge, 55 Tex. Civ. App. 124, 118 S. W. 593; McAmis v. Railway, 184 S. W. 331.

The first allegation of the petition which the answer questions is the allegation that the appellant's street car system is reasonably worth the sum of \$5,655,805. The denial of this allegation is as follows:

"Further answering these, defendants say that, according to their best information and belief, the properties of the said plaintiff company are not of the reasonable worth and value of \$5,655,805, and such sum has not been invested in said property by the said company according to defendants' best information and belief, in such a manner as to entitle it to earn return thereon."

The allegation as to the value of the properties is not material in view of the other allegations which show that the earnings of the company are less than the cost of the service, but, if it were material, the denial is too equivocal and uncertain to be entitled to any consideration. The only other denial of any allegation of the petition is of the allegation that there has been no change in the unfavorable condition of the affairs of the company since the application for a higher rate was presented to the council. In denial of this application the answer avers that since the passage of the ordinance of September, 1918, authorizing appellant to charge a six-cent fare, an armistice has been signed, and hostilities in the World War have ceased, "and some, if not all, of the material necessary for the operation of said street

railways have declined in price, and these defendants have reason to believe, and do believe, that conditions will be much more favorable in the near future." There is no averment as to the amount of decline in the price of material, and it is not alleged that the decline has been such that appellant can now maintain and operate its street cars without loss. The substance of this denial is that things are not quite as bad as they were, and defendants believe that conditions will improve in the near future. The answer further avers that the jitney competition has greatly decreased since 1915, and at the present it amounts to very little. The allegations of the petition show that such competition has greatly decreased since 1915, but that, notwithstanding this decrease, the appellant, by the operation of its railways in 1918, sustained a loss of more than \$200,000. The further averment that this competition is now very little, and the earnings of appellant had reached practically its highest point, are too general and indefinite to be considered as an answer to the allegations of the bill showing the loss sustained by appellant in maintaining and operating its road under present conditions and being required to charge not more than a five-cent fare. The further consoling prophecy in the answer, that with the increased earnings brought about by the elimination of jitneys, and the probability of falling prices due to the termination of the war, appellant "should and could be able to earn sufficient to pay its fixed charges, set aside a reasonable replacement fund, and pay a reasonable net earning upon the amount invested," falls far short of being such a denial of the equities of the bill as to authorize the court to refuse relief. If so, I think, clear that the defendants, as stated in the ordinance passed by them on September 19, 1918, having after a full and complete investigation of the affairs of appellant, found that facts existed entitling it to temporary relief, could not and would not now deny the existence of such facts, but were only willing to swear that the conditions were not as bad as they were and they believed they would improve in the near future. Such an answer cannot justify a refusal to grant appellant relief by temporary injunction.

If the injunction is granted, and conditions should improve as appellees anticipate, the injunction could be dissolved at any time upon a showing that a five-cent fare was sufficient to enable appellant to maintain and operate its system and pay a reasonable dividend upon its investment.

I think the application for temporary injunction should have been granted.

**HOUSTON & T. C. R. CO. v. REICHARDT  
& SCHULTE CO. (No. 7625.)**

(Court of Civil Appeals of Texas. Galveston.  
March 7, 1919. On Motion for Rehearing,  
May 1, 1919.)

**1. CARRIERS ⇐180(5)—CARRIAGE OF GOODS—  
CONNECTING CARRIERS—LIMITATION OF LIA-  
BILITY—INTERSTATE COMMERCE ACT.**

The consignees of onion sets shipped in interstate commerce could recover from the terminal carrier for damage only on the basis of the bona fide invoice price of the property, including freight charges, if prepaid, as its value, as stipulated by the standard form bill of lading issued by the initial carrier in compliance with order No. 787 of the Interstate Commerce Commission, dated June 27, 1908, pursuant to the Carmack Amendment to the Interstate Commerce Act, despite the consignees' allegation that the terminal and initial carriers were copartners, and despite the amendment of the Carmack Amendment on March 4, 1915 (U. S. Comp. St. § 8604a), subsequent to the contract of carriage.

**2. CARRIERS ⇐32(2)—CARRIAGE OF FREIGHT—  
LIMITATION OF LIABILITY FOR DAMAGES—  
INTERSTATE COMMERCE ACT—WAIVER.**

The terminal carrier of an interstate shipment by rail, when sued for damage to the shipment, could not waive provision as to damages of the standard form bill of lading issued as required by an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa).

**3. CARRIERS ⇐177(4)—CARRIAGE OF GOODS—  
INTERSTATE SHIPMENT—LIABILITY OF TER-  
MINAL CARRIER.**

The terminal carrier of an interstate shipment under the standard form bill of lading issued under order No. 787 of the Interstate Commerce Commission of June 27, 1908, pursuant to the Carmack Amendment of the Interstate Commerce Act, *held* required to respond only for such damages as occurred to the shipment on its own line, despite the consignees' allegation that the terminal and initial carrier were partners, and the amendment of the Carmack Amendment on March 4, 1915 (U. S. Comp. St. § 8604a), subsequent to the contract of shipment.

**4. CARRIERS ⇐185(1)—CARRIAGE OF GOODS—  
DAMAGE IN CUSTODY OF TERMINAL CARRIER—  
PRESUMPTION.**

There is a presumption against a terminal carrier which delivers goods in bad condition that the damage occurred on its own line, though it may have transported the goods over its line in the same through and sealed car in which it received them.

On Motion for Rehearing.

**5. CARRIERS ⇐185(3)—CARRIAGE OF FREIGHT—  
INTERSTATE COMMERCE—SUFFICIENCY OF  
EVIDENCE.**

In an action against the terminal carrier of an interstate shipment of onion sets to recover damage by wetting in transit, evidence

*held* sufficient to raise the issue as to whether or not some of the damage occurred before the sets came upon the terminal carrier's line.

**6. CARRIERS ⇐186—CARRIAGE OF FREIGHT—  
INTERSTATE SHIPMENT—APPORTIONMENT OF  
DAMAGES.**

Under a standard form bill of lading issued on an interstate shipment under an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa), such bill providing no carrier should be liable for loss not occurring on its own road or its portion of the through route, if damage to the shipment occurred before it came on the terminal carrier's line, the consignees' damages must be apportioned in their action as against the terminal carrier; the initial carrier having been dismissed for insufficient service.

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Suit by the Reichardt & Schulte Company against the Houston & Texas Central Railroad Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood and McMeans, Garrison & Pollard, all of Houston, for appellant.

Guy Graham and Atkinson & Atkinson, all of Houston, for appellee.

GRAVES, J. This cause involves the shipment of a car of onion sets by J. M. Ricker from Oswego, Kan., to Reichardt & Schulte Company at Houston, Tex., over two railroads, the St. Louis & San Francisco from Oswego to Sherman, Tex., and the Houston & Texas Central from Sherman to Houston. The contract of shipment was evidenced by the standard form bill of lading approved by the Interstate Commerce Commission on June 27, 1908, by its order No. 787, and contained these two clauses:

"Sec. 2. In issuing this bill of lading, this company agrees to transport only over its own line, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

"Sec. 3. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under the bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based."

When the car was delivered to and opened by Reichardt & Schulte Company in Houston on the morning after its arrival there the night before, the greater portion of the onion sets were found to be in a badly damaged condition, due to having become thoroughly soaked with water after being placed in the car. Having first salvaged all they could, the consignee then sued both the above-named railway carriers to recover damages for the loss upon the rest of the shipment. Holding the service upon the initial carrier, the St. Louis & San Francisco Railroad Company, to be insufficient, the court dismissed it from the suit, and trial proceeded against the terminal carrier, the Houston & Texas Central Railroad Company, alone.

The case was tried before a jury upon the theory that the amount by which the market value of the goods at Houston had been diminished constituted the measure of damages, and special issues were submitted directing the jury to find what, if any, loss upon that basis the Reichardt & Schulte Company had sustained. Upon the return of a verdict finding such a loss to have been sustained and fixing an amount, judgment was accordingly rendered against the railroad company therefor, from which it prosecutes this appeal.

[1] After careful consideration of all questions presented here, the conclusion is reached that only one material error was committed below, and that was in the measure of damages applied.

This was indisputably an interstate shipment, moving under the terms and provisions of a bill of lading prescribed and controlled by the Interstate Commerce Commission, thereby making the shipment a transaction in furtherance of interstate commerce and bringing it under the operation of the act of Congress known as the Carmack Amendment (Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]). *St. Louis Southwestern R. Co. of Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 80.

Without quoting the amendment here, it is sufficient to say that it required the initial carrier to issue a receipt or bill of lading in comport with stipulations 2 and 3 in the one here involved, fixing the invoice price of the goods to the consignee as the measure of his damages against the carrier.

While the appellee company did not directly sue on this bill of lading, it did declare against each and both of the carriers named upon a contract for through shipment between them from Oswego, Kan., to Houston, Tex., and, in proof of its case and of the terms of that contract, introduced in evidence the original of the bill of lading from

which the quoted sections have been taken as being the one under which the shipment moved. Having thus, both by express contract and through the operation of a federal statute governing all such transactions in interstate commerce as the only proof offered showed this to be, become bound by the rule fixing the invoice price as the measure of its damages, the appellee was not entitled to recover upon a different one; that is, the market value of the goods at Houston. It contends, however: First, that because of the allegation in its petition that the two railway companies were partners—which was not denied under oath—both carriers were rendered liable for the full damage it actually suffered, wholly independent of the Carmack Amendment. Second, that on March 4, 1915 (chapter 176, § 1, 38 Stat. 1196 [U. S. Comp. St. § 8604a]), which was subsequent to the date of the contract herein declared upon but prior to the trial, this amendment was itself so amended as to substitute for the invoice price rule one making the carrier liable "for the full actual loss, damage, or injury to such property," etc. (Ann. Cas. 1915B, 81), and that the state of the law at the time of the trial controlled. Third, that the issue of market value as constituting the measure of damages was submitted to, and evidence substantiating it admitted before, the jury, without objection upon appellant's part, and that it comes too late for complaint to be first made on motion for new trial.

It is not thought any of these answering positions can prevail. Just how the mere filing of an allegation that two connecting carriers extending into and transporting goods in interstate commerce across different states were partners, whether denied under oath or not, could defeat the operation of the then prevailing federal statute applying to all such transactions, does not readily occur. The cause of action declared upon, and in that regard substantiated by uncontroverted proof, constituted the shipment one in interstate commerce and so brought it within the purview of the original Carmack Amendment, which at that time was in force. The rule fixing the invoice price as the measure of appellant's liability having therefore been fixed as a matter of contract—executed and fully carried out in accord with the then existing law—its right to respond to that extent only became vested and could not subsequently be enlarged.

[2] It may be entirely true, as the appellee contends, that the effect of repealing a remedial statute is to as completely obliterate all liability thereunder as if it had never been passed, since it has often been held that no one has a vested interest in a continuance of the mere rules or doctrines, themselves, embodied in such laws. *Middleton v.*

Texas P. & L. Co., 108 Tex. 96, 185 S. W. 556, recently affirmed by the United States Supreme Court, 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. —. But, as these authorities disclose, this principle is limited to instances where rights have not, by contract or otherwise, become vested under pre-existing law and been thereby converted into rights of property, as has been seen was the situation here. In this latter class of cases, changes in the law may not have the effect of defeating rights accruing under prior contracts, since that would run counter to the inhibitions in both federal and state Constitutions against deprivation of property rights and impairment of the obligation of contracts. Nor, the transaction here being controlled by the terms of this act of Congress, could it make any difference, we think, that no objection to the measure of damages there applied was made upon the trial below; this, for the reason that the carrier could not waive the provisions of the bill of lading. *G. & S. F. Ry. Co. v. Texas Packing Co.*, 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970; *Georgia, etc., Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *Phillips v. Ry. Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774; *Ry. Co. v. Houston Packing Co.*, 203 S. W. 1140.

[3, 4] Granting then, as must be done under the above conclusions, that the rights and obligations of these litigants were to be determined by the provisions of a federal law which required the terminal carrier to respond in such damages only as occurred upon its own line (*C. R. Fuel Co. v. I. C. Ry. Co.*, 178 Iowa, 878, 160 N. W. 353, and authorities there cited), does it follow, under the facts here developed, that appellee was precluded from any recovery at all? We think not, for this reason: Irrespective of where the burden of proof lay, the evidence below was sufficient to support a finding, not only that appellant received the shipment in good condition, but that all the damage occurred upon its own line. The rule upon this subject seems to be as follows:

"Where the goods are received by the initial carrier in good condition, they are presumed to remain so, and, where they are subsequently delivered to the consignee by the terminal carrier in a damaged condition, the presumption is that the injury occurred on its own line, and a prima facie case is made against the delivering carrier. Evidence that goods were in a damaged condition when tendered by a terminal carrier makes a prima facie case against it for the entire amount of damage, which is not overcome by simply showing that the goods were damaged to some extent, the amount of which is not shown, when they were delivered to it. The terminal carrier has the burden of separating the damage sustained before it received them from that inflicted while the goods were in its charge." *Moore on Carriers*, pp. 467, 468, and 469.

Neither is this presumption against the terminal carrier delivering goods in bad condition changed or modified by the fact that it may have transported them over its own line in the same through and sealed car in which it received them. *St. Louis, S. F. & T. R. Co. v. Fenley*, 118 S. W. 845; *Texas & N. O. Ry. Co. v. Brown*, 87 S. W. 785; *Gulf, Colorado & S. F. Ry. Co. v. Edloff*, 89 Tex. 454, 34 S. W. 414, 35 S. W. 145; *Leo v. St. Paul M. & R. Co.*, 30 Minn. 438, 15 N. W. 872; *Colbath v. Bangor & A. R. Co.*, 105 Me. 379, 74 Atl. 918, 134 Am. St. Rep. 569; *Beede v. Wisconsin C. R. Co.*, 90 Minn. 36, 95 N. W. 454, 101 Am. St. Rep. 390.

But even if the rule were held to be different in interstate shipments controlled by the terms of the Carmack Amendment, and that in such cases the party seeking damages against another than the initial carrier must allege and prove that the damage occurred upon the line of the one recovered against, the case here made is still thought to have been sufficient.

While the jury found that the car had a leaky roof when furnished by the initial carrier at Oswego, Kan., there is no proof whatever that the goods were in any manner damaged while on its line. There was, however, direct and undisputed testimony from the shipper himself and his two helpers that both the car and the onion sets were dry and in good condition when shipped; one of the latter saying:

"I stayed in the car all night after loading it. \* \* \* At the time the onions were loaded the day was fair. There was a slight shower, not enough to wet a fellow's shirt sleeves. The night after loading there was a good rain, but not a heavy one. I closed the door so that no rain came in."

After having thus left Oswego in good condition, by the uncontroverted statement of appellant's own agents and employes, the car was neither opened nor examined as to the condition of its roof, or on the inside at all, until Mr. Schulte at Houston discovered that its roof was leaking when he began unloading it on the next day after reaching its destination; indeed, there was no suggestion in the evidence that the car was even rained on after thus leaving Oswego in dry and good condition until after it came upon appellant's lines at Sherman, Tex. But at that point the evidence indicated a heavy rainfall on the day the car was detained there for four hours, while weather conditions at Houston were thus described by Mr. Schulte:

"I remember distinctly it rained the night before we unloaded this car, in Houston, Harris county, Tex. It rained very hard. \* \* \* People that morning had to go almost knee deep to get to the car line."

As to whether or not the entire damage could have been caused at Houston, he further testified:

"If the rain got on them the night of the 12th, would they be in the condition we found them on the 13th? Yes, they would. They would be in the condition we found them in. \* \* \* I do believe these onions, basing it on my experience, that I found in that condition on the morning of the 18th was due to the fact that they might have gotten damp or wet by reason of the rain on the night of the 12th. \* \* \* I claim and believe, basing it upon my actual experience, that the onions on the morning of the 13th was placed in the condition they were in by reason of the rain that happened on the night of the 12th."

There was other testimony of similar character upon the time it would take for the condition shown to ensue after the goods had become wet.

With the body of the evidence in this state, the jury simply found—not, as appellant argues, that even a part of the damage occurred upon the initial carrier's line—but that the onion sets were damaged by water "after" their delivery to it at the point of shipment, by reason of the car having a leaky roof. This finding, in view of the positive and undisputed testimony already referred to that no rain got in and no damage was done at Oswego, together with the absence of a single circumstance tending to show the occurrence of either between that point and the connection with appellant's lines at Sherman, is not only not inconsistent with, but should, we think, be interpreted as embodying, the conclusion that no damage resulted until after the terminal line had been reached.

Under the view taken of the entire case, it but remains to deduct from the amount recovered the excess of the market value at Houston over the invoice price at Oswego of the goods lost, with such further readjustment of other items and amounts as that change necessitates. Since the facts and figures relating to these conditions are all in evidence, that is easily done. 680 bushels of the onion sets were lost, which, at the invoice price of \$1.30¼ per bushel, amounted to \$885.70. Six per cent. interest per annum on this sum to the date of the trial

added \$31.75, making \$917.45. The proportionate part of the freight on the onions destroyed was \$140.78, while the costs of separating the damaged and undamaged goods equaled \$70.50, aggregating in all \$1,128.71. The judgment below will therefore be so reformed as to give the appellee judgment for the sum of \$1,128.71 with 6 per cent. interest per annum thereon from June 18, 1917, until paid, instead of \$1,653 and interest, and as so reformed will be affirmed.

Reformed and affirmed.

#### On Motion for Rehearing.

Both parties to this cause have filed motions for rehearing. After carefully considering them, that of appellee has been refused, while appellant's has been granted, upon the conclusion that in one particular it is well taken.

[5, 6] Upon a re-examination of the statement of facts, we conclude that, under a fair construction, and despite its meagerness in some respects, the evidence upon the whole was sufficient to raise the issue as to whether or not some of the damage to the onion sets occurred before they came upon appellant's line, and, if it did, to require a finding apportioning the same accordingly; by appropriate procedure during the trial, appellant requested the submission of these matters to the jury, but the court declined to do so, which action, we now think, without entering into a discussion of the testimony, constituted error for which the judgment must be reversed and the cause remanded for another trial.

The statements in our former opinion that "there was no suggestion in the evidence that the car was even rained on after thus leaving Oswego in dry and good condition until after it came upon appellant's lines at Sherman, Tex.," and that there were no circumstances tending to show the occurrence of either rain or damage between Oswego and a connection with appellant's lines at Sherman, being therefore somewhat inaccurate, must be modified as herein indicated.

In other respects, it is not deemed necessary to add anything to or take anything from our original opinion. Appellant's motion for rehearing is granted, our former judgment set aside, and the cause remanded.

JOHN E. MORRISON & CO. et al. v.  
MURFF. (No. 7817.)

(Court of Civil Appeals of Texas. Galveston.  
May 6, 1919. Rehearing Denied  
May 15, 1919.)

1. SALES  $\S$ 199—PASSAGE OF TITLE—INTENTION.

Where the purchaser of an automobile turned in his old car for \$500 of the price of about \$2,000, telling the seller to keep the new car for him, the purchaser, as agent, there was a complete sale passing title, despite the absence of change of possession and nonpayment of the balance of the price; the intention of the parties that title should pass being controlling.

2. EXEMPTIONS  $\S$ 16—AUTOMOBILE—FATHER AS "HEAD OF FAMILY."

In view of Const. art. 16, §§ 49-51, a divorced father, who had not been legally deprived of the custody of his son or daughter, with whom the son was living, except for temporary absences, and who contributed to the daughter's support, though she was living with her mother, was the "head of the family," within Rev. St. 1911, art. 3785, subd. 10, entitling him to exemption of his automobile from forced sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]

Appeal from District Court, Harris County; John S. Prince, Judge.

Suit by L. A. Murff against John E. Morrison & Co. and others. From judgment for plaintiff, defendants appeal. Affirmed.

Hutcheson, Bryan & Dyess, of Houston, for appellants.

Vinson Elkins & Wood and Wharton Weems, all of Houston, for appellee.

GRAVES, J. Morrison & Co., a corporation, levied an execution upon and had the sheriff of Harris county to take into possession for sale thereunder, a Davis Chummy roadster automobile belonging to Murff. Murff then filed this suit in the Fifty-Fifth district court against the company, making the sheriff a party, claiming the car levied upon to be exempt to him by virtue of article 3785, Revised Statutes of Texas, under sworn petition alleging that he was the head of a family, that he owned no other property of the same kind or character, that being the only automobile, carriage, or vehicle then belonging to him, and prayed for an injunction restraining both parties sued from selling the car so seized.

The defendants joined in a duly verified answer denying the allegations of Murff's bill, and in turn averring that he had been divorced from his wife, was no longer the head of a family as contemplated by our ex-

emption statutes, having no members of his family then living with him, and that he did then own other property of the same kind and character as that levied upon.

Issues having been thus joined upon the application for injunction, the district judge heard the evidence offered, and thereupon entered his order directing issuance of the writ as prayed for, and restraining the defendants from selling the car pursuant to the levy made. From this judgment they present this appeal.

Appellants contend that the order awarding the injunction cannot stand, because, they say, the undisputed evidence showed, both that Murff was the owner of two automobiles at the time of the levy, and that he was not then the head of a family within the spirit and meaning of the exemption statutes.

Since only one such vehicle is exempt to a family, or the head of a family, under subdivision 10 of the article invoked (3785), it follows that, if either claim thus made was established as a fact, the injunction should not have been granted.

It is quite true that the evidence is entirely free from dispute or controversy; but, after a most careful consideration of the whole of it, the court is unable to agree with appellants as to its legal effect.

[1] The question as to whether or not Murff owned at that time another automobile than the Davis car levied on depends upon the effect to be given a transaction of his with Mr. B. C. Caveness, the material facts concerning which may properly, we think, be thus stated:

By agreement of counsel for both litigants, this affidavit of Mr. Caveness was admitted in evidence as confirmatory of the detailed testimony of Murff:

"I, C. B. Caveness, upon being duly sworn, state upon oath, that on or about June 8, 1918, I came to Houston for the purpose of trading in an old Case car for a new car and I saw L. A. Murff, who was at that time selling cars in Houston. He had at that time a Case car at his place of business and I told him that I wanted that car and he agreed to sell it to me. I bought the car for \$2,050.00, and Mr. Murff took my old car in lieu of the first payment of \$500.00. At the time I bought the car I was engaged in the sawmill business near Huffsmith, Tex., and was unable to take the car back with me at that time, so I told him to keep it for me until I sent for it. Later on, I decided that I would get Mr. Murff to sell the car, so I wrote him to sell it for me for not less than \$1,750.00, as I did not want to lose more than \$300.00 on the deal.

"Mr. Murff still has the car in his possession as my agent and he has authority to sell it for me at the above price.

"I understand that the title to this car is questioned, and I am making this affidavit for the purpose of showing that the car is my car and not Mr. Murff's car. C. B. Caveness."



Murff himself, as a witness upon the stand, went fully into the details of the matter; but his version did not materially differ from that thus given by Caveness. He was engaged in selling automobiles in Houston, but had at that time in his possession only one other car than the Davis roadster levied upon, a new seven-passenger Case, the one Caveness so testifies he bought.

There is no suggestion of collusion between them, nor of fraud on the part of either. Both positively swore that the sale of this particular new car was actually agreed upon and made at the fixed price of \$2,050, \$500 of which was represented by the old Case car Caveness turned in at the time of the purchase in lieu of cash, leaving a balance due by him of \$1,550; that when he drove his old car to Murff's place he said: "Here is the old car. I want the new one, but I am not in a position to take it back with me now"—and left the new one in Murff's possession to be kept for him until he sent for it. Murff immediately sold the old car and appropriated the proceeds to his own use and benefit; his testimony as to their further understanding about, and disposition of the new one being thus:

"Q. I believe you stated that subsequent to that he asked you to sell that car for him. Is that correct; that is, the car that he purchased, the new Case car? A. Yes, sir.

"Q. Were you holding that as an agent for the purpose of selling that car for Mr. Caveness, or not? A. I was.

"Q. I believe you stated that Mr. Caveness was unable to take the car out and agreed that you might sell it as his agent, is that correct? A. That was my understanding of it; yes, sir. It has always been my understanding that, if a man came and picked out an automobile and paid \$500 on it, it was his car and subject to his instructions."

There was no change in these arrangements up to the time of this trial, the new car being still so in Murff's possession.

Such was the sum and substance of the transaction, without going into further and immaterial details. The new car was undoubtedly subject to the orders of Caveness and could have been taken out by him at any time; it was undisputedly the intention of Murff to sell, of Caveness to buy, and both thought that a sale of the machine had actually been made and that title had passed. It is true no particular time for payment of the balance of the agreed price was fixed, and that shortly after the purchase, when Caveness told Murff he did not then have the money to pay the car but, Murff offered to take his notes for the balance, which Caveness declined to give, saying that he wanted to pay cash for it and asking Murff to hold it a little while longer for him; but that would not uproot the accomplished fact that a sale had already been specifically agreed upon, that nothing further remained

to be done to, and that delivery of the subject-matter thereof had been effected by the turning over of possession of it by the buyer to the seller to be held subject to the former's order.

There is an utter absence throughout the entire body of evidence of any intimation even that full payment in cash of the balance of the purchase price before removal of the car, or in the alternative the giving of a note therefor, were made or understood to be conditions precedent to completion of the contract of sale, or that they were part and parcel of it. To now read that effect into the dealings of the parties anyway, as appellants insist should be done, would simply amount to the making of a new contract for them; and right there, we think, lies the clear differentiation between the case here presented and the line of authorities relied upon and so forcefully discussed in this court by counsel for appellants. The leading case perhaps, and the one seemingly presenting the principle upon which they all proceed, is *Lang v. Rickmers*, 70 Tex. 108, 7 S. W. 527, where our Supreme Court, through Justice Stayton, says:

"When the contract of sale is that the goods shall be paid for with cash, or notes executed by the vendee or a third person, the sale is on condition that the payment be made, and until this is done the title to the goods remains in the vendor, notwithstanding they may have come into the possession of the vendee, unless it appears that they were delivered to the purchaser with intent to waive the condition of payment."

Of similar import also are the following additional ones: *Orange Iron Works v. Stafford*, 178 S. W. 683; *Stevens v. Mattern*, 164 S. W. 451; *Continental Bank & Trust Co. v. Hartman*, 129 S. W. 179; *Slayton & Co. v. Horsey*, 91 S. W. 799; *Victor Safe & Lock Co. v. Texas State Trust Co. et al.*, 101 Tex. 94, 104 S. W. 1040; *Half Co. v. Jones*, 169 S. W. 906.

An examination of these cases discloses that in each and all of them the understanding and clear intention of the parties was that no sale should take place until the cash had been paid or the notes given; that is, that such conditions precedent constituted part of the contract itself, the very thing we have found lacking here. In all those instances the sale was therefore plainly a conditional one, and title did not pass until the condition had been complied with or waived, notwithstanding the fact, as Judge Stayton says in the portion quoted from his opinion in the *Lang Case*, possession may have in the meantime been given to the would-be purchaser.

But analogy does not exist between that class of cases and the one before us. Here the agreement to make the sale was specific, complete, nothing remained to be done to identify the property, and delivery was

actually effected; in other words, the sale was absolute, consequently the title passed. *Brewer v. Blanton*, 66 Tex. 532, 1 S. W. 572; *Carriage Co. v. Lusk*, 11 Tex. Civ. App. 493, 33 S. W. 154; *Bank v. Strickland*, 32 Tex. Civ. App. 91, 74 S. W. 588; *Leonard v. Davis*, 1 Black, 476, 17 L. Ed. 222; *Blanton v. Langston*, 60 Tex. 149; *Barrett v. Goddard*, 2 Fed. Cas. 911, No. 1046.

Neither does it make any difference that possession was not actually turned over to Caveness—the undisputed proof being that Murff was to keep the car for him until he called for it—under the principle thus stated by Judge Story in *Barrett v. Goddard*, supra:

"The principle \* \* \* is sound; that is, that a continuance of the possession of the vendor does not prevent the delivery being complete, if nothing further remains to be done on either side, and the possession is by mutual consent." "There is nothing in reason or principle to make the present case different, simply because the bales of cotton remained in the plaintiff's own warehouse. It was part of the bargain, that they should so remain, and a part of the consideration of the promise."

To the same effect are *Stone v. Davis*, 175 S. W. 772, and *Hopkins v. Partridge*, 71 Tex. 606, 10 S. W. 214.

Moreover, the intention of the parties themselves, to be ascertained from their express declaration, or from the circumstances presented, or both, is the dominating consideration in determining whether or not title has passed in the sale of a chattel. 25 Cyc. 278; *Whitsett v. Carney*, 124 S. W. 444.

Under these conclusions, it is deemed unnecessary to pursue the discussion further; we think title to the Case car had passed from Murff, which left him then owning only the one levied upon.

[2] But was his status toward a family such as to entitle him to claim it to be exempt? It is thought an affirmative answer should be given to this inquiry. Murff and his wife were divorced by judgment of the district court of Harris county, Tex., rendered two years and three months prior to this injunction hearing. They had two children, a son 15 and a daughter 17; but the decree did not award their custody to either parent. After the divorce the daughter lived continuously with the mother, and the son with the father for the greater portion of the time until he entered a naval training camp in February before the trial late in March, he having only been with his mother when his father was out of town, and almost his entire expenses during that intervening period, including his board and tuition at different schools, being paid for by his father; indeed, when the boy, then only 17 years old, left for the training camp, the father gave him enough money to last until his first pay day and sent another and final remittance to him there the latter part of

February. At the time this testimony was given, March 25th the government was furnishing everything the boy needed.

While, as before stated, the daughter did not live with her father subsequent to the divorce, he did contribute to her support also, saying, when asked in what way:

"In every particular that she has ever called on me. She has had a drawing privilege on my bank account since she graduated, and she has had the use of my automobile whenever she wanted, and everything else that I had that she wanted she has had.

"Have you ever sent anything out to her in the way of clothing and food since she has been living with her mother? A. Yes, sir.

"Q. State briefly. A. Nothing in the way of food, except fruit and such things. She goes to town, and I have an account at most all the stores in town, and she would go and buy her shoes and clothes when she was not working and pay for them with a check on my account."

It is thought these facts easily make a different case from that presented in *Hammond v. Pickett*, 158 S. W. 174, decided by this court, to which appellants refer. There a divorce from bed and board in favor of the wife had been granted by the courts of Louisiana, the decree giving her custody of the sole child of the marriage. Neither she nor the child had ever lived in Texas, nor were shown to have had any intention of doing so. Following the divorce, Pickett himself had moved to Texas, where he had since lived as a single man, and three years afterwards set up these foreign relations as constituting him the head of a family within the meaning of the exemption statutes and entitling him to protection as such; the court in part said:

"The custody of the child was awarded to the mother by the decree of divorce, and is a member of her family, and not of his. He has no family unless the wife or child constitute it, and the one has been freed from that relation by the decree of divorce, and the other, so far as he is concerned, by the judgment of the court which deprives him of its custody."

Surely the same principle could not alike rule that case and this, for here Murff had not been deprived of the legal custody of either of his children, and was actually living with and almost entirely supporting one of them except for his temporary absence in a training camp. It is true the court in the opinion quoted from further remarked that the exemption under our statute is not to the head of the family, but to the family, and that is the wording used. The distinction seems to us artificial, however, and to be wholly without point as applied to the situation here, because, when the provisions of the Constitution upon which the statute depends are looked to, the terms are found to be used interchangeably. Constitution of Texas, art. 16, §§ 49, 50, 51.

Our decisions have likewise generally so

treated them, and it has often been held, that—

"The mere moral and natural obligation to support and a condition of dependence and actual support are sufficient to constitute one the head of a family." *Wolfe v. Buckley*, 52 Tex. 641; *Lane v. Phillips*, 69 Tex. 240, 6 S. W. 610, 5 Am. St. Rep. 41; *Barry v. Hale*, 2 Tex. Civ. App. 668, 21 S. W. 783; *Smith v. Wright*, 13 Tex. Civ. App. 480, 36 S. W. 324; *Bank v. Oruger*, 31 Tex. Civ. App. 17, 71 S. W. 784.

And further that the divorced husband may still be the head of a family, despite the failure of his children to constantly live with him and his acquiescence in their temporary residence with their mother. *Zapp v. Strohmeier*, 75 Tex. 639, 13 S. W. 9; *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82; *Bahn v. Starcke*, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40.

In *Stone v. McClellan*, 36 Tex. Civ. App. 364, 81 S. W. 751, it is said that the right of a husband to the custody of and his liability for the support of his children constitutes him the head of a family, while in *Speer et al. v. Sykes*, 102 Tex. 451, 119 S. W. 86, 132 Am. St. Rep. 896, the Supreme Court, through Judge Brown, held that a divorce and award of custody of the children to the mother did not discharge the father's legal and moral obligation to support them, nor deprive him of the homestead right as the head of a family, even though his children lived apart from him. The holding in *Shook v. Shook*, 145 S. W. 682, in which a writ of error was denied, is of like effect.

Under these pronouncements, it is not perceived how the appellee here could properly have been denied the writ he sought, and the trial court's action in awarding it is in all things affirmed.

Affirmed.

# GULF & INTERSTATE RY. CO. OF TEXAS v. STEPHENSON et ux. (No. 7675.)

(Court of Civil Appeals of Texas. Galveston. March 14, 1919. Rehearing Denied March 27, 1919.)

## 1. TRIAL $\S$ 252(5)—INSTRUCTIONS—WANT OF EVIDENCE TO SUPPORT.

In railroad's condemnation proceedings the court properly refused a requested charge that the jury should not consider injuries, if any, which the owners sustained in common with the community in general, not peculiar to them, where there was no evidence that the community generally sustained injury.

## 2. EMINENT DOMAIN $\S$ 262(5) — HARMLESS ERROR—INSTRUCTION.

In a railroad's condemnation proceedings, where the jury found that the land was not increased in value by the taking of the part con-

demned, failure to require it to state the amount of any increase in the value of the rest of the owners' land was harmless.

## 3. EVIDENCE $\S$ 488—OPINION—LAND VALUES—QUALIFICATIONS OF WITNESS.

In a railroad's condemnation proceedings, an owner of the land, who had lived in the neighborhood for 31 years, and on his then farm for 25 years, having been deputy tax assessor in the neighborhood for several years, and well informed as to the nature of lands in the vicinity, held qualified to testify as to market value.

## 4. EVIDENCE $\S$ 474(18)—OPINION OF LAND-OWNER—VALUE.

In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify in his own behalf that the fair market value of the land taken prior to its taking was \$100 an acre.

## 5. EVIDENCE $\S$ 142(2)—VALUE OF LAND—SALES OF OTHER LAND.

In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify to sales of land four or five miles from his own, against objection that there was no showing whether the sales were for cash or credit, or whether there were any improvements on the lands sold, where the owner stated that there were no improvements on one tract sold, except a small box house, etc.

Appeal from Galveston County Court; George E. Mann, Judge.

Condemnation proceedings by the Gulf & Interstate Railway Company of Texas against Joseph E. Stephenson and wife, wherein defendants filed opposition and exception to the award of damages. From judgment for defendants on the jury's findings, the railway company appeals. Affirmed.

Terry, Cavin & Mills and Frank J. Wren, all of Galveston, for appellant.

Frank S. Anderson, of Galveston, for appellees.

LANE, J. The appellant, Gulf & Interstate Railway Company of Texas, instituted proceedings in the county court of Galveston county to condemn, for railroad purposes, certain land owned by appellees, Joseph E. Stephenson and wife, situated in Galveston county. Commissioners were duly appointed and qualified, and thereafter duly made their award, assessing damages against appellant in favor of appellees in the sum of \$150. In due time appellees filed their opposition and exception to said award, alleging, in substance, that the award was wholly insufficient, in that the land taken was of much greater value than the sum awarded, and that in addition to the loss of the land taken their lands on both sides of the strip taken were damaged, and that no special benefits accrued to them by reason

of the construction of the railroad of appellant. They pleaded their total damages at \$1,500.

Thereafter the cause was submitted to the jury upon special issues, as follows:

"First. What do you find, from the evidence, is the market value of the portions of the tracts taken by the railway company, as described in the petition?

"Second. Do you find, from the evidence, that the remainder of said tracts increased in value by the taking of portions by the railway company?

"Third. Do you find, from the evidence, that the remainder of the tracts was diminished in value by taking of the portions by the railway company; if so, what was the reasonable value, as shown by the evidence of such decrease?"

To the first question the jury answered, \$75 per acre, total \$240.75.

To the second they answered, No.

To the third they answered, \$259.25.

Upon these findings the court rendered judgment for appellees for the sum of \$500. From this judgment the railway company has appealed.

By the first assignment it is insisted that there was no evidence to support the findings of the jury that appellees were damaged in the sum of \$500, nor to support a finding for any sum greater than \$150.

We deem it unnecessary to set out the evidence, which we think was amply sufficient to support the findings of the jury, both as to the value of the land taken and the damage to the other lands of appellees. The assignment is overruled.

[1] The second assignment is as follows:

"The court erred in submitting special issue third of his charge to the jury for the reason that in said special issue he did not limit the jury to the damages sustained by the defendants peculiar to them, and did not instruct the jury that they were not to consider those injuries, if any, that the defendants sustained or received in common with the community in general, and which were not peculiar to them and connected with their ownership, use, or enjoyment of the particular parcels of land."

And the third assignment is a complaint of the refusal of the court to charge the jury at the request of appellant that they should not take into consideration such injuries, if any, which appellees sustained in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of his lands.

These assignments cannot be sustained. There is no evidence even remotely tending to show that the community generally sustained any injury whatever by reason of the taking of appellees' land, or by the construction of appellant's railroad, but all the evidence shows that the injuries complained of related to and were directly connected with the ownership, use,

and enjoyment by appellees of their farm lands, and no other land or property. Therefore the court properly refused the requested charge. *Dallas, P. & S. Ry. Co. v. Day*, 3 Tex. Civ. App. 353, 22 S. W. 538.

[2] By the fourth assignment insistence is made that the court erred in submitting to the jury the following question:

"Do you find, from the evidence, that the remainder of said tracts increased in value by the taking of portions by the railway company?"

—because the jury were not asked to find the value of such increase in the remainder of the tracts of land caused by the taking of portions thereof by the appellant, if any.

We think the court should have instructed the jury that, in the event they should find, in answer to the question propounded, that there was an increase in value, to state the amount of such increase; but, in view of the fact that the jury in answer to such question answered that there was no increase in the value of the land of appellees by reason of the taking of portions thereof by the railway company, the failure to require the jury to state the amount of such increase, if any they should find, became immaterial and harmless.

[3-5] By the fifth, sixth and seventh assignments it is insisted that the trial court erred in the following particulars: First, in permitting appellee J. E. Stephenson to testify as to the market value of the land taken by appellant for right of way purposes, because it was not shown that the witness was qualified to testify in that regard; second, in permitting said witness to testify, in his own behalf, that the fair market value of the land taken, prior to its taking, was \$100 per acre; third, in permitting the witness to testify to the sales of land situated four or five miles from the land involved in this cause, without showing whether or not such sales were for cash or credit, or whether there were any improvements on said lands so sold. None of these contentions can be sustained.

The witness Stephenson testified substantially that he had lived in the neighborhood of the lands involved in this cause for 31 years, and on the farm where he now lives for 25 years; that he has been deputy tax assessor in that neighborhood for several years, and well informed as to the nature of the lands in that vicinity; that the surrounding country was a sparsely settled farming community; that he knew of a sale of about 40 acres of land about four miles distant from his land, with no improvements thereon, except a small box house, at \$600 for the whole tract, and that he knew of the sale of 50 acres near the town of Bolivar at \$2,500 for the whole tract; that the 3.21 acres of his land taken by appellant was the highest and best land he had on his farm; that he cultivated the same before it was taken,

and raised thereon cotton, corn, sweet potatoes, Irish potatoes, vegetables, etc.; that the land taken was worth \$100 per acre; that no tract of land, a high tract such as that part taken, could be bought in that community for \$100 per acre; that the ridge along and upon which the railway right of way was laid constituted the best land he had; that the portion taken was under a high state of cultivation, and that he has raised thereon 510 pounds of Island cotton to the acre; that he had offered Fahey & McCarthy \$100 per acre for a tract of land near Elm Grove, close to the bay, and they refused his offer.

We think this testimony was properly admitted.

We find no such error committed in the trial of the cause as should cause a reversal of the judgment of the trial court; therefore said judgment is in all things affirmed.

Affirmed.

#### SYKES et al. v. FISCHL. (No. 7686.)

(Court of Civil Appeals of Texas. Galveston.  
April 16, 1919. Rehearing Denied  
May 8, 1919.)

#### 1. PLEADING $\S$ 248(3) — AMENDMENT — NEW CAUSE OF ACTION — CHANGE OF VENUE.

Where original petition was amended only to the extent of changes due to a different stage having been reached in the progress of negotiations for exchange of properties, held, that different causes were not stated, and court did not err in overruling defendants' plea asking a transfer of cause to the county to which they had moved between the time of filing of original and amended petitions.

#### 2. APPEAL AND ERROR $\S$ 843(4) — REVIEW — MATTERS NOT ESSENTIAL TO DISPOSITION OF CASE.

Since defendants' plea of privilege cannot be sustained, it is unnecessary to consider whether it was waived.

#### 3. ESCROWS $\S$ 12 — TIME WHEN INSTRUMENT TAKES EFFECT.

A deed placed in escrow to be delivered on compliance with specified conditions becomes effective on the fulfillment of the conditions, though there is no actual delivery.

#### 4. ESCROWS $\S$ 18 — DELIVERY — RELATION BACK.

Where delivery is to a third person in escrow for delivery to grantee upon compliance with specified conditions, a delivery as directed relates back so as to divest the title of the grantor from the first delivery.

#### 5. INJUNCTION $\S$ 194 — EXTENT OF RELIEF — TITLE AND POSSESSION OF LAND.

In suit to restrain defendant from interfering with plaintiff's use and possession of property received from defendants in exchange for her own, where defendants disputed plaintiff's

title and sought to recover it for themselves, it was not improper for the court to render judgment against defendants for title and possession.

#### 6. INJUNCTION $\S$ 194 — RELIEF — RESTRAINING SUIT AT LAW.

Where defendants threatened to forcibly re-enter and take possession of property deeded to plaintiff in exchange for plaintiff's property, and rescind trade for sole reason that they were unsatisfied with their bargain, after having lived upon plaintiff's property for 11 months, it was a proper exercise of the court's power in suit to restrain such acts to enjoin the institution of further suits by defendants.

Appeal from District Court, Austin County; M. C. Jeffrey, Judge.

Suit by Mrs. Mollie Fischl against Frank Sykes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. A. Barlow, of Taylor, for appellants.

C. G. Krueger, of Bellville, and Mathis, Teague & Mathis, of Brenham, for appellees.

GRAVES, J. On August 24, 1915, the parties to this litigation executed, each to the other, separate 30-day option contracts for the exchange between them of their respective properties located in the towns of Sealy and Taylor, Tex. Appellants, who were defendants below and owned the Taylor property, agreed to give a difference of \$3,000 between it and that at Sealy owned by the appellee, who was plaintiff, to be represented by their notes in that amount secured by a vendor's lien on the Sealy property.

What are deemed the material further developments of this transaction are thus stated in the trial court's findings of fact:

"(5) I find that on the 4th day of September, 1915, the defendants abandoned the above option and entered a new contract, and made, executed, and acknowledged a deed conveying the Taylor property to plaintiff.

"(6) I find that on the 4th day of September, 1915, that plaintiff abandoned the above option and entered into a new contract—made, executed, and acknowledged a deed conveying the Sealy property to defendants.

"(7) I find that the consideration moving for these deeds was the exchange of the properties described. The defendants promised to pay the plaintiff \$3,000 difference, for which they executed their notes, secured by a vendor's lien on the Sealy property.

"(8) I find that upon the making of said deeds they were delivered to C. C. Glenn, of Sealy, Austin county, Tex., under and by virtue of an agreement by the parties that said deeds should be delivered by the said Glenn to the respective grantees therein at such time and when title to said property should be passed upon and found to be good.

"(9) I find that the titles to said respective properties were ascertained and found to be

good; that such ascertainment and findings were accomplished within a reasonable time after the execution of said deeds; and that the delivery of the deed by C. C. Glenn to plaintiff was in accordance with the agreement under which the same was delivered to him to be delivered to plaintiff.

"(10) I find that the title to the Sealy property was ascertained, found to be good, and defendants apprised thereof prior to any effort on their part and prior to any expressed intention on their part to rescind or withdraw from the trade hereinabove specified.

"(11) I further find that the defendants employed W. A. Barlow, an attorney of Williamson county, Tex., to pass on the title of the Sealy property; that the plaintiff furnished an abstract of title to the said Barlow; and that said attorney, on the ——— day of November, 1915, wrote an opinion and addressed it to the defendant Frank Sykes and mailed a copy thereof to C. C. Glenn, attorney for Mrs. Mollie Fischl, plaintiff herein, in which opinion he said there were three objections to the title of said property, specifying same, and that when the said three objections were met that in his opinion the title to said property would be in the plaintiff, Mrs. Mollie Fischl, and a deed from her properly drawn and properly executed would vest a fee-simple title in the party to whom the deed was made.

"(12) I find that said objections as outlined by Mr. Barlow were met, and that thereafter Mr. Barlow forwarded the abstract of title to the Sealy property to the said C. C. Glenn without further comment or objection, and that the said Glenn delivered to the plaintiff herein the deed from the defendants to the Taylor property and offered the deed from Mrs. Mollie Fischl to the Sealy property to the defendants herein, who refused same; that up to the time of the delivery and offer of delivery of the respective deeds to the respective parties no objection had been made to the said C. C. Glenn as to the defendants desiring to rescind the trade.

"(13) I find that the defendants removed from the Taylor property in August, 1915, to the Sealy property, and went into possession of the Sealy property and used, occupied, and claimed the same as their home for 11 months; that the defendant Frank Sykes caused a large sign to be erected on the Sealy property as follows: 'Sykes Hotel'; that the said Sykes became a citizen of Austin county, and paid his poll tax and voted in Austin county, Tex.; that possession of the Taylor property was delivered to plaintiff at the time of the removal of the defendants therefrom; and that the defendants recognized and treated the Taylor property as the property of plaintiff, as shown by the correspondence introduced in evidence.

"(14) I find that defendants were not prompted in their desire and effort to rescind said trade by any dissatisfaction with the title thereto, but, after having lived upon the Sealy property for 11 months, they became dissatisfied with their bargain, and for that reason alone attempted to rescind the trade.

"(15) I find that the defendants threatened to forcibly re-enter said Taylor property, take possession thereof from plaintiff, and that they would have done so but for the restraining order of this court enjoining them from so doing."

Mrs. Fischl originally filed this suit in July, 1916, in the district court of Austin county, where all the parties then resided, and obtained from the judge of that court, sitting in chambers, an order restraining Sykes and wife from interfering with her use and possession of the Taylor property, and appointing a receiver to take charge of the Sealy property during the pendency of the suit.

Upon final trial before the court without a jury, amended pleadings having been filed by both parties, judgment was entered in plaintiff's favor against the defendants for title and possession of the Taylor property, perpetually enjoining them from either interfering with her possession and control thereof, or from bringing or causing to be brought in any of the courts of the state any suit for the recovery of, or which might either affect or cast a cloud upon plaintiff's title to, the Taylor property, and establishing and continuing in force the vendor's lien specified in the deed to the Sealy property from her to them, referred to in the above-quoted seventh finding. From such judgment Sykes and wife appeal.

[1] Their first contention is that the trial court erred in not sustaining their plea of privilege asking the transfer of the cause to Williamson county, where they lived at the time it was filed. The theory underlying the interposition of this plea was that plaintiff, in her amended petition, filed after their removal from Austin county to Williamson, had sued them upon a different cause of action from that declared upon in her original petition, which entitled them to be sued thereon in the latter county. After a careful comparison of the two petitions, we are unable to agree that different causes of action are stated, but think that essentially one and the same is declared upon in both. It is true that a different stage had been reached in the progress of the transaction between the contending parties at the time the amended pleading was filed, in that, among other changes, as the court finds, the option contracts had meanwhile been abandoned, and new ones evidenced by the mutually exchanged deeds of September 4th had superseded, title had been approved, and the purchasers had severally taken possession of their newly acquired properties; but, modified only to the extent of these ad interim changes, the original agreement for the exchange of their different places upon the same terms and conditions as the final judgment reflected, together with the rights arising therefrom, and nothing else, were substantially embodied in each petition.

[2] Since, under this view, the plea of privilege could in no event have been good, it is obviously unnecessary to consider whether

or not it was waived through failure of appellants to sooner or differently place themselves in position to complain of the order overruling it.

Through a number of additional assignments attack is made upon the above-copied fact findings as being unsupported by proof, and in some instances by pleading as well. In response to them, the statement of facts has been carefully examined, with the result that each and all of the findings is considered to be so clearly justified as to make it unnecessary to here repeat or reiterate the evidence upon which they are based. The several findings quoted are accordingly adopted by this court, with correction of an inaccuracy of statement in the fifth and sixth, which should recite that the option contracts were merged into and carried out through the new ones rather than that they were abandoned.

[3-5] The judgment is further assailed as being unsupported by the pleadings and proof in several different particulars, but under the case as made we conclude that no error in this respect is shown. It is well settled that a deed placed in escrow to be delivered on compliance with specified conditions becomes effective on the fulfillment of the conditions, though there is no actual delivery; likewise, where delivery is to a third person in escrow for delivery to the grantee upon compliance with specified conditions, a delivery as directed relates back so as to divest the title of the grantor from the first delivery. Accordingly, inasmuch as appellants here disputed the appellee's title and sought to recover it themselves, it was not improper for the court to render judgment against them for title and possession, and also to adjudge that all of their right, title, and interest be divested out of them. *Ketterson v. Inscho*, 55 Tex. Civ. App. 150, 118 S. W. 626; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.

[6] Neither was its injunction against the institution of further suits, under the facts here pleaded and proved, beyond the proper exercise of the court's power. In the case of *Simpson v. McGuirk*, 194 S. W. 979, it is said:

"The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction."

Continuing, the court says:

"It is also a well-settled rule that a court of equity may take cognizance of a controversy, determine the rights of all the parties, and grant the relief requested to meet the ends of justice in order to prevent a multiplicity of suits. 1 *Pomeroy's Equity Jurisprudence*, § 248 et seq. Under the foregoing provisions of our statute and well-established principles of equity, the

district courts of this state, it occurs to us, have power to grant injunctions restraining any party or parties from entering into a combination and a conspiracy to harass and annoy a citizen in the possession of his property, and especially when that property is the homestead of himself and family, and to prevent them from filing a multiplicity of suits against him for the purpose of harassing and annoying him, and also to enjoin a party or parties from doing anything to interfere with his possession and enjoyment of the premises when the facts in the petition make it appear that such interference will do him irreparable injury."

See, also, *Railway Co. v. Dowe*, 70 Tex. 1, 6 S. W. 790; 22 Cyc. 790 and 810.

From what has been said it follows that, in our opinion, all assignments should be overruled, and the judgment affirmed. That order has accordingly been entered.

Affirmed.

# FIRST NAT. BANK OF NAVASOTA v. TODD. (No. 7689.)

(Court of Civil Appeals of Texas. Galveston.  
April 10, 1919. Rehearing Denied  
May 8, 1919.)

## 1. APPEAL AND ERROR ⇐1068(3)—HARMLESS ERROR—INSTRUCTIONS.

Where the evidence was of such a conclusive character as to make it doubtful whether any other conclusion could reasonably have been reached by the jury, it was harmless error for the court in its instructions to place the burden of proof upon the wrong party.

## 2. CHATTEL MORTGAGES ⇐157(2)—FAILURE TO FILE—BONA FIDE PURCHASERS—BURDEN OF PROOF.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5655, providing that chattel mortgages shall be void as against subsequent mortgagees or lienholders in good faith unless forthwith deposited and filed in the office of the county clerk, the burden is upon the subsequent mortgagee or lienholder to show by a preponderance of the evidence that he was a bona fide purchaser or holder for value.

## 3. CHATTEL MORTGAGES ⇐157(2)—FAILURE TO FILE—BONA FIDE PURCHASER—"CONSIDERATION."

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5655, providing that chattel mortgages shall be void as against subsequent mortgagees or lienholders in good faith unless deposited in the office of the county clerk, proof by subsequent mortgagee of the execution of his mortgage together with the fact that a note was taken for a less amount than an old one evidencing the same indebtedness, and that an extension was granted, was not sufficient to show that the subsequent mortgagee was a bona fide mortgagee for value, there being no showing that the extension was not a mere incidental; such an extension not constituting a new consideration (citing Words and Phrases, First and Second Series, Consideration).

4. CHATTEL MORTGAGES  $\Leftarrow$ 157(2) — UNRECORDED MORTGAGE—BONA FIDE MORTGAGEE—EVIDENCE.

In action by a subsequent chattel mortgagee to foreclose a mortgage, where a prior mortgagee intervened, evidence held to warrant a finding that plaintiff was not a bona fide subsequent mortgagee for value, although the mortgage was executed in renewal of an older mortgage, and although the mortgagee advanced the fees or charges for preparing the instrument, and although mortgagor was credited with a balance left over of \$1.60.

Appeal from District Court, Grimes County; E. A. Berry, Judge.

Suit by the First National Bank of Navasota against R. A. Barker, in which J. S. Todd intervened. From a judgment for intervenor, plaintiff appeals. Affirmed.

Lewis & Dean, of Navasota, for appellant.  
T. P. Buffington, of Anderson, and I. W. Stephens, of Ft. Worth, for appellee.

GRAVES, J. The First National Bank of Navasota, appellant, sued R. A. Barker upon two notes and to foreclose a mortgage dated January 20, 1916, given to secure them on certain steers, cows, horses, and mules. Pending the foreclosure, in order to prevent waste or loss, the court ordered the steers sold, and the proceeds were placed in the registry of the court to await the outcome of the litigation.

Both of the bank's notes were payable June 1, 1916, the smaller of them, \$441.80 in amount, bearing date of December 9, 1915, while the larger one, being for \$5,416.20, was of even date with the mortgage declared upon, January 20, 1916. This mortgage described the steers involved as branded A B on the left side.

Subsequent to the sale of the steers, J. S. Todd, the appellee here, intervened in the cause, claiming a superior lien to that of the bank upon the steers and to the proceeds of their sale by virtue of his ownership of three mortgages given by Barker to Evans-Snyder-Buel Company, a corporation, in security for notes aggregating \$6,134.81, the mortgages being dated, respectively, January 5, January 19, and February 5, 1916.

Defendant Barker did not answer, judgment going against him as by default, and, while the bank made no answer to intervenor Todd's allegations of prior right to the amount then on deposit in court, the cause was tried as between these two rival claimants thereto before a jury on special issues. Upon the jury's answers being returned, the court entered judgment in the bank's favor against Barker for the full amount of the debt and foreclosure of the mortgage lien declared upon by it against him, subject, however, to

the lien of the intervenor upon the sum so on deposit, \$2,411.50, which was foreclosed as being superior to the bank's claim, and the amount was ordered paid over to the intervenor. From that judgment the bank presents this appeal.

[1] In logical sequence the first fact issue below was whether the steers described in the bank's mortgage of January 20, 1916, were the same as those described in the one held by intervenor of January 5th preceding. This inquiry was embodied in the second special issue submitted to the jury, and was answered by a finding that the steers covered by both instruments were the same. Irrespective of where the burden of proof in establishing that fact lay, testimony relating to the matter being freely offered by both litigants, the overwhelming weight of all the evidence touching it so amply supported the jury's finding as to make it doubtful whether any other conclusion could reasonably have been reached. In these circumstances, error, if any, in advising the jury which of the parties had the laboring oar in inducing that conclusion, obviously became immaterial and wholly harmless. With the evidence upon the point of the conclusive character stated, it is not deemed necessary to reiterate it here, but merely to make the jury's finding our own. The assignments criticizing that part of the court's charge dealing with the burden of proof as to the identity of the steers are accordingly overruled without more extended discussion.

[2] The steers then being the same, since at least the first of the intervenor's three mortgages was also undisputedly prior in point of time to the one held by the bank, the sole remaining question in the contest for priority of liens was whether or not the bank was a bona fide purchaser or holder for value; and upon that issue it undoubtedly, we think, had the burden of proof, so that, under the developments of the case, the trial court's instruction that the bank had the burden of proving its case by a preponderance of the evidence was correct. Indeed, after the identity of the steers covered by the mortgages of both parties had been established, that became "the whole case," or, as just suggested, the only remaining issue between them.

Upon this feature of the case the jury found, in response to special issue No. 1, that at the time the bank took its mortgage of January 20, 1916, upon the cattle therein described, it parted with nothing of value in consideration, or part consideration, for the mortgage. If, under the facts here involved, the effect of that finding was to leave the bank without the pale of protection as a bona fide lienholder for value, and there is supporting evidence, it is thought the judgment should be affirmed.



Our statute (article 5655, Vernon's Sayles' Statutes) provides in substance that all such chattel mortgages as those here under consideration shall be void as against subsequent mortgages or lienholders in good faith, unless forthwith deposited and filed in the office of the county clerk of the county where the property is then situated, or the mortgagor resides. In construing that article and the one immediately preceding it, article 5654, the Supreme Court, in *Bowen v. Wagon Works*, 91 Tex. 385, 48 S. W. 872, held that there is a distinction between the terms "creditors" and "purchasers" as used in these statutes, that the former includes only persons whose claims are, upon certain conditions, charged by law as specific liens on the property involved, such as holders of attachment, execution, judgment, landlord, and mechanic's liens, while the latter embraces all persons who have fixed their liens by contract or act of the parties, such as holders of trust deeds or mortgages, and that in these last-mentioned instances the mortgagees must show that they paid an additional valuable consideration for the lien at the time of its execution, a mere pre-existing debt alone not being sufficient. Of similar import also is the holding in *Turner v. Cochran*, 94 Tex. 485, which further furnishes direct authority for our previously stated conclusion as to the burden of proof being upon the bank here, in this paragraph quoted from page 486 of that opinion (61 S. W. 923, at page 925):

"We therefore conclude that the burden of proof was upon those claiming under the junior mortgage to show the facts which would give it precedence over the prior deed."

[3] Now the record here disclosed two uncontroverted facts: First, that both of the bank's notes represented pre-existing debts; second, that while the small note for \$441.80 was not changed as to its maturity, the larger one for \$5,416.20 was, contemporaneously with the taking of the mortgage of January 20, 1916, extended so as to become due June 1, 1916, instead of November 1, 1915, as theretofore. But there is no evidence whatever that this extension was contracted for as the consideration for the giving of the mortgage, or that it constituted the motive or inducement to give that security. There is completely wanting any suggestion of that sort; the testimony merely showing that upon the same date with the mortgage a new note, this one for \$5,416.20, was taken for a less amount than an old one, evidencing the same indebtedness and made to mature on like date with the small note, June 1, 1916.

No witness testified that the mortgage of January 20, 1916, was executed by Barker

to obtain an extension of time for the payment of what he owed the bank; but, on the contrary, the testimony of the officers and agents of the bank strongly tended to show the execution of this mortgage was demanded by the bank and executed by Barker solely to better secure an old pre-existing debt of the bank, because the bank felt insecure after learning that Barker had disposed of some of the property covered by the previous mortgage, and that the extension of time was a mere incident of and not the consideration for, the transaction.

It has been directly held that extension under such circumstances will not constitute a new consideration. *Ingenhuett v. Hunt et al.*, 15 Tex. Civ. App. 248, 39 S. W. 310, writ of error refused, 42 S. W. xvi. See also 1 Pars. Cont. 355; *Words and Phrases*, vol. 2, p. 1445, col. 2. And, if this change in the maturity date of the larger note did not furnish the requisite additional consideration for the mortgage declared upon, there was scant showing otherwise even tending to indicate the existence of one. As already intimated, the mortgage itself was but the continuation of two previous ones, both of which had been given as security for an indebtedness maturing November 1, 1915, the reduced amount of which was carried into and evidenced by the new note for \$5,416.20 so made to mature on June 1, 1916, this recitation appearing upon its face:

"This mortgage is given in renewal of and continuation of a mortgage heretofore executed by me to said bank, which is now on file in the office of the county clerk of Brazos county, Tex., and is hereby in all things renewed and continued in full force and effect. The changes made in said mortgage are due to the sale of 61 head of steers sold to Stinson & Batts and additional cattle added for which mules and horses were traded, and I hereby solemnly swear that I own the said cattle and have the same in my possession as aforesaid."

The prior mortgage thus referred to bore date of August 20, 1915, and likewise recited that it also was in renewal and extension of a still older one. Since all of these antecedent mortgages were indisputably shown to have secured the same indebtedness as did the one here involved, only in a larger amount, the recitation in the latter that the changes therein made were due to the sale of 61 head of steers, thereby reducing the amount of the indebtedness it secured, is very strongly persuasive of what we have said to be indicated in the testimony of the bank's witnesses, that the effort to obtain better security for an already existing debt rather than the release of any security formerly held really brought about the execution of the mortgage of January 20th. Indeed, that no

security already held either actually was or was intended to be surrendered in the taking of the new mortgage is practically conceded by the active vice president of the bank. After first saying that it had been suggested to them that possibly Mr. Barker did not still have all the cattle on which they then had a mortgage, and that he sent one of the bank's directors to make an investigation of the cattle he did have, he further testified with reference to this mortgage of January 20th, and why it was executed:

"I do know it was our intention to take a mortgage on everything owned by Mr. Barker."

"This mortgage was given in renewal of a previous mortgage. We drew the second mortgage up to show just what Mr. Barker had at that time."

"So far as I know, the property covered by the second mortgage was more than that covered in the first one. I only took his word about his owning 110 head of cows. I did not go out and count them myself. I did not have any one to make an investigation to find out about it."

When these statements are read in connection with the provision in the renewal mortgage itself that the previous one was not released, but "continued in full force and effect," it is difficult to see how the alleged release of any formerly held security could be said to have formed any part of the consideration for the mortgage sued upon.

The only other suggestion offered is that the fees or charges for preparing the instrument were advanced to Mr. Barker, and that he was credited with a balance left over of \$1.60; but concerning both of these items the bank's vice president admitted:

"Yes; these were just incidental expenses which accrued in the execution of the second mortgage."

It therefore conclusively appears that these small matters were mere incidents of the transaction, and not the moving cause of the contract.

[4] If, then, there was neither such extension of time, relinquishment of formerly held security, nor payment of or credit for money as amounted to a consideration, the conclusion easily follows that the jury were not without warrant in finding that the bank parted with nothing of value in taking the mortgage.

This conclusion, under the deductions already made, determines the merits of the appeal and renders further discussion, as well as the statement of additional details of the case, unnecessary. All assignments are accordingly overruled, and the judgment is affirmed.

Affirmed.

**STEMMONS et al. v. DALLAS POWER & LIGHT CO. (No. 8227.)**

(Court of Civil Appeals of Texas. Dallas.  
April 19, 1919. Rehearing Denied  
May 24, 1919.)

**EMINENT DOMAIN §318—CONDEMNATION OF LAND FOR USE OF "POLES"—TOWERS.**

In a proceeding to condemn land for the use of electric power lines, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 1283c and 1283d, the provision of the latter article that lines shall be constructed upon suitable "poles" means either wood or metal poles, and in view of the land being subject to overflow, and the necessary carrying of numerous wires and the distance between poles, the statute must be construed to include towers as well as "poles."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Pole.]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by L. A. Stemmons and others against the Dallas Power & Light Company. Judgment for defendant, and plaintiffs appeal. Judgment affirmed.

Leake & Henry, of Dallas, for appellants. Templeton, Beall, Williams & Callaway, of Dallas, for appellee.

RAINEY, C. J. This is an appeal from a judgment dissolving a temporary injunction. Appellee, the Dallas Power & Light Company, sought to condemn property of appellants, having the right to do so under the statutes for the purpose of "constructing, creating, operating, and maintaining thereon an electric transmission line or lines, consisting of a variable number of wires, and in the said application or petition for condemnation it was stated to be the purpose of the appellee to condemn a right of way over appellants' said land for the erection of three steel towers of large proportions and other structures." It was further stated in the application for condemnation that the towers proposed to be constructed would be of steel, with open or lattice work construction, and placed in the center of three square tracts of land, two of said tracts being 50 feet square, and the other tract being 25 feet square, and the said towers at the base occupying a space of not exceeding 20 square feet, said towers to be protected by driftwood protectors of wood with open or lattice work construction, not over 20 feet in height, triangular shape, and so placed within said 50-foot squares as to protect said towers in times of high water. Appellants' petition charged that appellee's application for condemnation made no proposal for the construction of the condemnor's line through the appellants' property upon poles, as permitted or authorized by law, but

only for the construction of structures of highly disadvantageous character upon the premises of appellants, and appellants pray that an injunction issue.

"The defendant filed its answer, which was marked 'Defendant's Plea in Abatement,' in which it set forth in the existence of the condemnation proceedings, not specifically denying that the purpose of the condemnation was as alleged in the plaintiffs' petition. The answer averred an award by the said commissioners appointed by the county judge, a deposit of double the amount of the award, and the filing of a bond for the payment of costs, as required by the condemnation statute, all of which, it was averred in the answer, had occurred prior to the issuance and service of the temporary writ of injunction; that the said proceeding was pending in the county court, where it had been regularly instituted, and that the plaintiffs' sole and only remedy was by proper appeal from the award of the commissioners; that plaintiffs had a full, adequate, and complete remedy at law in the condemnation proceeding, which said remedy was exclusive of all other remedies; that if it should be determined, upon final decision and judgment in said condemnation proceedings, that the right to condemn the property in question did not exist, then the defendant, which was plaintiff in the condemnation proceedings, would be required by law to surrender possession of the property taken by it, and the county court would be required by law to so adjudge, and to order a writ of possession for the property aforesaid in favor of plaintiffs, who were defendants in said condemnation proceeding; that the condemnation proceedings so instituted and pending between the parties in the county court constituted a complete bar to plaintiffs' suit and right to injunction in this cause; that the land of plaintiffs, over which the right of way was sought to be condemned, was river bottom land, subject to periodical overflows by high water, lying in a state of nature, uncultivated and unoccupied. The answer prayed that the suit be abated, and the district court not take any further jurisdiction or cognizance of the cause than to enter an order abating and dismissing the same."

On trial, under the rule to show cause, without hearing other evidence than the reading of the bill and answer, the court rendered judgment dissolving the temporary injunction and dismissing the cause from the docket of the court.

The trial court's finding of facts, which we adopt, is as follows:

"(1) Defendant is a corporation duly incorporated under the laws of this state for the purpose of generating, manufacturing, transporting, and selling gas, electric current, and power, and among its corporate powers has the right of condemnation conferred upon it by law.

"(2) On the — day of September, 1918 and prior to the filing of plaintiffs' petition herein, and after the parties had failed to agree on the damages, defendant caused condemnation proceedings to be instituted in the county court of Dallas county, at law, for the purpose of condemning a right of way through plaintiffs' lands in order to construct and maintain a transmission line along and over said right of way.

"(3) In pursuance of said condemnation proceedings the judge of said county court appointed three disinterested freeholders as special commissioners to assess the damages resulting from the condemnation of said land.

"(4) Said commissioners duly qualified as such, and appointed a day and place of hearing, notifying plaintiffs thereof, and said commissioners met at the time and place so appointed, and proceeded to hear the parties. Plaintiffs appeared before said commissioners at said time and place, and filed and urged their claim for damages, and said commissioners heard the evidence, and assessed plaintiffs' damages at the sum of \$450.

"(5) Thereafter, on the — day of September, 1918, defendant here (plaintiff in the condemnation proceedings) deposited in said county court, subject to the order of plaintiffs (defendants in said condemnation proceedings), the sum of \$450, the amount of said award, and in addition thereto defendant then deposited in said county court the further sum of \$450, to be held exclusively to secure all damages that may be awarded or adjudged against it in said condemnation proceedings, and paid all court costs awarded against it in said proceedings, and on the day and date aforesaid defendant filed its bond in said county court in the sum of \$200, conditioned that it will pay all further costs that may be adjudged against it in said condemnation proceedings, either in the court below or upon appeal. Plaintiffs filed their opposition to the report of said commissioners and said condemnation proceedings, and now and were at the time of the filing of the petition and the issuance of the temporary writ of injunction herein pending in the county court of Dallas county, at law.

"(6) Plaintiffs filed their petition in this suit, and secured the issuance of a temporary writ of injunction herein on two alleged grounds, that said condemnation proceedings were void, to wit: (a) Because defendant proposed to use towers or metal structures instead of wooden poles for the purpose of constructing and erecting said transmission line over said right of way; and (b) because the city of Dallas had neither permitted nor required defendant to institute said condemnation proceedings.

"(7) The judge of the Fourteenth district court by his order caused a temporary writ of injunction to be issued, pending hearing, returnable to this court, and on the — day of September, 1918, the parties appeared and the hearing was duly had.

"(8) Defendant filed and presented its answer by way of a special plea, urging that the temporary writ of injunction be dissolved, and that the suit be dismissed because of the pendency of said condemnation proceedings, contending that such proceedings were exclusive of all other rights or remedies, and that the plaintiffs were relegated to such condemnation pro-

ceedings for any relief to which they might be entitled.

"(9) Plaintiffs' petition contained no allegations of value either of the land sought to be taken or amount of damages thereto. Said petition was partly sworn to positively and partly on information and belief. The allegations of defendant's answer were sworn to positively and unequivocally. Both the petition and answer are here referred to for a full statement of the contents of each respectively.

"(10) No evidence was introduced, but oral argument was heard. In the argument plaintiffs admitted the pendency of the condemnation proceedings (so called), but claimed same were void because (1) defendant proposed to erect towers or metal structures in lieu of wooden poles, and (2) because, the land being situated in the city of Dallas, said city must either permit or require such condemnation proceedings as a condition precedent. Defendant contended that since condemnation proceedings were pending in the county court at the time of and prior to the filing of the petition in this suit, and since said county court had exclusive original jurisdiction of the subject-matter involved, and plaintiffs had an adequate remedy at law in that court, the condemnation proceedings aforesaid constituted, therefore, a complete bar to this suit. Defendant further contended that, if such condemnation proceedings were void, it would be presumed that the county court would so find and adjudge."

**Appellants' first assignment of error is:**

"The court erred in rendering judgment dismissing the cause in the absence of any testimony having been adduced upon the trial of the cause."

**Appellee's counsel makes the following statement:**

"As found by the trial court, no evidence was introduced, but oral argument heard. The attorneys representing the respective parties in this cause were the same as the attorneys representing said parties in the condemnation proceedings in the county court, and said attorneys were, of course, familiar with all the facts relating to said condemnation proceedings, including the state of the pleadings therein. Every finding of fact by the court is abundantly and amply sustained by the pleadings filed and by the admissions, statements, and declarations of appellants' counsel in the argument on the hearing to dissolve the temporary restraining order. There was no contention or controversy in regard to the facts whatever. The facts were admitted, and repeatedly gone over and referred to and discussed by appellants' attorney in his argument before the trial court. Appellants' contention in the court below was twofold: First, that, under the statute authorizing condemnation proceedings, such proceedings, instituted for the purpose of erecting steel or metal towers instead of wooden poles, were void; and, second, that, since the proceedings affect land situated within a municipal corporation, either the permission of the city to proceed, or its requirement that such proceedings be had, was a condition precedent. Appellants seem to have entirely abandoned the second position on appeal. There was absolute-

ly no contention made or point raised on the hearing of this cause as to the sufficiency of the pleadings or the regularity of the proceedings pending in the county court, except as above stated. All the facts being admitted and agreed to by the parties in oral argument, there was no occasion for the introduction of testimony. On the declarations and admissions contained in the pleadings, as well as declarations and admissions of counsel at the hearing, the trial court filed findings of facts."

If the plea to the jurisdiction was right-fully sustained there was no error in dismissing the case. The question of jurisdiction of the district court depends upon whether or not the county court had taken jurisdiction of the condemnation proceedings to condemn appellants' land for the purpose of erecting a transmission line.

Our statutes (Vernon's Sayles' Civil Statutes) granting power to erect such lines and condemn land for that purpose provide, as set out in article 1283c, as follows:

"Shall have the power to generate, make and manufacture, transport and sell gas, electric current and power to individuals, the public and municipalities for light, heat, power and other purposes, and to make reasonable charges therefor; to construct, maintain and operate power plants and substations and such machinery, apparatus, pipes, poles, wires, devices and arrangements, as may be necessary to operate such lines at and between different points in this state; to own, hold, and use such lands, rights of way, easements, franchises, buildings and structures as may be necessary for the purpose of such corporation."

And article 1283d provides that—

"Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation. \* \* \* The manner and method of such condemnation shall be the same as is provided by law in the case of railroads, pipe lines, telephone and telegraph lines; provided, that such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet."

Article 1283c, it will be noted, provides for constructing, maintaining, and operating power plants, and such machinery, apparatus, pipes, poles, wires, devices, and arrangements as may be necessary to operate such lines at and between points in the state. This power is very broad and comprehensive, and appellants' counsel contend that the language used in article 1283d, viz. "provided, that such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet," requires wooden poles to be used instead of steel towers. We do not concur in this contention. The Century Dictionary defines a "pole" to be "a piece of wood (or metal) of much greater height than thickness"; hence we see a pole

may be constructed of metal. The statute provides that the line shall be constructed upon "suitable poles," in the most approved manner. When we consider the object of the construction of said line, the land being subject to overflow, the number of wires to be carried, and the distance between points to be reached, the evident intention of the Legislature was to construct said lines so as to make them strong and durable, and of such material and in such manner as was necessary for the purpose intended. The use of towers, as defined, being suitable, is embraced by the word "pole," and meets the requirements of the statutes; and therefore we hold that, as the statutes give to the county court absolute jurisdiction of condemnation proceedings, and the application nor the facts neither showing that the appellee was not a trespasser in endeavoring to get the land condemned, the district court was without jurisdiction to grant the injunction, and jurisdiction was vested in the county court to pass on all matters pertaining to such proceedings. *Johnston v. O'Rourke & Co.*, 85 S. W. 501; *Ellis v. Railway Co.*, 203 S. W. 172.

The judgment is affirmed.

# UNION CENT. LIFE INS. CO. v. SHORT. (No. 6223.)

(Court of Civil Appeals of Texas. San Antonio.  
May 14, 1919.)

## 1. INSURANCE ⇨198(4)—LIFE INSURANCE— RECOVERY OF PREMIUM—FRAUD.

Though agent represented to plaintiff that premium would be \$270 and plaintiff did not know that policy provided for an annual premium of over \$337, where no concealment or fraud was used when application was made and the policy followed the terms of the application, plaintiff, who could read, but who kept the policy and application for about a year before examining them, cannot recover from the company the amount paid; he having actually received protection under the policy.

## 2. INSURANCE ⇨198(4)—LIFE INSURANCE— FRAUDULENT REPRESENTATIONS OF AGENT.

In such case, the rule is that fraudulent representations of the agent, to be available to insured, must take place at the time of the delivery of the policy, at which time the contract is consummated, and a preliminary representation of insurer's agent that the premium would be a certain amount, when in fact the premium on the policy as delivered was more, was not fraud.

Appeal from Guadalupe County Court; J. B. Williams, Judge.

Suit by H. E. Short against the Union Central Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Wurzbach & Wirtz, of Seguin, for appellant.

Dibrell & Mosheim, of Seguin, for appellee.

FLY, C. J. Appellee sued appellant to recover the sum of \$270, alleged to have been paid on an insurance policy on his life, which he alleged he had been induced to apply for and procure through the fraud of an agent of appellant. The cause was tried by jury, and, upon responses to special issues submitted by the court, judgment rendered in favor of appellee for \$298.39.

[1] It was claimed by appellee that the agent of appellant induced him to take out a \$10,000 life policy, permitting other policies to lapse in order to insure with appellant, upon the representation of the agent that the amount of the premium would be \$270 each year, and that he afterwards discovered that appellant was claiming an annual premium of \$337.10. The jury found that the agent represented to appellee that the premium would be \$270; that appellee did not know at or before his acceptance of the policy and the execution of a note for the premium that the policy provided for an annual premium of \$337.10; that appellee used ordinary care in signing the application for insurance, which showed a premium of \$337.10, and exercised ordinary care in accepting a policy of insurance which provided for an annual premium of \$337.10.

Through propositions under the first assignment of error it is contended that under the law, as appears in articles 4953 and 4954 of the Revised Statutes of Texas, the policy of insurance and the application for insurance constituted the entire contract between appellant and appellee, and the agent could not, by any representations, vary the terms of the contract as contained in the application and policy; that appellee was guilty of negligence in not discovering the fraud, if any, and was not damaged because he had been insured for \$10,000 for the \$270. These propositions are offered under an assignment of error which assails the action of the court in refusing to instruct a verdict for appellant.

Article 4953 provides that—

"Every policy of insurance issued or delivered within this state on or after the first day of January, 1910, by any life insurance company doing business within this state, shall contain the entire contract between the parties, and the application therefor may be made a part thereof."

Article 4954 has reference to rebates and discrimination. Under the allegations of fraud and the evidence of appellee, we doubt the applicability of the two articles to this case. There was nothing in the evidence that tended to show that appellee knew that

he was contracting for any but the regular premiums.

The evidence in this case shows that appellee signed an application for insurance in which was written in plain figures the premium of \$337.10; that the policy with the application attached was given to him by the agent. On the envelope the amount of the premium, \$337.10, plainly appeared, as it did on the policy and application. Appellee testified that he did not discover the amount of the premium for about a year after he applied for and obtained the policy. The jury has found that appellee did not know what was in the application and policy, although they were in his possession for months, and the case will be considered as though that is an established fact.

There has been some contrariety of opinion on the question as to whether the insured is not estopped from setting up errors in an application and policy, the former of which he signed and both of which he had in his possession for a long time. In a Connecticut case (*Ryan v. Life Ins. Co.*, 41 Conn. 168, 19 Am. Rep. 490) it was held that it was inexcusable negligence to sign an application for a life risk without reading or having it read. The court said:

"It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not."

So it was held in *Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Walker v. Ins. Co.*, 46 Kan. 312, 26 Pac. 718; *Briggs v. Ins. Co.*, 65 Mich. 52, 31 N. W. 616; *Ins. Co. v. Freedman*, 159 Mich. 114, 123 N. W. 547, 32 L. R. A. (N. S.) 293; *Cuthbertson v. Ins. Co.*, 96 N. C. 480, 2 S. E. 258.

No matter what representations may have been made to appellee before the application was made, it is not pretended that any device, concealment, or fraud was used at the time the application was made, and the policy followed the terms of the application. Appellee knew how to read, and should, in the exercise of ordinary diligence, have read the application. It is true that appellee testified in his direct examination as though the application was blank when he signed it, but on the cross-examination he admitted that portions of it were filled, and it is clear from the intimate matters about himself and wife written in the application that the information was furnished by appellee. The only mistake complained of was as to the amount of insurance in another company. The written parts of the application were done in the same ink. He not only failed to even look at policy or application, but kept them for about a year before examining them.

The distinction is drawn between cases

where the fraud or mistake is such as to render the policy void ab initio, and those not rendered void, and the insured has actually received protection under the policy. In the first instance it is held he is not bound, but in the latter that he is. The insured in the latter case, it is held, is estopped to set up fraud, and is chargeable with notice of the contents of the policy.

[2] The evidence fails to show that the representation as to the amount of the premium was made at the time the application was signed or the policy delivered. The rule is that the fraudulent representations must take place at the time of the delivery of the policy. As held in *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705:

"A person is negligent in receiving an article and accepting it without any examination thereof, wholly relying on representations, whether fraudulent or not, made at or previous to the time when the article was contracted for or ordered."

Appellee did not testify that the representation as to the premium was made at the time he signed, and the only words spoken when the policy was delivered were, "There is your policy." The facts in the *Bostwick* Case were quite similar to the facts in this case, and that case has been followed in a number of cases. *Fidelity Co. v. Dierks Lumber Co.*, 183 Mo. App. 637, 114 S. W. 55; *Hutchinson v. Palmer*, 147 Ala. 517, 40 South. 339; *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Voss v. Ins. Co.*, 137 Wis. 492, 118 N. W. 212.

The contract between appellant and appellee was not consummated until the policy was delivered and the first premium paid, or secured. The proceedings prior to that time were merely preliminary, and it is clear that if appellee had died before the policy was delivered, the amount of it could not have been recovered. Appellee knew full well that, under the circumstances of the case, there was no contract of insurance until the policy was delivered and the note executed. Although appellee testified that the agent "represented that this was my policy as agreed on," it is evident that was a mere conclusion, as the only language he testified to was, "There is your policy." He does not claim that the agent told him that the application stated that the premium was \$270, nor that the premium expressed in the policy was \$270. It is singular that a party insured would consummate a contract without even glancing at it on account of what an insurance agent had represented before that time. As said in *DeUinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538:

"It is plain that no deceit was practiced here. It was pure negligence in the defendant not to

have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it."

The representations, so-called by the agent were not fraudulent representations, but were merely promises, and fraud cannot be predicated on a promise or a prophecy. No one ever told appellee that the policy contained a provision for an annual premium for \$270, and it was gross and inexcusable negligence for appellant to enter into the contract without reading it.

This is not a case of an illiterate party asking relief from the consequences of his failure or inability to read the contract, but, on the other hand, the appellee is an educated man, belonging to a learned profession. As said by the Supreme Court of South Dakota in *Farlow v. Chambers*, 21 S. D. 128, 110 N. W. 94:

"Neither is it one in which the signer was prevented from ascertaining the truth by subterfuge or some fraudulent device."

In the case of *Railway v. Rhodes*, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A. (N. S.) 490, it was held:

"We take it the rule is well established, that, in the absence of any incapacity to read, or any trick or artifice resorted to to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound by its express terms and conditions therein contained, and that he cannot set up his own carelessness and his own indolence as a defense, and, because he failed to make use of the faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are."

To the same effect are *McNinch v. Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Magee v. Verity*, 97 Mo. App. 486, 71 S. W. 472, and *Wallace v. Railway Co.*, 67 Iowa, 547, 25 N. W. 772.

No reason for relying upon the statements of the agent of appellant is alleged in the petition or given in the evidence, and the reason that appellee was too busy to read the application or policy simply accentuates his gross negligence. He had time to make arrangements about securing the first premium by a promissory note and to write and sign that instrument.

The evidence is clearly insufficient to sustain the verdict, and the judgment must, as a matter of law, be reversed; and, as it must be presumed that appellee has testified to all matters known to him, it would be useless to remand the cause for another trial.

The judgment is reversed, and judgment here rendered that appellee take nothing by his suit and pay all costs in this behalf expended.

ROBERTS et al. v. ARMSTRONG.  
(No. 7656.)

(Court of Civil Appeals of Texas, Galveston.  
April 3, 1919. Rehearing Denied  
May 8, 1919.)

1. APPEAL AND ERROR  $\S$  1097(1) — SUBSEQUENT APPEAL—LAW OF CASE.

On subsequent appeal, Court of Civil Appeals will follow law as announced by decision on former appeal, where it has not been reversed or modified by Supreme Court.

2. APPEAL AND ERROR  $\S$  1198 — RETRIAL — LAW OF CASE.

On retrial, lower court is required to obey orders of appellate court in remanding case.

Appeal from District Court, Wharton County; Sam'l J. Styles, Judge.

Suit by R. A. Armstrong against B. O. Roberts and another, executors. Judgment for plaintiff, and defendants appeal. Affirmed.

Hall & Barclay and Kelley & Hawes, all of Wharton, for appellants.  
Gaines & Corbett, of Bay City, for appellee.

LANE, J. This suit was originally brought by R. A. Armstrong against G. C. Gifford, deceased, to recover the sum of \$2,835.90, alleged to be due for services rendered by him in procuring a purchaser for certain lands of Gifford. While the suit was pending, Gifford died, and the executors of his will, Annie Gifford and B. O. Roberts, were made parties.

The suit was based on a contract between appellee, Armstrong, and Gifford, deceased, dated February 21, 1913, by which appellee, in consideration of \$1,000, was given an option on 531 acres of land owned by Gifford, situated in Wharton county, until the 1st day of August, 1918, at \$60 per acre. The contract provided that the consideration should be one-fifth in cash and the balance in one, two, three, and four years, and appellee was given the right to sell the land on or before August 1, 1913, on the same terms of his option, and Gifford agreed to make a deed to the vendee. It was also provided that if appellee sold the land for more than \$60 an acre the profit should go to him, but that he should take a proportionate amount of the notes to have a lien secondary to those taken by Gifford. To pay the \$1,000 cash to be paid for the option, appellee was to convey to Gifford nearly 4 acres of land in the town of Wharton.

Afterwards, on August 9, 1913, some dispute having arisen as to whom the rents of the 531 acres should belong, another contract was drawn, providing that possession of the land should not be given until January 1, 1914, and that the land in Wharton should

be reconveyed to appellee, and it was further provided:

"And whether said deed be made to said Armstrong, or to some other person at his direction, the right of said Armstrong shall exist to claim said rents and crops, and to sue for and recover the same in his own name, provided he, or the vendee, or both, were entitled to a deed under said contract which would have passed the rents and crops, and as if a deed had been executed thereunder, in accordance with the terms of said contract, and the right of said Gifford to claim and retain said rents and crops shall exist if such right existed under said contract, without regard to the language of the deed now to be made to the said Armstrong or his order, or the terms stipulated in said deed."

It is provided in the last contract that the changes as to the interest not beginning until January 1, 1914, or other matters therein, should in no way affect the rights of the parties under the original contract as to rents and crops, but that their rights should rest strictly on the terms of the original contract.

This is the second appeal of this case. Upon the first trial judgment was rendered for the executors, Annie Gifford and B. C. Roberts. On appeal to the Court of Civil Appeals for the Fourth District, at San Antonio, in an opinion by Chief Justice Fly, reported in 196 S. W. 723, that judgment was, on the 6th day of June, 1917, reversed. In that opinion, after stating the nature of the case and result of trial, it is said:

"When there is no agreement to the contrary, the rents and crops from land that has been purchased passed with the deed to the land. *Porter v. Sweeney*, 61 Tex. 213; *Hearne v. Lewis*, 78 Tex. 276, 14 S. W. 572. There was no deed made until August 15, 1913, when the land was conveyed to G. A. Harrison by G. C. Gifford. That deed was made in pursuance of the contract of August 9, 1913, between appellant and Gifford, in which it was agreed that a deed would be made in which rents would not be mentioned, and that no interest would be charged on the notes until January 1, 1914, at which time possession was to be given the vendee. It was also provided that the status of the rents should be as fixed by the contract of February 21, 1913. It follows that the making of the deed did not, under the terms of the contract, affect the rents, and the rights of the parties remain as they were fixed by the original contract.

"With these preliminary matters settled, the only issue in this case is: Did the making of the contract carry with it the obligation upon the part of the owner of the land, when he made the deed, to convey the crops then growing upon the land, but which were not in existence when the contract was executed? In other words, would specific performance of the contract involve the duty to convey the crops with the land? Upon the answer to that question depends the decision of this case.

"When a deed is given, and the vendor remains in possession of the premises, he is treated as is the mortgagee in possession of mort-

gaged property, and will be held liable to the vendee for the rents and profits of the property. The reason for this rule in the case of a mortgage is that the title still remains in the mortgagor, and he is entitled to the usufruct of the land, and in the case of the vendor the title has passed from him to the vendee and he is entitled to the rents and profits. *Mortgage Co. v. Gill*, 8 Tex. Civ. App. 358, 27 S. W. 835; *Devlin, Real Estate*, par. 862c; *Siemers v. Hunt*, 28 Tex. Civ. App. 44, 65 S. W. 62, 66 S. W. 115; *Hotel Co. v. Gammon*, 41 Tex. Civ. App. 1, 91 S. W. 337.

"Under the terms of the original contract, appellant had the right to a deed for the land at any time that he complied with the terms of the contract, and that deed would be a clear-cut conveyance of the land, without any reservation, except what might arise from the contract. Under the plain unequivocal language of that contract, nothing could be reserved in connection with the land, except the vendor's lien to secure the purchase-money notes, and that arises only by implication. The evidence establishes beyond question that a purchaser was found before August 1, 1913, who was ready, willing, and able to comply with the terms of the contract. This fact was recognized by G. C. Gifford, who was ready and willing to give the deed, as he had contracted to do, if he could reserve the crops growing on the land. No such reservation had been made in the contract, and the execution of the deed will date back to the date of the contract. No doubt appellee would have been authorized to have severed the crops from the land at any time before, but when he did not do this he was compelled under the terms of the contract to execute a deed to the land which would embrace everything attached to the soil and all unpaid rents, that were not due at the time when the deed was executed or should have been executed. *Devlin on Real Estate*, par. 862a; *Keesee v. Sloan*, 69 Miss. 369, 11 South. 631; *Allen v. Hall*, 66 Neb. 84, 92 N. W. 171; *Scott v. Sloan*, 72 Kan. 545, 84 Pac. 117; *Siemers v. Hunt*, 28 Tex. Civ. App. 44, 65 S. W. 62, 66 S. W. 115.

"It has been held that, where the owner of land conveys it before the accrual of rent, he cannot recover the proportionate amount that would be due at the time of delivery of the deed. *Hammond v. Thompson*, 168 Mass. 531, 47 N. E. 137. A person who has contracted to sell land, but who retains the title and possession, is held to the same liability for rents and profits as a mortgagee in possession. *Ashurst v. Peck*, 101 Ala. 499, 14 South. 541.

"When the contract of February 21, 1913, was executed, appellant had an equitable title to the land, and when that was perfected, and became a legal title, appellant was entitled to the rents and profits of the land. The facts in the Alabama case herein cited are similar to those in this case, and the court said: 'It is a familiar rule, declared in many of our decisions, that the relation of a vendor of lands, who has retained the title and bound himself to convey on payment of the purchase money to his vendee, is analogous to that of a mortgagee to mortgagor. All the incidents of a mortgage attached to it. We hold, therefore, that such vendor in possession of the lands is accountable to the vendee or his assignee for



rents and profits to like extent that a mortgagee in possession is accountable.' This rule applies, not only to rents, but to growing crops, and a deed will convey such crops, unless there is a special reservation of them in the deed. Dev. Real Estate, par. 980b; *Newburn v. Lucas*, 128 Iowa, 85, 101 N. W. 730; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; *Porter v. Sweeney*, 61 Tex. 213.

"When the deed was made by Gifford to Harrison, the crops would have passed to him, but for the agreement that appellant should have the rights given by the contract of February 21, 1913. Under our view of the case, appellant would be entitled to recover the value of the crops received by Gifford, deducting therefrom the amounts received by the tenants and the amounts advanced in raising the crop and gathering them.

"It is argued that it was not in contemplation of the parties that the crops should pass with the land, because, when the contract was made, the crops had not been planted; but it was known to the parties that the sale of the land might be consummated at any time before August 1st, when the crops were either matured or well-advanced. They were charged with knowledge that the crops growing when the deed was executed, being attached to the soil and undisposed of, would be a part of the realty. The crops could have been severed from the land before that time, either by gathering, sale, or mortgage; but they had not been so detached, and the presumption is that it was the intention of the parties that the crops should go, as the law directs, with the land. It may appear to be a hardship to the owner of the land that the fruits of his labor should thus be taken; but he could have protected himself by contracting to retain the crops, or by selling the same. This court is not in possession of sufficient facts upon which to render judgment, and the judgment will be reversed and the cause remanded."

On the 5th day of November, 1917, mandate was issued ordering the reversal of the judgment of the trial court and the remanding of the cause for further proceedings in accordance with said opinion. On November 21, 1917, after said reversal and remand, appellants, Mrs. Annie Gifford and B. C. Roberts, filed their amended answer, in which, after alleging substantially the same matter as in their answer upon which the case was first tried, they made additional allegations:

First, that neither Armstrong nor Harrison tendered in writing the performance of that part of the contract of February 21, 1913, assumed by Armstrong; second, that as Armstrong was not entitled to the rents involved under the contract of February 21, 1913, he is not entitled to recover the value of the same under the contract of August 9, 1913; third, "that the last clause of said contract of August 9, 1913, is in direct contradiction of the intention of the parties in entering into said agreement, as clearly expressed in the preamble and in the next preceding clause of said agreement, because it seeks to change the rights of the parties as they existed under the contract of Feb-

ruary 21, 1913, which was manifestly contrary to the intention of the parties in executing said agreement."

"That if the last clause of the contract of August 9, 1913, should be held to prevail over the prior clauses of said contract, thereby changing the rights of the parties as they existed under the contract of February 21, 1913, then defendants say that such contract was without consideration as to the said G. C. Gifford, and was a nudum pactum and not binding on him, and that the provisions in the last clause of the contract of August 9, 1913, to the effect that the right of Armstrong should exist to claim said rents and crops, and to sue for and recover same in his own name, provided he or the vendee, or both, were entitled to a deed under said contract of February 21, 1913, which would have passed the rents and crops, and as if a deed had been executed thereunder in accordance with the terms of said contract, cannot be enforced, because it is based on a fictitious state of facts which never existed, and attempts to confer upon plaintiff a remedy based upon an abstract proposition, and one to which he was not entitled under the contract of February 21, 1913, in case the same was breached by Gifford."

Appellee Armstrong filed his supplemental petition November 21, 1917, and therein demurred generally and specially to all and each paragraph of appellants' answer, on the grounds that the Court of Civil Appeals at San Antonio, by its decision herein set out, had passed upon, decided and settled all the matters and things both of fact and law now sought to be put in issue by the amended answer of appellants, and that said issues were by said decision decided adversely to the contention of appellants, and that said decision is the law governing the disposition of the cause. He again alleged the execution of the contracts involved in this cause, and also alleged that under the terms of said contracts he was entitled to the value of the rents of the land in question collected by Gifford, for which he prayed judgment.

When the case was called for trial the court sustained demurrers to the entire answer of appellants, and, as it had been agreed by all parties that the rent involved in the suit was the sum of \$2,635.89, the judgment was rendered in favor of Armstrong for such sum. From this judgment Mrs. Gifford and B. C. Roberts, executors, have appealed.

The effect of all of appellants' assignments is that the trial court erred in sustaining appellee's demurrers to their answer, and in refusing to hear evidence on any issue presented therein, except on the question of amount of rents collected by Gifford. The contention under these assignments is that new issues, not decided on the former appeal, were raised by the amended answer, and that the court erred in sustaining appellee's demurrers, and thereby refusing to permit appellants to offer evidence in support of such new issues.

We have reached the conclusion that the amended answer of appellants, filed after the rendition of the decision of the San Antonio court, set out herein, presents no new legal defense to appellee's suit, not set up in their original answer, upon which the case was first tried. In our opinion, the pleadings of the parties originally and now present but one material question, and that is whether or not a purchaser under the terms of the contract of February 21, 1913, was entitled to the rents of the land involved for the current year 1913?

[1] Whether the issues were thus limited or not, we have concluded that all of the material questions raised by appellants on this appeal were decided adversely to them on the former appeal, and we conceive it to be our duty to follow the law as announced in that decision until the same has been reversed or modified by the Supreme Court.

[2] On the last trial the trial court could not do otherwise than to obey the orders of the Court of Civil Appeals remanding the case. We think its decision was the law of the case. We therefore follow that court, and decline to enter into a detailed reconsideration of the questions presented, all of which were expressly or necessarily decided on the former appeal, except as to the amount collected by G. C. Gifford as rents, and this matter was ascertained and properly disposed of in the last trial of the case.

The judgment of the trial court is affirmed. Affirmed.

#### LEE v. BUIE. (No. 8139.)

(Court of Civil Appeals of Texas. Dallas.  
May 24, 1919.)

#### 1. APPEAL AND ERROR $\S$ 690(6)—RECORD—OMISSION OF EVIDENCE—EXPERT OPINION.

In an action on notes given for the price of a piano, testimony of the buyer as to the market value of the instrument will not be held inadmissible on the ground the buyer was not an expert, but that his testimony was mere hearsay; the bill of exceptions failing to rebut the presumption that the buyer qualified himself to testify as an expert.

#### 2. APPEAL AND ERROR $\S$ 1050(1)—HARMLESS ERROR—EXPERT TESTIMONY.

The improper admission of alleged expert testimony as to value was harmless error, where two other witnesses testified to the same fact of value, one without objection.

#### 3. SALES $\S$ 38(4) — PURCHASE BY WRITTEN CONTRACT—WANT OF CONSIDERATION OR MISREPRESENTATION.

The right of a buyer to urge want or failure of consideration when sued on promissory notes given for the price, or to urge misrepresentation concerning the character or kind of the goods inducing the purchase, when relied on, is not

limited because the transaction took the form of a written contract.

Appeal from Dallas County Court; W. L. Thornton, Judge.

Suit by Frank A. Lee against A. C. Buie. From judgment for defendant, plaintiff appeals. Affirmed.

George Sergeant, of Dallas, for appellant. Short & Field, of Dallas, for appellee.

RASBURY, J. Appellant sued appellee in justice court for debt evidenced by promissory notes and to foreclose chattel mortgage lien on a piano, in part payment of which the debt was incurred. Appellee defended the suit on the ground of a want or failure of consideration resulting from the false representations of appellant, upon which appellee replied, and which were that the piano was a new John Church piano of first-class workmanship and material, while in truth it was not a John Church, but a Dayton piano, a much cheaper and inferior instrument, and instead of being a new piano was a long-used, secondhand, and much inferior one, of no greater value than \$75, the sum paid when purchased. There was trial de novo before jury in county court, to which the case had been appealed from the justice court, the issues of fact being submitted to the jury in form of the usual interrogatories for special verdict, and upon the answers to which judgment was entered for appellee.

[1] After introducing testimony tending to show that the piano was a secondhand one, counsel elicited from appellee, while testifying in the case, in substance, that, while he had never engaged in the piano business, he had made inquiries concerning the market value of secondhand pianos; had made it a point to learn the value of such pianos, and that their value was \$75. The bill of exception recites that the witness first stated that he knew the values. It does not appear from the bill that following such statement counsel for appellant availed himself of his right to test the competency of the witness on voir dire, but objected after the facts had been elicited on the ground that the testimony disclosed that appellee was not an expert, and was merely stating his opinion based on hearsay. "A common method of proving market value is by the inference of competent observers or experts personally acquainted with the market in question." 16 Cyc. 1142. The evidence discloses that the witness was not an expert. Whether he was a competent observer may be argued either way from his testimony, since in one statement he says he inquired concerning such values, which probably indicates hearsay information, while at another point he says he made it a point to learn the

market value. He was not tested on the latter statement. He may have learned the value so testified to in such manner as to make the evidence admissible, as, for example, being cognizant of or witnessing both sales and purchases. The matter so standing, we are not prepared to say that the evidence was inadmissible, especially since the bill of exceptions fails to rebut the presumption that the witness qualified himself to testify in the capacity assumed. *Hardin v. Sparks*, 70 Tex. 433, 7 S. W. 770; *Tex. & Pac. Ry. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 489.

[2] Further, in reference to the fact sought to be established, two other witnesses testified to the same fact, one without objection, which is sufficient to support the finding of the jury, for which reason the testimony of appellee, if erroneous, does not constitute reversible error.

Appellant requested and the court refused to peremptorily direct verdict for the former. It is claimed that the court's action was error, for the reason that appellee before purchasing had ample opportunity to inspect the piano, and was not prevented by appellant from doing so, while the defects complained of were patent and discoverable by the exercise of reasonable diligence. We have carefully examined the evidence respecting the representation made concerning the character, make, and condition of the piano by the salesman and that concerning its actual character, make, and condition as testified to by appellee's witnesses, and have reached the conclusion that an issue of fact for the determination of the jury was presented, and that a finding either way by the jury would have been supported thereby.

[3] Appellant makes some contention that because the purchase and sale was by express contract it affected appellee's right to make the defenses urged. We do not understand that the right to urge a want or failure of consideration or to urge misrepresentation concerning the character or kind of a given commodity inducing purchase, when relied upon, is in any way limited, because the transaction took the form of a written contract.

Finding no reversible error in the record, the judgment is affirmed.

#### CLARK v. TAYLOR et al. (No. 7670.)

(Court of Civil Appeals of Texas. Galveston.  
Feb. 27, 1919. Rehearing Denied  
March 27, 1919.)

#### 1. APPEAL AND ERROR §707(2)—RECORD—JUDGMENT—RIGHT TO EXCESS ON SALE OF LAND.

In an action to foreclose vendor's lien against the vendee and purchasers of part of

land, where there was a judgment against the vendee for the amount due on notes sued upon and against the other defendants foreclosing the lien, but providing, in event the land should sell for more than sufficient to satisfy plaintiff's judgment, for payment of the excess to the "defendants," it cannot be said on appeal that the direction to pay the excess to the "defendants" was not proper, where there was no pleading between the defendants, and the only allegation as to the ownership of the land was an allegation in plaintiff's petition that part of the tracts had been sold by the vendee to the other defendant, and where there is no statement of facts with the record.

#### 2. JUDGMENT §251(2) — CONFORMITY TO PLEADING AND ISSUES—RELIEF BETWEEN DEFENDANTS.

In a suit to foreclose vendor's lien against the vendee and others who had purchased part of the land from the vendee, in the absence of any pleading of equities by either defendant, or any pleading or proof as to the amount he was entitled to receive of the excess proceeds of a sale of the lands, the court could not do otherwise than direct that such excess proceeds be paid to the defendants jointly.

#### 3. JUDGMENT §21—DEFINITENESS.

In action on notes and to foreclose vendor's lien against the vendee and others who had purchased part of the land from vendee, a judgment against the vendee for the amount due upon the notes and against all of the defendants foreclosing the lien, the decree foreclosing the lien and ordering the sale of the land directing the officers making the sale, in event the lands should sell for more than sufficient to satisfy the judgment, to pay the excess to the "defendants," was not indefinite nor uncertain, so as to require that it be reversed or reformed.

#### 4. JUDGMENT §736—RES JUDICATA—MATTERS NOT IN ISSUE—RIGHTS BETWEEN DEFENDANTS.

In an action on notes and to foreclose a vendor's lien against the vendee and others who had purchased part of the land from the vendee, a judgment against the vendee for the amount due on the notes and against all the defendants foreclosing the lien, directing that any excess proceeds be paid to the "defendants," in the absence of any pleading or proof as to the amounts each was entitled to receive of the excess proceeds of a sale, will not preclude either of the defendants from having their equities in any such excess proceeds thereafter adjudicated.

Error from District Court, Jackson County; John M. Green, Judge.

Suit by W. E. Taylor against H. J. Clark and others. Judgment for plaintiff, and H. J. Clark brings error. Affirmed.

W. E. Lessing and W. L. Eason, both of Waco, for plaintiff in error.

J. H. Hooker, of McGregor, and Cross & Rogers, of Waco, for defendants in error.

PLEASANTS, C. J. This appeal is from a judgment rendered in a suit brought by W.

E. Taylor against H. J. Clark and J. H. Lindsey and wife, Addie L. Lindsey. Other parties were interpleaded, but for the purpose of this opinion it is only necessary to state the case and the result of the suit as between the parties above named.

Plaintiff Taylor sued to recover upon five promissory notes executed by Clark in part payment of four tracts of land described in the petition, and to foreclose a vendor's lien upon the land. The petition alleges that Clark had sold two of the tracts of land to Lindsey and wife, and they were made parties for the purpose of foreclosing plaintiff's lien as against them upon the two tracts of land sold to them.

The defendant Clark answered plaintiff's suit by a general demurrer and general denial. The answer of the defendant J. H. Lindsey contains only a general demurrer and general denial. No answer was filed for Mrs. Lindsey. There was no pleading of the defendants against each other.

The trial in the court below without a jury resulted in a judgment in favor of plaintiff against defendant Clark for the amount due upon the notes sued upon, and against all of the defendants foreclosing plaintiff's vendor's lien. The decree foreclosing the lien and ordering the sale of the land is in the usual form, and directs the officers making the sale, in event the land shall sell for more than sufficient to satisfy plaintiff's judgment, to pay the excess to the "defendants."

Under sufficient assignments of error plaintiff in error assails the judgment on the ground that, Clark being the judgment debtor, all of the excess for which the land might be sold over and above the amount sufficient to satisfy plaintiff's judgment should be paid to him, and there was neither pleading nor evidence to authorize the payment of any part of the excess to defendants Lindsey and wife.

[1, 2] These assignments cannot be sustained. As we have before stated, there was no pleading as between Clark and Lindsey, and the only allegation as to the ownership of the land is the allegation of plaintiff's petition that two of the four tracts had been sold by Clark to Lindsey. There is no statement of facts with the record. Upon this state of the record we cannot say that the trial court was not authorized to direct that the excess, if any, in the proceeds of the sale should be paid to the defendants. If the evidence disclosed that Clark sold a por-

tion of the land to Lindsey, we know of no rule of law which would prevent the court from directing that any excess in the proceeds of the sale should be turned over to the defendants. Plaintiff sought foreclosure of his lien against the defendants jointly upon all of the land, and such judgment was awarded him. If upon a sale of the land under this judgment there should be any excess in the proceeds, such excess would belong to the owners of the land. The mere fact that Clark was the judgment debtor would not entitle him to receive the excess in the proceeds of the sale of land which belonged to Lindsey. If there were any equities which could have been asserted in this suit, and that would have entitled either of the defendants to receive any portion of the excess proceeds of the sale of the land of the other, such equities should have been pleaded. Or if under the facts one of the defendants was entitled to a greater portion of the excess proceeds than the other, such facts should have been alleged and proven, and the court could have then directed the excess proceeds of the sale to be paid to the defendants severally in the amount to which each should be entitled. But in the absence of any pleading of equities by either defendant, or any pleading or proof as to the amount each was entitled to receive of the excess proceeds of the sale, the court could only direct, as it did, that such excess proceeds be paid to them jointly.

[3] Such judgment is not indefinite nor uncertain, and cannot be reversed or reformed on that ground, as was done in the case of *Shannon v. Buttery*, 140 S. W. 859, which directed that the excess proceeds of the sale of the lien property be paid "to the defendant H. A. Shannon, or those claiming under him."

[4] We think the judgment in this case, like a deed conveying land to several vendees, *prima facie* gives an equal interest to each. It appears, however, from the record that the respective rights of the defendants in the excess proceeds of the sale were not settled by this judgment, such rights not having been put in issue by any pleading, and the affirmance of this judgment will not preclude either of the defendants from having their equities in any such excess proceeds hereafter adjudicated.

It follows from the views above expressed that the judgment should be affirmed; and it has been so ordered.

Affirmed.

FT. WORTH & R. G. RY. CO. v. FLEMING.  
(No. 6219.)(Court of Civil Appeals of Texas. San Antonio.  
May 7, 1919.)1. CARRIERS  $\S$ 228(5)—CARRIAGE OF LIVE STOCK — EVIDENCE—SUFFICIENCY—CONJECTURE.

In action for delay in delivery of shipment of horses, shippers' testimony as to death of mare from lockjaw that, "I suppose that this was caused by placing the horses in this hot pen and feeding them on this coarse sedge grass hay," without evidence as to real cause of mare's death, was insufficient basis for judgment of damages, since contraction of lockjaw from such source, being contrary to general rule, should have been established by something more than mere supposition.

2. EVIDENCE  $\S$ 13 — JUDICIAL NOTICE — LOCKJAW.

It is well known that tetanus, or lockjaw, usually, if not invariably, arises from wounds inflicted under certain peculiar circumstances.

3. APPEAL AND ERROR  $\S$ 1177(7)—DISPOSITION—REMAND.

Where plaintiff was led to believe by trial courts that he had made a perfect case, appellate court in reversing for insufficient evidence will remand case to give him opportunity to produce legal testimony to sustain case, if he can do so.

Appeal from Menard County Court; J. D. Scruggs, Judge.

Action by J. S. Fleming against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Andrews, Streetman, Burns & Logue, of Houston, J. L. Lockett, Jr., of Ft. Worth, and Sam McCollum, of Brady, for appellant.

F. T. Neel, of Menard, and M. E. Blackburn, of Junction, for appellee.

**FLY, C. J.** This is a suit instituted by appellee in the justice's court to recover damages to a shipment of horses. The justice of the peace, a jury not being demanded, rendered judgment in favor of appellee for all he sought to recover, and upon appeal to the county court a jury was again waived, and the county judge rendered judgment in favor of appellee for all he sued for.

Appellee was the only witness to sustain the damages which, he claimed, arose from a delay of the animals in Ft. Worth, Tex. He swore that the horses had been consigned to him at Vicksburg, Miss., but when he ascertained at Ft. Worth that the animals were required to be dipped for ticks, before they could go to Vicksburg, he decided to change the point of destination to Wells, Tex., and eventually sent them there. He swore the

animals were not roughly handled, but were damaged by being held at Ft. Worth for two days. One mare died in Ft. Worth from lockjaw, and appellee testified:

"I suppose that this was caused by placing the horses in this hot pen and feeding them on this coarse sedge grass hay."

She naturally was the highest priced animal in the lot of 38. He swore she was worth \$80 at Menard, where she began her journey, and \$75 at Ft. Worth, where the sun's rays and sedge grass developed a case of tetanus or trismus that culminated in death. The other mares were worth only \$70 a head, and "they were worth about \$2 to \$2.50 per head less." He meant after they had stayed in Ft. Worth two days.

No pretense was made by appellee that he knew anything about the actual or market value of his animals either in Menard or in Ft. Worth, and no effort was made to show any such actual or market value.

[1, 2] What really killed the mare was not disclosed by the evidence. The hypothesis of appellee that she died from lockjaw caused by heat and food was not based on any knowledge of any one, and had no scientific basis, at least shown by the evidence. It is well known that tetanus, or lockjaw, usually, if not invariably, arises from wounds inflicted under certain peculiar circumstances, and if, contrary to the general rule, heat of the sun and coarse hay will produce it, the exception should be established by something more than the supposition of a shipper of horses.

As said by the Court of Civil Appeals at Ft. Worth, in *Railway v. Kerr*, 184 S. W. 1058, where the evidence was that—

"If the cattle had reached Ft. Worth in good condition they would have been worth on the market from \$1.50 to \$2.50 per head more than they were worth in the condition they were in when they reached their destination," and no knowledge of the market value was shown. "Under the circumstances, the estimate of damages so given by the witness necessarily involved a mere guess, and the objection urged to it should have been sustained."

As in that case, so in this, there was nothing but conjecture as to the amount each of the animals was injured by delay at Ft. Worth. There was no basis for even an intelligent or reasonable guess.

The evidence showed that at least 24 hours of the delay in Ft. Worth could not be laid at the door of appellant, but was caused by another railroad company, and yet all the bad results of all the delay was charged to appellant. It is apparent that this was unjust.

[3] We are not disposed to render a judgment in favor of appellant, from the fact that appellee was led to believe by the two

trial courts that he had made a perfect case, and we think he should have an opportunity to produce legal testimony to sustain his case, if he can do so.

The judgment will be reversed, and the cause remanded for a trial upon the law as herein indicated.

**TEXAS & PACIFIC COAL CO. v. ERVIN.**  
(No. 976.)

(Court of Civil Appeals of Texas. El Paso.  
May 8, 1919.)

**1. MASTER AND SERVANT ⇨101, 102(2)—INJURY TO SERVANT—SAFE PLACE TO WORK AND TOOLS—DUTY TO EXERCISE ORDINARY CARE.**

Where a servant alleged negligence on the part of the master in furnishing a defective pipe wrench, a charge that it is the duty of an employer to furnish reasonably safe tools, and that a failure to do so is negligence, was erroneous as making such duty absolute.

**2. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTIONS—UNDUE PROMINENCE.**

In servant's action against a master for personal injuries, a charge giving undue prominence to the amount sued for *held* not commendable, although not reversible error.

**3. MASTER AND SERVANT ⇨291(13) — INJURIES TO SERVANT — INSTRUCTIONS — PROXIMATE CAUSE.**

In a servant's action for injuries by the slipping of a defective pipe wrench, causing him to be caught in exposed cogwheels, instructions *held* erroneous in failing to instruct the jury to find whether the defective wrench or the exposed cogwheels, or both, was the proximate cause of the injuries.

**4. APPEAL AND ERROR ⇨213 — OBJECTIONS IN LOWER COURT—SUBMISSION OF ISSUES.**

The error of the trial court in failing to submit the issue of proximate cause is one of omission and to be available as reversible error appellant must have presented a special charge curing the omission.

**5. TRIAL ⇨191(10)—INSTRUCTIONS—ASSUMING FACTS.**

In a servant's action for injuries, a charge assuming decrease in the servant's earning capacity as a proven fact from statement of a physician that plaintiff would always have a weak arm was erroneous, since the weakened condition of the arm need not necessarily decrease plaintiff's earning capacity.

**6. TRIAL ⇨251(8) — INSTRUCTION—ASSUMPTION OF RISK—FAILURE TO PLEAD.**

In a servant's action against a master for personal injury, where the defense of assumed risk was not pleaded, the court was not in error in failing to submit that issue.

Appeal from District Court, Eastland County; Joe Burnett, Judge.

Action by C. D. Ervin against the Texas & Pacific Coal Company. Verdict and judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. J. Oxford, of Thurber, and Pentz & Miller, of Mineral Wells, for appellant.

J. R. Stubblefield, of Eastland, for appellee.

**WALTHALL, J.** This suit was brought by C. D. Ervin, appellee, against Texas & Pacific Coal Company, to recover damages for personal injuries sustained while in the employ of appellant in operating a gasoline engine and water pump.

Appellee alleged that it was a part of his duty in the line of his employment to operate a gasoline engine and water pump in drilling a well for oil and gas at Ranger, Tex.; that the gasoline engine was in bad repair; that on account of the water pump failing to properly pump the water it was necessary for him to unscrew a nut, tap, or pipe connected with the pump; that near the place where the said nut was to be unscrewed were stationed cogwheels connected with the machinery of the pump, and that in order for him to unscrew the nut it was necessary for him to come in close proximity to the cogwheels; that when the engine and pump were in operation the cogwheels moved very rapidly; that appellant furnished appellee a pipe wrench with which to unscrew the nut and to use generally. The negligence assigned is that the pipe wrench furnished him with which to unscrew the nut or tap was old, broken, worn, and defective; that while attempting to unscrew the said nut or tap the said pipe wrench, because of its defective condition, failed to take hold of the iron pipe, but slipped, causing appellee to fall on the open and exposed cogwheels, then in rapid motion, thereby causing the injuries of which he complained. Appellee also assigned as negligence that the place in which he was required to work was unsafe, because of the exposed cogwheels; that he (appellee), being inexperienced in the particular work in which he was then employed, did not fully realize the defective condition of the said pipe wrench.

The case was tried with the aid of a jury, resulting in a verdict and judgment against appellant. The case was submitted on special issues.

As a part of the main charge the court instructed the jury as follows:

"It is the duty of an employer to furnish reasonably safe machinery and tools with which his employes work, and a failure to do so is negligence on the part of the employer. Negligence is the doing of an act which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to

do something that an ordinarily prudent person would do under the same or similar circumstances. Now, bearing the above instructions in mind, answer the following questions: Question No. 1: Was defendant negligent in furnishing a pump with the cogwheels exposed? Answer 'Yes' or 'No.' Question No. 2: Was the wrench with which plaintiff was supplied by defendant, defective? Answer 'Yes' or 'No.' Question No. 3: If you answer question No. 2, above, in the affirmative, then answer: Was the defendant negligent in furnishing a defective wrench to plaintiff, to be used for such purpose as was necessary in the operation of the pumps? Answer 'Yes' or 'No.' Question No. 4: If you answer the above questions in the affirmative, and only in that event, then answer: Was plaintiff injured by reason of the negligence of the defendant? Answer 'Yes' or 'No.' Question No. 5: If you have answered that plaintiff was injured, then answer: How much money, if paid now, would reasonably compensate plaintiff for his injuries?"

The court then gave a charge on the measure of plaintiff's damages; instructed that the jury could find no damages unless the jury should find that the plaintiff's injuries, if any, were the direct and proximate result of the defendant's negligence, if any, followed by a charge on the burden of proof. The jury answered each question in the affirmative and assessed the damages at \$5,000.

[1, 2] Appellant presents 17 assignments of error. The first complains of the portion of the charge first quoted, defining the duty of appellant to appellee in furnishing tools with which to work. The charge makes it the absolute duty of appellant to furnish appellee reasonably safe machinery and tools, and that a failure to do so is negligence. The extent of appellant's duty to appellee under the pleadings was to exercise ordinary care to furnish a reasonably safe pipe wrench and a reasonably safe place to work. The charge is affirmatively erroneous. The error in the charge is material and apparent when applied to several of the questions following. Appellant made seasonable objection to the charge before it was read to the jury, pointing out the objectionable paragraph, and excepted to the paragraph on the ground that the charge "imposes a duty on the defendant much more onerous than the law imposes." The objection made to the charge sufficiently points out the error. The second assignment complains of the charge as giving undue prominence to the amount sued for, because, in stating the case, the court stated the amount of the damages sued for. This, we think, while not to be commended, is not reversible error.

[3, 4] By a number of assignments appellant, on various grounds, complains of the foregoing charge submitting the issues to the jury. We will not discuss them singly, as to do so would extend the opinion to too great a length, and serve no good purpose. The same grounds of error will, no doubt, not arise on

another trial. It was unquestioned that the cogwheels were exposed, and the jury found that it was negligence to so furnish them. The jury also found that the wrench furnished was defective, and that it was negligence to furnish the defective wrench. While the charge is somewhat confusing in submitting the fourth issue as to what negligent act of appellant caused the injury to appellee, it might well be inferred therefrom that the court intended to submit to the jury, and the jury found, that the injury was caused by one or the other or both of the negligent acts charged and submitted, and of each of which the jury found the company to be guilty. The court did not submit to the jury for their finding whether the exposed cogwheel, or defective pipe wrench, either or both, proximately caused the injury. The facts found seem to call for the submission of proximate cause. The jury might, from the evidence, say that it was negligence to furnish the unguarded cogwheels and the defective pipe wrench, and still not find that either or both of said negligent acts was the proximate cause of the injury to appellee. The rule is that, when one has violated a duty, the liability of the wrongdoer extends to such injuries as might reasonably have been anticipated, under ordinary circumstances, as the natural and probable result of the wrongful act. *Seale v. Railway Co.*, 65 Tex. 278, 57 Am. Rep. 602; *St. Louis, A. & T. Ry. Co. v. McKinsey*, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54; however, the question presented here is: Did the failure of the trial court to define and present to the jury the issue of proximate cause show reversible error? The error was one of omission, and not of commission, and, to be available as reversible error, appellant must have presented a special charge curing the omission. *Good v. Texas & Pacific Ry. Co.*, 160 S. W. 670; *Bryning v. M., K. & T. Ry. Co.*, 167 S. W. 826; *Van Geem v. Cisco Oil Co.*, 152 S. W. 1108; *Modern Woodmen, etc., v. Yanowsky*, 187 S. W. 728; *Rabinowitz v. Smith Co.*, 190 S. W. 197. It has been the uniform holding that an error of omission in the court's general charge should be supplied by a request for a correct special charge. *St. Louis S. W. Ry. Co. of Texas v. Martin*, 161 S. W. 406.

[5] In stating the measure of appellee's damages, the court's charge includes the decrease in the earning capacity of appellee as a proven fact which the jury might consider. Dr. Terrell said that appellee would "always have a weak arm," giving the reason for it. Appellee's arm was exhibited to the jury in the explanation given of its condition when injured and the treatment of it. It still might be that the condition of the arm, weakened by the injury, might not necessarily decrease appellee's earning capacity; in other words, the fact of the decrease in the earning capacity of appellee is left to in-

ference and argument. While the criticism of the charge by appellant is sustained, we do not hold that the error would necessarily reverse the case.

[8] The defense of assumed risk was not pleaded, and the court was not in error in failing to submit that issue. *I. & G. N. R. R. Co. v. Harris*, 95 Tex. 346, 67 S. W. 315.

The court was not in error in refusing to give appellant's peremptory charge; nor was the court in error in refusing to enter judgment for appellant.

In view of another trial we will not discuss the assignment claiming the verdict and judgment to be excessive. For the reason stated in considering the first assignment, the case is reversed and remanded.

### WATER, LIGHT & ICE CO. OF WEATHERFORD v. BARNETT et al. (No. 9081.)

(Court of Civil Appeals of Texas. Ft. Worth. April 12, 1919.)

#### 1. APPEAL AND ERROR $\Leftrightarrow$ 1060(2)—TRIAL $\Leftrightarrow$ 127—ADMISSION OF IMPROPER TESTIMONY—HARMLESS ERROR.

In action against defendant light company for injuries sustained by plaintiff, who, when walking along sidewalk, stepped upon a meter box lid, which lid gave way and caused her to fall into the opening, permitting introduction of evidence showing that defendant was insured in an indemnity company, held error and prejudicial to rights of defendant.

#### 2. APPEAL AND ERROR $\Leftrightarrow$ 742(1), 743(1)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments followed by neither proposition nor statement, or in which no sufficient reference is made to record where the proceedings out of which the alleged error arose are to be found, are insufficient.

Appeal from District Court, Parker County; F. O. McKinsey, Judge.

Action by Mrs. Marie Barnett and husband against the City of Weatherford and the Water, Light & Ice Company of Weatherford. The City was given a peremptory instruction in its favor, and from a judgment against the other defendant in favor of plaintiffs, it appeals. Reversed and remanded.

Hood & Shadle, of Weatherford, for appellant.

Grindstaff & Zellers and Preston Martin, all of Weatherford, for appellees.

BUCK, J. Mrs. Marie Barnett and husband, Paul Barnett, sued the city of Weatherford and the Water, Light & Ice Company of Weatherford for personal injuries alleged to have been sustained by Mrs. Barnett through falling into a water meter maintain-

ed on the sidewalk of one of the streets of Weatherford. Plaintiff alleged that while she was walking along said sidewalk she stepped upon the lid of a meter box belonging to the Water, Light & Ice Company, and that the box inclosing same was then in an unsafe and defective condition, and that by reason thereof the lid of said box gave way under her and caused her to fall into the opening, from which fall she sustained serious and permanent injuries. The city of Weatherford was given a peremptory instruction in its favor, and from a judgment against the Water, Light & Ice Company in favor of the plaintiff Mrs. Marie Barnett in the sum of \$3,000, and in favor of Mr. Barnett in the sum of \$175, the defendant has appealed.

[1] We will first direct our attention to the consideration of the sixteenth assignment. Frank Cherry was shown to be the manager of the Water, Light & Ice Company, and had held said position for some years prior to the accident. Shortly after plaintiff's alleged injuries, he, in company with another employé of defendant, went to the home of the plaintiff, Mrs. Barnett, for the purpose of talking to her about her injuries and how they occurred. He had a conversation with her, and made at the time a written statement of her answers, which she was not requested to sign. While Cherry was on the stand, and after he had testified for defendant, on cross-examination he was asked by plaintiffs' counsel who sent him to plaintiffs' house to get the statement, to which question defendant objected on the ground that the same was immaterial. Pending a ruling by the court, one of defendant's counsel stated to the court in a low voice so that it could not be heard by the jury, in substance, that the answer of the witness would be that he had been sent to the plaintiffs' house on the occasion in question by an insurance company, whereupon the court overruled said objection, and said witness was required to answer over said objection as follows:

"The request did not come verbally. No one in Weatherford sent me. An insurance company sent me."

To the admission of the question and answer defendant then and there excepted, and moved the court to withdraw said answer from the jury; as the same did not tend to prove any issue in the case and was highly prejudicial to the rights of the defendant. Thereupon the court stated to the jury:

"Gentlemen, I simply admit this testimony to explain Mr. Cherry's action in going down there and having a conversation with the lady, and not for any other purpose in the case. I will let it go before you, gentlemen of the jury, for that purpose and with that explanation."



By a long line of authorities it has been held that it is improper to introduce evidence showing or tending to show that the defendant in an action for damages is insured in an indemnity company, not a party to the suit. In *Wichita Falls Motor Co. v. Meade*, 203 S. W. 71, in an opinion by Associate Justice Hall, Court of Civil Appeals for the Seventh District, it was held that it was error to admit a statement by plaintiff that one who had investigated the accident said he was "working for the insurance company." As to the admission of this testimony the court said:

"This testimony was improper, and should not have been elicited. When considered in connection with other testimony which tended to create sympathy in behalf of appellee, we think it was highly prejudicial and the admission of such testimony has often been condemned in this state."

See, also, *Carter v. Walker*, 165 S. W. 486; *City of Austin v. Gress*, 156 S. W. 536; *Beaumont Traction Co. v. Dilworth*, 94 S. W. 352; *Lone Star Brewing Co. v. Voith*, 84 S. W. 1100; *Manigold v. Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Wildrick v. Moore*, 66 Hun, 630, 22 N. Y. Supp. 1119; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202.

In *Carter v. Walker*, supra, it is said:

"When appellee was testifying, he was asked if he had ever had a talk with appellant about the accident, and he answered that he had, and that appellant had told him the number of his car. He was then asked if he made any other statement, and he answered: 'He said he had insurance on the car.' That illegal testimony came from the appellee, who must have known that it was very improper testimony. In consulting with his attorney, he must have told him about the conversation with appellant, or he would not have been interrogated about it, and we must presume that his attorney informed him that such testimony was not permissible. He must have appreciated the effect it would have upon a jury trying a case between two citizens, when it was made known, that a corporation, and not the defendant, would have to discharge the judgment for damages. He must have known that the wavering balances would go down against the 'soulless corporation.' No amount of admonition to the jury could remove the effects of the testimony, because it could not remove the knowledge that the suit was not one between citizens, but between a citizen and a corporation."

In the instant case the court knew before the answer of the witness what the question propounded by plaintiffs' counsel would elicit, and after the question had been answered, and a motion to exclude it had been made by defendant's counsel, plaintiffs' counsel, as well as the court, knew the prejudicial character of the testimony admitted. We do not think that the instruction in the way of limitation given by the court cures the error, but perhaps tends to accentuate it. Appellee urges that the question did not call for

the answer given; that no company was inquired about, and in the question answered no reference or intimation made to any insurance company; that the answer of the witness was not responsive to the question, but was made "for the apparent purpose of injecting an error into the case." We do not think the criticism made is sound. Counsel for defendant at the time did everything in his power to prevent the answer being given. Those familiar with courts and trials know that often it is more injurious to a party resisting the admission of improper evidence to disclose the reason for the objection in the presence and hearing of the jury than it is to have said evidence admitted without objection or comment. In this instance defendant's counsel took the proper and judicious course in presenting to the court, out of the hearing of the jury, the reason for the objection made, and in further moving to exclude the testimony after its admission. We are of the opinion that the error presented calls for the reversal of the judgment.

The evidence in this case was of a nature tending to arouse in the minds of the jury much sympathy for the plaintiff Mrs. Barnett. It was shown that she was of a frail and delicate constitution, and shortly prior to the accident had undergone a serious operation and was just recovering from the same; that, by reason of the injuries sustained in this accident, she suffered a falling of the womb, the loss of both ovaries, and that her health was generally undermined; that at the time of the trial she was in an extremely nervous condition—as she expressed it, "a nervous wreck."

The testimony of the witness Cherry sharply conflicted with that of Mrs. Barnett as to what occurred and the conversation had on the occasion of the former's visit to the latter's home. In view of this conflict, and in view of the circumstances tending strongly to create sympathy in behalf of Mrs. Barnett in the minds of the jury, and in view of the substantial damages awarded, we are unable to say that the admission of the testimony did not probably influence the verdict rendered. Appellee cites *Tex. P. & L. Co. v. Bird*, 165 S. W. 8, *Harry Bros. v. Brady*, 86 S. W. 615, and other cases to support the contention that the error, if any, was not calculated to improperly influence the jury, and hence does not constitute reversible error. But we think the first case cited is easily distinguishable from the one at bar, and the other cases cited merely lay down the general rule that the error complained of must be of a nature reasonably calculated to injuriously affect appellant's rights before such error will be held reversible.

[2] Other assignments are presented in appellant's brief, but we do not find it necessary to discuss any of them at length. Appellees object to the consideration of most of

the other assignments because of a failure on appellant's part to observe the rules for briefing, and in the main we believe said objections are well founded. Quite a number of the assignments are followed by neither proposition nor statement, and in others no sufficient reference is made to the record where the proceedings out of which the alleged error arose are to be found.

In the seventeenth assignment complaint is made of the argument of the plaintiff's counsel in his closing address to the jury to the effect that, if the evidence did not show that plaintiffs were entitled to recover, the court would have given a peremptory instruction for the defendant Water, Light & Ice Company. Upon request of defendant's counsel, the court instructed the jury not to consider these remarks, and upon another trial, doubtless, this question will not be presented.

For the reasons given, the judgment below is reversed, and the cause remanded.

**DEVINE INDEPENDENT SCHOOL DIST.  
v. KOEHLER et al. (No. 3214.)**

(Court of Civil Appeals of Texas. San Antonio.  
April 30, 1919. Rehearing Denied  
May 28, 1919.)

**1. INTOXICATING LIQUORS — 45 — FORFEITURE  
OF LIQUOR DEALER'S BOND — PENAL CHARACTER OF STATUTE — RIGHT TO SUE.**

Since the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond is penal in its nature, the right of plaintiff, an independent school district, to sue for such forfeiture must be made very clear.

**2. INTOXICATING LIQUORS — 88(2) — FORFEITURE OF BOND — RIGHT OF INDEPENDENT SCHOOL DISTRICT TO SUE — "PERSON."**

An independent school district is not a "person" within the meaning of the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

**Appeal from District Court, Bexar County; R. B. Minor, Judge.**

Suit by the Devine Independent School District against Walter H. Koehler and others and the Lion Bonding & Surety Company. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

O. C. Harris and Hertzberg, Kercheville & Thomson, all of San Antonio, for appellant. Ward & Bickett, Davis & Long, and H. B. Cline, all of San Antonio, for appellees.

**COBBS, J.** This suit was brought by the Devine Independent school district of Devine,

Tex., against Walter H. Koehler as principal and the Lion Bonding & Surety Company as surety for penalties for violations of the conditions contained in a retail liquor dealer's bond by making sales to certain students attending the high school in the independent school district.

Koehler's saloon was at "Klondike," near Bexar county line. His bond was signed by the Lion Bonding & Surety Company for the sum of \$5,000, and was dated September 22, 1916, and filed with county clerk, Bexar county, conditioned that the said Walter Koehler shall not, either in person or knowingly by his agent, employé, or representative, during the year for which such license shall run, from September 28, 1916, to September 28, 1917, sell or permit to be sold in his house or place of business or give or permit to be given any spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication to any student of any institution of learning. Plaintiff alleges defendant violated the conditions of the bond by selling beer, on or about October 13, 1916, to Fred Thompson; on October 7, 1916, sold beer to Wiley Foster; in month of September, 1916, and on January 20, 1917, sold beer to Carroll Thompson; October 13, 1916, sold whisky to Temple Adams; December 25, 1916, sold whisky to Bryan Briscoe—all being students in the Devine independent school.

It was alleged that the plaintiff was aggrieved by the violations of the conditions in the bond by the defendant Koehler, in that said sales were made to students who were attending the Devine high school in the Devine independent school district, and that such sales to said students operated to injure, disturb, and annoy plaintiff, and that because of such the plaintiff (appellant) is entitled to recover the sum of \$500 as liquidated damages for each and every infraction of the conditions of said bond. Prayer was made for recovery of \$3,000.

The defendants filed exceptions, and properly challenged plaintiff's right to bring this suit, and as such to recover on the bond.

Upon hearing the trial court sustained defendants' exceptions, and dismissed said suit.

Appellant brings its suit under that provision of article 7452, which requires the execution of a statutory bond of "every person or firm desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises," etc. It is provided therein:

"Said bond may be sued on at the instance of any person or persons aggrieved by the violations of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the conditions of such bond."

Appellant's first assignment of error is substantially to the effect that plaintiff, an independent school district, within the meaning of that statute, is "an aggrieved person," and may maintain such suit and recover the penalties for its own benefit, because of the sale of liquors to students attending that school.

[1] The statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond is penal in its nature, and the right of an independent school district to sue for such must be made very clear. Suits for forfeitures and penalties are not favorite subjects of the law.

[2] Now, it is not made clear to us that a school district is a person within the meaning of that statute. Providing common school funds, establishing and maintaining schoolhouses, and establishing school districts for the education of the children of Texas has been a favorite subject of legislation, for their protection and ultimate good. In creating these various arms for the education of the children of Texas, flowing from the sovereign grant of power, in the very nature of things the district cannot, for one moment, be held to have the qualities and attributes of a person or a private corporation. These schools are managed by trustees duly elected, who are vested with the full management. The statute provides for the support of the schools by raising taxes and issue of bonds and from common school fund, and the trustees must cause suits to be instituted and maintained. *Wright v. Jones*, 55 Tex. Civ. App. 619, 120 S. W. 1139.

Devine independent school district is a corporation, limited to certain well-defined purposes, not having the scope or category of private corporations engaged in business pursuits.

Appellants cite case of *Daniels v. College*, 20 Tex. Civ. App. 562, 50 S. W. 205, as justifying this suit. It is said in that case:

"Evidence shows that the appellee is an incorporated institution of learning, located at Whitewright, in which the sale of intoxicating liquors is prohibited. The prohibition character of the town is widely published by the college, and is an advantage to the institution." El. O. Wentzell wrote to Daniels, who had a saloon in Sherman, for a half gallon of whisky, which Daniels expressed him. He and three other students got drunk, and "exhibited themselves upon the streets of the town in that condition. This caused the officers of the college much trouble, annoyance, and humiliation, interrupted the course of business in the school for a half day, and was calculated to injure the character and reputation of the institution."

This is a private college, and the success of the college is affected by sales of whisky to the students to such an extent as to im-

pair their manhood and moral character. The college is standing in the relation of parent and guardian, and if "such influences are bad, and are manifested in the conduct of the students, the public will be soon made aware of the fact, and the institution will suffer in its patronage." It would not be long before a private institution of learning would close its doors and go out in utter failure if such conduct were permitted to continue. It would be aggrieved; the college had a personal interest, and, as such, a person, within the meaning of the law, that could sue. It had no sovereign power to assess and levy taxes for its support and to issue bonds under such statutes as created the school districts.

It cannot be contended successfully for one moment, or anywhere pointed out, that the Legislature at any time gave such school districts the authority to bring a suit on a liquor dealer's bond, or delegated any of its power to enforce penal statutes, or to recover penalties of the kind sued for herein.

As this discussion leads to an affirmation of this case, we overrule all of appellants' assignments of error and propositions thereunder.

The judgment is affirmed.

U. S. FIDELITY & GUARANTY CO. v.  
DAVIS. (No. 9061.)

(Court of Civil Appeals of Texas. Ft. Worth  
March 22, 1919. Rehearing Denied  
April 26, 1919.)

1. MASTER AND SERVANT  $\S$  391 $\frac{1}{4}$ , New, vol. 7A Key-No. Series—WORKMEN'S COMPENSATION ACT—ATTEMPTED REPUTATION AND AFFIRMANCE OF AWARD.

An injured servant could not, under Workmen's Compensation Act, pt. 2,  $\S$  5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-44), repudiate and abrogate the ruling of the Industrial Accident Board awarding compensation, and at the same time treat it as effective and binding on the employer, and seek under section 5a to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with the mandates of the board.

2. MASTER AND SERVANT  $\S$  411—WORKMEN'S COMPENSATION ACT—PROVISION OF JUDGMENT FOR EXECUTIONS.

In a workmen's compensation case, the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they matured, since clerk cannot be made the judge to determine what character of process he shall issue.

3. MASTER AND SERVANT  $\S$  411—WORKMEN'S COMPENSATION ACT—FORM OF JUDGMENT.

In a workmen's compensation case, the form of judgment proposed by the servant, em-

bodily the right and power of the court to review it, and diminish, increase, or terminate the liability of the insurer in accordance with part 1, § 12d, of the Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-25), with the right in the insurer at any time to redeem its entire liability by payment of a lump sum on agreement with the servant, with the approval of the Industrial Accident Board, in accordance with part 1, § 15 (article 5246-33), *held* proper, with modification of provisions as to executions and the approval of the trial court of any lump sum settlement.

**4. MASTER AND SERVANT ⇐408—WORKMEN'S COMPENSATION ACT—POWER OF COURT OVER AWARD—LUMP SUM SETTLEMENT.**

In view of Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-44), a court trying a workmen's compensation case by implication has the power given the Industrial Accident Board by part 1, § 15 (article 5246-33), to approve any agreed lump sum settlement, and the power given it by section 12d (article 5246-25) to review, terminate, diminish, or increase an award for compensation made.

**5. COURTS ⇐26—ACQUISITION OF JURISDICTION—EFFECT.**

Where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties.

**6. MASTER AND SERVANT ⇐385(5)—WORKMEN'S COMPENSATION ACT—BASIS OF AWARD—AVERAGE WEEKLY WAGES.**

Where an injured servant had worked in the employment in which he was engaged when injured for several years before injury, under Workmen's Compensation Act, pt. 4, § 1, subsec. 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-82), his average weekly wages, and not the average weekly wages of other persons similarly engaged, were the proper basis for determining the amount of compensation.

Appeal from District Court, Denton County; John Speer, Judge.

Proceedings for compensation under the Workmen's Compensation Act by W. W. Davis against the J. W. Thompson Construction Company, the employer, and the United States Fidelity & Guaranty Company, the insurer. Compensation was awarded, and the insurer appeals. Judgment reformed and affirmed.

Seay & Seay, of Dallas, for appellant.  
Ed I. Key, of Denton, for appellee.

DUNKLIN, J. W. W. Davis was an employé of the J. W. Thompson Construction Company, which was a subscriber to the Workmen's Compensation Act, appearing in full in the acts of the Legislature of 1917, p. 269 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246-1 to 5246-91), and held a policy of insurance in the United States Fidelity &

Guaranty Company, issued according to the requirements of the act, and which made the insurer liable for compensation to the employés of the Thompson Construction Company for injuries sustained by them while engaged in such employment. On February 1, 1918, the Industrial Accident Board, with whom Davis had filed a claim for compensation, awarded him compensation to be paid by the insurer in the sum of \$15 per week for the injury which the board found had totally incapacitated him for work, said weekly allowance to continue during the existence of such total incapacity, not to exceed, however, the period of 401 weeks, and subject to modification or termination in accordance with the provisions of the act.

Davis had attempted to procure an order allowing him compensation in a lump sum rather than in weekly installments in accordance with the provisions of section 15, pt. 1, p. 280, of the act, upon the plea that, as he had a wife and three small children to support, the oldest being only 12 years of age, and as he was wholly incapacitated to work himself, a manifest hardship and an injustice would be done him if his compensation was fixed at even the maximum weekly allowance authorized by the act. And when that request was refused he, within 20 days after that decision by the Industrial Accident Board, gave notice to the board and to the insurer that he would not abide by said ruling, and immediately instituted this suit to recover compensation under the act, as was his right to do under the provision of section 5, pt. 2, p. 283, of the act. In his petition, filed in this suit, he sought to recover compensation in a lump sum as he did before the Accident Board, and on the same grounds. In the alternative he prayed that, if he was not entitled to a lump sum settlement, then he should be awarded compensation in the sum of \$15 per week for 389 weeks. Plaintiff further alleged that he had presented his claim to the Industrial Accident Board, and that said board had awarded him compensation which the defendant had refused to pay in accordance with the terms of that decision, although defendant was duly notified of plaintiff's dire distress and urgent need of such compensation for the support of his family. In both counts of his petition plaintiff sought to recover exemplary damages in the sum of \$4,000, as well as actual damages, which in each count was fixed at the sum of \$6,000; the claim for exemplary damages being predicated upon an allegation of the construction company's "negligence and willful disregard for this plaintiff's rights in causing the said injuries."

It was further alleged that plaintiff has the right to a lump sum settlement by reason of the fact that the insurer had, without justifiable cause, failed to pay the weekly allow-

ances made by the Accident Board as they matured.

Judgment was rendered decreeing a recovery by the plaintiff of \$22 per week for 265 weeks, after allowing the defendant credit for \$180 which it had already paid prior to the trial under the ruling of the Industrial Accident Board. But one-third of the recovery was awarded to plaintiff's attorney for his services in prosecuting the suit. From that judgment the defendant has prosecuted this appeal.

The trial was before a jury, who returned a verdict, such as is indicated by the judgment, upon a general charge submitted to them by the trial judge.

[1] By section 5a, pt. 2, p. 284, of the act it is provided that, should the insurer, without justifiable cause, refuse to make prompt payment of the assessments decreed by the Industrial Accident Board as the same mature, then the injured employé or his beneficiary shall have the right to mature the entire claim and to institute suit thereon to collect the full amount of the award, together with 12 per cent. penalty and attorney's fees. While plaintiff did allege in his petition such a failure on the part of defendant, coupled with an allegation of his right thereby to mature the entire amount of his claim, yet the trial judge did not submit to the jury the issue whether or not the defendant had, "without justifiable cause," refused to pay said awards, and no complaint is made by the appellee here of the failure of the court to submit that issue. Furthermore, as shown by plaintiff's petition, he was not willing to abide by the decision of the Industrial Accident Board, and instituted this suit under the provisions of section 5, pt. 2, p. 283, of the act, according to the terms of which the decision of the board was thereby abrogated, and exclusive jurisdiction to determine the controversy was vested in the court in which the suit was instituted. Plaintiff could not thus repudiate and abrogate the ruling of the Industrial Accident Board, and at the same time treat it as effective and binding upon the defendant and seek to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with mandates of the board. The only basis for a verdict in plaintiff's favor for a lump sum settlement submitted in the court's charge was the issue whether or not a manifest hardship and injury would result to the plaintiff if he were not allowed that relief in accordance with the provisions of section 15, pt. 1, p. 280, of the act, and no complaint was made by the plaintiff of the charge of the court in thus limiting his right to recover damages in a lump sum to that theory of his pleading.

In various sections of part 1 of the act it is provided that the Industrial Accident Board shall allow compensation for the injuries received by an employé of a subscriber

to the act, and the rules for computing the compensation are prescribed. Section 10, pt. 1, p. 274, of the act reads as follows:

"While the incapacity for work resulting from injury is total, the association shall pay the injured employé a weekly compensation equal to sixty per cent. of his average weekly wages, but not more than \$15.00 nor less than \$5.00, and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury."

Section 12d, pt. 1, p. 278, of the act reads as follows:

"Upon its own motion or upon the application of any person interested showing a change of conditions, mistake, or fraud, the board at any time within the compensation period may review any award or order, ending, diminishing or increasing compensation previously awarded within the maximum and minimum provided in this act, or change or revoke its previous order sending immediately to the parties a copy of its subsequent order or award. Review under this section shall be only upon notice to the parties interested."

Section 15, pt. 1, p. 280, of the act provides:

"In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board."

The court did not submit the issue of a partial incapacity to labor, resulting from plaintiff's injury, total incapacity being the only incapacity submitted, and the verdict of the jury, construed in the light of the charge, indicates a finding of a permanent total incapacity to labor by reason of plaintiff's injuries, since he was allowed a maximum compensation equivalent to \$15 per week for 401 weeks by increasing the weekly compensation with a corresponding decrease of the number of weeks in accordance with section 15a, pt. 1, p. 281, of the act, which was given to the jury by the court in his charge, after crediting the defendant with the payment of 12 weekly installments of \$15 each, or \$180 in the aggregate, already paid.

Appellant has cited the Southern Surety Co. v. Stubbs, 199 S. W. 343, and Southwestern Surety Ins. Co. v. Curtis, 200 S. W. 1162, announcing the rule that a judgment cannot be rendered upon an obligation which has not matured, and upon those authorities it is insisted that the judgment in the trial court was erroneous in that execution was awarded to collect the weekly installments to mature in the future. Appellant has also cited the provisions of section 5, pt. 2, p. 283, of the act wherein it is said that, if either party shall be dissatisfied with the final ruling of the Industrial Accident Board, and shall institute suit to recover for the injury, in ac-

cordance with the terms of that section, "the rights and liability of the parties thereto shall be determined by the provisions of this act."

After the verdict was returned appellant filed a motion that judgment be entered in accordance with a form tendered which embodied in it the right and power of the court to review the same and diminish, increase, or terminate the liability of the defendant in accordance with the provisions of section 12d, copied above, with the right in the defendant at any time to redeem its entire liability by payment of a lump sum upon agreement with plaintiff thereto and with the approval of the Industrial Accident Board in accordance with the provisions of section 15, pt. 1, p. 280, of the act. But the proposed form concluded with this provision:

"To enforce the above judgment all process necessary, or permitted by law to enforce this judgment, or to keep the same in existence may be issued."

[2, 3] It is a familiar rule that the clerk of the court cannot be made the judge to determine what character of process he shall issue, and in order to conform to that rule the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they shall mature. And we are of the opinion that the proposed form of judgment with that change and with the further change that any future agreed lump sum settlement shall be with the approval of the trial court should have been adopted.

Such a judgment, perhaps, would be contrary to the general rule that a recovery cannot be decreed upon an obligation which has not matured, but it will be necessary to depart from that rule in order to give effect to the provisions of the Compensation Act referred to already. At all events, appellant is in no position to complain of such a judgment, since it has invoked the entry of the same.

[4, 5] The act does not specifically vest in a court trying such a case as this the power given to the Industrial Accident Board by section 15, pt. 1, copied above, to approve any agreed lump sum settlement, nor the power given that board by section 12d, copied above, to review, terminate, diminish, or increase an award of compensation previously made, but we are of the opinion that the court is, by implication, vested with such power, in view of the provision of section 5,

pt. 2, p. 283, of the act, to the effect that, "whenever such a suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act."

We do not think that it was the intention of the Legislature to vest in the Industrial Accident Board the power to review a judgment rendered by a court of competent jurisdiction of the issues involved in a suit like the present one in violation of the general rule that, where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties.

[6] By another assignment appellant complains of the refusal of its requested instruction to the effect that the plaintiff was entitled to receive only 60 per cent. of his average weekly wages during the time he was totally incapacitated for work, in no event to exceed \$15 per week nor less than \$5 per week, and that such average weekly wages should be computed upon the basis of the average annual wages of other employees working in the same class of work, if the jury should find that plaintiff had not worked in the employment in which he was engaged at the time of his injury during substantially the whole of the year next preceding his injury.

This assignment is overruled because the proof was uncontroverted that plaintiff worked in the employment in which he was engaged at the time of his injury for several years prior to his injury, and, that being true, his average weekly wages, and not the average weekly wages of other persons similarly engaged, was the proper basis for determining the amount of compensation to be awarded to him. See subsection 1 of section 1, pt. 4, p. 291, of the act. Furthermore, no evidence has been pointed out by appellant, and we have found none, to show such average weekly wages of such other employees for the preceding year.

Accordingly the judgment of the trial court will be reformed as indicated above, and as so reformed it will be in all things affirmed; and this decision will be certified to the trial court, with instructions to retain the suit upon its docket for the purpose of further proceedings therein in the event of the happening of any of the contingencies specified in the judgment for reviewing the same and ending, diminishing, or increasing the amount of the award so decreed to the plaintiff. Costs of appeal are taxed against the appellant.

WESTERN UNION TELEGRAPH CO. v.  
JANKO. (No. 7663.)

(Court of Civil Appeals of Texas. Galveston.  
March 11, 1919. Rehearing Denied  
April 3, 1919.)

1. TELEGRAPHS AND TELEPHONES ⇨54(4)—  
CONTRACTS—VALIDITY.

A contract between a sender of a telegram and a telegraph company to the effect that the company shall not be liable for damages or statutory penalties where the claim is not presented in writing within 95 days after the cause of action shall have arisen is valid, and is binding on the parties thereto and their principals, unless procured by fraud, or unless unreasonable under the facts and circumstances of the particular case, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714.

2. TELEGRAPHS AND TELEPHONES ⇨66(1)—  
CONTRACT—PRESUMPTIONS OF KNOWLEDGE.

One dictating a message to a telegraph agent and then signing the message, and the sendee named in the message, are presumed to know the contents of a contract on the back of the blank.

3. APPEAL AND ERROR ⇨173(9)—ISSUES IN  
LOWER COURT—WAIVER.

A waiver of a right not pleaded cannot be urged for the first time on appeal.

Appeal from District Court, Burleson County; R. J. Alexander, Judge.

Suit by Joe Janko against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

W. H. Flippen, of Dallas, Albert Stone, of Brenham, and Albert T. Benedict, of New York City, for appellant.

W. M. Hilliard and A. B. Gerland, both of Caldwell, for appellee.

LANE, J. This suit was instituted by Joe Janko, appellee, in the district court of Burleson county, Tex., on November 1, 1916, against the appellant, Western Union Telegraph Company, to recover damages in the sum of \$1,900 for alleged negligence of the appellant for failure to promptly transmit and deliver the following telegram:

"Burton, Texas, May 2, 1915.

"To Joe Janko, Caldwell, Texas: Come at once. Mother is very low. F. J. Janko."

Among other things, appellee in substance alleged that at about 1 o'clock p. m. on the 2d day of May, 1915, his brother, F. J. Janko, who resided at or near the town of Burton, in Washington county, Tex., for his benefit delivered to appellant's agent, at its office in Burton, the foregoing message to be transmitted and delivered to him at his home two miles east of the town of Caldwell, in the

county of Burleson; that F. J. Janko got the agent of appellant to write the message and told him that the words he wanted in the message were, "Come at once. Mother is very low," and that he did not tell him to use any other words therein; that when F. J. Janko signed the message for transmission he did not know that there was a clause therein providing, "The company will not be liable in any case where claim is not presented in writing within ninety-five days after the cause of action, if any, shall have arisen;" that, when said message was handed to F. J. Janko to sign, the printed matter on the front thereof was concealed by the hand of appellant's agent so that he could not see the same, and in this manner the signature of sender was fraudulently procured, and therefore the clause above quoted is not binding on him. He alleged that the message was never delivered to him; that his mother died on said 2d day of May, 1915, was buried on the 3d of said month; and that by reason of such failure on the part of appellant to deliver the message he was prevented from seeing his mother before she died and from attending her funeral, to his damage in the sum of \$1,900.

Appellant answered and filed general and special demurrers, general denial, and under oath specially answered that the message was written on one of its printed blanks, which contained a stipulation, among other things, "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within ninety-five days after the cause of action, if any, shall have arisen," and that no written claim for or notice of damages was given to defendant until September 25, 1915, which was more than 95 days from the date of the filing of said message, and the knowledge of its contents was known to the plaintiff, and more than 95 days from the date of the accrual of plaintiff's cause of action, and that by reason of plaintiff's failure to comply with the terms of said contract he is precluded from any recovery based on the sending of said message; that the plaintiff's cause of action, if any he had, accrued not later than May 5, 1915, and that it is more than 95 days from May 5, 1915, until September 25, 1915; that, by reason of plaintiff's failure to comply with the terms of said contract, he is precluded from any recovery based on said message.

The case was submitted to a jury upon special issues, in answer to which they found, among other things, the following:

(1) That F. J. Janko did not know that the 95-day clause or stipulation for notice of claim was on the back of the message signed by him.

(2) That F. J. Janko was not prevented from learning of the 95-day stipulation on

the back of the message by the action of the defendant's agent at Burton.

(3) That Joe Janko did not know of the 95-day stipulation for notice on the back of the message.

(4) That Joe Janko was prevented from learning of said 95-day stipulation by the failure or refusal of defendant's agent at Caldwell to deliver the message.

(5) That under all the facts and circumstances proven, the 95-day stipulation for notice was not a reasonable stipulation.

The jury also found that the appellant was guilty of negligence in not making prompt delivery of the message, to the damage of appellee in the sum of \$375.

Upon these findings of the jury the trial court rendered judgment in favor of appellee against appellant for the sum of \$375. From this judgment the telegraph company has appealed.

Appellant presents but one assignment, as follows:

"The court erred in refusing to give to the jury special charge No. 1, requested by the defendant, which was as follows: 'You are hereby instructed to return a verdict for the defendant company'—because the undisputed testimony in this case shows that the plaintiff and defendant entered into a contract containing the following stipulations or agreement, to wit: 'The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within ninety-five days after the cause of action, if any, shall have arisen.' That the message herein sued on was sent on May 2, 1915, and no claim of any kind was filed with the plaintiff until the original petition was filed in this cause, which was on the 1st day of November, 1915, which was more than 95 days after the cause of action, if any, shall have arisen. The evidence further shows that on May 3, 1915, the plaintiff, Joe Janko, had knowledge of all the damages that would accrue to him, and, so far as he is concerned, the cause of action had arisen on May 8, 1915. There is no effort made on the part of plaintiff or excuse given as to why he did not comply with this contention. On the other hand, the undisputed testimony shows that his agent, F. J. Janko, had knowledge of this condition and knowledge to agent is knowledge to the principal, and that he had this knowledge on May 3, 1915, and, notwithstanding this, the said Joe Janko made no effort to in any way comply with the provision of his contract.

"Conditions like the above are not contrary to law, and, in absence of their being prohibited by law, they must be upheld by the court, and, the testimony in this case showing a breach of the said condition, it was the duty of the court to have instructed the verdict for the defendant company."

Appellee's contention is:

First. That at the time his brother, F. J. Janko, signed and delivered the message to be transmitted for his benefit, the said F. J. Janko did not know that the 95-day stipulation was on the back of the message;

that this fact was concealed from him by the agent of appellant at Burton; and that after the message was transmitted to him at Caldwell, in Burleson county, the same was never delivered to him, and he had no knowledge of the contents of the contract evidenced thereby, and therefore he is not bound by said 95-day stipulation.

Second. That if it be held that the message, including the 95-day clause, was his voluntary contract, still he contends that his failure to give the written notice provided by said clause should not defeat his right of recovery, because he did, within four or five days after his damage accrued, orally tell appellant's local agent at Caldwell that he was going to sue the company for damages because of the failure of the company to deliver the message which should have been transmitted to him from Burton to Caldwell; that the agent did not tell him to put his claim in writing, and therefore he waived the stipulation for the presentation of appellee's claim in writing, and the company is now estopped to set up his failure to present said claim in writing as a defense to his suit.

Third. That under all the facts and circumstances proven, the 95-day clause was unreasonable and should not constitute a defense to his right to recover.

We find that the notice provided for in this contract was not given within 95 days after plaintiff's cause of action accrued.

[1] The contract for notice on the back of the message is one which the parties had the right to make, and which is binding on the parties thereto and their principals, unless shown to have been procured by fraud, or unless the same is unreasonable under the facts and circumstances shown to exist. If such notice stipulation was reasonable under the facts and circumstances, and appellee failed to give such notice within the time specified, he cannot recover. Article 5714, Vernon's Sayles' Civil Statutes; *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. W. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *W. U. Tel. Co. v. W. S. Rains*, 63 Tex. 27; *W. U. Tel. Co. v. Edsall*, 63 Tex. 668; *W. U. Tel. Co. v. Culbertson*, 79 Tex. 65, 15 S. W. 219; *Lester v. W. U. Tel. Co.*, 84 Tex. 313, 19 S. W. 256; *W. U. Tel. Co. v. Vanway et ux.*, 54 S. W. 414; *W. U. Tel. Co. v. Taber*, 127 S. W. 208; *W. U. Tel. Co. v. Douglass*, 104 Tex. 66, 133 S. W. 877; *Taber v. W. U. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185; *W. U. Tel. Co. v. McMillan*, 174 S. W. 918.

We find no evidence in the statement of facts which would justify the jury or the trial court in finding that appellant's agent at Burton either intentionally or otherwise prevented F. J. Janko, the sender of the message from seeing and reading the 95-day clause on the back thereof. Indeed,



the jury upon this issue found that said agent did nothing to prevent F. J. Janko from seeing and reading said clause, and we think such finding is supported by the undisputed evidence. We also find that the undisputed evidence shows that F. J. Janko requested appellant's agent at Burton to write the message for him which was to be transmitted to appellee, Joe Janko, at Caldwell, and that at the same time he also requested him to write one containing the same substance to be transmitted to his brother, John Janko, at Somerville, Tex., and another of the same substance to be transmitted to J. R. Clipper at Anderson, Tex.; that in writing said messages said agent, by reason of a misunderstanding of the proper addresses or by inadvertence, addressed the message intended for John Janko, who resided at Somerville, to Caldwell, where appellee, Joe Janko, resided, and addressed the one intended for the appellee, Joe Janko, to Somerville, where John Janko resided. It is also shown that the message addressed to John Janko at Caldwell, the only one transmitted to that place, was promptly transmitted on the 2d day of May, 1915, and was delivered to appellee, Joe Janko, at about 2 o'clock p. m. on the 3d day of May, 1915, about 24 hours after it was lodged with the Burton agent, but that such delivery was too late to enable appellee to get to Burton before the death and burial of his mother.

We also find that, while the trial court recites in his judgment "that the defendant, through its agent at Caldwell, Tex., fraudulently kept and prevented the said Joe Janko, plaintiff, from knowing of and about said 95-day clause and stipulation on the back of said telegram," and while the jury found the same to be true, there is neither pleading nor evidence to support such recital, or finding of the jury.

We have also carefully examined the statement of facts, and find no evidence whatever to support or sustain the finding of the jury that the 95-day clause was, under the facts and circumstances surrounding the parties, unreasonable. There is nothing in the record to support a finding that any agent of appellant did any act or omitted to perform any duty incumbent upon them which prevented either of the Jangos from knowing that said 95-day clause was on the back of the message.

[2] We also find as a matter of law that both Joe Janko and F. J. Janko are presumed to have known the contents of the contract made by F. J. Janko for appellee, Joe Janko, and that, in the absence of proof that said contract was obtained by fraud, it is binding upon appellee, unless it be shown that the clause in question was, under all the facts and circumstances surrounding the parties, unreasonable.

[3] We have reached the conclusion that no fraud was shown on the part of the appellant or any of its agents in obtaining the contract, and that appellee was charged with the notice of the contents of the contract, and that he was as well advised of the contents thereof on the 3d day of May, 1915, as he was on the 1st day of November, 1915. We also conclude that there was no evidence to support the finding of the jury that the 95-day clause was unreasonable under the facts and circumstances proven. We also find that, if the facts now contended for by appellee as constituting a waiver of written notice was in fact a waiver, still such facts cannot now be availed of by appellee, for the reason that there is no pleading setting up such facts as a waiver. A waiver must be pleaded, and, unless pleaded, cannot be urged for the first time on appeal. It is apparent from what has been said that we have reached the conclusion that the court should have instructed a verdict for the defendant as requested by it.

Having reached such conclusion, we here now reverse the judgment of the trial court and render judgment for the appellant, defendant in the trial court.

Reversed and rendered.

#### TEXAS CO-OP. INV. CO. v. CLARK et al. (No. 8804.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 1, 1919. On Motion for Rehearing,  
March 29, 1919.)

#### 1. LIMITATION OF ACTIONS $\S$ 28(1), 39(7)— RESCISSION OF CONTRACT—ACTIONS FOR DECEIT.

An action for the rescission of a contract to purchase corporate stock on the ground of fraud is governed by the four-year statute, but an action for damages by reason of fraud in the sale of corporate stock is governed by the two-year statute.

#### 2. ACTION $\S$ 25(2)—DECEIT—RESCISSION.

A petition in an action against a corporation by a purchaser of stock on the ground of fraud held one for damages for fraud and deceit, and not one for rescission of a contract.

#### 3. LIMITATION OF ACTIONS $\S$ 100(5)—FRAUD— ACCRUAL OF ACTION.

A cause of action for deceit accrues at the time that the defrauded party discovers facts which would put a reasonable man on notice of the fraud.

#### 4. APPEAL AND ERROR $\S$ 1039(9)—HARMLESS ERROR—ELECTION AS TO CAUSE OF ACTION.

Error of the court in calling upon plaintiff to elect as to whether he would prosecute his suit as one for rescission of contract or as one for the recovery of damages for fraud and

deceit was harmless, where it appeared the action was barred by limitations.

On Motion for Rehearing.

5. PLEADING  $\S$  72—PRAYER—"GENERAL RELIEF."

A prayer for "general relief" is just as comprehensive in its scope as the prayer for "such other and further relief, judgments and decrees, legal and equitable, such as he may be entitled to under the facts in this case," etc.

Buck, J., dissenting.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by James Clark and others against the Texas Co-operative Investment Company. Judgment for plaintiffs, and defendant appeals. Reversed and rendered.

Ramsey & Odell, of Cleburne, and Capps, Cante, Hanger & Short, and David B. Trammell, all of Ft. Worth, for appellant.

S. C. Padelford, of Cleburne, and D. W. Odell, of Ft. Worth, for appellees.

BUCK, J. December 24, 1913, appellee filed his suit in the district court against the appellant and the Texas Organization Company. He alleged that on the ——— day of June, 1911, the defendant Texas Organization Company was engaged in promoting the organization of and in selling capital stock of the appellant company, preparatory to securing a charter for said corporation; that on said date the appellant, acting by and through its duly authorized agents, contracted with plaintiff to sell him stock in said company to the amount of \$4,000, the sum of \$1,000 being paid in cash, and plaintiff executed his notes for the aggregate sum of \$3,000, which notes were delivered to the defendant; that as a part of the contract by which plaintiff was to become the purchaser of said shares of stock said defendant agreed that shares of stock in another company of the par value of \$5,000 then owned and held by plaintiff would be accepted by the appellant as collateral security for plaintiff's notes for \$3,000; and that said shares of stock in the appellant company would be immediately issued and delivered to plaintiff. He further alleged that on July 10, 1911, plaintiff contracted to purchase \$2,000 additional in stock of the appellant company, for which \$500 was paid in cash, and notes were executed for the remaining \$1,500; that in order to induce plaintiff to sign the application for the purchase of the stock and to pay the cash and execute the notes before mentioned, the defendant and his agents made certain representations which the plaintiff alleged were false, and that plaintiff relied on and was induced by said representations to execute the application

and the notes and pay the money. Plaintiff further alleged that on May 27, 1912, the said contract was rescinded and the notes canceled by defendant, but that defendant had failed and refused to repay to plaintiff the \$1,500 paid in cash. The prayer of plaintiff's petition is as follows:

"Wherefore plaintiff sues and prays that he have judgment against the said defendant for the sum of \$1,500, with legal interest thereon from and after the date of the payment of the same by plaintiff to said defendant, for cost of suit, and general relief."

In his sixth amended petition, upon which trial was had, plaintiff largely amplified his allegations, but the essence of the allegations contained in the said amended petition, and of the prayer for relief there made, was essentially the same as shown in the original petition. The amended petition was filed February 23, 1917. Defendant, among other defenses urged, pleaded the two and four years statutes of limitation. The cause was submitted to a jury under a general charge as between the appellee and the appellant; the court having given a peremptory instruction in favor of the Texas Organization Company. From a judgment in favor of the plaintiff the defendant Texas Co-operative Investment Company has appealed.

[1] While appellant's brief contains some 26 assignments of error, it will not be necessary for us to discuss any but the first, which complains of the refusal of the trial court to give defendant's specially requested peremptory instruction, on the ground that plaintiff's suit had become barred by the two-years statute of limitation. The controlling question is as to the nature of plaintiff's cause of action as disclosed by his pleadings. If the pleadings may properly be construed as presenting an action for rescission of the contract originally made between the plaintiff and the defendant, the four-years statute of limitation would apply, and plaintiff's cause of action was not barred at the time of the filing of the suit. *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Evans v. Goggan*, 5 Tex. Civ. App. 129, 23 S. W. 854; *Barbian v. Grant*, 190 S. W. 789; *Lone Star Life Ins. Co. v. Pierce*, 200 S. W. 1104; *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 89. If the action must be construed as one seeking damages for fraud and deceit, the two-years statute of limitation would apply. *Gordon et al. v. Rhodes & Daniel*, 102 Tex. 300, 116 S. W. 40; *Bass v. James*, 83 Tex. 110, 18 S. W. 336; *Sowell v. Hoffman*, 182 S. W. 1152.

[2] The majority of the court have come to the conclusion that plaintiff's cause of action, as pleaded, cannot be construed as an action for rescission, but is one for fraud and deceit, the fraud consisting of the alleged oral representations of the agent which in-

duced plaintiff to execute the instrument before mentioned and to pay the \$1,500, that plaintiff's petition discloses that the defendant, appellant here, had, prior to the filing of the suit, canceled the notes, and that there was no part of the contract still executory. The application contract provided that upon the failure of the plaintiff to pay the notes executed the defendant would have the right to cancel the notes given and to retain the cash paid as liquidated damages. The evidence shows that shortly after the execution of the application and notes and payment of money by plaintiff, perhaps within three or four days, he came to Ft. Worth, where appellant company had its general office, and had a conversation with the manager, and told the latter of the agreement which plaintiff claimed he had with the agent selling him the stock. Plaintiff testified:

"I presented this stock to Mr. C. C. Hays in the office of the Texas Co-operative Investment Company. He was there apparently in charge of the office. When I went in there, I presented this stock to Mr. C. C. Hays. When I went there with the stock, I told him there was an agreement between me and Mr. Peebles that I was to turn the stock over to him as collateral, and he wouldn't—he says 'I don't want to see it; he had no right to do it.' He said Peebles had no right to do it. I thought it necessary to make an inquiry up there afterwards with reference to the value of the stock. Hays knew about it or said something to me about the person I inquired of. I talked to other parties, and told him I did. I went up to Mr. Hays' office and I told him I had been out there and tried to see if I could find out what the stock was worth and whether it was worth away above par value as they represented to me that it was, and I told him that six prominent men, financiers, all of them but one—I told him there was not one of them that had ever heard tell of the company; they said they didn't know a thing on earth about it. He had told me, he says, 'If you will get out and sell stock,' and I says, 'I can't sell it because it's got no value.' Hays said something about one of those men I told him I had consulted. It was Mr. Lon Beavers. He said that Lon Beavers professed to be a friend of his, 'but he is now trying to undermine me and ruin my business.' At that time I made a demand of him; I told him that I wanted him to cancel my notes and pay me my money back, the \$1,500 in money that I paid him. He didn't agree to that. He said he wouldn't do it. I made another demand on him. I told him then if he wouldn't do that to cancel my notes and give me certificates of stock for the money that I had paid in and stock I had bought. I asked him to cancel the notes and pay me my money back. When he wouldn't do that, I asked him to give me certificates for the stock I had paid for. That was 150 shares. He said he wouldn't do it. \* \* \* He said that that contract that I signed stated that if I didn't pay for the stock, pay the notes in a certain time, that he could cancel it."

[3] Considerable of this sort of testimony covering these conversations is presented in

the statement of facts, but sufficient has been quoted to show that, within a few days after the contract was made between plaintiff and defendant, plaintiff discovered the facts which would have put a reasonable man on notice that the defendant did not purpose to carry out the promise which plaintiff claimed the agent had made to him, and that the representations as to the value of the stock, etc., were not true. Therefore plaintiff's cause of action accrued at that time.

[4] The trial court, at the instance of defendant, called upon plaintiff to elect as to whether he would prosecute his suit further as one for rescission and cancellation, or as one for the recovery of damages for fraud and deceit. The plaintiff declined to make this election, but stated to the court that he would stand upon and rely on the sixth amended petition, whereupon the court construed the action to be for the recovery of money based on alleged fraud of defendant in procuring same from plaintiff, and ordered that the cause proceed to trial. In his charge to the jury the court proceeded upon the theory that the action was one for the recovery of money secured through fraud and deceit. But this action of the court becomes immaterial, if the evidence discloses, as we think it does, that the cause of action was barred by the two-years statute of limitation. We are of the opinion that the evidence makes it conclusive that plaintiff discovered the alleged fraud practiced upon him more than two years prior to the filing of his suit. As to this conclusion we all agree. The writer, however, is of the opinion that the pleadings justify the conclusion that the suit is one for a rescission of the original contract or application under which plaintiff agreed to purchase the stock in appellant's company. The cancellation of the notes given and the recovery of the money paid were but incidental to and flowing from the right of rescission of the original contract. "Rescission," defined by Black on Rescission and Cancellation, vol. 1, p. 3, is as follows:

"To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo, that is, an offer by the moving party to restore all that he has received under it, with a demand for the similar restoration to him of all that he has paid or given under it, and, in effect, a mutual release of further obligations."

The writer is further of the opinion that the fact, as pleaded by plaintiff, that defendant had already canceled the notes, would not deprive plaintiff of his right of rescission. Defendant was retaining the \$1,500 by reason of its contention that the contract made was binding. Plaintiff insisted that it was not binding by reason of the alleged fraud. Therefore plaintiff, in the opinion of the writer, had the right to have tried the issue as to whether fraud was practiced in securing his signature to the application and consent to the contract. The fact that some of the relief to which he would be entitled under ordinary circumstances if he should prevail had already been granted by the defendant it does not appear to the writer would affect the character of the suit. The cancellation of the notes already made by defendant was in pursuance of a stipulation contained in the contract that upon the failure to pay the notes the defendant would have the right to cancel the notes and retain the cash. But this contractual right on the part of defendant, plaintiff claimed, did not exist, because of fraud practiced. Plaintiff was, in effect, saying to the defendant:

"You had no right to cancel the notes by virtue of the contract, for the contract is unenforceable for fraud. But I have the right to have the notes canceled and to recover the money paid because of your fraud."

But the majority have concluded otherwise, and the judgment will be reversed, and here rendered for appellant.

BUCK, J., dissenting.

On Motion for Rehearing.

BUCK, J. [5] In his motion for rehearing appellee insists we erred in our original opinion in stating that the prayer, as well as the allegations, in the original petition was substantially the same as in the sixth amended or trial petition. He insists that in the original petition he asked for special relief only, while in the petition upon which the trial was had he prayed "for such other and further relief, judgments and decrees, legal and equitable, such as he may be entitled to under the facts in this case," etc. The original petition contained a prayer for "general relief," as shown by the transcript. This prayer was as comprehensive in its scope as the one in the trial pleading. *Lee v. Boutwell*, 44 Tex. 151, cited by appellee in support of his contention that we erred in the statement made.

Appellee further says that we erred in holding that the trial court had the authority to require the plaintiff to elect upon which ground for rescission set forth in his petition he should proceed to trial. By reference to our original opinion it will be noted

that we did not so hold. The majority concluded that the petition must be construed as an action to recover damages for fraud and deceit, and not one for rescission of the original contract. Hence the trial court's action in this respect was immaterial. The single cross-assignment of appellee is directed to the trial court's action requiring an election. There is no cross-assignment to the exclusion of any evidence offered by appellee. Apparently the evidence submitted by appellee was the same as it would have been if the trial court had not required an election. Hence appellee's cross-assignment is overruled.

For the reasons given, the motion for rehearing is overruled.

BUCK, J., dissenting as before.

WOOTEN v. TEXAS BITULITHIC CO. et al.  
(No. 9047.)

(Court of Civil Appeals of Texas. Ft. Worth.  
April 5, 1919. On Motion for Rehearing,  
May 10, 1919.)

1. MUNICIPAL CORPORATIONS  $\S$  446 — PUBLIC IMPROVEMENTS—COMPLIANCE WITH CONTRACT.

Though the contract for paving a street called for pavement to the south line of an intersecting street, and the pavement constructed extended only to the north line, *held* that, as the contract made the charter and ordinances of the city a part thereof, and all of the proceedings by the board of commissioners, etc., showed that the pavement was to extend only to the north line of the intersecting street, the assessment for such paving was not open to attack on that ground.

2. MUNICIPAL CORPORATIONS  $\S$  204(5) — PUBLIC IMPROVEMENTS—NOTICE OF PROPOSED WORK—MORTGAGEE.

Though no notice of the proposed paving of a street was given a mortgagee, *held*, that publication in a newspaper of notice of the proposed pavement was sufficient to bind the mortgagee; the city charter, which provided for notice, declaring that service of notice by advertisement should be conclusive.

3. CONSTITUTIONAL LAW  $\S$  290(1)—MUNICIPAL CORPORATIONS  $\S$  407(1)—DUE PROCESS OF LAW—PRIORITY OF LIEN FOR IMPROVEMENTS.

Where a city charter provided that on the day fixed for hearing any person owning or having any interest in the property proposed to be assessed for paving should have the right to be heard, *held*, that the provision of the charter making the lien of paving superior to that of a mortgage was not invalid as working a deprivation of property without due process of law in violation of Const. Tex. art. 1,  $\S$  19, and Const. U. S. Amend. 14,  $\S$  1.

**4. MUNICIPAL CORPORATIONS — 516 — PUBLIC IMPROVEMENTS—ASSESSMENTS—COLLATERAL ATTACK.**

Though a city charter provided that any person interested in property assessed for street improvements should not institute suit to contest the validity of the assessment after a time fixed, the assessment can be collaterally attacked where the board of commissioners of the city did not acquire jurisdiction under the charter to levy the assessment.

**5. MUNICIPAL CORPORATIONS — 522 — PUBLIC IMPROVEMENTS—ASSESSMENTS—VALIDITY—PAYMENT IN INSTALLMENTS.**

Where a city charter made it the duty of the board of commissioners to order a street paved whenever the owners of 60 per cent. of the property abutting thereon should present a written petition therefor, and provided that assessment should be paid in five installments, and a petition for paving signed by the owners of more than 60 per cent. was filed, the board of commissioners cannot disregard it, and, acting under their general authority, order improvement and provide for payment of the assessment within 30 days after acceptance of the work.

**6. MUNICIPAL CORPORATIONS — 443 — PUBLIC IMPROVEMENTS—ASSESSMENTS—VALIDITY.**

Where an assessment for street paving was invalid ab initio because the board of commissioners of the city attempted to act under their general authority without following the provisions applicable because property owners had petitioned for the improvement, the fact that act of the board did not prejudice one holding a mortgage on abutting property held not to validate the assessment.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Suit by the City of Ft. Worth for the use and benefit of the Texas Bitulithic Company against Joe S. Wooten, executor and others. From a judgment for plaintiff, the named defendant appeals. Reversed and rendered in part, and undisturbed in part.

Robert G. Johnson and Carl W. Wade, both of Ft. Worth, for appellant.

T. J. Powell, of Ft. Worth, L. M. Dabney, of Dallas, and W. W. Wilkinson, of Ft. Worth, for appellees.

DUNKLIN, J. Joe S. Wooten, as executor of the last will and testament of Mrs. H. G. Wooten, deceased, has appealed from a judgment rendered in favor of the city of Ft. Worth for the use and benefit of the Bitulithic Company foreclosing a lien upon a lot on Eighth avenue in the city of Ft. Worth for paving done by that company on the street abutting said lot. This is the second appeal in this case. The disposition of the former appeal appears in 196 S. W. 601.

The paving was done by the Texas Bitu-

lithic Company under a contract with the city, and after it was completed the city, acting through its board of commissioners, issued a paving certificate in favor of the company for the sum of \$417.50, which was the amount assessed by the city against Mrs. E. C. Florence, who owned the lot in controversy, and the amount so assessed was declared to be a lien on said lot. Mrs. Florence was also made a defendant, and a personal judgment was rendered against her for the balance due on the certificate, and the foreclosure of the lien decreed was against her, and also against R. I. Craig, who was likewise made a defendant upon an allegation that he was claiming some interest in the property, but neither of those two defendants has appealed from the judgment so rendered.

The trial was before a jury, who, in answer to a special issue, found that the lot had been enhanced in value in the sum of \$500 by reason of the paving done by the paving company.

The contract for the paving was let by the city to the paving company on May 3, 1910. On November 8, 1910, the city engineer reported to the board of commissioners of the city that the paving had been done in strict compliance with the terms of the contract and the specifications adopted by the city, and he recommended that the improvement be finally accepted by the city, which was done on December 20, 1910, at which time the paving certificate sued on was issued. All proceedings by the board of commissioners relative to said paving were done under and by virtue of a special charter granted to the city of Ft. Worth by the Legislature of Texas.

On June 9, 1910, one month and three days after the paving contract was let, Mrs. H. G. Wooten, acting through Robert G. Johnson, her agent and attorney in fact, loaned \$1,200 to Mrs. E. C. Florence, the owner of the property in controversy, who then and there secured the loan by a deed of trust on the property of even date with her note evidencing the loan, and which deed of trust was duly filed for record in the records of deeds and mortgages of Tarrant county on June 13, 1910, four days after said loan was made. Neither Mrs. Wooten nor her agent and attorney had any actual notice that said paving contract had been entered into or that any steps had been taken to pave the street in front of the property, and none of the proceedings relative to fixing a lien on the lot for said paving were ever recorded in the records of deeds and liens of any character for Tarrant county.

The initial step for the paving in controversy was taken on April 5, 1910, by the owners of the property abutting on the street that was paved, who upon that date filed a

petition to the city commission asking that Eighth avenue between Weatherbee and Morgan streets be paved, and the petitioners owned 85 per cent. of the property abutting on that portion of the street sought to be paved. On April 12, 1910, the board of commissioners passed a resolution ordering that portion of the street named in the petition to be paved and directing the city engineer to prepare and file with the board of commissioners specifications for the paving, and invited bids for the work to be done, but the resolution so passed did not mention or in any manner refer to the petition that had been filed by the property owners asking that the paving be done. The Texas Bitulithic Company was the successful bidder for the work to be done, and entered into a contract therefor which was approved and accepted by the board of commissioners, and which contract contained, among others, the following provisions:

"That the improvements hereinafter referred to shall be laid and constructed by the contractor on the following streets and thoroughfares in the city of Ft. Worth, to wit: Eighth avenue from the south line of Weatherbee street to the south line of Morgan street. \* \* \*

"It is understood and agreed that this contract is entered into with reference to the existing charter and ordinances of the city of Ft. Worth, which are hereby made a part hereof, in so far as the same may be applicable. \* \* \*

"That the proportion of the cost of such improvements which shall be payable by the owners of property abutting on said street shall be paid to the contractor within 80 days after completion of the improvements in front of the property of such owners and shall bear interest from date of completion at the rate of 8 per cent. per annum, and that the amounts to be paid by each owner of property abutting on said street shall be secured by a lien upon said property and a personal claim of liability against the owner thereof."

By the resolution passed accepting said bid and contract the board ordered the certificate for the paving to be issued, fixing maturity of the certificate at 80 days from and after November 8, 1910, that date being recited as the date of the completion of the work, and the certificate was made to draw interest at the rate of 8 per cent. per annum from its date, and it was declared to be a lien upon the property, in accordance with the provisions of section 9, c. 14, of the city charter; and according to that provision of the charter the lien so created was made superior to all other liens or deeds except lawful taxes.

[1] It will be noted that the contract for paving described the street to be paved to begin with the south line of Weatherbee street and to extend to the south line of Morgan street, while the order for paving and all other proceedings had relative to such described the property as beginning

with the south line of Weatherbee street and extending to the north line of Morgan street, and the proof was conclusive that that only was the portion of the street paved. It thus appears that the contract for paving included a strip from the north line of Morgan street to the south line of Morgan street which was never paved, and by his first assignment of error appellant insists that no foreclosure of the lien could properly be decreed, because the paving company did not fully comply with its contract. It is a familiar rule that, in order to fix such a lien as is here claimed, the statutory requirements must be strictly followed. We are of the opinion, however, that there is no merit in the assignment, since the contract for paving expressly referred to the charter and ordinances of the city, which were made a part thereof in so far as the same were applicable, and since the board of commissioners never authorized the paving of the strip between the north and south boundaries of Morgan street, and since all of its proceedings relative to the paving, including the acceptance of the work done, referred to that portion only of Eighth avenue lying between the south boundary of Weatherbee street and the north boundary of Morgan street. Under such circumstances the most that can be said is that there was an ambiguity in the contract for paving, and the trial court was authorized to adopt the construction which made it applicable to that portion of Eighth avenue between the south boundary of Weatherbee street and the north boundary of Morgan street.

[2] By section 8, c. 14, of the charter it is provided that, in order to bind the owner of any property by the board of commissioners determining the necessity of assessing any part of the cost of the paving against his property, it shall be necessary to publish a notice of such order in some newspaper published in the city for five consecutive days, and also by posting in the post-office of the city a copy of such notice to the owner. But it further provided that "service of said notice by advertisement shall be conclusive and binding whether service by posting shall be had or not, the latter being merely cumulative."

Upon the trial it was agreed that notice of the order declaring a necessity for the paving was not mailed to Mrs. Wooten nor to any agent for her, but that the notice required by the charter was published in a newspaper in the city for the period of time required.

We are of the opinion that such publication of the notice was sufficient to bind Mrs. Wooten if the order was otherwise effective to create a lien upon the property in favor of the holder of the certificate sued on. 2 Page & Jones on Taxation by Assessment, §§ 748, 760; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 841.

[3] By another assignment it is insisted that, if by section 8, c. 14, it was intended that a lien for paving can be made superior to a prior mortgage lien duly recorded, under such proceedings as were taken by the board of commissioners in the present instance then the same would be in violation of article 1, § 19, of the Constitution of Texas, and article 14, § 1, of the Amendments to the Federal Constitution, in that it would have the effect of destroying or injuriously affecting the mortgage lien without due process of law. In the section of the charter referred to it is expressly provided that on the day fixed for hearing any party owning or having any interest in the property proposed to be assessed with any part of the cost of the paving shall have the right to be heard, and upon such hearing to present any objection to such assessment or the making of such improvement, and the right to urge any reason showing the invalidity or irregularity in the proceedings relative to such improvement. In view of that provision, and upon the authority of *Storrie v. H. C. St. Ry. Co.*, 92 Tex. 129, 48 S. W. 796, 44 L. R. A. 716, the assignment now under discussion is overruled.

[4-6] By section 14, c. 14, of the city charter it is made the duty of the board of commissioners to order a street paved whenever the owners of 60 per cent. of front feet of property abutting on the street shall present a written petition therefor. And it is provided that, whenever paving is ordered upon such a petition, the cost shall be payable by assessments against the property owners in five equal installments, the first of which shall be due 30 days after the completion and acceptance of the improvement by the city, and the remainder in four annual installments thereafter, bearing interest at not to exceed 8 per cent. per annum, and that default in payment of any installment of the principal or interest when due shall, at the option of said city or its assigns, mature all unpaid installments. By section 5 of the same chapter of the charter power is vested in the board of commissioners upon their own initiative to order the paving of any of the public streets of the city, and in such event to prescribe that the amounts assessed against the property owners may be paid in not more than three installments payable in not more than three annual payments next after the completion of the improvement; such assessments drawing interest at the rate not to exceed 8 per cent. per annum. It thus appears that, if the paving is done upon the initiative of the board of commissioners, that board may, at its discretion, make the assessments mature at any time within the limitations stated, and may provide that the entire assessment may be made payable in one installment, if they see fit so to do.

Appellant insists that the record shows

that the paving in controversy was ordered upon the written petition filed therefor, and that, since the entire assessment against the property in controversy was made payable in a single installment, evidenced by the certificate sued on, payable in 30 days after the completion of the work, said assessment was in violation of the terms of the charter, and therefore illegal and void. As noted above, the order passed by the board of commissioners, which was made seven days after the petition for paving the street was filed by the owners of the property abutting thereon, did not in terms approve the petition, and did not refer to it in any manner; neither did it contain any recital showing that the board of commissioners, in ordering the paving to be done, was acting upon its own initiative. The order begins as follows:

"Be it resolved by the board of commissioners of the city of Ft. Worth, Texas, that the following streets and avenues of the city be paved and improved within the following limits, to wit: Eighth avenue from Weatherbee street to Morgan street."

Section 5, c. 14, of the charter, which vests in the board of commissioners the power to make public improvements in the city upon its own motion, reads in part as follows:

"The board of commissioners shall have the power by resolution to order the making of such public improvements, or any of them, by a majority vote, without notice, and the passage of such resolution shall be conclusive of the public necessity and benefits thereof."

Appellee insists that it conclusively appears that the board of commissioners acted upon its own motion, and not upon the petition of the property owners, since the entire assessment was made payable in a single installment 30 days after the completion of the work, contrary to the requirements of the charter when the paving is ordered in compliance with the petition of the property owners. We sustain the contention of the appellee.

Upon the face of the proceedings it appears that the board of commissioners ignored the petition of the property owners to have the street paved, and in ordering such paving done acted upon their own motion. But we are of the opinion that in so doing the board exceeded its jurisdiction, and for that reason its order so made was void. The decision of our Supreme Court in the case of *Haverbakken v. Hale* (Sup.) 204 S. W. 1162, and the reasoning there advanced are controlling upon this question. That was a suit to restrain by injunction the opening of a public road in compliance with an order of the county commissioners' court made upon a petition of freeholders of the county, but the requisite number prescribed by the statute did not sign the petition. On appeal of the case to this court a majority of the court held that, since by article 6871

of the Statutes the commissioners' court had the power upon their own initiative to order the opening of such a road, the order for it to be opened should be sustained even though the petition upon which they acted had not been signed by the required number of freeholders. But that decision was reversed by our Supreme Court, which held that, as articles 6875 and 6876 gave the right to freeholders to present a petition for the opening of the road, the filing of such a petition before the commissioners' court had seen fit upon its own motion to order the road opened deprived the court of the jurisdiction to open the road upon its own initiative, and that, as the court was without jurisdiction to make it, the order was void. The decision was based upon the following reasons, which seem to us sound and irrefutable:

"Article 6860 does not of itself, in our opinion, confer upon the commissioners' court any authority to open a new road of its own motion. Article 6871 does confer such authority. It relates to a condition where the court may act of its own accord. Articles 6875 and 6876 relate to another condition where it is contemplated that the court shall not act except upon the petition of a required number of freeholders. The theory of article 6871 doubtless was that under certain necessities the court should be free to lay out new roads or straighten existing ones of its own initiative. But it was clearly not intended that in all cases it should so act. To ascribe such an intention to the Legislature is to impute to it no purpose whatever in its enactment of articles 6875 and 6876. It renders them vain and meaningless. There could be no reason for writing their provisions into the statute law unless it was plainly contemplated that, while the court might proceed upon its own motion, yet, where it had not done so, its power was subject to be invoked upon petition. They furthermore make it plain that, when the court's jurisdiction is thus invoked, it is without the power to act except upon a substantial compliance with their requirements."

By section 10, c. 14, of the city's charter it is provided:

"Any person interested in any property assessed for such improvements, or against whom any charge of personal liability may have been fixed, may, within ten days from the conclusion of the hearing above referred to, but not thereafter, institute suit in any court having jurisdiction for the purpose, on any ground, of testing the validity of said assessment or personal liability, and the validity of any proceeding had with reference thereto; but if said action be not brought within said period of ten days, then said persons, their heirs, successors, assigns, or personal representatives, shall be forever barred from asserting any defect in such proceedings or any invalidity in said assessment or charge of personal liability, in any action in which the same may thereafter be brought into question."

But that provision does not bar even a collateral attack at any time upon any as-

essment made in any case where the board of commissioners does not acquire jurisdiction under the provisions of the charter to make it. The rule applicable to proceedings by such a board is stated in 2 Page & Jones on Taxation by Assessment, § 1337, as follows:

"If, by statute, certain objections to the assessment proceedings are to be made at certain specified stages of the proceedings, a property owner who does not make such objections at the time specified cannot interpose such objections as defenses in an action to enforce the assessment, if the objections interposed do not affect the jurisdiction of the public corporation to levy the assessment. If the objection really goes to the want of power of a public corporation, or to its jurisdiction, failure to object does not waive such objection. Thus, if the property owner is required to take an appeal in order to preserve his rights, such appeal is not necessary if the proceedings are void on their face, and failure to appeal does not prevent him from setting up such defenses subsequently."

See, also, sections 1358 and 1359, which are to the same effect.

The reasoning advanced in the Haverbekken Case applies with even greater force here, in view of the fact that, if paving is done upon the petition of owners of property abutting on the street to be paved, their respective assessments for the cost of paving, instead of being made payable all in a lump sum 30 days after completion of the work, must be divided into five equal installments, one of which shall mature within 30 days, and one each year for 4 years thereafter, which liberal terms of payment constitute a valuable right to the property owners. And it would be unreasonable to say that, after the jurisdiction of the board of commissioners has been invoked to grant that right, the petition may be arbitrarily ignored by action under the provisions of section 5, c. 14, of the charter referred to above, to the destruction of the right accorded to the property owners by section 14, c. 14, of the charter, to more liberal terms of payment. And, as said by our Supreme Court in the Haverbekken Case, the enactment of section 14 would have been meaningless if it had been intended that the board could thus ignore and render it inoperative at its pleasure.

Nor is it any answer to the foregoing conclusion that appellant has suffered no injury by reason of the fact that more than 7 years had expired after said assessment was made before the case was tried and judgment rendered. Even though it could be said that the course pursued by the board was more advantageous to the property owners than the proceedings prescribed in section 14, c. 14, of the charter, that fact could not validate an assessment that was void ab initio. *Allen v. Galveston*, 51 Tex. 302; 2



Page & Jones on Taxation by Assessment, § 777. Plaintiff's suit was based solely upon the paving certificate issued by the board, and, unless that certificate was valid, it follows, of course, that a recovery must be denied irrespective of the enhancement of the value of the property by reason of the improvement.

The record shows that subsequently to the pavement of said street Mrs. E. C. Florence sold the property in controversy to defendant R. I. Craig, and thereafter the lien of Mrs. Wooten was foreclosed by sale by the trustee named in the deed of trust in accordance with the terms of that instrument, and that at such sale Mrs. Wooten bought the property, and her estate is now the owner thereof.

Since the action of the board of commissioners in ordering the assessment in controversy was void for the reason that the board never acquired jurisdiction to make it, the judgment of the trial court foreclosing the plaintiff's alleged lien against the lot in controversy is reversed, and judgment is here rendered denying such a foreclosure and decreeing that the estate of Mrs. H. G. Wooten, deceased, and Joe S. Wooten, as executor of said estate, is vested with title to said lot free of said alleged lien.

The personal judgment rendered in plaintiff's favor against Mrs. E. C. Florence for the amount of the assessment as evidenced by the certificate sued on, from which she has not appealed, is left undisturbed.

Reversed and rendered in part, and undisturbed in part.

#### On Motion for Rehearing.

The petition filed by the property owners for paving the street referred to in our original opinion was as follows:

"Ft. Worth, Texas, March 27, 1910.

"To the Honorable Mayor and Board of Commissioners of the City of Ft. Worth:

"The undersigned property owners along 8th Ave., between Weatherbee and Morgan Sts. in the city of Ft. Worth, hereby petition your honorable body to order the pavement of 8th Ave., between the above-mentioned streets, with bitulithic pavement, and each of us do hereby agree to pay for the pavement of one-half the street in front of our respective property. We request that this portion of 8th Ave. be made uniform in width with that portion of 8th Ave. immediately north of Weatherbee street.

"I. C. Chase, 80 ft.

"J. M. Long, 80 ft.

"J. I. Turner, 50 ft.

"W. H. Word, 100 ft.

"Geo. W. Armstrong, 63 ft.

"F. E. Whitsell, 100 ft.

"L. M. Burkhart, 100 ft.

"I. N. McCrary, 65 ft."

That part of the street that was paved was 400 feet on one side and 360 feet on the

other, or a total of 760 feet counting the frontage on both sides. The number of front feet owned by the signers of the petition and situated partly on one side of the street and partly on the other aggregated 638 feet, or 83 per cent. of the entire both sides frontage of the paved part. The agreement of each owner to pay one-half of the cost of the entire pavement in front of his property was an agreement to pay for the paving to the middle of the street, and such agreement by the owners on both sides covered the whole. Furthermore, the agreement to pay the cost of paving would include the cost of excavations, grading, and other necessary incidents to the work of the paving. The designation by the petitioners of the kind of paving desired as "bitulithic" pavement was in strict compliance with section 14, c. 14, of the city charter. With these additional findings of fact, the motion of appellee for further findings and for a rehearing are both overruled.

#### BIRD v. BIRD et al. (No. 8171.)

(Court of Civil Appeals of Texas. Dallas.  
April 26, 1919. Rehearing Denied  
May 24, 1919.)

HUSBAND AND WIFE ~~8171~~(1)—DEBTS OF  
HUSBAND—POWER OF WIFE TO MORTGAGE  
SEPARATE PROPERTY.

A married woman may mortgage or pledge her separate property to secure a debt incurred by her husband; her power in that regard not being impaired by the Married Woman's Act of 1913 (Vernon's Sayles' Ann. Civ. St. 1914; arts. 4621, 4622, 4624).

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Suit by Mrs. Myrtle Bird against Geo. H. Bird and another. From the judgment rendered, plaintiff appeals. Affirmed.

Etheridge, McCormick & Bromberg, of Dallas, for appellant.

Thomas, Milam & Touchstone, of Dallas, for appellees.

RAINEY, C. J. The statement of the case by appellant's counsel found in their brief is adopted by this court, and is as follows:

"Mrs. Myrtle Bird, then the wife of George H. Bird, instituted this suit against him and the First State Bank of Dallas on April 30, 1917, alleging that certain shares of stock which were a part of her separate estate had been pledged by herself and husband to the appellee First State Bank of Dallas to secure a debt due from her husband to said bank evidenced by a note for \$5,930, as well as to secure the payment of a debt incurred for the benefit of her separate estate evidenced by a note for \$800.

She alleged that she had tendered payment of the \$800 note and demanded the return of her pledged property, but that the bank had refused to return it unless the other note was also paid, were threatening to execute a power of sale contained in the pledge, and would do so unless injunction issued. She prayed for an injunction restraining the sale, tendering the \$800, with interest, and praying that the judgment be perpetuated on final trial. Appellant filed her first amended petition on April 6, 1918, praying in the first count as in her original petition and in the second count for a judgment against the First State Bank of Dallas, appellee, for conversion of her property. A temporary injunction issued. On April 18, 1918, the appellant filed her first supplemental petition, alleging the rendition of a judgment for divorce in her favor dissolving the marriage relation between her and the appellee George H. Bird. The appellee First State Bank of Dallas on April 15, 1918, filed its first amended answer, consisting of a general demurrer and certain special exceptions, a general denial, a plea that the pledged stock had been first pledged to Citizens' State Bank & Trust Company by the appellant and appellee George H. Bird, and that the appellant, on the advice of counsel, had voluntarily participated in the renewal of the loan to the First State Bank of Dallas and had signed a collateral contract in writing pledging her said stock to secure both of the notes described in the plaintiff's petition, and that she was thereby estopped to claim that the said property was not pledged to secure the larger note as well as the smaller note, setting up the terms of the pledge contract, a cross-action declaring on the notes, a plea declaring that the loans would not have been made except in reliance on the collateral security which was the separate property of the appellant, and praying judgment on the notes against the makers for the principal, interest and attorney's fees thereof, and for a foreclosure of the lien. The facts were stipulated between the parties. The case was tried to the court without a jury and he rendered judgment against George H. Bird in favor of the appellee First State Bank of Dallas, awarding a recovery of the principal, interest, and attorney's fees of both notes, with a foreclosure against the said George H. Bird and appellant of the lien and dissolving the temporary injunction. To the action of the court in dissolving the injunction and in adjudging the stock subject to a lien to pay the whole indebtedness recovered against George H. Bird appellant excepted, and is prosecuting the appeal in this court."

There is no conflict in the facts, and we adopt as our conclusions the findings of fact of the trial court as follows:

"(1) That on December 27, 1916, Mrs. Myrtle Bird and George H. Bird, then being husband and wife, made, executed, and delivered to the First State Bank of Dallas their certain promissory note in writing, signed by them, by the terms whereof they and each of them agreed and promised to pay to the bank or its order, on March 27, 1917, \$5,930.28, with interest at the rate of 10 per cent. per annum from March 27, 1917, until paid, and 10 per

cent. additional as attorney's fees in case said note be placed in the hands of attorneys for collection or collected by suit, for money loaned in that amount by the bank to George H. Bird.

"(2) That Mrs. Myrtle Bird, by the signing of said note, attempted to become surety of George H. Bird as to said debt for \$5,930.28, that she voluntarily signed said note, and that no part of said debt was incurred for the benefit of the separate estate of Mrs. Myrtle Bird, nor was the said debt, in whole or in part, contracted for necessities furnished to Mrs. Myrtle Bird or her children.

"(3) That on the said 27th day of December, 1916, Mrs. Myrtle Bird owned in her own right as her separate property, to wit, 25 shares of the capital stock of the Moody Calculator Company, evidenced by certificate No. 68 issued in her name, and also 27 shares of the capital stock of the Planters' National Bank of Honey Grove, Tex., evidenced by certificate No. 219 issued in her name, and that on said date, as part of the loan described aforesaid, Mrs. Myrtle Bird, joined by her then husband, George H. Bird, executed and delivered to the First State Bank of Dallas a certain instrument in writing which purported to transfer, pledge, and hypothecate said stock to the said the First State Bank of Dallas, and to subject the same to the payment of the aforesaid indebtedness and to the payment of any other indebtedness which might become due to the said the First State Bank of Dallas by the said George H. Bird, Mrs. Myrtle Bird, or either of them; that said instrument so executed by Mrs. Myrtle Bird and George H. Bird evidenced, in substance, that the aforesaid shares of capital stock were pledged and transferred to said the First State Bank of Dallas for the purpose of securing the payment of the note aforesaid, and for any other indebtedness to the said the First State Bank of Dallas, and that in case of insolvency or failure in business said bank might, at its option, mature all indebtedness secured by the said pledged property, and that upon failure of the said makers to pay the debt evidenced by the note first hereinbefore described or any other indebtedness or to perform any agreement contained in said collateral pledge contract, said bank, without other demand, advertisement, or notices of any kind, might sell at public or private sale the whole or any part of the securities then held by it in pledge and transfer the same to the purchaser or purchasers thereof and receive the proceeds of the sale, and that the bank might buy at its own sale, the same as if a stranger, and apply the proceeds of the sale to the payment of said indebtedness, and further that the rights of the bank under said collateral pledge contract might be assigned to any assignee, and that the assignee shall enjoy all the privileges accruing to the bank thereunder; that, as a part of the same transaction, said stock was indorsed in blank by Mrs. Myrtle Bird and delivered to the First State Bank of Dallas, and has since remained and is now in its possession."

"(4) That on January 19, 1917, Mrs. Myrtle Bird and George H. Bird, then being husband and wife, made, executed, and delivered to the First State Bank of Dallas their certain promissory note in writing, signed by them, by the terms of which they and each of them agreed

and promised to pay to the First State Bank of Dallas, or its order, on April 19, 1917, \$800, with interest at the rate of 10 per cent. per annum from April 19, 1917, until paid, and 10 per cent. additional as attorney's fees in case said note be placed in the hands of an attorney for collection or collected by suit, for money loaned in that amount by the bank to George H. Bird and to Mrs. Myrtle Bird; that all of said funds so borrowed and as represented by said \$800 note were borrowed, and all of said indebtedness as represented by said note was incurred for the benefit of the separate estate of Mrs. Myrtle Bird.

"(5) That on said 19th day of January, 1917, Mrs. Myrtle Bird owned in her own right as her separate property, to wit, 87 shares of the capital stock of the Security National Bank of Dallas, Tex., evidenced by certificate No. 179 issued in her name, and that on said date, as a part of the loan transaction aforesaid, Mrs. Myrtle Bird, joined by her then husband, George H. Bird, executed and delivered to the bank a certain instrument in writing, which purported to transfer, pledge, and hypothecate said stock to the First State Bank of Dallas, and to subject the same to the payment of said indebtedness and to all other indebtedness in favor of the First State Bank of Dallas against George H. Bird and Mrs. Myrtle Bird, or either of them; that said instrument so executed by said Mrs. Myrtle Bird and George H. Bird evidenced, in substance, that the aforesaid shares of stock of the Security National Bank were pledged and transferred to the said First State Bank of Dallas for the purpose of securing the note aforesaid and any other indebtedness to the said First State Bank of Dallas, and that in case of insolvency or failure in business the bank might, at its option, mature all indebtedness secured by the said pledge, and that upon failure of the makers to pay the debt evidenced by the note last hereinabove described, or any other indebtedness, or to perform any agreement contained in said collateral pledge contract, the bank, without other demand, advertisement, or notice of any kind, might sell at public or private sale the whole or any part of the security then held by it in pledge and transfer the same to the purchaser or purchasers thereof and receive the proceeds of the sale, and that the bank might buy at its own sale, the same as if a stranger, and apply the proceeds of the sale to the payment of said indebtedness, and, further, that the rights of the First State Bank of Dallas under said collateral pledge contract might be assigned to any assignee, and that the assignee shall enjoy all of the privileges accruing to the bank thereunder; that, as a part of the same transaction, said stock was indorsed in blank by Mrs. Myrtle Bird and delivered to the First State Bank of Dallas, and has since remained and is now in its possession.

"(6) That the acts of the said Mrs. Myrtle Bird in signing the above-described pledge contracts and her acts in pledging her above-described personal property were voluntary on her part.

"(7) That in making the loan evidenced by said notes the First State Bank of Dallas relied on the pledge of the said personal property as collateral security and looked solely to the stock hereinbefore described for indemnification,

payment, and reimbursement against loss as to all of the hereinabove described indebtedness; that the several amounts advanced and paid upon said loans by the First State Bank of Dallas herein were so advanced and paid solely upon the credit of the collateral pledged, and said money would not have been paid by the First State Bank of Dallas simply upon the execution of promissory notes by George H. Bird and Mrs. Myrtle Bird, or either of them.

"(8) That the indebtedness above described and all of it is wholly unpaid; that same has been placed in the hands of attorneys for collection and suit brought thereon, and that the 10 per cent. attorney's fees, as evidenced in said notes have accrued, and that said indebtedness and said contracts hypothecating said stock as aforesaid are owned wholly by the First State Bank of Dallas, and that the shares of stock described herein and covered by said hypothecation contracts is also held by said the First State Bank of Dallas, and that said bank claims the right to subject said stock to the payment of said indebtedness and all of it above described.

"(9) That at the time of the institution of this suit Mrs. Myrtle Bird and George H. Bird were still husband and wife; that since the institution of this suit Mrs. Myrtle Bird obtained a decree of divorce from George H. Bird, which decree has become and is final.

"(10) That, when Mrs. Myrtle Bird filed her original petition for suit herein, the same was presented to the judge of this court in an ex parte hearing, and a temporary injunction was granted in accordance with the prayer of her said original petition.

"(11) That neither the Citizens' State Bank & Trust Company nor the said the First State Bank of Dallas, nor the officers of either, knew the purpose for which the moneys advanced upon said collateral pledge as hereinbefore set out were expended."

The following stipulations were filed by the parties:

"It is agreed between the parties hereto as follows:

"(1) That the \$800 note mentioned in the plaintiff's pleadings represents money borrowed for the use and benefit of the plaintiff's separate estate; that the other indebtedness mentioned in the plaintiff's petition represents money used by George H. Bird and is the individual indebtedness of George H. Bird, his wife signing the notes representing same as surety. The stocks pledged by plaintiff to defendant bank were and are her separate estate.

"(2) That the corporate stock described in the plaintiff's petition as being deposited with the defendant First State Bank was so deposited by George H. Bird and the plaintiff, each of whom jointly executed contracts of pledge thereto, as described in the plaintiff's petition, and that the pledge on her part was voluntary.

"(3) That, at the time the moneys representing said indebtedness were borrowed and the notes and collateral contracts described in plaintiff's petition were executed, plaintiff and George H. Bird were husband and wife, but since the institution of this suit a decree of divorce has been pronounced between them, and they are no longer husband and wife.

"(4) That no part of the indebtedness described in plaintiff's petition evidenced by the \$800 note and the \$5,930.28 note therein has been paid; that the said notes have been placed in the hands of an attorney for collection, and they provide for payment of 10 per cent. attorney's fees in such event; that the terms of the notes and the collateral contracts are substantially as described in plaintiff's and defendant's pleading and the exhibits thereto.

"(5) That in making the loans evidenced by said notes the defendant bank relied on pledge of the collateral security.

"(6) That neither the Citizens' State Bank nor the First State Bank nor the officers of either know the purposes for which the moneys advanced and the collateral hereinabove set out were expended.

"(7) That the several amounts advanced and paid by the banks herein were so advanced and paid on the collateral pledged, and said moneys would not have been parted from by the banks by the execution of promissory notes of either or both of them. Said banks looked solely to the stocks described for indemnification and reimbursement against loss."

The trial court's conclusions of law are as follows:

"(1) That the temporary injunction granted upon the ex parte application of Mrs. Myrtle Bird should be dissolved as not being warranted under the facts of this case.

"(2) That, as the indebtedness evidenced by the note for \$5,930.28 of date December 27, 1916, due the First State Bank of Dallas, was not for the necessities furnished Mrs. Bird and her children, and was not for the benefit of her separate estate, she is not personally and generally bound thereon, and that no general or personal judgment should be rendered against her; that Mrs. Myrtle Bird was without legal capacity to bind herself personally as a joint maker of said note with her husband, either as principal with him or as surety for him.

"(3) That the hypothecation, pledge, and transfer of the certificates of stock in the Moody Calculator Company and in the Planters' National Bank of Honey Grove, Tex., explained and evidenced by the joint signatures of Mrs. Myrtle Bird and her then husband, George H. Bird, to secure the First State Bank of Dallas, in the repayment to it of the \$5,930.28 loaned by it, was and is a valid pledge, hypothecation, and transfer of said certificates of stock to the First State Bank of Dallas as security for such indebtedness, and that the lien in favor of the First State Bank of Dallas arising therefrom is valid and ought to be foreclosed.

"(4) That the indebtedness evidenced by the \$800 note of date January 19, 1917, was for the benefit of the separate estate of Mrs. Myrtle Bird, and that she is generally and personally bound thereon, and that a personal judgment should be rendered against her thereon; that Mrs. Myrtle Bird possessed legal capacity to bind herself personally as a joint maker of said \$800 note with her husband, either as principal with him or as surety for him; the proceeds being used for the benefit of her separate estate.

"(5) That the hypothecation; pledge, and transfer of the certificate of stock in Security National Bank of Dallas, Tex., explained and evidenced by the joint signature of Mrs. Myrtle Bird and her then husband, George H. Bird, to secure the bank in the repayment to it of the \$800 loan by it, was and is a valid hypothecation and transfer of said certificate of stock to the First State Bank of Dallas, as security for such indebtedness, and for any other indebtedness due the First State Bank of Dallas, as evidenced by the terms of said pledge contract, and that the lien in favor of the bank resulting therefrom is valid and ought to be foreclosed, and the property subjected to the payment of all indebtedness due to the First State Bank of Dallas, including said \$5,930.28 loan and said \$800 loan.

"(6) That Mrs. Myrtle Bird shall take nothing by her suit against the First State Bank of Dallas; that the First State Bank of Dallas shall on its cross-action have personal judgment against George H. Bird for its debt, interest, and attorney's fees, and shall have foreclosure on its certificates of stock as against Mrs. Myrtle Bird and George H. Bird for its entire debt, principal, interest, and attorney's fees, and costs of suit; that the First State Bank of Dallas shall have personal judgment against Mrs. Myrtle Bird upon the \$800 note, together with interest and attorney's fees."

One controlling question is presented for decision, and that is: Can a married woman mortgage or pledge her separate property to secure a debt incurred by her husband? We hold that this question should be answered in the affirmative. It was so held in the case of *Hollis v. Francois*, 5 Tex. 199, 51 Am. Dec. 760; Chief Justice Hemphill saying that the power of the wife to mortgage her separate property with the consent of the husband to secure his debts is undeniable. In *Sampson v. Williamson*, 6 Tex. 112, 55 Am. Dec. 762, the same rule was announced; also in *Shelby v. Burtis*, 18 Tex. 645.

In a long list of authorities since the *Hollis* Case supra, our Supreme Court has adhered to the doctrine therein announced; that is, that a married woman can mortgage her separate property to secure her husband's debts, down to the case of *Bank v. Ferguson*, 206 S. W. 923, wherein Chief Justice Phillips reviews the act of 1913 (Acts 38d Leg. c. 82 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624]), and says:

"The power heretofore possessed by the wife to mortgage her separate property for the debts of the husband was not impaired by this act. It remains with her as aforesaid."

This last decision is conclusive of the question. Mrs. Bird had the right to pledge her stock as was done in this case, and the judgment is affirmed.

Affirmed.

## BIRD v. BIRD et al. (No. 8172.)

(Court of Civil Appeals of Texas. Dallas.  
May 3, 1919. Rehearing Denied May  
24, 1919.)

Appeal from District Court, Dallas County;  
W. F. Whitehurst, Judge.

Suit by Mrs. Myrtle Bird against George H. Bird and another. From the judgment rendered, plaintiff appeals. Affirmed.

Etheridge, McCormick & Bromberg, of Dallas, for appellant.

Thompson, Knight, Baker & Harris, of Dallas, for appellees.

**TALBOT, J.** The appellant instituted this suit against the appellees, George H. Bird and the City National Bank of Dallas, Tex., on the 30th day of April, 1917. The issues of law in the case and the facts upon which they are to be determined are precisely the same as those involved in and passed upon by this court at a former day of the present term in the case of Mrs. Myrtle Bird v. George H. Bird et al., 212 S. W. 253, in which the First State Bank of Dallas, Tex., was a party. For the reasons given in the opinion in that case, the judgment of the court below in this case is affirmed.

Affirmed.

## BARBEE et al. v. LUNDY et al. (No. 7728.)

(Court of Civil Appeals of Texas. Galveston.  
May 1, 1919. Rehearing Denied  
May 15, 1919.)

1. HOMESTEAD §31 — ADDITION TO RURAL HOMESTEAD — PURCHASE OF ADDITIONAL LAND—INTENT AND OCCUPANCY.

Where owners of rural homestead purchased adjoining land with intention of making it part of homestead, and where the two tracts comprised less than 200 acres, the land so purchased became a part of the homestead at time of purchase, though owners at such time were not living upon homestead.

2. HOMESTEAD §57(3)—RURAL HOMESTEAD—PURCHASE OF ADDITIONAL LAND—INTENT—SUFFICIENCY OF EVIDENCE.

Evidence held not to support finding that owners of rural homestead who purchased adjoining land did not intend to make purchased land a part of the homestead.

3. MORTGAGES §497(2)—CONCLUSIVENESS OF MORTGAGE FORECLOSURE—FAILURE TO MAKE WIFE PARTY—HOMESTEAD CLAIM.

Judgment foreclosing mortgage, in action against husband mortgagor, is not res adjudicata against wife who was not made a party to the suit, and in no way affects her right to assert her homestead claim to the land.

Appeal from District Court, Houston County; John S. Prince, Judge.

Action by T. L. Lundy against H. M. Barbee and another, in which named defendant

asks that the Texas Moline Plow Company be made a party, and in which D. E. Barbee intervenes. Judgment for plaintiff and the Texas Plow Company, and defendants and intervenor appeal. Reversed and rendered.

Moore & Ellis and Adams & Young, all of Crockett, for appellants.

Nunn & Nunn, of Crockett, for appellees.

**PLEASANTS, C. J.** This is an action of trespass to try title brought by the appellee Lundy against appellants H. M. Barbee and David Griffin. The land in controversy is a tract of 32.2 acres on the James Nevill League in Houston county.

The defendant Barbee, in addition to a general and several special exceptions, a general denial, and plea of not guilty, specially pleaded, in substance:

That some time during the year 1913 he executed a mortgage upon the 32.2 acres of land to secure an indebtedness due by him to the Texas Moline Plow Company; that at the time said mortgage was executed this land was a part of defendant's homestead, and he so informed the agent of said company, who induced him to execute the mortgage, and it was agreed between said agent and the defendant that vendor's lien notes owned by defendant would be thereafter given by him as security for his indebtedness in lieu of the mortgage which would then be canceled.

"That in pursuance of such agreement this defendant did within the time so agreed upon between himself and said plow company deliver to the said Texas Moline Plow Company certain vendor's lien notes of value largely in excess of the land so attempted to be mortgaged herein, and demanded a cancellation and release of the mortgage or lien so given on the said land.

"That thereafter, about June, 1915, the said Texas Moline Plow Company sued this defendant in the district court at Dallas, Tex., for foreclosure of the said attempted lien on the said land, and on the 7th day of September, 1915, this defendant, by his attorneys, filed answer in such suit, denying plaintiff's right of foreclosure against said land, and specially pleading that the said H. M. Barbee had theretofore been duly adjudged a bankrupt in the United States District Court for the Eastern District of Texas, at Tyler, Tex., wherein he, H. M. Barbee, had claimed the land in controversy herein as his rural homestead. Thereupon it was agreed by and between the attorney for the said Texas Moline Plow Company and the attorney for this defendant that the cause so pending in the district court of Dallas county, Tex., of said Moline Plow Company against this defendant should abide the decision of the court in bankruptcy, and be governed therein and should not be further heard or tried until after such cause had been settled in the said court of bankruptcy."

It is then averred that in October, 1915, the court in which said bankruptcy proceeding was pending set aside to defendant as the homestead of himself and family the tract of

185 acres of land theretofore claimed and occupied by them as their homestead, which said tract includes the 32.2 acres in controversy in this suit; that the Moline Plow Company was present in said court at the time and contested defendant's homestead claim to the land; that after said judgment was rendered defendant, believing that said company would keep its agreement in regard to disposition of the suit for foreclosure pending in the district court of Dallas county, gave no further attention thereto, but said company, in violation of its agreement and without this defendant's knowledge, procured the rendition of a judgment in the Dallas court foreclosing its alleged lien upon the land; that defendant did not learn of the rendition of said judgment until about a year thereafter, when an order of sale was issued thereon and his land levied upon and advertised for sale thereunder.

It is further averred that said judgment foreclosing the pretended lien upon the land and ordering the sale thereof, having been so obtained by fraud and misrepresentations, was therefore void, and the sale of the defendant's land thereunder to plaintiff was also void; that plaintiff was notified by defendant before he purchased the land at said sale that the land was a part of defendant's homestead and had been set apart to him as such by the decree of the bankruptcy court before mentioned.

"Further defendant charges that at the time such notice was given to the plaintiff at the time he was preparing to bid on such land at the time of the sheriff's sale thereof, that the agent of the said Texas Moline Plow Company insisted to the plaintiff to purchase such land, that the Texas Moline Plow Company would stand by its title, and defend the plaintiff in his right and title to the said land, in case he should be the purchaser, and thereby promised to defend such title, and this defendant says the Texas Moline Plow Company, residing in Dallas county, Tex., are the real parties at interest in this said suit, and are necessary parties herein, and he respectfully prays that citation issue to the said company, and that it be made parties herein, and that proof be heard, and that upon hearing the said judgment so rendered in the district court of Dallas county, Tex., attempting to foreclose any lien upon plaintiff's land, as herein shown, be held void and of no force and effect, but the same be held for naught, as having been obtained through fraud of its own, and against all fair dealing and equity, and that the plaintiff, in case he so desires, have his remedy against the said Texas Moline Plow Company for the purchase price of the said land, and that the said land herein sued for be declared to be a part of the homestead of this defendant, he being a married man, the head of a family, and residing thereon with his family, and making his living by farming, and for special and general relief, both in law and in equity."

The defendant David Griffin, who was a tenant upon the land under the defendant

Barbee, answered by general demurrer, general denial, and plea of not guilty.

Mrs. D. E. Barbee, wife of defendant H. M. Barbee, intervened in the suit, claiming the land as a part of her homestead. Her plea in intervention, after fully alleging facts showing that the land was, at the time of the execution of the mortgage by H. M. Barbee, for some time prior thereto, and continuously since said time, a part of the homestead of herself and husband, alleges that she had no knowledge of the execution of said mortgage until, she went before the bankruptcy court in the fall of 1915 for the purpose of asserting her homestead rights in said land.

The Texas Moline Plow Company answered by exception to the answer of defendant Barbee on the ground that said answer does not allege facts sufficient to show jurisdiction of the district court of Houston county to hear and determine the matters charged against it by said answer. In event said exception was overruled it specially denied all of the allegations of fraud and misrepresentation contained in defendant Barbee's answer, and pleaded the judgment of the district court of Dallas county as res adjudicata of defendant's homestead claim.

By supplemental petition the plaintiff excepted to the answer of the defendant Barbee and adopted the answer of the Texas Moline Plow Company "in so far as the same is applicable to the interest of the plaintiff and the issues between him and the defendants." By alternative plea he asked recovery against the plow company for the amount paid by him for the land in event the sale should be held void.

The cause was tried in the court below without a jury, and judgment rendered in favor of plaintiff and the Texas Moline Plow Company sustaining the exceptions to the answer of defendant Barbee and adjudging that plaintiff recover of the defendants H. M. Barbee and David Griffin and the intervener, D. E. Barbee, the title and possession of the land and the rents accrued thereon as claimed by plaintiff, and that the Texas Moline Plow Company go hence without day and recover of the defendant Barbee all costs incurred by said company. From this judgment the defendants H. M. Barbee and David Griffin and the intervener, D. E. Barbee, prosecute this appeal.

At the request of appellants the trial court filed the following findings of fact and conclusions of law:

"I find that H. M. Barbee and his wife occupied a tract of land as their homestead from the date of their marriage on the — day of — until 1908, when they moved to Lovelady. This land was H. M. Barbee's separate property, and thought to be 200 acres, but a survey disclosed that it contained only 187 acres, 37 acres of which was lost in a lawsuit, leaving

the homestead to consist of 150 acres, adjoining the 34 acres in controversy in this suit.

"I find that defendant Barbee and his wife, intervener, purchased in Lovelady a lot with dwelling house, which they occupied with their family from the date of its purchase, on the — day of — until the — day of —, but that they never intended this to be their permanent home, they never paid it out, but finally deeded it back for the purchase money. Defendant Barbee purchased the land in controversy in 1911, and in the year 1913 he mortgaged the same to Texas Moline Plow Company. In 1914 he sold the same to E. W. McCullor, his wife not joining in this deed, and McCullor conveyed the land on the — day of — to intervener, in consideration of the cancellation of the purchase-money notes executed by McCullor to H. M. Barbee.

"I find that the 150 acres of land was always the homestead of defendant and intervener, and that, while they lived for several years in Lovelady, it was always their intention to return to said home, and that on the — day of — they did return to said 150 acres, and it is now their homestead.

"I find that, when defendant purchased the land in controversy, it was his intention to use it as a part of his homestead when he should finally return to the 150 acres, and since his return it has been a part of the homestead.

"I further find that defendant and intervener never considered this as a part of their homestead, or used it as such, till their return to the home.

"I conclude that the facts are not sufficient to impress the land in controversy with the homestead right of defendant and intervener, regardless of what their intentions may have been.

"I further conclude that the execution sale to plaintiff passed title, and the plaintiff is entitled to recover the land in controversy."

The court, at the request of defendant and intervener, made the following additional findings:

"(1) Intervener, Mrs. Barbee, was not a party to the suit in Dallas by the Moline Plow Company against H. M. Barbee, and did not have knowledge of the pendency of said suit until after the issuance of the execution introduced in evidence in this suit.

"(2) The land in controversy in this suit adjoins the original homestead tract of defendant and intervener, and a small part of the yard, in one corner of the yard, is on the tract in controversy.

"(3) The defendant and intervener kept their milk cows on the homestead place during their residence in Lovelady, and milked them daily, bringing the milk to their residence in Lovelady. And during all the time that they lived in Lovelady they used the rents and the crop from the cultivated land on the homestead for the use and support of their family."

[1] We think these findings of fact and the undisputed evidence show that the land in controversy was a part of the homestead of the intervener and her husband at the time the latter executed the mortgage under which, through foreclosure proceedings, the plaintiff claims title. None of the trial

court's fact findings were excepted to by appellees, and no assignment is presented by them complaining of any of these findings.

The court having found that the 150 acres upon which Barbee and wife first established their home has always been their homestead, and that the land in controversy, which adjoins the 150-acre tract, was purchased with the intention of making it a part of the homestead, the two tracts comprising less than 200 acres, we cannot see upon what theory it can be held that the 32.2 acres has not been a part of the homestead ever since its purchase. It has been expressly held by our Supreme Court that, when the owner of a rural homestead of less than 200 acres buys land adjoining his homestead for the purpose and with the intention of making it a part of the homestead, the land so purchased becomes a part of the homestead by the mere intent of the purchaser without its being inclosed or any improvements being placed thereon. *Crockett v. Templeton*, 65 Tex. 134; *Luhn v. Stone*, 65 Tex. 441.

The fact that Barbee and wife were not living on their homestead at the time they purchased the 32.2 acres and had not returned to and resumed its occupancy at the time Barbee executed the mortgage on the small tract cannot affect the question of whether the 32.2 acres was a part of their homestead at the time the mortgage was executed. To hold otherwise would be to deny to the owner of a homestead who had temporarily ceased to occupy it as such the right to add to the homestead additional land without inclosing or improving the land so added. We cannot believe such restrictions upon the right to acquire a homestead containing the number of acres fixed by the Constitution can be sustained in reason or by authority.

[2] The finding of the trial court that the defendant and intervener never considered the 32.2 acres a part of their homestead or used it as such until their return to the home is assailed by appellant upon the ground that it is without support in the evidence. We think the assignment complaining of this finding should be sustained. The undisputed evidence shows that Barbee and wife at the time the land was purchased intended it as a part of their homestead, and that Barbee informed the agent of the Moline Plow Company at the time he executed the mortgage that the land was a part of his homestead. There is no evidence that Mrs. Barbee ever changed this intention as to making the land a part of the homestead or ever considered it otherwise than as a part of the homestead. The only evidence which tends in the least to indicate that Barbee ever ceased to regard the land as a part of his homestead is the fact that after he executed the mortgage and shortly before his bankruptcy he conveyed it to E. W. McCullor without his wife joining in the deed. The evidence does not show

that Mrs. Barbee knew anything about this conveyance. We agree with counsel for appellee that the evidence justifies the conclusion that this conveyance was made for the purpose of preventing Barbee's creditors from subjecting or attempting to subject the land to the payment of his debts. No payment was made on the land by McCullor, and after the bankruptcy proceedings he reconveyed to Barbee in consideration of the cancellation of the notes given by him as consideration of the conveyance to him. We think this evidence merely shows that Barbee may have doubted whether he could hold the land as a part of his homestead, and that this doubt on his part in no way affects the question of whether the land upon the other undisputed facts found by the court was a part of appellants' homestead.

[3] Mrs. Barbee not having been a party to the suit in which the foreclosure judgment was rendered, such judgment is not res adjudicata as to her, and in no way affects her right to assert her homestead claim to the land. In suits to foreclose a lien upon a homestead, unless the lien is one which could not be defeated by the plea of homestead, the wife must be made a party in order to make the judgment binding upon her.

Having reached the conclusion that the undisputed evidence and the facts found by the trial court show that the land in controversy was the homestead of appellants Barbee at the time the mortgage was executed, and that Mrs. Barbee is not estopped by the judgment of foreclosure against her husband, it is unnecessary for us to determine the question of whether the trial court erred in sustaining the exceptions to the answer of defendant Barbee attacking said judgment on the ground of fraud and misrepresentations.

For the reasons indicated, the judgment of the court below is reversed, and judgment here rendered for appellants.

Reversed and rendered.

#### WESTERN UNION TELEGRAPH CO. v. HAYNES. (No. 7695.)

(Court of Civil Appeals of Texas. Galveston.  
April 18, 1919. Rehearing Denied  
May 22, 1919.)

#### 1. TELEGRAPHS AND TELEPHONES §56(4) — FAILURE TO PROMPTLY DELIVER — LOSS — PROXIMATE CAUSE.

Evidence held insufficient to show that failure to promptly deliver telegram sent by a bank with which plaintiff had pledged stock to secure note to one who had agreed to advance money to pay off note and redeem stock notifying him that, if loan was not retired, collateral would be sold, was the proximate cause of the loss due to acquisition or sale of stock by the bank.

#### 2. PLEDGES §56(4) — SALE OF PROPERTY — VALIDITY.

Unless otherwise expressly authorized by the contract of bailment, a sale by a pledgee of property pledged to secure an indebtedness, to be valid, must be public after due advertisement and reasonable notice to the pledgor of the time and place of sale.

Appeal from District Court, Austin County; M. C. Jeffrey, Judge.

Suit by R. B. Haynes against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Hume & Hume, of Houston, and Albert T. Benedict, of New York City, for appellant.  
Lane, Wolters & Storey, of Houston, and C. G. Krueger, of Belleville, for appellee.

PLEASANTS, C. J. Appellee brought this suit against appellant to recover damages for the alleged negligent failure of appellant to promptly deliver the following telegram:

"San Antonio, Texas, Nov. 3, 1908.

"To C. T. Sanders, Cashier Sealy National Bank, Sealy, Texas:

"Unless Haynes loan is retired previously, will sell collateral ten o'clock Wednesday, November 4th.

"[Signed] City National Bank."

The amount of damages sought to be recovered was \$2,928, the alleged difference between the market value of certain shares of stock owned by the plaintiff and held by the bank as collateral to secure an indebtedness due it by plaintiff and the sum received for said stock at its forced sale on November 4, 1908.

The following are, in substance, the allegations of the petition:

On August 8, 1908, plaintiff became indebted to the City National Bank of San Antonio in the sum of \$3,000, for which amount he executed his note to said bank payable on demand with 10 per cent. interest from date, and to secure said note transferred and delivered to the bank 100 shares of the capital stock of the Sealy Mattress Company. Some time in October, 1908, the bank demanded payment of the note, and plaintiff, being unable to meet the demand, applied to Mr. C. T. Sanders, cashier of the Sealy National Bank, for a loan of a sufficient sum of money to pay off said note and redeem the certificates of stock held by the San Antonio bank as aforesaid. Before any definite arrangements were made with Sanders for said loan, the San Antonio bank agreed with plaintiff and the Sealy bank that it would carry said loan until November 1, 1908. Plaintiff thereafter, during the month of October, "made arrangements with the Sealy National Bank and with C. T. Sanders, the cashier of said bank, to loan him the money to pay off the said note of \$3,000 and accrued interest thereon on or about the 1st day of November, 1908, or at such time thereafter as the said City National Bank of



San Antonio demanded the payment of said note, the understanding between the plaintiff and the Sealy National Bank and its cashier, C. T. Sanders, being that the said bank or C. T. Sanders would see that the said note due the City National Bank of San Antonio, Tex., would be taken up and carried by the said C. T. Sanders or the Sealy National Bank, or by some other person or institution to be provided by the Sealy National Bank or by C. T. Sanders, cashier as aforesaid. That the said C. T. Sanders, in pursuance of said agreement and arrangement with this plaintiff, made known to the City National Bank of San Antonio its willingness and the willingness of the said C. T. Sanders, cashier aforesaid, to take up said note of plaintiff on or about the 1st day of November, 1908. That said Sealy National Bank and the said C. T. Sanders and the said institution and persons above referred to were able and willing to pay off said note of plaintiff to the said City National Bank of San Antonio, and to carry the said note secured by said certificates of 100 shares of stock in the Sealy Mattress Company for this plaintiff until such time as the plaintiff should become able to take up the same."

The San Antonio bank on November 3, 1908, determined to close out its loan to plaintiff, and in pursuance of its agreement and understanding with the Sealy Bank delivered to appellant for transmission to C. T. Sanders the telegram before set out. The telegram was accepted by appellant for transmission, but it negligently failed to promptly transmit and deliver it to the addressee, and it was not delivered to Sanders until 11:20 a. m. on November 4th. In the meantime the San Antonio bank had at 10 o'clock, or a few minutes thereafter, on the morning of November 4, 1908, sold plaintiff's stock for the sum of \$3,074, and applied said sum to the satisfaction and discharge of plaintiff's said note and interest thereon.

"Plaintiff further represents unto the court that, if the defendant company had promptly delivered the message aforesaid to the said Sealy National Bank or to said C. T. Sanders, its cashier, the said bank or the said C. T. Sanders would have, before 10 o'clock a. m. on the 4th day of November, 1908, paid off the said note of \$3,000 due the said City National Bank of San Antonio, Tex., and would have taken over the same, together with the certificates of stock in the Sealy Mattress Company, and would have carried the same or caused the same to have been carried for this plaintiff to such a time as the plaintiff would have been able to pay said note and take up said shares of stock, and that therefore the said certificates of stock aforesaid would not have been sold at a great sacrifice, as was done, in satisfaction and payment of said \$3,000 note by the City National Bank of San Antonio, Tex."

The market value of the stock is alleged to have been \$6,000, and the prayer is for recovery of \$2,928, the difference between said alleged market value and the amount for which the stock was sold.

The defendant answered by a general demurrer and a general denial.

The trial in the court below without a jury resulted in a judgment in favor of the plaintiff for the amount claimed by him.

The facts alleged in the petition in regard to plaintiff's indebtedness to the San Antonio bank and his transfer and delivery to said bank of the certificates of stock to secure said indebtedness, and also the facts as to the demand for payment of the note, the subsequent agreement by the San Antonio bank with the Sealy Bank to hold the note until November 1, 1908, the sending of the telegram on November 3d, and the failure of the defendant to deliver it before 10 o'clock on the morning of November 4th, were shown by the undisputed evidence. It was also shown that Sanders had agreed with the plaintiff that he would furnish or procure the money to take up the loan in consideration of the interest which plaintiff agreed to pay for said money. Sanders testified that he notified the San Antonio bank that he had promised plaintiff to take up the note and collateral and carry it or get some one else to do so, but that he had no definite agreement with said bank as to paying or taking up the note. He further stated that, while he had no positive promise from the San Antonio bank that it would notify him before offering the stock for sale, he had requested the bank to do so, and felt confident it would show him that courtesy as a brother cashier.

In the matter of procuring the money with which to take up the note, Sanders testified that he had made arrangements with the New Ulm State Bank for \$2,000 and intended to ask plaintiff's father to advance the balance required to prevent the sacrifice of the collateral; that he had a right to believe that plaintiff's father would come to his assistance, but, if he had failed him, he would have made application to the loan committee of the Sealy Bank, and, if necessary, he himself would have taken this balance rather than have permitted the sale of the collateral.

The testimony showing the sale of the stock is meager and somewhat indefinite. W. R. King, vice president of the San Antonio bank, testified that the R. B. Haynes loan of \$3,000 was settled by foreclosure of the collateral by which the loan was secured, which collateral consisted of Sealy Mattress Company stock of \$100 face value per share; the total face value as shown by the records of the bank being \$9,000. He further testified:

"I cannot give details of the foreclosure, but said collateral was sold and the proceeds applied to liquidate the obligation. Our files are incomplete. \* \* \* We quite likely did notify R. B. Haynes that the note was due. We probably did notify R. B. Haynes that we would sell the collateral before we sold same. I do not know when we last notified R. B. Haynes that the note must be paid. As to whether we had notified either the Sealy Bank or C. T. Sanders or R. B. Haynes of our purpose to sell the collateral prior to sending the telegram, my impression is that the telegram conveyed this information. We notified them of said pur-

pose by telegram to the Sealy National Bank. I do not know when I had last seen R. B. Haynes prior to November 3, 1908. I cannot state when I had last communicated with him prior to November 3, 1908, in reference to the payment of said note. This matter is ancientated and our records are incomplete. As to why we did not offer longer time in our telegram than we did offer for the plaintiff to protect his collateral in our hands, we handled the transaction with our usual patience, indulgence, and consideration."

This is all of the testimony in regard to the sale of the stock and the amount realized from the sale. Neither Sanders nor plaintiff made any inquiry in regard to the sale of the stock, and neither knew how, when, to whom, or for what price it was sold. No steps were taken by either to ascertain who held the stock after November 4th, and no attempt was made to redeem it. Plaintiff testified:

"As to whether any effort was made to redeem this collateral after the demand for payment was made, I could not say as to that. I don't know when demand was made, nor what agreement the Sealy National Bank had with Mr. Sanders. I had simply turned the matter over to the Sealy National Bank, and looked to them to protect me. As to when it was I took up the matter with the Sealy National Bank or with Mr. Sanders as to the status of that transaction, I did so immediately upon my becoming aware of the fact that the collateral had been sold in San Antonio. \* \* \* I did not make any effort personally to redeem the collateral. I do not know as matter of fact whether the collateral was actually sold at public or private sale. I have no idea whether there was a fair price gotten for it or not; I don't know what the price was. I don't know whether the San Antonio bank merely took that collateral themselves and applied it to the loan or not. They did not send me the note. I think the note was turned over to the Sealy National Bank, or to Mr. Sanders. I don't know whether it was marked paid or not. It is my understanding that the City National Bank of San Antonio applied the proceeds of this collateral in whatever way it was disposed of to the extinguishment of my obligation there and then sent the note to Mr. Sanders. I don't think Mr. Sanders gave the note to me."

Sanders testified that he had no recollection of making any request of the San Antonio bank in reference to this loan after receiving the telegram on November 4th.

[1, 2] We think this evidence wholly fails to show that plaintiff sustained the loss of his stock as a proximate result of appellant's failure to promptly deliver the telegram. All

the evidence shows is that on November 4th the San Antonio bank appropriated plaintiff's stock and applied it to the extinguishment of his indebtedness to the bank, and plaintiff acquiesced in this disposition of the stock. In order to hold appellant liable for the loss sustained by him by the act of the San Antonio bank in disposing of his stock in satisfaction of his indebtedness to the bank, it devolved upon plaintiff to show that such act of the bank was lawful and deprived him of his right to redeem the stock. He could not acquiesce in the wrongful acquisition or sale of his stock by the bank and hold appellant liable for the loss thereby sustained by him. Appellee's stock was pledged to the San Antonio Bank to secure the payment of his note. Unless otherwise expressly authorized by the contract of bailment, a sale by a pledgee of property pledged to secure an indebtedness, to be valid, must be a public sale after due advertisement, and reasonable notice to the pledgee of the time and place of the sale, and a sale made in any other manner does not foreclose the pledgee's right of redemption. *Lockett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723; *King & Co. v. Insurance Co.*, 58 Tex. 669; *Hart v. Tyrell*, 36 Tex. Civ. App. 626, 82 S. W. 1074, 86 S. W. 350; 31 Cyc. 874-878; *Schouler on Bailments*, p. 112.

The evidence before set out not only fails to show that the stock was sold at public auction after due advertisement and reasonable notice to appellee, but negatives such a finding.

We do not think it can be seriously contended that the telegram to Sanders which was filed with the telegram company at San Antonio on November 3d, and which the evidence shows was a night message sent on a contract which provided that it was to be sent during the night of the 3d and delivered on the morning of the 4th of November, was reasonable notice to appellee of the sale of his stock.

Appellee having wholly failed to show that he lost his stock as a proximate result of appellant's negligence in not sooner delivering the telegram, there is no rule of law nor of equity which will hold appellant liable for the value of the stock. This conclusion renders unnecessary a discussion and determination of the other questions presented in appellant's brief.

For the reason indicated, the judgment of the trial court is reversed, and judgment here rendered for appellant.

Reversed and rendered.

## SIMPSON v. GREEN et al. (No. 9038.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 15, 1919. Rehearing Denied  
April 12, 1919.)

1. FRAUDS, STATUTE OF §117—LAND SALE  
CONTRACT — INSUFFICIENCY OF DEED DE-  
POSITED IN ESCROW.

A deed deposited in escrow, reciting full payment of consideration for the sale of land, held not such a memorandum of an oral agreement for the transfer of the land, in consideration of an automobile, cash paid, and deferred payments, as to satisfy the statute of frauds. *Vernon's Sayles' Ann. Civ. St. 1914, art. 8965.*

2. VENDOR AND PURCHASER §105(1)—CON-  
TRACT—INVALIDITY—STATUTE OF FRAUDS—  
RESCISSION.

Where a contract for sale of land was not enforceable by reason of the statute of frauds, it was terminated and annulled when vendor elected to rescind it and notified purchaser of such rescission, and purchaser's subsequent offer of payment for the land could not revive it.

Appeal from District Court, Wise County;  
F. O. McKinsey, Judge.

Suit by William Simpson against Jesse Green and others. Judgment for defendants and plaintiff appeals. Judgment affirmed.

McMurray & Gettys, of Decatur, and H. E. Lobdell, of Bridgeport, for appellants.

R. E. Carswell, of Decatur, for appellees.

DUNKLIN, J. William Simpson instituted this suit to recover title to 175 acres of land situated in Denton county. The suit was in the form of trespass to try title, and in addition to the usual allegations for a recovery upon that issue plaintiff also alleged that defendant Jesse Green sold to him the land in controversy for a consideration of \$4,500, of which amount \$50 and an automobile of the agreed value of \$300 was paid at the time said agreement to trade was made, and the balance was to be paid in cash when an abstract of title was furnished to plaintiff showing a good title in Green. It was further alleged that within a short time after the terms of trade were agreed on, Green executed a deed to the property, purporting to convey the land to plaintiff for a cash consideration of \$4,500, which he placed in the hands of Frank Turner, who was also made a defendant in plaintiff's petition, to be held by said Turner in escrow until plaintiff should approve the title and should pay the balance of the purchase price according to his contract. It was further alleged that thereafter plaintiff offered to pay the entire balance of the consideration for said sale, and also offered to waive performance by Green of his obligation to furnish an abstract of title; the plaintiff

being willing to accept the title without such an abstract. It was further alleged that, notwithstanding such tender of performance by plaintiff, Turner refused to deliver the deed, on account of the fact that Green was unwilling for him to do so. Plaintiff prayed for a decree vesting title in him to the land, and also for a judgment awarding him the possession of the deed held by Turner.

Defendant Green answered by general denial, and also by plea that the contract of sale between him and plaintiff was oral, and therefore unenforceable, because it was in violation of the statute of frauds. He further alleged that at the time of the execution and delivery of the deed to Turner, to be held by him in escrow, he was a mere boy, having just passed the age of majority, without either business experience or education, and without due appreciation of the value of the property, which he had acquired in part by inheritance and in part by his labor, and which was all the property he possessed; that plaintiff was a shrewd business man and a trader of long experience, thoroughly familiar with the value of such property, and therefore held a decided advantage over him in the negotiations for said sale. He further alleged that the land was then worth \$8,000, and had a growing crop upon it in which he had a rental interest of the value of \$1,500; that the consideration for which he agreed to convey the land was grossly inadequate; that he was induced to make the trade with plaintiff by repeated and persistent importunities and assurances from plaintiff that the consideration offered was in excess of the value of the land; that at the time the original agreement to sell the land to plaintiff was made, which was oral, he received from plaintiff, as a part of the consideration for the sale, the sum of \$50; that later but before the deed was executed and delivered to Turner, he offered to plaintiff to rescind the contract of sale and to return the \$50, and after delivery of said deed and receipt of the automobile, and before plaintiff offered to pay over to Turner the balance of the purchase price of \$4,150, defendant became convinced of the inadequacy of the consideration for said sale, and, desiring to rescind the contract, so notified the plaintiff, and offered to return the \$50 and the automobile, which offer was refused.

Defendant further alleged that when the deed was executed and delivered to Turner, plaintiff assured him that he could not legally withdraw from his prior contract of sale, that he was legally bound to consummate the trade in accordance with its terms, and that, being ignorant of his rights in the premises, he was thereby induced to believe that he was so bound, and to thereafter ex-

ecute and deliver the deed to Turner in escrow. He further alleged that said assurances by the plaintiff were false and fraudulently made, and were well known to him to be so; that plaintiff then knew that the defendant was ignorant of the law, and was relying upon his assurances in that respect, and fraudulently took advantage of his ignorance and of his belief, so induced by the plaintiff, in order to acquire the land for a consideration which was wholly inadequate and unconscionable.

Defendant Turner filed an answer in which he disclaimed any interest in the land or in the controversy between plaintiff and defendant Green, further alleging that he held the deed alleged in plaintiff's petition as a mere stakeholder, which he tendered into court with an offer to deliver to whomsoever the court might decree to be entitled thereto.

From a judgment denying plaintiff a recovery, he has prosecuted this appeal.

The trial was before the court without a jury, and the trial judge filed findings of fact and conclusions of law which are as follows:

#### "Findings of Fact.

"1. On the ——— day of August, 1917, the plaintiff and the defendant Jesse Green entered into a verbal contract whereby the said Green was to sell and convey to plaintiff the 175 acres of land situated in Denton county and described in plaintiff's petition, in consideration of \$50 then paid said Green and an automobile then or a few days thereafter delivered to him by plaintiff and \$4,150 to be paid when Green furnished plaintiff an abstract showing good title in Green. There was a lien against said land amounting to \$1,900 which Green was to discharge out of the money to be paid him by plaintiff.

"2. Within a short time after this trade was made, and after the \$50 cash had been paid to Green, he became dissatisfied with the trade, and went to plaintiff and offered to rue the trade, and had tendered to plaintiff the \$50 cash, which plaintiff refused, telling and representing to Green that the trade was binding, and that he could enforce it in the courts, and that he was going to hold him to it, and would do so, and that he was going to have the land. Green was ignorant of the law, and did not know that his contract was not enforceable, but plaintiff, by the representations stated, induced Green to believe their contract was binding, and thereby induced him to go further with the trade.

"3. After Green was made to believe that he could be held to said contract as aforesaid, he executed his general warranty deed, reciting the consideration to be \$4,500 cash paid, conveying the land in controversy to plaintiff, and containing the usual clauses and covenants. Said deed was placed in the hands of the defendant Frank Turner, who was to hold the same until Green furnished abstract of title and plaintiff had paid balance of the purchase money, when it was to be delivered to plaintiff. At the same time said deed was made and put

up with Turner, plaintiff delivered to defendant Green the automobile in question, and also deposited with Turner (or his bank) \$2,000, to be paid Green upon delivery of said deed to plaintiff, and was to pay the balance when the abstract was furnished and the deed delivered to plaintiff.

"4. A short time after the deed was made and deposited with Turner as aforesaid, the defendant Green being still dissatisfied with his trade, and having been advised that he could still withdraw from same, went to plaintiff and offered to return to plaintiff the automobile, and offered and tendered to plaintiff the \$50 cash, and the plaintiff refused to receive the same. Green left the automobile at plaintiff's house, and deposited the \$50 in defendant Turner's bank in the name of plaintiff, subject to plaintiff's order, and offered to pay plaintiff for the use of the auto and damages to same, and also demanded of Turner the return of his deed, which demand Turner refused. The plaintiff did not accept said automobile, but placed same in a place of safety, where the same has since been kept. Soon after defendant thus sought to rescind their contract and tried to procure the return of his deed, the plaintiff concluded to waive, and did waive, the furnishing of an abstract by Green, and tendered to Turner the balance of the purchase money, viz. \$4,150, and demanded delivery of the deed to him, which Turner refused to do.

"5. The property to be conveyed to plaintiff under the verbal contract was worth, at the time of the trade, at least \$6,000, and plaintiff knew its real value, but defendant Green, by reason of his youth and inexperience, did not know that said property was worth more than he was to receive for the same.

#### "Conclusions of Law.

"1. I conclude as matter of law: (a) That the contract between plaintiff and defendant Green, being verbal, was unenforceable; (b) that the deed executed and delivered to defendant Turner was not sufficient to take said transaction out of the statute of frauds; and that, therefore, (c) the defendant Green had the right to refuse to complete said contract, and the right to withdraw from the same and to have the deed returned to him.

"2. I conclude, further, that the defendant, having been induced to execute and put up his deed under circumstances which renders that transaction voidable in law, upon the discovery of his legal rights in the premises, had the right to rescind the contract and have his deed returned to him.

"3. I conclude that it would be inequitable to enforce the contract against defendant Green, and, the law not requiring it, specific enforcement thereof should not be decreed."

[1] The first assignment of error we shall notice is the one in which appellant attacks the conclusion reached by the trial judge that the execution and delivery of the deed to Turner, and by him held in escrow, was not sufficient to satisfy the statute of frauds, which is article 3965, Vernon's, Sayles' Tex. Civ. Stats., and which reads as follows:

"No action shall be brought in any of the courts in any of the following cases, unless the

promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized: \* \* \* Upon any contract for the sale of real estate or the lease thereof for a longer term than one year."

The question whether or not a deed deposited in escrow, reciting full payment of the consideration as did the deed from Green to plaintiff, and containing no recital of any prior contract of sale, is a compliance with the provisions of that statute has never been passed on in this state so far as we have been able to ascertain.

It cannot be doubted that the statute applies to executory contracts which are sought to be enforced, and requires such a contract or some memorandum thereof to be in writing in order to be enforceable by suit. It cannot be said that the deed delivered to Turner, reciting full payment of the consideration, was in itself in any sense an executory contract to convey the property, since it was of itself a conveyance, nor can it be said that it was in itself a memorandum of the parol agreement theretofore made to sell the property to Simpson, since it recited the present payment in cash of the entire consideration. It imports an offer by Green to sell the land for \$4,500 in cash, payable in a lump sum upon delivery of the deed, and an acceptance of the offer by Simpson, but it does not import that prior to its execution the parties had entered into the parol agreement for purchase and sale alleged in plaintiff's petition, and which was sought to be enforced. If it could be said that the deed of itself is a memorandum of any contract by Green to sell and by Simpson to purchase the property, then such contract was different from the one alleged in plaintiff's petition, since it would indicate an unconditional agreement on the part of Simpson to pay to Turner, as trustee for Green, the sum of \$4,500 in cash before he would have the right to demand delivery of the deed to him, and that too without any right to demand an abstract of title, while, according to the terms of the contract plaintiff sought to enforce, he was entitled to be furnished an abstract of title, and, if satisfied with the title, and in that event only, to demand the deed upon payment to Turner of only \$4,150.

The parol contract of sale, and no other, was the one sought to be enforced, and we are of the opinion that the deed did not constitute such memorandum thereof as to make it enforceable under the statute of frauds, above referred to. 10 Ruling Case Law, § 3, p. 622; 20 Cyc. 257; Lowther v. Potter (D. C.) 197 Fed. 197; Id., 221 Fed. 881, 137 C. C. A. 451; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; Kopp v. Ritter,

146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156; Cagger v. Lansing, 43 N. Y. 550; Swain v. Burnette, 89 Cal. 564, 28 Pac. 1093; King v. Upper, 57 Wash. 130, 106 Pac. 612, 1135, 31 L. R. A. (N. S.) 606; Barr v. Johnson, 102 Ark. 377, 144 S. W. 527; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; Popp v. Swanke, 68 Wis. 864, 31 N. W. 916; Freeland v. Charnley, 80 Ind. 132; Wilson v. Winters, 108 Tenn. 898, 67 S. W. 800; Flowe v. Hartwick, 167 N. C. 448, 83 S. E. 841; Main v. Pratt, 276 Ill. 218, 114 N. E. 576; Sursa v. Cash, 111 Mo. App. 396, 156 S. W. 779.

In Morrison v. Dailey, 6 S. W. 426, our Supreme Court held that a receipt given, reciting that it was in part payment for a tract of land which the one who signed the receipt had sold to the person to whom it was given for the sum of \$4,500, part cash, and the balance to bear interest at the rate of 10 per cent. per annum, was a sufficient memorandum in writing of a contract to sell the property within the meaning of the statute of frauds. And in the case of Fulton v. Robinson, 55 Tex. 401, the same conclusion was reached with respect to a similar receipt. But we do not construe those decisions to be in conflict with the conclusion reached above, since the instruments which were there held to be sufficient memoranda of the contracts of sale clearly showed the terms of the contracts of sale, which were executory contracts, and were not executed conveyances, such as was the deed from Green to Simpson in the present suit.

Many decisions of other states might be cited which are in conflict with the authorities cited above to support the conclusion we have reached; but, as said in many of the cited authorities, the great weight of authority is in accord with that conclusion, and we are of the opinion that they have better support in reason.

Appellant has also cited authorities to sustain his contention to the effect that a deed deposited in escrow becomes operative to vest title in the vendee when he pays the agreed consideration therefor, such as Kettersen v. Inscho, 55 Tex. Civ. App. 150, 118 S. W. 626; 10 R. C. L. p. 640, and other authorities to the effect that a deed deposited in escrow without reservation is irrevocable, such as 16 Cyc. 568; Smith v. Moore, 155 S. W. 1017. It is also a familiar rule that it is within the jurisdiction of a court of equity to compel the delivery of an instrument placed in escrow after the performance of the condition stipulated. 10 R. C. L. 642.

[2] But we are of the opinion that those authorities go no further than to announce the rule applicable to escrow contracts which are not prohibited by the statutes of frauds or some other statute, or by some rule of public policy. We do not believe they have

any application to the enforcement of any contract, the enforcement of which is in violation of some law of the land. And in this connection it is well to note that in the trial judge's findings of fact it appears that Green repudiated his parol contract of sale soon after he had deposited the deed in escrow with Turner, and before Simpson had offered to pay the balance of the consideration of \$4,150, remaining after the payment of \$50 cash and the delivery of the automobile, valued at \$300, and at the same time offered to Simpson to return the \$50 and the automobile, which offer Simpson refused. If, as concluded by us already, the parol agreement to sell the land was not enforceable by reason of the statute of frauds, that contract was terminated and annulled when Green so elected to rescind it and notified Simpson of such rescission, and the subsequent offer of Simpson to pay the \$4,150 could not have the effect of reviving it.

In view of the foregoing conclusion, it will be unnecessary to discuss other assignments of error appearing in appellant's brief to the findings and conclusions of the trial judge on the issue of fraud presented in appellees' petition.

For the reason indicated, the judgment of the trial court is affirmed.

#### ALLEN v. VINEYARD et al. (No. 7643.)

(Court of Civil Appeals of Texas. Galveston.  
April 10, 1919. Rehearing Denied  
May 8, 1919.)

#### 1. ACTION $\S$ 50(3)—PARTIES—MISJOINDER.

The several owners of separate parcels of land composing a large tract cannot maintain a joint suit for the entire large tract, but each must sue for his respective part.

#### 2. TRESPASS TO TRY TITLE $\S$ 12—TITLE TO SUSTAIN ACT—PRIOR POSSESSION.

Proof of prior possession is sufficient to sustain an action of trespass to try title, when defendant is shown to be a mere naked trespasser.

#### 3. PROPERTY $\S$ 9—OWNERSHIP—PRESUMPTION FROM POSSESSION.

Possession of land is prima facie proof of ownership.

#### 4. PLEADING $\S$ 387—ISSUES—VARIANCE.

The allegata and probata must correspond.

Appeal from District Court, Ft. Bend County; Saml J. Styles, Judge.

Trespass to try title by R. E. Vineyard and others against C. H. Allen, wherein Lelia Hill intervened. Judgment for the intervener and plaintiffs, and defendant appeals. Affirmed in part, and reversed and remanded in part.

Stevens & Stevens, of Houston, for appellant.

H. A. Cline, of Wharton, and F. K. Joerger, of Rosenberg, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title brought by R. E. Vineyard and 35 others against appellant, C. H. Allen, to recover a tract of 105.5 acres of land, a part of the Isaac McGary and Elizabeth Powell leagues in Ft. Bend county.

Plaintiffs' petition, after alleging ownership and possession of the land, which is described by metes and bounds, and that the defendant, on January 1, 1913, unlawfully entered upon the premises and ejected plaintiffs therefrom, and unlawfully withholds from plaintiffs the possession thereof, contains the following allegations:

"Plaintiffs further show to the court that on said first day of January, A. D. 1913, the plaintiffs were in joint possession of the aforesaid land and premises, each and all of said plaintiffs by mutual consent and agreement having the right of entry and possession of said entire tract, and every part thereof, and were so in the actual possession thereof on the date mentioned, and the said land was on said date inclosed by fence, and plaintiffs were denying any and all other persons the right of entry or possession thereof save only the plaintiffs herein."

Plaintiffs further pleaded title under the three, five, and ten years statutes of limitation.

The answer of defendant contained the following plea in abatement, followed by a plea of not guilty and pleas of three, five, and ten years limitation:

"For plea in abatement this defendant says that the plaintiffs cannot maintain their action because he says that they are not tenants in common of the land described in their petition, but that each of said plaintiffs claim a segregated part of said land, and said plaintiffs have been improperly joined in this proceeding, for the reason that, if any cause of action they have, or either of them, said causes of action are several and peculiar to each of said plaintiffs, and defendant offers to make proof of this fact; wherefore he prays in limine that this cause be abated, and proceed no further."

Mrs. Lelia Hill intervened in the suit claiming an undivided interest in certain specified tracts out of the 105.5 acres described in plaintiffs' petition. To this petition in intervention the defendant answered by a plea of not guilty and pleas of limitation.

There was a jury trial in the court below, and, after hearing the evidence, the trial judge instructed the jury to return a verdict in favor of the plaintiffs and intervener. A verdict was returned in accordance with these instructions, and judgment was rendered thereon in favor of the plaintiffs and intervener.

The record discloses the following facts:

The titles of plaintiffs are deraigned as follows: It was agreed that the common source of title was in W. E. Kendall and S. A. Hackworth. S. A. Hackworth conveyed his interest to W. E. Kendall. Under the will of W. E. Kendall his estate passed to his wife, Belle S. Kendall, and his children, William Earle Kendall, Odin M. Kendall, T. Clarence Kendall, and Frank F. Kendall, Belle S. Kendall being appointed independent executrix. Kendall and Hackworth had conveyed to the plaintiffs and those under whom some of the latter held various subdivisions of the 105.5 acres of land in controversy by specific metes and bounds about the year 1879. There is no controversy over the fact that the plaintiffs originally deraigned title under certain deeds from Kendall and Hackworth, executed about the year 1879, which deeds attempted to convey specific parts of the 105.5 acres of land in controversy, and that on account of a supposed defective description a substitute deed was executed by the devisees of W. E. Kendall. This substitute deed, which was executed on January 30, 1914, contains the following recitals:

"Whereas by deeds heretofore executed by W. E. Kendall and by the grantors herein, which said deeds are recorded in the records of Ft. Bend county, Texas, certain tracts of land were sold and conveyed out of a tract of a hundred, five and  $\frac{5}{10}$  (105.5) acres in the Isaac McGary and Elizabeth Powell leagues in Ft. Bend county, Texas; and whereas, the several purchasers of said tracts of land under said conveyance, took possession of the several tracts conveyed to them and have since the date of said deeds claimed same in severalty; and whereas, a question has arisen as to the validity and sufficiency of the description in the several deeds conveying the tracts of land hereinafter described:

"Now, therefore, we, Belle S. Kendall (independent executrix under the will of W. E. Kendall, deceased), W. E. Kendall, F. F. Kendall, O. M. Kendall and Clarence Kendall, of Harris county, Texas, for and in consideration of the sum of one dollar (\$1.00) to us in hand paid, and for the further consideration of the correction of any defects which may appear of record, or which may have existed in any of said conveyances, which were not recorded, have granted, sold, conveyed and quitclaimed unto Ike Graves, Lillie Jackson, Frank Mikulencak (the heirs of Fayette Thomas), T. B. Mitchell, Nathan Axel (the heirs of Ike Foster), and Calvin Brown of Ft. Bend county, Texas; R. E. Vineyard, Wharton county, Texas; Charley Mooney (the heirs of Andy Taylor, Robert Foster, Robert Fulton and the heirs of Reuben Lewis, deceased), all of Ft. Bend county, Texas, conveying to each the particular tract hereinafter described and designated, the said entire tract being described as follows."

The deed then describes the 105.5-acre tract by metes and bounds, and then describes and conveys in severalty to the vendees above named, most of whom are plaintiffs in this suit, separate tracts out of the 105.5 acres;

each of said separate tracts being fully described by metes and bounds.

The evidence shows that in 1902 or 1903 the owners of the several tracts of land agreed to fence it and hold it together. The land was fenced under this agreement by the claimants of the several tracts, each person holding an interest in the land contributing money or labor in fencing it. Under this agreement each person owning one of the several tracts in the inclosure could pasture therein five head of cattle.

No one resided on the land. The owners of the several tracts owned other lands on which they lived, and these lands, which were all timbered, were purchased and held for pasturage purposes, and to furnish the several owners with a supply of timber and firewood. In inclosing the land no fence was built along the Bernard river, which was one of the boundaries of the 105.5 acres. There is evidence that the river was often so low that for a considerable portion of its course along this land it formed no barrier to ingress and egress upon and from the land. The evidence is conflicting as to the length of time the fences around the land were kept up.

The defendant Allen claims under a deed from James Armstrong executed on March 4, 1911. The deed describes the land conveyed as follows:

"The following tract or parcel of land situated in Ft. Bend county, Texas, being a part of the land conveyed to me by Kendall & Hackworth, a firm composed of W. E. Kendall and S. A. Hackworth, by deed dated January 9, 1879, and of record in Book M, page 541, of the Deed Records of said Ft. Bend county.

"The tract or parcel of land herein conveyed is known as timber lot No. 5, containing ——— acres of land, according to a plat and field notes of a subdivision of the lower half of the Isaac McGary league, situated on the Bernard river, and known as my timber tract, and more particularly described as follows:

"Beginning at a point where an extension of the south line of a tract of seventy acres of land now known as the Thomas Jennings tract, would intersect the west boundary line of a one hundred and fifty-two acre tract deeded to B. F. Williams by W. E. Kendall, November 11, 1875; thence south 30 east with said Williams west boundary line, to intersect the Bernard river; thence up said river with its meanders to a point where a line of the Reuben Lewis and Thomas Jennings tracts intersect the said Bernard river; thence N. 30 W. following said Lewis-Jennings line to an inner corner of said Thomas Jennings tract; thence N. 60 E. following said Jennings south boundary line to the place of beginning, containing ——— acres, more or less."

On January 9, 1879, Kendall and Hackworth conveyed to James Armstrong two tracts of land described as follows:

"All of that tract or parcel of land situated in Turkey creek and the east San Bernard river in said Ft. Bend county, being a part of the

upper half and lower half of the Isaac McGary league of land, and more particularly described as prairie lot No. 66, embracing about 175 acres out of the upper half of said league in Turkey creek, upon which the said Armstrong now lives, and timber lot No. 15 on said river, containing about 25 acres of land out of the lower half of said league of land, said lot No. — and 15, containing 200 acres of land more or less according to field notes and plat of said land as made by J. W. Hackworth, which will be a matter of record as soon as the same can be procured of said surveyor."

The intervener showed title under the common source to the interest in the several tracts of land claimed by her and awarded her by the judgment.

Allen testified that when he purchased from Armstrong in 1911, and when he took possession in 1912, the land was not inclosed with any fence, and cattle went in and out from the land at will. He further testified that he tried to get some of the owners of the other tracts in the 105.5 acres to agree to have the lines of the several tracts established, so that each would know the exact location of his tract. He further testified:

"These people would not agree to my proposition, but they told me that they were going to sue for it and get it all. I claimed 25 acres under the Armstrong deed, and they would not make any agreement at all, so after that time I kept the fence up for my own protection. I built the fence there, and kept it up for my protection. It so happened that my fence inclosing my own land inclosed theirs. The fence inclosing my own field outside of where this fence that I built on the Mitchell line and the Armstrong line necessarily fenced it all. \* \* \* All that I am claiming in this suit and all that I have ever claimed is the title I got from Armstrong under his deed, and if I haven't got any title under the Armstrong deed I have no title to any of that land."

He also expressly says he does not claim either of the respective tracts in which the intervener recovered an interest.

The judgment rendered by the court below contains the following recitals:

"And on the 31st day of October, A. D. 1917, after the plaintiffs and intervener had rested their cause, the defendant, C. H. Allen, urged his plea in abatement, and, after hearing same, the court is of the opinion, and it is so ordered, adjudged, and decreed, that said plea of abatement should be sustained as to plaintiffs' right to recover jointly for damages sustained by them for trespass to the premises described in their petition and overruled as to all other things therein prayed for, to which ruling of the court defendant, C. H. Allen, then and there in open court excepted."

Appellant preserved and presents to this court a proper bill of exceptions to the action of the trial court in not fully sustaining his plea in abatement if it was shown by the undisputed evidence that plaintiffs owned the land in severalty.

The first assignment of error complains of this ruling of the court.

[1] Since the case of *Curry v. York*, 3 Tex. 357, it has been the uniform rule of decision in this state that the several owners of separate parcels composing a large tract of land cannot, even under our liberal system of pleading, maintain a joint suit for the entire large tract, but each must sue for his respective parcel. *Punchard v. Delk*, 55 Tex. 304; *Paschal v. Dangerfield*, 37 Tex. 273; *Ford v. Sutherland Springs Co.*, 159 S. W. 879. Appellees do not question this general rule, but insist that it is not applicable in this case, because plaintiffs alleged and proved a joint possession of the land, and upon proof of such possession were entitled to recover same from defendant, whom the evidence shows was a mere trespasser, and the judgment in this case only awards them possession of the premises.

[2, 3] In support of this contention appellees cite the case of *Parker v. Ft. Worth & D. C. Ry. Co.*, 71 Tex. 132, 8 S. W. 541, and other cases which announce the well-settled rule that proof of prior possession is sufficient to sustain an action of trespass to try title when the defendant is shown to be a mere naked trespasser. This rule, which is one of evidence, based upon the further rule that possession of land is *prima facie* proof of ownership, and so in actions of trespass to try title, when the defendant is shown to be a mere naked trespasser, the plaintiff sufficiently establishes his right to recover by proof of his prior possession.

[4] The other rule which forbids joint recovery of land when the proof shows that the plaintiffs own in severalty is but a specific application of the fundamental rule that the *allegata* and *probata* must correspond. If the petition alleges that the plaintiffs own the land jointly such allegation is not supported by proof that each of the several plaintiffs own a separate and distinct parcel of the land, and any judgment that could be rendered in such case would be either without support of the pleading or in the evidence. Appellees, in order to avoid the effect of this rule, alleged that they were in joint possession of the premises under a joint and mutual agreement to occupy and hold the land jointly. If it be conceded that upon proof of this allegation they would be jointly entitled to recover possession, the action of the trial court in instructing a verdict in their favor on this theory cannot be sustained, because the evidence was sharply conflicting on the issue of whether the plaintiffs were in possession of the land when defendant entered and took possession, and also upon the issue of whether defendant showed title to 25 acres of the land claimed by him. Upon this state of the evidence the court was clearly wrong in instructing a verdict for plaintiffs, and appellant's assignment,



complaining of the judgment on this ground, must be sustained.

It follows from these conclusions that the judgment of the trial court as between plaintiffs and defendant must be reversed, and the cause remanded.

The intervener having shown title to the land claimed by her, and her title not being questioned by the evidence offered by plaintiffs or defendant, the judgment in her favor should be affirmed. It is accordingly ordered that judgment of the trial court in favor of the intervener be affirmed, and the judgment in favor of plaintiffs be reversed, and the cause remanded for a new trial of the issues between plaintiffs and defendant.

Affirmed in part, and reversed and remanded in part.

VAUTER et ux. v. GREENWOOD et al.  
(No. 9069.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 22, 1919.)

1. DEEDS  $\S$  26—REALTY BROKERS—AUTHORIZATION INSTRUMENT—TITLE TO LAND.

Instrument, whereby landowners authorized agent to sign their names to contract with third person in disposal of their land, owners agreeing in consideration of agent's services and moneys expended in negotiating the transaction to accept a number of acres out of certain public school lands for their equity in the land disposed of, did not pass any legal or equitable title to the agent or agents in the public school lands conveyed by the third person to the owners.

2. ACKNOWLEDGMENT  $\S$  20(2)—COMPETENCY TO TAKE—INTERESTED GRANTEE.

A grantee directly interested in the deed was not competent to take the acknowledgment of either of the grantors, husband and wife; and acknowledgments taken by him were invalid, and gave no force whatever to the instrument.

3. DEEDS  $\S$  53—CONVEYANCE AS DEED OR AS CONTRACT FOR CONVEYANCE—QUESTION FOR JURY.

In trespass to try title by realty brokers to recover certain lands as commission, whether there was such intention to convey that a deed from defendants to plaintiff broker conveyed title as a contract for conveyance of land under Vernon's Sayles' Ann. Civ. St. 1914, art. 1116, held for the jury under the evidence, though defendants admitted they signed the instruments.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Suit by W. H. Greenwood and another against S. C. Vauter and wife. From judgment for plaintiffs, defendants appeal. Reversed, and cause remanded.

V. K. Wedgworth, of Ft. Worth, for appellants.

Wray & Mayer, of Ft. Worth, for appellees.

CONNER, C. J. In its final form this suit is one by W. H. Greenwood and W. L. Sargent, appellees, against S. C. Vauter and wife to recover 240 acres of land in Reeves county. The plaintiffs' petition is the ordinary one in trespass to try title, with the usual allegations of seizure and title in plaintiffs and ouster by the defendants. The defendants answered by the plea of not guilty, and the court, upon the conclusion of the evidence, gave a peremptory instruction to the jury to find for the plaintiffs, which being done, judgment in their favor was entered, and the defendants have appealed.

Appellees present objections to the assignments of error; but, inasmuch as we have concluded to treat the court's action in giving the peremptory instruction as fundamental error, we need not stop to consider the sufficiency of appellants' assignments.

The judgment rests alone upon two instruments in writing; the first relates to commissions to be given to appellees for services to be performed in effecting an exchange of an incumbered tract of land owned by appellants in Hunt county, for a one-half section of state school land in Reeves county owned by A. L. Camp. It reads as follows:

"The W. H. Greenwood Land Company.

"Ft. Worth, Texas, April 23, 1915.

"Mr. W. L. Sargent, Dear Sir: Take this as authority from us to sign our name to contract with A. L. Camp in the disposal of the 220 acre Hunt county land. In consideration of services rendered and moneys expended in negotiating the said transaction by and through you, we hereby agree and accept 80 acres of land out of the west  $\frac{1}{2}$  of section 46, block 56, public school lands, Reeves county, Texas, for our equity in the Hunt county land. All expenses of this transaction shall be paid by W. L. Sargent and associates and said W. L. Sargent and associates to receive from A. L. Camp the remainder of said Reeves county land as per contract between us and A. L. Camp.

"Yours very truly,

S. C. Vauter.  
"Ruth Vauter."

The other instrument need not be set forth. It is merely in the usual form of a general warranty deed, signed by S. C. and Ruth Vauter, purporting to convey to W. L. Sargent and W. H. Greenwood "the south  $\frac{1}{4}$  of the west  $\frac{1}{2}$ , section 46, block 56, public school land in said county and containing 240 acres of land."

The deed referred to was signed by S. C. and Ruth Vauter, and acknowledged by these parties in the usual form before the appellee Will Sargent, acting as a notary public, but there were no subscribing witnesses to the deed. The exchange of lands, contemplated between the appellants Vauter and wife, and A. L. Camp, was effected by the appellees Sargent and Greenwood, pursuant to which

due conveyances seem to have been exchanged between the Vauters and Camp.

[1] It seems evident that the instrument dated April 23, 1915, above copied, does not amount to title, either legal or equitable, in appellees to any specified part of the west  $\frac{1}{2}$  of section 46, block 56, public school land in Reeves county, conveyed by A. L. Camp to S. C. Vauter and wife. It only purports to give authority for Mr. Sargent to contract with A. L. Camp in the disposition of the Hunt county land, with the further agreement to accept an unidentified 80 acres of the Reeves county land for their equity in the Hunt county land. In other words, the instrument referred to amounts to no more than a mere contract, and in no sense can it alone be construed as title in appellees to the specific 240 acres of land for which they sued so as to authorize the court's peremptory instruction. Indeed, there is no such claim by the counsel who represent appellees in this case, and the matter has been referred to in order merely to exclude suggestions that this instrument supports the peremptory instruction. We, therefore, will discuss the effect of the deed above referred to as the only possible support for the peremptory instruction shown by the record.

[2] W. L. Sargent was a grantee and directly interested in the deed above referred to, and was therefore not competent to take the acknowledgment of either of the grantors, S. C. and Ruth Vauter. The acknowledgments, therefore, were invalid, and gave no force whatever to the instrument. See *Brown v. Moore*, 38 Tex. 645; *Sample v. Irwin*, 45 Tex. 567; *Rothschild v. Daugher*, 85 Tex. 332, 20 S. W. 142, 16 L. R. A. 719, 34 Am. St. Rep. 811; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158.

[3] But it may be said that the instrument is good as a deed without acknowledgment and without subscribing witnesses. In title 24 of our statutes, relating to conveyances of land, it is provided that such conveyances must be by instruments in writing "subscribed and delivered by the parties disposing of the same or by his agent thereunto authorized by writing." See *Vernon's Sayles' Civil Statutes*, article 1103. Article 1109 of the same title expressly provides that—

"Every deed or conveyance of real estate must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses thereto, or must be duly acknowledged before some officer authorized to take acknowledgments and properly certified to by him for registration."

Of itself, therefore, and without other proof of its execution, we do not think it can be said that the deed signed by Vauter and wife, above referred to, conclusively operates as a transfer of title out of Vauter and wife to the appellees, Greenwood and Sargent.

We have, however, a statute relating to conveyances, which reads as follows:

"When an instrument in writing which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this chapter, the same shall nevertheless be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit." *Vernon's Sayles' Civil Statutes*, article 1116.

And it has been held in one case (*Clay County Land & Cattle Co. v. Wood*, 71 Tex. 460, 9 S. W. 340), that under a general allegation of title a contract for the conveyance of land may be proven, but it is to be noted that to come within the purview of article 1116, supra, the instrument must have been intended as a conveyance, and in the case mentioned there was proof of actual possession on the part of the one claiming under the contract, which actual possession of itself was evidence of title.

In the case before us now, however, there is no proof of actual possession by appellees, and both of the appellants specifically testified that in signing the deed under discussion it was not intended to thereby convey the land therein described. On this point Mrs. Vauter, among other things, testified in reference to the instrument under discussion:

"I asked Mr. Sargent what kind of an instrument it was, and he told me it was just an instrument in writing to show that we owed him a commission, and I asked him if it had anything to do with my title, and he said, 'Not a bit.' He said it didn't have anything to do with the title in any way. I didn't know that I was signing a deed at that time. I have seen the instrument since signing it; I saw it when the case was up before. I don't have to use glasses; this looks like the instrument of writing that I signed. This is the instrument we had on the other trial. That is my signature there. This deed recites \$1,000 in here; either Mr. Greenwood or Mr. Sargent never paid me \$1,000. \* \* \* They never paid me anything at all."

S. C. Vauter testified:

"I remember signing an instrument in the office of Mr. Greenwood. Mr. Sargent asked me to sign that instrument. He told me what the instrument was. He said it was just an instrument in writing to show his folks that he had a commission coming in case he should drop off. I don't think he read the instrument to me. \* \* \* I know he didn't. I didn't ask him any questions as to what was in the instrument or what the instrument was. Mrs. Vauter asked Mr. Sargent, 'Will this hurt my deed in any way—will affect my title?' And he said it wouldn't affect the title at all. This is my signature to the instrument you have just handed me."

As it seems to us, it follows that the trial court was not authorized to construe the deed under consideration as conveying title either

of itself or as a contract for the conveyance of land. Appellants were at least entitled to go before the jury and have the jury's determination of whether by the execution of the deed, they, in fact, intended to convey the land therein specified to Greenwood and Sargent. It is true both S. C. Vauter and wife acknowledged that they signed the instrument, and appellees insist that by reason of this fact the peremptory instruction was justified, but we do not think so. Certainly not in view of their testimony, which presents an issue that the court was not authorized to take from the jury.

For the reasons stated, we conclude that the judgment must be reversed and the cause remanded.

### BURKETT v. CHESTNUTT. (No. 973.)

(Court of Civil Appeals of Texas. El Paso. May 1, 1919.)

#### 1. APPEAL AND ERROR $\Leftrightarrow$ 739—ASSIGNMENT OF ERROR—REFUSAL TO SUBMIT SPECIAL ISSUES.

A single assignment of error complaining of refusal of trial court to submit 19 special issues requested, the charges not being germane to each other but presenting several propositions of law and fact, will not be considered, in view of Court of Civil Appeals Rule 26 (142 S. W. xii).

#### 2. TRIAL $\Leftrightarrow$ 350(1)—SUBMITTING SPECIAL ISSUES.

Refusal to submit special issues which deal with immaterial matters is not error.

#### 3. TRIAL $\Leftrightarrow$ 350(2)—SPECIAL ISSUES—EVIDENTIARY FACTS.

Refusal to submit special issues calling for evidentiary and not ultimate facts is not error.

#### 4. TRIAL $\Leftrightarrow$ 351(5)—SPECIAL ISSUES.

Refusal to submit special issues covered by those submitted is not error.

#### 5. TRESPASS TO TRY TITLE $\Leftrightarrow$ 41(3)—EVIDENCE.

In trespass to try title, evidence held sufficient to support finding that the southwest corner of survey owned by defendant was on a river bank, so that land claimed by plaintiff as a survey of land lying between defendant's survey and the river was in fact in defendant's survey.

#### 6. BOUNDARIES $\Leftrightarrow$ 14—"ON THE RIVER BANK"—"NEAR THE RIVER BANK."

The words, "near the river bank," as used in field notes locating the corner of a survey, mean the same as, "on the river bank" (citing Words and Phrases, First and Second Series, Near).

#### 7. BOUNDARIES $\Leftrightarrow$ 36(3)—PLATS.

The plat filed as a part of the description of a survey by the original surveyor, showing a river to be the southern boundary of the sur-

vey, is the best of evidence that the river is such boundary in fact.

#### 8. NAVIGABLE WATERS $\Leftrightarrow$ 36(2)—BOUNDARIES—"THENCE DOWN THE RIVER."

The expression, "thence down the river," as used in field notes of a surveyor of a patent, is construed to mean with the meanders of the river, unless there is positive evidence that the meander line as written was where the surveyor in fact ran it; for such lines are to show the general course of the stream and to be used in estimating acreage, and not necessarily boundary lines (citing Words and Phrases, First and Second Series, Down).

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Trespass to try title by John G. Burkett against J. A. Chestnutt. From judgment for defendant, plaintiff appeals. Affirmed.

Moyers & Creighton, of Mineral Wells, and Bradley, Burns & Hiner, of Ft. Worth, for appellant.

Ritchie & Cousins, of Mineral Wells, and Hood & Shalde, of Weatherford, for appellee.

HARPER, C. J. Burkett filed this suit in form trespass to try title to 290 acres more or less, of land out of the P. M. Yell survey.

Defendant answered by general denial, not guilty, and specially that the land in question is a part of the George Green survey, and for that reason the purported award and sale by the state was void; that he acquired the land in controversy and other lands, by deed dated July 14, 1899, duly recorded, and is now owner in fee simple of same; and pleaded the five and ten year statutes of limitations. To the last pleas the plaintiff urged exceptions, contending that the sole issue in the case is whether the Brazos river formed the south boundary line of the George Green survey. Exceptions sustained.

Trial with the jury submitted upon special issues, and upon the answers judgment was entered for the defendant, from which it comes to us by appeal for review.

[1-4] The first assignment is based upon the refusal of the trial court to submit 19 special issues requested by him. The proposition is:

"That it was error for the court to fail and refuse to submit pertinent and sufficient issues to enable the jury to make findings of fact upon all matters in controversy that would enable the court to render proper judgment upon the facts so found."

These charges are not germane to each other, but present several propositions of law and fact; wherefore we are not required to consider them. Rule 26 (142 S. W. xii); M., K. & T. Ry. Co. v. Nelser, 54 Tex. Civ. App. 460, 118 S. W. 166. But we have carefully considered the charges requested and have

concluded that they are either upon immaterial issues, or call for evidentiary and not ultimate facts, or are covered by those submitted.

The special issues submitted and the answers are as follows:

"Special Issue No. 1: At what point do you find that the original surveyor who surveyed the Green survey located the southwest corner of said survey?

"Answer to Special Issue No. 1: On a post oak tree which was on or near the river bank, marked 'W.'

"Special Issue No. 2: Did the surveyor who made the George Green survey on May 18, 1852, actually run out and mark the west line of same? (Answer: Yes or no.)

"Answer to Special Issue No. 2: Yes.

"Special Issue No. 3: Did the surveyor who made the George Green survey on May 18, 1852, mark a post oak W. for the southwest corner of said survey? (Answer: Yes or no.)

"Answer to Special Issue No. 3: Yes.

"Special Issue No. 4: If you find that the said surveyor who made the George Green survey in 1852 established the southwest corner of the same at a post oak mark W, then where and at what point in reference to the river or its bank, or the bluff of the river, was such corner tree located? (Answer just as you find.)

"Answer to Special Issue No. 4: On the river bank.

"Special Issue No. 5: Did the surveyor who originally surveyed and located the George Green survey establish the corner thereof on the bank of the Brazos river, under the bluff or mountain, overlooking the said river, as it existed at the time said survey was made? (Answer: Yes or no.)

"Answer to Special Issue No. 5: Yes.

"Special Issue No. 6: Did the surveyor who originally surveyed and located the George Green survey in 1852 actually run out the south line of said survey, from the southwest corner of same to the southwest corner of same, in accordance with the field notes of said survey? (Answer: Yes or no.)

"Answer to Special Issue No. 6: Yes.

"Special Issue No. 7: Where do you find that the original surveyor who surveyed and located the George Green survey located the south line of same, in reference to the Brazos river, and the north line of the Yell survey, as made by H. M. Berry in 1917? (State just as you find.)

"Answer to Special Issue No. 7: On or near the bank of the river."

The second assignment is that the answer to special issue No. 4, and the judgment of the court in response to such question and answer, are wholly unsupported by and are contrary to the testimony in the record that has any probative force.

The third is: The jury having found that the survey of the George Green survey ran the lines on the ground, even if the southwest corner is on the river bank, the next call south 65° east, 1,200 varas, from said point, will leave defendant 200 acres south of said line.

The fourth is that the court erred in deter-

mining that the river is the south boundary of the Green survey because it is contrary to the finding on issue No. 6.

The fifth is that the judgment finding that there is no vacant land south of the south line of the Green survey and the Brazos river is contrary to the answer to special issue No. 6, and that the answer to issue No. 7 is so indefinite as that no judgment could be predicated thereon.

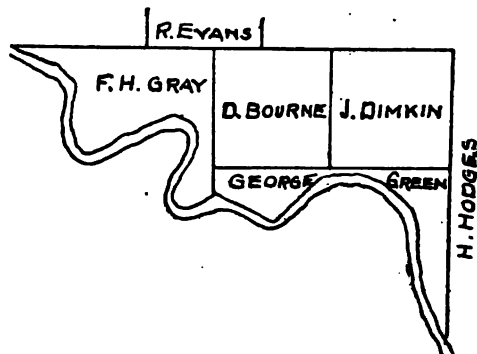
The sixth raises the same questions.

That we may more clearly discuss the real question at issue in the case, to wit, should it be held that the Brazos river is the south boundary line of the Green survey, it becomes necessary to here make a statement of facts constituting the history of the location, etc., of the lands in controversy.

The records of the General Land Office of Texas show that in 1852 Chambers filed his report of survey of the George Green survey, of which the following is a copy:

"The State of Texas, Robertson Land District.

"I have surveyed for George Green nineteen hundred and twenty acres of land, by virtue bounty certificate No. 839, issued by Ben F. Hill, Adjutant General, and dated June 6th, A. D. 1851. Situated in Palo Pinto county (Robertson district) on the east bank of Brazos river about 11 miles S. 61° E. of the town of Palo Pinto.



"Beginning on the bank of the Brazos river at the upper corner of 13 labors surveyed for H. Hodges, a stake from which a cottonwood 14 in di. S. 62½ W. 7.2 vs. mkd. A. elm 20 in. brs. S. 86 E. 6.9 vs. mk. H. hackberry 12 in. brs. N. 23 E. 4.8 vs.

"Thence running north with the west boundary of sd. survey 6,406 varas to the N. W. corner of the same, S. E. corner also of 1,920 acres surveyed for J. Dimkin, a rock mkd. A. from which a P. oak mkd. X brs. N. 21 W. 6 & a post oak mkd. M brs. S. 21 W. 10 va.

"Thence west with the south boundary of sd. 1,920 acre survey passing its S. W. corner, and continuing with the south boundary of 1,920 acres surveyed for Dan'l Bourne, 6,584 varas to his S. W. corner, a rock mkd. B, from which a post oak 14 inches diam. brs. S. 52 W. 8½ varas & another 10 inches di. brs. N. 43½ E. 6 va.

"Thence south 707 varas to a post oak 8 inches di. mkd. W. near the river.

"Thence down the river S. 65 E. 2,100 varas,

east 400 vs. N. 18 E. 1,500 vs. east 910 vs. S. 45 E. 2,100 vs. S. 10 E. 3,000, S. 25 E. 2,070 vs. to the beginning.

"Surveyed May 18th, 1852. B. J. Chambers, Depty. Survr. for Robertson District. Jno. P. Bailey and N. G. Kerr, C. C."

This survey was patented to the heirs of George Green in accordance with said report in 1869. In 1917, P. M. Yell, "looking for scrap land," as he expressed it, procured one Berry, the county surveyor of Palo Pinto county, to survey and prepare the field notes of the land sued for, and applied to the land office to purchase it as vacant land. The land commissioner returned the first field notes for correction because they did not close. The surveyor testified as to this:

"When I got the field notes back and saw the error, I just took from one line and added to another to make them close. I didn't go down on the ground and remeasure the land."

On the 28th of July, 1917, patent was issued to P. M. Yell.

It is apparent that the George Green west line call of 707 varas south from the southwest corner of the Bourne survey not reaching the river bank by 360 varas is the reason Yell concluded that there was vacant land between the Green survey and the river, because it appears that running from that point S. 65° E. on a straight line 2,100 varas would in fact leave approximately the number of acres sued for between said call and the river bank; but if the surveyor in fact placed the southwest corner upon the river bank, as found by the jury, then there would be much less land between the same call S. 65° E. 2,100 varas, and the river.

But if the court was correct in his finding that the river is the south boundary line of the Green, then there is no land for the Yell survey, and the appellant should take nothing by his suit.

The jury were not asked to find the fact, is the river the south boundary line of the Green as originally surveyed, but they are asked by the fourth to locate the southwest corner, and they answer on the river bank. And by the seventh they are asked where the original surveyor located the south line, and they answer, "On or near the river." So by these quoted findings and the other, they have in effect found that the river is the south boundary line. So, if these findings are supported by evidence, the trial court did not err in holding that the river is the south line, and that there was no vacant land upon which to file for the Yell patent.

[6] The first question raised by the second assignment is: Is there evidence to support the finding that the southwest corner of the Green was established on the river bank?

The original report of the survey with its plat shows that the Green was placed between the river and three older surveys. It

begins on the bank of the river at the upper corner, or the Hodges; "thence to the northwest corner of same, S. E. corner of Dimkin survey; thence W. to S. W. corner of Bourne survey; thence S. 707 varas to post oak \* \* \* near the river; thence down the river." The Gray survey lying west, made by the same surveyor, same year in June, patented in 1855, recites its beginning corner, "Beginning on the river bluff at George Green's upper corner," and its closing call, is "thence down the river with its meanders to the place of beginning."

Many witnesses testified to facts which indicated that this corner was in fact upon the river bank, and that the river was the boundary line. Bradford testified that he had lived in the county since 1861 or 1862, and that in 1879 he assisted the county surveyor to subdivide the survey, and that at that time the surveyor seemed to be familiar with the lines and corners of the survey, and that he treated the river as the boundary.

So we think there is an abundance of evidence to support this finding.

[8] In fact, the trial court could have so construed the wording of the patent to mean "on" the river bank, for "near the river bank," as expressed in the original field notes, means the same thing. *St. Clair County v. Lovington*, 23 Wall. 46, 23 L. Ed. 62; *Brown v. Hugar*, 21 How. 305, 16 L. Ed. 130; 5 Words and Phrases, 4689.

[7] As for the contention that, if the corner is on the river that the line S. 65° E. 2,100 varas, still leaves an acreage for the Yell, the answer is that the evidence in this record is such as to make it clear that the river's meanders is the south boundary line of the Green survey from the southwest corner to the southeast corner thereof. Therefore there is no vacant land for the Yell patent. The plat filed, copied above, as a part of the description of the survey by the original surveyor, showing the river to be the boundary, is the best of evidence that it is in fact the south boundary thereof. *Boon v. Hunter*, 62 Tex. 589.

Appellant's contention is that, the jury having found that the original surveyor actually ran out this line, it must be held to locate the boundary in strict accordance with its course and distance calls from the established corner, because we must follow the footsteps of the surveyor.

It does not necessarily follow that we would follow his footsteps by tracing this course and distance call, because the surveyor may not have written his calls for course and distance as he ran them, and this is the question to be determined by the evidence. There is nothing in evidence to show that he ran this line as written; he does not place it upon his plat filed; it recites no natural or artificial objects by which to trace his foot-

steps. Then by what evidence are we to determine that there was an actual survey of the line and the route taken by the surveyor? The only evidence in this record is the recitals in the original report and in the patent, and the plat filed by the surveyor.

The jury have found that he ran the line on or near the bank of the river, and we are of the opinion that the court could have decided that the river was the south boundary without this finding of the jury.

[8] "Thence down the river" is construed to mean with the meanders of the river, unless there is positive evidence that the meander line as written was where the surveyor in fact ran it. *Bland v. Smith*, 43 S. W. 49; *St. Clair County v. Lovington*, 23 Wall. 46, 23 L. Ed. 62; *Brown v. Hugar*, 21 How. 305, 16 L. Ed. 130; 3 Words & Phrases, 2194. For such lines are to show the general course of the stream and to be used in estimating acreage, and not necessarily boundary lines.

So we conclude that the trial court did not, in view of the facts of this case, err in holding that the Brazos river is the boundary of the George Green survey, and that therefore the attempted location and patent of the Yell was void.

The cause is affirmed.

#### MICHAELIS v. HAUPT et al. (No. 6195.)

(Court of Civil Appeals of Texas. San Antonio.  
April 30, 1919. Rehearing Denied  
May 28, 1919.)

#### WILLS §535 — CONSTRUCTION — EXCLUSION FROM PROVISIONS.

A will in which the testator provided that "each heir" should take an undivided interest in certain land, and after some intervening language, which does not establish any rule, states, "Their is one exception to this rule," and then recites that his afflicted daughter's husband and grown sons, who had not cared for her, should not have any interest in his land, held not to exclude such afflicted child from an interest in such land; no other provision being made for her.

Appeal from District Court, Hays County; M. C. Jeffrey, Judge.

Suit by G. B. Haupt and others against M. G. Michaelis. From a judgment for plaintiffs, defendant appeals. Reversed and rendered in part, and affirmed in part.

W. W. Searcy, of Brenham, and R. E. McKie, of San Marcos, for appellant.

Will G. Barber, of San Marcos, for appellees.

MOURSUND, J. G. B. Haupt, L. M. Haupt, Mrs. Touay Barbee, W. H. Barbee,

Jerry M. Nance, Jr., E. P. Nance, Mrs. Bassie Nance and her husband, J. M. Nance, and Mrs. Leila Cooper brought this suit against M. G. Michaelis in trespass to try title and for partition of a tract of 2,830 acres out of the Andrew Dunn and McCarver surveys in Hays county, Tex.

Plaintiffs alleged that they were the owners in various portions of an undivided eleven-twelfths interest in the said 2,830-acre tract of land, alleging that they own their respective interests by inheritance from W. W. Haupt and Mrs. Sarah A. Haupt, both deceased, or by transfers from the heirs of said deceased persons. Plaintiffs alleged that M. G. Michaelis was claiming and in possession of an undivided one-sixth interest in said land, and that he had been in possession thereof since June 1, 1914, and they prayed judgment establishing title in them to an eleven-twelfths interest, for rents from M. G. Michaelis in the sum of \$40 per month from June 1, 1914, to date of trial. Plaintiffs alleged specifically that G. B. Haupt, L. M. Haupt, Mrs. Leila Cooper, Mrs. Touay Barbee, Mrs. Bassie Nance, and Mrs. Alice Landers were the only children of W. W. Haupt and Mrs. Sarah A. Haupt; that the said W. W. Haupt and Sarah A. Haupt owned the 2,830 acres of land in controversy at the time of their death; that they are both dead, and Mrs. Sarah A. Haupt died intestate, and each of said children inherited an undivided one-sixth of her one-half interest in said land, or an undivided one-twelfth interest. Plaintiffs further alleged that W. W. Haupt died prior to the death of his wife, leaving a will, which is set out in plaintiffs' petition, and plaintiffs claim that under said will all of the property of W. W. Haupt was left to five of his children, to wit, G. B. Haupt, L. M. Haupt, Mrs. Leila Cooper, Mrs. Bassie Nance and Mrs. Touay Barbee, to the exclusion of Mrs. Alice Landers. Plaintiffs prayed for a construction by the court of the will giving same the effect contended for, for an adjudication of the interest of each of the plaintiffs, and decreeing that M. G. Michaelis owned no interest in the said land, but, in case he should be found to own an undivided one-twelfth interest, then decreeing that interest to him and canceling any further claim, praying for a recovery of the rents as aforesaid from said Michaelis, and praying for partition.

Defendant answered by general demurrer, special exceptions, a general denial, and plea of not guilty, and a special answer pleading title in fee simple to an undivided one-sixth interest in the 2,830 acres of land described in plaintiffs' petition.

The cause was submitted upon special issues, which being answered favorably to plaintiffs, judgment was entered in their

favor, restricting defendant to a one-twelfth interest in the land, fixing the interests of the respective plaintiffs, appointing commissioners to partition the land, and awarding plaintiffs \$320.75 damages for the use of the one-twelfth interest to which it was held he had no title. In making the foregoing statement, we have copied in part the statement in appellant's brief.

W. W. Haupt and his wife, Mrs. Sarah A. Haupt, owned as community property a tract of land out of the McCarver league, supposed to contain 400 acres, and a tract out of the Dunn league, supposed to contain 2,000 acres. He conveyed to his five children, other than Mrs. Alice Landers, about 257 acres out of the McCarver land, designated the field land, dividing the same into five parcels, each receiving approximately one-fifth thereof. After his death all of the children, and the husband and children of Mrs. Landers, conveyed a tract of about 125 acres of the McCarver land to Mrs. Sarah Haupt. Mrs. Haupt afterwards conveyed this land, the deeds calling for 129.3 acres, to four of the children; it having been arranged for one of them to receive a conveyance of Mrs. Cooper's interest. A vendor's lien was retained in some of the deeds to secure the payment of notes to Mrs. Landers. The arrangement was made for the five children other than Mrs. Landers to pay her \$1,000. This was shown to be for her interest in some of the land, and, the evidence indicates, was for what her interest was conceived to be worth in the entire McCarver tract. It was afterwards ascertained, according to plaintiffs' petition, that the pasture land, when surveyed out, was found to contain 2,830 acres, including 10 acres out of the McCarver league, which 10 acres constituted no part of the 400-acre tract.

The defendant is the owner, by purchase from the guardian of Mrs. Landers, of all of her interest in said 2,830 acres of land. As Mrs. Haupt died intestate, there is no question but that defendant acquired a one-twelfth interest in the land, being the interest inherited by Mrs. Landers from her mother. After defendant had purchased as aforesaid, the will of W. W. Haupt was admitted to probate, and it was contended by appellees that thereby he excluded Mrs. Landers and bequeathed his interest in said land to the other five children, and therefore defendant did not acquire any interest in the half owned by W. W. Haupt at the time of his death. That contention was sustained on the trial of this case. The will reads as follows:

"As I am past my three score years and ten, it becomes my duty to provide for the future.

"My land is all surrounded by fence which my son Lewis (and every one in the neighborhood knows its boundaries).

"I have already laid off my field in 50-acre

lots and all the children have drawn shares and measured off and selected their lots and are satisfied with their selection. These are on the M. M. McCarver league. The balance of my land lies on the west end of the McCarver tract. Some, or in all on the McCarver tract 400 acres.

"The balance of my land (some 2,000 acres or more acres) (see records in San Marcos deed) lies on the Dunn league (Andrew Dunn).

"That is held as pasture land and each heir should have an undivided interest in said pasture—as 150 acres on the west end of the McCarver league. As I expect the most of my children to build houses on west end of the McCarver league. I desire that each one should occupy all the land necessary to accommodate the necessity of the land around the house.

"Their is one exception to this rule. I don't want A. P. Landers to ever have any interest whatever in any part of this land. Nor his two children, Willie & Johnnie. His wife, my daughter Alice, has lived with me five years and she is entirely incompetent to do anything & has to be taken care of all her life.

"My wife, Sarah Ann, as long as she lives must be provided from the products of this place, as far as it is able to do so, with all the necessities & comforts of this life. I have a few dollars in the Wood National Bank, the Ed. Green First National Bank, both of San Marcos, and the Groos Bank of Kyle, all of which is at her disposal and use. Now to sum up, there is not a child of mine, who would not spend the last dime for their mother's comfort. As for A. P. Landers I ask no favors from him and don't want any. As for his two sons Willie & Johnnie, my children can give them money if they choose, but they must be deny any of my land. [Signed] W. W. Haupt."

Appellees argue that the words "There is one exception to this rule," must be held to relate back to the statement that each heir should have an undivided interest in the pasture, for the reason that such statement announces a rule, and the intervening language does not announce a rule. The testator states that he expected most of his children to build houses on the west end of the McCarver league, and that he desires that each one should occupy all the land "necessary to accommodate the necessity of the land around the house." Perhaps he had the mental training and analytical mind necessary to comprehend that, as to bequeathing the pasture land, he was announcing a rule, and, as to giving land to those who built houses, he was not announcing a rule. If he did, he failed to exhibit it in writing the will; for appellees say in argument that he identified Mrs. Landers in "his careless way" by identifying her share. It appears reasonable that, no matter how ignorant or careless a man may be, if he writes a will for one purpose, namely, to disinherit one child, he would say so, as it would take no particular skill, such as is imputed to Haupt by appellees when they contend that he must by the use of the word "rule" have referred back to

the statement that "each heir" should share in the pasture land. When we consider the statement, "Their is one exception to this rule," alone, it appears that it was intended to name a person or class of persons as being excepted from some provision theretofore made. When it is considered in connection with the next sentence, which was undoubtedly designed for the purpose of explaining it, the result is disappointing, and we enter the domain of conjecture as to why or for what purpose he used such expression. He names no heir who is to be excepted, so we would naturally say he did not refer back to the statement that each heir is to have an undivided interest. He does not appear to speak of the land on which houses are to be built or the additional land which the children are authorized to occupy, but of all the land. The phrase, "Their is one exception to this rule," introduces matter apparently foreign to what precedes such language, unless the testator regarded A. P. Landers and his sons as included in the words "each heir." We do not believe he regarded them as heirs, but we do believe that he had an idea that they might assert rights in the land by virtue of Mrs. Landers' ownership of an interest, or by inheritance from her, and that he intended to provide against that contingency. If he had consulted a lawyer, perhaps Mrs. Landers would have been restricted to a life estate, or a provision made that the land should go to the other children and that each should pay her a certain sum. To charge Haupt with knowledge that his plainly expressed desire to forever exclude Landers and his sons would not accomplish his purpose in law would be to credit him with legal training not displayed in drawing the will, and especially when drawing a provision for the benefit of his wife. There can be no doubt of his purpose to provide that neither A. P. Landers nor his two sons should ever have any interest in the land. The language is emphatic, and probably intended to cover every contingency that the future might hold in store by which such persons might, in the absence of a provision to the contrary, become entitled to an interest in the land. Now, if he did not know that disinheriting his daughter would prevent them from ever obtaining an interest, and render unnecessary any provision that they should never have any interest, it follows that he might have thought they would take some interest with Mrs. Landers, which would explain the provisions under discussion. If he knew that disinheriting Mrs. Landers would effectually deprive them of all interest, and he intended to disinherit her, he need not have stated so explicitly that he did not want them to ever have any interest whatever in any part of this land. After expressing his desire with respect to Landers and the boys, he states that Mrs.

Landers has lived with him five years and is entirely incompetent to do anything and has to be taken care of all her life. This statement was intended most likely as explanatory of his attitude towards Landers and the boys. It implies that they have not taken care of her, but have made it incumbent on him to do so; that, although incompetent to do anything and in a condition requiring that she be taken care of all her life, her husband and sons have failed to do their duty by her. It certainly cannot be construed as a provision for Mrs. Landers. There is not a word to the effect that his other children are to take care of her, or that one-sixth of the property is to be held in trust for her. It must be conceded that it is highly improbable that a father would exclude an afflicted daughter and not even state that he expected or required the other children to take care of her. He makes provision for his wife, not as would be done if the will was drawn by a lawyer, but still in what must have appeared to him to be a satisfactory way, and then states that there is not a child of his who would not spend the last dime for their mother's comfort. He does not make any such statement as to Mrs. Landers, but, if he intended to exclude her, it seems natural that he would have in some way expressed either his desire or his belief that the other children would care for her. The testator again refers to A. P. Landers and his sons right at the end of the will, but again fails to say that Mrs. Landers shall not take under the will. It is argued by appellees that the statement by the testator that his children could give Willie and Johnnie money if they chose, but they must be denied any of his land, indicates that the appellees were to receive more than Mrs. Landers, or else there would be no occasion to say that they could give her children money. The argument is persuasive, but here again it is impossible to tell what was in the testator's mind. If he thought he had so provided that even after Mrs. Landers' death her boys could not claim the land, he might state that his children could give them money, and again emphasize that they are not to receive any land. Again, he may have had in view that Mrs. Landers and the children who would assist her in money matters could give the boys money, but could not let them have any land.

Appellees say:

"The wording, writing, and construction of the paper shows it to be inaccurate and crude. It is just such a paper as one will expect to find imperfect, yet, when it is read over and over, we think no one will have fair doubt as to which one of his six children Mr. Haupt meant should be the exception to the rule. If so, you have found the intention which it is the duty of the court to respect, or at least by necessary implication Mrs. Landers is identified as the one not to take."



It appears to us that they are in the attitude of assuming that the use of the words, "Their is one exception to this rule," was made accurately and with a complete and thorough understanding of what a rule is, and of the impropriety of using such an expression thoughtlessly or carelessly, and, having made such assumption, of jumping to the conclusion that as to the other sentences the testator's work is inaccurate and crude, and he did not mean what he said, but meant something else.

It occurs to us that there is much greater likelihood of inaccurate use of the expression, "Their is one exception to this rule," than of the language following it. It is not reasonable to suppose that a man would one instant have in his mind the thought that he was going to except his daughter from the benefits of his will, and write down the thought that he was going to make an exception, and instantly follow it up by a plain, unequivocal statement that other persons are not to have any interest in his land.

We believe that the logical way to construe the will is to minimize the importance of the expression, "Their is one exception to this rule," instead of magnifying it and making every other statement give way to it. We think it should be considered as an introductory phrase to what is to follow, used for no purpose except to introduce the thought expressed in the following sentences. There is no getting around the fact that when the testator said "each heir" he included Mrs. Landers, or the further fact that he did not thereafter say that she should not take part of the estate. To exclude her, it is necessary first to be certain that he intended to create an exception to the words "each heir," and then to say that, although he failed to thereafter state an exception, we will deduce by implication that he intended to name Mrs. Landers as the one to be excepted because the persons he did name were not heirs, and were her husband and grown sons, who had not cared for her.

It is urged by appellees that, if appellant's construction is adopted, Haupt accomplished nothing by his will. This statement is not accurate unless it be assumed that the provision made for Mrs. Haupt is meaningless, and also the provision authorizing the children who erect houses to occupy additional land. We cannot know whether the sole motive of the testator was to prevent Landers and his sons from ever obtaining an interest in the land. If it was, and he failed, it is because the law fails to give the desired effect to his plainly expressed wish, and not

by reason of any doubtful construction placed upon the language used. He could have accomplished such purpose by premitting his afflicted child, but no court is authorized to do this for him. The will contains a clear devise to Mrs. Landers as one of the heirs, which is nowhere negated by language purporting to refer to her, and it is only by conjecturing that a certain doubtful expression was used for the purpose of referring to her that even an issue can be raised as to his intention towards her. Every true parent recognizes the moral obligation to provide for his afflicted children, and a construction which would deprive such a child of its share of the estate, without even expressing a desire that those receiving the estate should care for the afflicted one, should not be permitted to stand upon conjecture as to what was meant by provisions purporting to deal with others. We conclude that the court should have construed the will to vest in Mrs. Landers a one-sixth interest in the land in controversy. Believing, as we do, that if the language is given its plain, ordinary meaning, the intention to bequeath to Mrs. Landers a one-sixth interest is clear, we conclude that it is unnecessary to pass upon questions relating to the charge, and to evidence which we regard as of doubtful admissibility.

The case has been well briefed, and the authorities relied on have been considered. It is obviously unprofitable for us to discuss fact cases when a will of such original and unusual language as the one involved herein is presented for construction.

The judgment of the trial court will be reversed in so far as it construes the will and awards plaintiffs a recovery of the one-twelfth interest to which they sought to establish title as against defendant's claim thereto; also in so far as it awards plaintiffs a recovery of damages and costs; and upon each of said matters judgment will be rendered in favor of defendant. That is, defendant will be adjudged to own a one-sixth interest in the land in controversy instead of one-twelfth, and the plaintiffs' interests will be reduced to correspond with the change thus made; it will be adjudged that plaintiffs take nothing by their claim for damages; also that the costs incurred in the trial court be adjudged against plaintiffs in so far as incurred up to the date of the judgment of the trial court. In all other respects the judgment will be affirmed.

Reversed and rendered in part; affirmed in part.

**WITHERSPOON - McMULLEN LIVE STOCK COMMISSION CO. v. NORTH TEXAS TRUST CO. (No. 9022.)**

(Court of Civil Appeals of Texas. Ft. Worth. March 8, 1919. Rehearing Denied April 19, 1919.)

**TRUSTS ~~6~~—356(2)—PROPERTY DELIVERED TO THIRD PERSON—LIABILITY.**

Where plaintiff advanced funds to enable the borrower to purchase 133 cattle, and in a letter inclosing a check to defendant the seller gave notice that plaintiff contemplated the purchase of such number of cattle, and defendant applied a portion of money to a debt due from the borrower selling 93 cattle and accepting the borrower's explanation that he was to give a mortgage on 40 other cattle which he already owned, defendant is liable for sum applied on the debt; the same being a trust fund, and defendant appropriating it with knowledge of its character.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Action by the North Texas Trust Company against the Witherspoon-McMullen Live Stock Commission Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. K. Goree and Slay, Simon & Smith, all of Ft. Worth, for appellant.

McLean, Scott & McLean, of Ft. Worth, for appellee.

**CONNER, O. J.** The appellee trust company, a corporation engaged in lending money, sued the appellant, the Witherspoon-McMullen Live Stock Commission Company, herein after referred to as the Commission Company, for the recovery of \$2,200 and interest, etc.

The plaintiff alleged that on August 7, 1916, one S. L. Eddleman applied for sufficient money to buy 133 head of steer cattle, representing that the Commission Company was willing to sell him that many head of cattle for \$6,945.06, and would do so if the Trust Company would send the Commission Company its check for that amount; that in compliance with said request, the plaintiff on August 7, 1916, sent to the Commission Company its check for the amount stated, which was received and cashed by it.

It was further alleged that the defendant Commission Company did not sell to Eddleman 133 head of cattle, but only 93 head, and applied \$2,200 of the money so transmitted by the plaintiff to an old debt due by Eddleman to the defendant Commission Company; that the defendant knew that Eddleman was not purchasing 133 head of cattle and plaintiff would lose its \$2,200 if said amount was applied to the payment of the debt due by Eddleman.

It was further alleged that defendant represented that Eddleman was purchasing 133 head of cattle, and thereby induced the plaintiff to issue its check, as stated, to the plaintiff's damage in that amount; it being further alleged that Eddleman was insolvent. There were other allegations which we think unnecessary to notice.

The defendant answered by general demurrer and general denial, and specially pleaded, in substance, that prior to August 7, 1916, Eddleman had advised the defendant Commission Company that he had arranged a loan from the plaintiff to take up the indebtedness that Eddleman was owing to the defendant Commission Company and to purchase additional cattle, and that the money to be so advanced was to be secured by a mortgage on cattle Eddleman represented he then had, and on the cattle that Eddleman was going to purchase; that, so understanding, the defendant sold or caused to be sold to Eddleman 93 head of cattle at \$50 per head for the total sum of \$4,650, and gave to Eddleman an account sales showing the purchase price of said cattle, the total amount of said purchase price and debt having been previously furnished.

It was further alleged that thereafter the plaintiff's check for \$6,945.06, representing the purchase price of said 93 head of cattle, and the balance then due on Eddleman's note, was received, and that said money was applied to the payment of the cattle bought, and to the liquidation of the Eddleman note and indebtedness.

The defendant further alleged that plaintiff had taken as security for its advancement a chattel mortgage on 93 head of cattle purchased as alleged, and on 40 head of cattle, and 150 head of cattle then represented by Eddleman to be owned and held by him in Parker county, Tex., that, if plaintiff was misled, deceived, or defrauded by Eddleman, it was the result of the negligence of plaintiff, and that it was estopped from recovering the money, for the reason that at the time of said application of moneys advanced by plaintiff to Eddleman's debt the defendant had surrendered and delivered to Eddleman valuable security and a mortgage it had on cattle which Eddleman had represented that he had in Parker county.

Upon the conclusion of the evidence the court gave a peremptory instruction to find for the plaintiff. The jury returned a verdict in accordance with this instruction, and plaintiff was awarded a judgment in the sum of \$2,200, with interest at 6 per cent. from August 7, 1916, and the defendant has appealed.

In one form or another the questions raised by the assignments of error require a consideration of whether the evidence was such as to authorize the peremptory instruction. We

have carefully considered the evidence, and are not able to say that the court's instruction thereof was erroneous. We will not set out the evidence at length, but it may be briefly stated that the following facts are undisputed: It is undisputed that Eddleman applied to the appellee Trust Company for money with which to purchase cattle from the Commission Company. The Trust Company finally agreed to advance the amount of money necessary for the purchase of 133 head of cattle, and the Commission Company, after inquiry upon its part, was so informed; that Eddleman, in fact, purchased but 93 head of cattle, for which he was charged by the Commission Company \$4,650. He, however, represented to the Trust Company that he had bought 133 head of cattle, upon which, together with the 159 other head of cattle which he owned in Parker county, he secured the advancement in money to be made by the Trust Company. Before, however, the Trust Company would deliver its check, the Commission Company was informed that it, the Trust Company, must have an account sales of the cattle Eddleman had purchased. Soon thereafter the Trust Company received through the mail the Commission Company's account sales in the following terms:

Ft. Worth, Texas, 8-5, 1916.

Bought for the Account of S. L. Eddleman,  
Weatherford, Texas.

Purchaser.	Cattle.	Price.	Total.
Cochron.....	93 steers branded C-S left side	\$50	\$4,650 00
Cochron.....	40 steers branded L right side		\$2,295 06
			\$6,945 06

Upon receipt of the account sales the Trust Company issued and mailed to the Commission Company its check for \$6,945.06, of which \$2,200 was applied by the Commission Company to the payment of the debt due it from Eddleman.

The testimony of the Commission Company is to the effect that the account sales, as actually made out by it, only included the 93 head of cattle branded C-S, left side, and that the 40 head branded L on the right side had been fraudulently inserted by Eddleman. There is no evidence, however, that tends to show that the Trust Company, who advanced its money on the faith of this account sales, had knowledge or was put upon inquiry as to Eddleman's forgery, if any. It seems undisputed that the Trust Company's advances were in all things in good faith, and that it was so induced to do upon the representations of Eddleman and of the statement of the account sales by the Commission Company.

The check transmitted to the Commission Company was inclosed in the following letter of the Trust Company:

"Ft. Worth, Texas, 8-7-16.

"Witherspoon Live Stock Commission Company, Stockyards Station, Ft. Worth, Texas—Gentlemen: We beg to inclose you our check for \$6,945.06, same being for account of 133 steers bought from you by S. L. Eddleman.

"Yours very truly."

In reference to this letter Mr. Cochron, the agent of the Commission Company, acting in its behalf, testified as follows:

"I received the letter, and the inclosed check and noted that the check was enough to pay for the 93 head of cattle and also the balance due on the note. Shortly after I got the letter Mr. Eddleman came into the office, and I showed him this letter and told him, 'Mr. Eddleman, this calls for 133 head of cattle.' When I got the letter my first impulse was to call up the North Texas Trust Company and tell him that this letter was wrong; that we had only sold him 93 head of steers. The thing that kept me from calling up Mr. Davidson and asking him about the 133 not being the number of steers we had actually sold to Eddleman was that Mr. Eddleman came in the office shortly after we got this letter, and I showed him the letter, and I said, 'This letter calls for 133 head of cattle, and we only sold you 93 head,' and the cattle were in the yards at that time; they hadn't been shipped out yet, the 93 head; and he said: 'They made a mistake; this 40 head of cattle is the additional 40 head of cattle that I told him were out at Weatherford in connection with the other cattle, 40 head of two year old steers that I have out there.' Well, that explained it perfectly satisfactory to me, and I didn't think anything about it not being correct or that he didn't have the 40 head of cattle or that he hadn't made such explanation to Mr. Davidson, so I just threw the letter down and gave him a release then and there, and I supposed that everything was straight and correct, not dreaming for a minute that Mr. Eddleman was trying to do anything wrong."

It further appears that, a few days after the plaintiff Trust Company transmitted its check to the Commission Company, the Trust Company's agent discovered the fact that Eddleman had purchased but 93 head of cattle, and thereupon sought and took possession of the 93 head which had been so purchased, and later sold them; other cattle which Eddleman represented that he owned in Parker county not having been found.

It seems clear that, as between the plaintiff Trust Company and Eddleman, the money advanced by the former for the purchase of cattle was a trust fund, and a misapplication thereof by Eddleman would constitute a conversion, and appellant, having notice, is in no better position. Defendant makes no contention that it had a right to appropriate any part of the money advanced by the Trust Company to the payment of Eddleman's debt, if done without the knowledge or consent of

the Trust Company. Its reliance was wholly upon the agreement and statements of Eddleman, which, in the absence of notice to the Trust Company, does not bind the latter. We do not find it necessary to pass upon the good faith of the agent of the Commission Company in relying upon Eddleman's representation that the loan from the Trust Company secured by him was for the purchase of cattle, and also for the purpose of the payment of his debt, but of this it is clear that the Trust Company had no notice, and it is further clear that the Trust Company was only induced to advance its moneys upon the faith that it would be applied upon the actual purchase of cattle, upon which it was to have a mortgage. Of this the agents of the Commission Company clearly had notice. They also had notice from the letter inclosing the Trust Company's check that the Trust Company was acting upon the assumption that 133 head of cattle had been purchased, and that the moneys advanced was for the purchase of cattle, and not for the payment of the debt due from Eddleman. Having such notice it was the duty of the agents representing the Commission Company to notify the Trust Company of the mistake, if any, claimed to be in the account sales. If they saw proper to trust Mr. Eddleman's explanation, the risk of its falsity must fall upon the Commission Company, and not upon the Trust Company, which acted in good faith. It is a familiar doctrine that he who trusts most must suffer most, and we see no escape from the conclusion that the undisputed facts show that the Trust Company had a right to recover the fund.

It is true there is a further suggestion in the pleading and in the evidence that the Commission Company surrendered to Eddleman a mortgage that it had upon the cattle to secure the Eddleman note, but with the notice it had of the Trust Company's relation to the fund the surrender was made at its peril. Besides there is nothing in the evidence to indicate that at the time of the surrender the mortgage had any real value; for the evidence seems to leave it unquestioned that Eddleman was insolvent and did not own or have in his possession the cattle in Parker county upon which the Commission Company's mortgage rested.

The further contention, under one of appellant's assignments, to the effect that the plaintiff could not recover the money advanced and appropriated by the appellant to the payment of Eddleman's debt because such money could not and was not identified as being held by the appellant, has no application in this case.

On the whole we conclude that the court committed no error, and that the judgment must be affirmed.

**CITY OF FT. WORTH v. WEISLER et ux.**  
(No. 9084.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 8, 1919. Rehearing Denied  
April 19, 1919.)

**1. DAMAGES §208(4) — INABILITY TO PERFORM HOUSEHOLD DUTIES—EVIDENCE.**

In suit by husband and wife for injuries to the latter due to cover of manhole in street of defendant city tilting, causing her foot and leg to fall into hole, evidence of pecuniary value of wife's services *held* to warrant submission, as an element of damages, of loss of ability of wife to perform her household duties.

**2. DAMAGES §186—LOSS OF SERVICES OF WIFE—EVIDENCE.**

It is not essential to the right of recovery for wife's impaired capacity to perform her household duties that the pecuniary value of the same be shown with any mathematical accuracy or in dollars and cents.

**3. DAMAGES §99—VALUE OF WIFE'S SERVICES—HOW COMPUTED.**

The wife's services are not to be computed as those of a servant, and a verdict based upon the circumstances and conditions of the wife and guided by the sound judgment of the jury should not be disregarded, unless upon evidence of abuse of such discretion.

**4. DAMAGES §99—WIFE'S SERVICES—VALUE.**

From a detailed statement of the position of the wife, her family, her ordinary duties and labor, the jury can ascertain the value of her services in the performance of household duties, as well as any witness.

**5. MUNICIPAL CORPORATIONS §822(5)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.**

In suit by husband and wife for injuries to the latter, due to cover of manhole in street of defendant city tilting, causing her foot and leg to fall into hole, instructing that burden of showing contributory negligence was on defendant, and that in determining the issue the jury should consider all the facts and circumstances in evidence, *held* not erroneous, though plaintiff's evidence tended to show such negligence.

**6. MUNICIPAL CORPORATIONS §819(7)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

In suit by husband and wife for injuries to the latter, due to cover of manhole in street of defendant city tilting, causing her foot and leg to fall into hole, *held* that jury was justified in concluding that plaintiff was not negligent, and was not acting in violation of the spirit of an ordinance forbidding use of street by pedestrians.

**7. MUNICIPAL CORPORATIONS §819(6)—DEFECTIVE MANHOLE—NOTICE—EVIDENCE.**

Evidence *held* sufficient to show that defendant city had notice, or in the exercise of ordinary care should have had notice, of de-

fective condition of manhole into which plaintiff pedestrian fell.

**8. APPEAL AND ERROR ⇐736—ASSIGNMENT—MULTIFARIOUSNESS.**

On appeal from judgment for plaintiffs, assignment of error *held* multifarious, in that it complains of four express errors alleged below.

Appeal from District Court, Tarrant County; Ben M. Terrill, Judge.

Suit by H. Weisler and wife against the City of Ft. Worth. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. J. Powell and R. S. Phillips, both of Ft. Worth, for appellant.

R. L. Carlock, of Ft. Worth, for appellees.

BUCK, J. This is a suit by H. Weisler and wife, Daisy Weisler, against the city of Ft. Worth for damages by reason of injuries to the wife alleged to have been sustained from falling into a manhole on one of the streets of the defendant city. Plaintiffs alleged that said manhole was "in a tilted, unsafe, and defective condition, \* \* \* that the said manhole covering and the manhole itself were of a defective design and pattern, in that the said lid or covering had an insufficient bearing to rest upon, and the same not fitting snugly upon the iron surface upon which it rested, but had a play of one-half to three-quarters of an inch, and was also insufficiently beveled, and to some extent warped, so that the said covering and said manhole were so defectively constructed and maintained by the defendant as that, when heavy objects like horses' hoofs or steel-tired trucks or heavy vehicles would strike said manhole cover at a certain angle, same would tilt out of position," etc. That plaintiff, Mrs. Weisler, while lawfully using the street, stepped on the manhole cover, which tilted and caused her foot and leg to fall into the hole, by reason of which she was injured seriously in certain respects specified.

Defendant answered by way of general demurrer, special exceptions, general and special denials, and a plea of contributory negligence. From a verdict and judgment for plaintiffs in the sum of \$1,450, defendant has appealed.

[1] Only three assignments are presented. The first complains of the submission in the main charge of the issue of loss of ability on Mrs. Weisler's part to perform her household duties, as an element of damages. This complaint is based on the contention that no evidence was introduced to show that such loss, if any, had any pecuniary value. The evidence shows that by reason of the injuries received in this accident, Mrs. Weisler was confined to her bed for some nine months, her injured limb being partly paralyzed; that during said time she

was unable to perform any household duties, while theretofore she had performed practically all the household work for her family. The accident occurred October 2, 1914, while the trial took place January 19, 1918. She testified at the time of the trial that she was still suffering from the effect of the injuries, and that she was confined to her bed a good deal of the time; that her young lady daughter had been forced to stop school to attend to the household duties for the family; that she, plaintiff, was not able to perform any substantial part of the housework at the time she testified.

[2, 3] It is not essential to the right of recovery for the wife's impaired capacity to perform her household duties that the pecuniary value of the same be shown with any mathematical accuracy, or in dollars and cents. *G., H. & W. Ry. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269. The wife's services are not to be computed as those of a servant or hireling, and a verdict based upon the circumstances and conditions of the wife, and guided by the sound judgment of the jury, should not be disregarded, unless upon evidence of abuse of such discretion.

[4] From the detailed statement of the position of the wife, her family, her ordinary duties and labor, a jury, composed of fathers, husbands, and sons, can estimate the value of such services, as well as any witness likely to be called. *Railroad Co. v. Lacy*, supra; *M., K. & T. Ry. Co. v. Vance*, 41 S. W. 167; *Ft. W. & D. C. Ry. Co. v. Walker*, 48 Tex. Civ. App. 86, 106 S. W. 400, writ refused. Hence the first assignment is overruled.

[5] The second assignment is directed to the giving of this charge on contributory negligence, to wit:

"The burden is upon the defendant herein to prove by a preponderance of all the evidence herein that the plaintiff, upon the occasion of her injuries, was guilty of negligence proximately contributing to cause her injury, if any, and in determining this issue you will look to and consider all the facts and circumstances in evidence."

It is urged that as the evidence of plaintiff herself supported the defendant's plea of contributory negligence, and the defendant offered no original evidence on this question, the burden of proving such contributory negligence on the part of plaintiff was not upon the defendant, but that the jury were authorized to look to and consider all the facts and circumstances in evidence, whether introduced by plaintiff or defendant, and determine therefrom whether or not the injured party was guilty of negligence proximately contributing to her injuries, without reference to the burden of proof. We do not think the charge given is subject to the criticism made. Burden of proof, as used in this connection, means the duty resting on

the party having the affirmative of the issue to satisfy or convince the minds of the jury, by a preponderance of the evidence, of the truth of his contention. This duty may be discharged by testimony from the mouth of the adversary's witnesses, or the testimony of the adversary himself. In *G., O. & S. F. Ry. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538, the Supreme Court, after discussing the question as to the burden of proof to show contributory negligence, and animadverting to the conflict existing among the courts of last resort in the different states as to this rule, concludes that the rule in Texas is that the burden of proof is upon the defendant to establish contributory negligence, except in two instances, to wit: (1) Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of the plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption; (2) where the undisputed evidence adduced on the trial established *prima facie*, as a matter of law, contributory negligence on the part of the plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole may find him free from negligence.

Without setting out at length the pleadings of the plaintiff, or referring in detail to the evidence upon the issue of contributory negligence, it is sufficient to say that in our opinion this case does not come within either of the two exceptions mentioned. Hence the burden of establishing contributory negligence was upon defendant, but in so discharging the burden the defendant had the right to rely on all the facts and circumstances in evidence whether arising from the testimony of the plaintiffs and their witnesses or the testimony of defendant's witnesses, and the jury in determining the issue had the right and was impressed with the duty of considering all such testimony pertinent to that issue. We think the charge given presented the law as it exists in this state, and could not be reasonably construed as misleading. *Railway Co. v. Shieder*, supra; *Railway Co. v. Howard*, 96 Tex. 582, 75 S. W. 805; *Railway Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Railway Co. v. Hill*, 95 Tex. 629, 69 S. W. 136; *Railway Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *Galveston Electric Co. v. Antonini*, 152 S. W. 841, 845.

[8] It is urged by appellees, and we think properly, that the evidence supporting the plea of contributory negligence does not rest entirely upon the plaintiffs' testimony; that defendant, in support of its plea, introduced provisions of a city ordinance with reference to the use of the streets by pedestrians and the penalty for a violation of the said ordinance. We think the jury were justified in concluding, under the facts and circumstances disclosed, that the plaintiff was not guilty of contributory negligence,

and was not acting in violation of the spirit of the ordinance mentioned. She testified that the sidewalk was obstructed by building material, stacked and piled thereon, and it was necessary for her to go out into the street in order to pass, and that while so doing automobiles from different directions were passing, and that in order to avoid being run over she stepped back to that part of the street near the manhole, and that after the automobiles had passed she started towards her destination, probably took only one step, and fell into the manhole.

[7, 8] The third and last assignment is as follows:

"Because the verdict of the jury is contrary to and unsupported by the evidence, in that the evidence did not show that the defendant had any notice of the condition of said manhole at the time of the alleged injury, and failed utterly to show that it had any character of notice for such a length of time as would permit it to remedy any defects in said manhole, or to prevent said injury, and did not show that the defendant was guilty of negligence, or failed to use ordinary care with reference to the maintaining of said manhole, or to prevent its condition being such as to avoid the injury complained of, and because the evidence further shows that the plaintiff was guilty of contributory negligence proximately causing her injuries, and did not use ordinary care to detect the condition of said manhole at the time of the injury, or to avoid said injury, and said evidence further showed that the plaintiff was using that portion of the street in violation of a valid ordinance of the city of Ft. Worth as shown by defendant's bill of exception No. 19."

We are of the opinion that we would be authorized to sustain appellee's objection to the court's considering this assignment on the ground that it is multifarious, because it complains of four separate alleged errors below. *Sanitary Mfg. v. Gamer*, 201 S. W. 1068. But out of an abundance of caution, and in an effort to give appellant the full benefit of any error alleged in this assignment, we have examined the record with reference to the matter set forth in the first proposition under this assignment, to wit, that the evidence failed to show that defendant had not exercised ordinary care in maintaining the manhole in the condition it was at the time and place of the alleged injury. The plaintiff, H. Weisler, husband of the injured party, testified that about a week or so before his wife got hurt he noticed the condition of the manhole, and that the cover thereto was about an inch and a half or two inches out of position. He further testified that on at least two occasions subsequent to the accident he noticed that the cover to the manhole was out of place. Miss Lillian Weisler, daughter of plaintiffs, testified that subsequent to the accident she noticed that the cover to the manhole was tilted up on one side. Ross Bowlin, a lawyer and a neighbor of the plaintiffs, testified that prior to

and about the time of plaintiff's injury he had noticed that the lid to the manhole was tilted up, and disclosed an opening of some four or five inches, so that if a person's foot had come down on the side where the hole was it would have probably gone down in the hole; that a street sweeper had just passed over the manhole before the witness had his attention called to the condition aforesaid.

There was evidence to show that the street department of the defendant of the city had a large employed force, the duty of many of whom was to work on and traverse and inspect the streets. The evidence showed that the manhole cover was warped and not level, so that it was easily pushed out of position by a passing vehicle or animal, also that the bearing, instead of being three-fourths of an inch wide, was one-half to three-eighths of an inch only. The evidence further showed that this manhole had been in use for several years, and we believe that the evidence was sufficient to authorize the jury to find that the defects were those of construction, having existed from the time the manhole and its cover was first put in use.

Without citing further evidence upon this issue, we are of the opinion that the evidence was sufficient to show that the defendant had notice, or in the exercise of ordinary care should have had notice, of the defective condition of the manhole.

All assignments of error are overruled, and the judgment is affirmed.

#### WELLS FARGO & CO. EXPRESS v. BOLLIN. (No. 9083.)

(Court of Civil Appeals of Texas. Ft. Worth. April 12, 1919. On Appellant's Motion for Rehearing, May 17, 1919.)

#### CARRIERS §158(2)—EXPRESS COMPANY—LIMITATION OF LIABILITY.

In view of Interstate Commerce Commission Rule 18, §§ (a), (b), and (c), unless a shipper declares a value greater than 50 cents per hundredweight, and pays the excess rate for the higher valuation, the liability of the express company is limited to such lower rate, and that, even though the contract is oral and nothing is said about rates or value, all express charges to be paid at destination.

Appeal from Johnson County Court; B. Jay Jackson, Judge.

Suit by W. R. Bollin against the Wells Fargo & Company Express. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

J. O. Lockett, of Cleburne, and Baker, Botts, Parker & Garwood, of Houston, for appellant.

Walker & Baker, of Cleburne, and W. H. Skelton, of Alvarado, for appellee.

BUCK, J. Plaintiff, W. R. Bollin, sued Wells Fargo & Co. Express for the loss of three trunks and their contents, shipped from Cordell, Okl., and destined to Alvarado, Tex. In the petition the lost articles, consisting mostly of family wearing apparel and photographs, etc., were itemized, and the value of each alleged, aggregating nearly \$500. It was further alleged that plaintiff had been damaged in the further sum of \$100, by reason of the family having been deprived of the use of the wearing apparel, and the increased cost of such articles on the market due to the rise in the purchase price thereof, but this element of damage was not submitted to the jury.

Defendant answered by way of general demurrer, various special exceptions, general and special denials, and specially pleaded that if plaintiff should be entitled to recover at all, such recovery should be limited to \$107.50 or 50 cents per pound on 215 pounds, the weight of the three trunks and contents; that the bill of lading issued to plaintiff evidenced the contract of shipment between the parties, and so limited the liability of the express company in case of loss; that the rate charged plaintiff was authorized by the Interstate Commerce Commission, and that in receiving and transporting said property the defendant was required to issue and did issue to plaintiff a uniform express receipt or bill of lading for the property to be transported for plaintiff, who knew the same would be issued and called for same, and said receipt was later issued, under and by virtue of which the property referred to by plaintiff in his petition was to be and was transported by defendant; that under said receipt the liability of defendant was limited to the amount above named. Defendant prayed that plaintiff be given judgment for \$107.50, and defendant recover judgment for its costs. From a judgment for plaintiff in the sum of \$413, the defendant has appealed.

There are various assignments in appellant's brief directed to the action of the trial court in sustaining certain special exceptions of plaintiff to portions of defendant's answer by which it sought to limit plaintiff's recovery to \$107.50. Other assignments are directed to the charge of the court, which withdrew from the jury all testimony of the defendant on the question of the limitation of liability by reason of any alleged contract, and also all evidence on the question of tender, made by defendant, but we do not find it necessary to discuss these assignments serialim, inasmuch as the testimony offered

by defendant in support of its allegations of limited liability seems to have been admitted without objection, and we have concluded that the testimony as a whole fails to show that plaintiff, either expressly or impliedly, contracted with defendant to ship the trunks at the lower rate, or at any other rate which would have entitled defendant to urge the defense of the limitation of the liability by reason of any contract. The evidence shows that the plaintiff had lived in Alvarado, Tex., and at Cordell, Okl., for many years, spending a part of his time at each place; that some two weeks before the shipment of goods in question plaintiff and his family left Alvarado for Cordell; that at the time of the shipment plaintiff desired to return to Alvarado through the country in an automobile, and delivered the trunks for shipment to the express company; that the assistant agent received the trunks, and, when plaintiff offered to pay the charges thereon, the agent told Bollin that he, the agent, was busy at the time, and that it would be all right to pay the charges at destination; that nothing was said by either party as to what the rate was on the goods shipped, or what the amount of charges would be. Upon plaintiff's arrival at Alvarado, he inquired of the local agent for his trunks, and learned that they had not arrived. Some two weeks later he was again at Cordell, and inquired of the shipping clerk about his trunks, and the latter told him that he had shipped them out the day they were delivered to the express company. He also talked to the agent about the trunks, who said that they would make every effort possible to locate them. Several weeks later, after his return to Texas, the plaintiff wrote to a friend in Cordell to go to the express company and get a receipt for the goods shipped, which the friend did. This receipt was made as of the date of the shipment and read as follows:

"Wells Fargo & Company Express. Nonnegotiable receipt. 3-6-1917. Received from W. R. Bollin subject to the classification and tariffs in effect on the date hereof three trunks value herein stated and warranted by shipper to be \_\_\_\_\_ dollars. Consigned to W. R. Bollin at Alvarado. Charges collect. Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof, accepts and signs this receipt. \_\_\_\_\_, Shipper. J. E. Kerr, for the Company.

"Note.—The company's charge is based upon the character of the property of which its value is an element, and its value must be declared in writing by the shipper unless its character is otherwise disclosed. When goods are hidden from view by wrapping, boxing or other means, and the company is not notified of the character thereof, the shipper's declaration of value may be made by notation, 'Not to exceed \$50' or 'Not exceeding fifty dollars or fifty cents per pound actual weight.'"

It will be noted that said receipt does not contain the signature of the shipper. On the

reverse side of this receipt there appears certain provisions, among which are the following:

"1. The provisions of the receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers handling this shipment, and shall apply to any consignment or return thereof.

"2. The rate charged for carrying said property is dependent upon the actual value of the property, which must be specifically stated in writing by the shipper, and applies only upon property of an actual value not exceeding fifty dollars for any shipment of 100 pounds or less, or not exceeding fifty cents per pound actual weight for any shipment in excess of one hundred pounds or less. If the actual value is greater than fifty dollars for any shipment of one hundred pounds or less, or exceeds fifty cents per pound actual weight for any shipment in excess of one hundred pounds, such actual value must be specifically stated in writing by the shipper, and excess charges for such greater value must be paid therefor in accordance with the lawfully published tariffs of the company."

There was in use by the express company another form of receipt which provided, in part, that:

"The company will not pay over fifty dollars in case of loss, or fifty cents per pound actual weight for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid. \* \* \* Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof, accepts and signs this receipt. \_\_\_\_\_, Shipper. \_\_\_\_\_, for the Company.

"Note.—The company's charge, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to \$50 for any shipment of 100 pounds or less, or not exceeding fifty cents per hundred pounds actual weight for any shipment in excess of 100 pounds, the value may be released by inserting 'not exceeding \$50' or 'not exceeding fifty cents per pound' in which case the company's liability is limited to the amount not exceeding the value so declared or released."

It is further in evidence that the express company, through its agent at Alvarado, in August following, presented to plaintiff a form of receipt to be signed by him, stating to the plaintiff that by his signing said receipt the express company would be better able to trace and recover the lost goods, and that the plaintiff would get a settlement sooner. Plaintiff declined to sign said instrument until he could submit it to his attorney, and, after submitting it to his attorney, he declined to sign it at all. While defendant pleaded that plaintiff knew the form of receipt that would be issued, and that by and in said form the liability of defendant was limited to 50 cents per pound, yet no evidence is cited in the brief, and we have found none in the statement of facts showing, or tending to show, that plaintiff intended and contem-



plated shipping the goods at the lower rate, and thereby agreed to the limitation of liability. The rate from Cordell to Alvarado for trunks is \$1.80 per 100 pounds. Under this rate defendant would have been liable for the reasonable value of the goods lost. Geo. W. Higgins, the clerk to whom was delivered the trunks in question, testified that—

The rate "from Cordell, Okl., to Alvarado, Tex., where no value is declared, is \$1.80 per hundred. Where value higher than 50 cents is declared the rate is 10 cents per hundred or fraction thereof in excess of 50 cents per pound."

In *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, perhaps the leading case on the question here involved, it was held that a stipulation in a carrier's receipt, limiting its liability to an agreed or declared value, made to adjust the rate, is not forbidden by the provision of the Carmack Amendment, Act Cong. June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 595, to the Act of Congress of February 4, 1887, c. 104, § 20, 24 Stat. 386, that—

"No contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

It was further held in the same case that a carrier could, at common law, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates, proportioned to the amount of the risk. Subsequent to this decision there were two further amendments made to this act (Act Cong. March 4, 1915, c. 176, § 1, 38 Stat. 1196; Act Cong. Aug. 9, 1916, c. 301, 39 Stat. 441 [U. S. Comp. St. §§ 8604a, 8604aa]), by the last of which common carriers, under the authority of the Interstate Commerce Commission, might adopt schedules of rates varying with the value of the goods shipped as declared and agreed upon, and the commission was empowered to make rates dependent on and varying with declared or agreed values in cases where such rates would be just and reasonable under the circumstances and conditions surrounding the transportation.

While the two forms of receipt hereinabove noted appear to be contradictory, in that the first implies that the shipper must declare a value in excess of 50 cents per pound in order to be entitled to full liability on the part of the carrier, and while the second form seems to provide that unless the shipper releases the value to \$50 per hundredweight or less, in order to secure a reduced rate, there will be no contractual limitation of the liability of the carrier, the authorities seem to support the view that it is only by a contract or agreement, expressed or implied, between the

carrier and the shipper for a decreased liability on the part of the carrier on consideration of a lower rate charged, that such decreased liability may be sustained. In *Cau v. T. & P. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, Justice McKenna, speaking for the Supreme Court, says:

"Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627."

To the same effect are the cases of *Texas Midland Ry. Co. v. Edwards*, 56 Tex. Civ. App. 643, 121 S. W. 570; *S. A. & A. P. Ry. Co. v. Bracht*, 172 S. W. 1116, writ refused. In the case last cited it was held that, where the facts showed that an oral contract was made between the carrier and the shipper at the time of the delivery of the goods, and that a written contract, containing stipulations as to the liability of the carrier, was signed by the shipper after the shipment had proceeded several miles on its journey, the oral contract would prevail, unless the shipper, with knowledge of the contents of the written contract, had agreed to the same, citing *Railway Co. v. Meadors*, 104 Tex. 469, 140 S. W. 427; *Railway Co. v. Sparks*, 162 S. W. 943. In the *Bracht* Case it is said:

"It is true that appellee knew that he would be required to sign a bill of lading or contract after the train arrived at a certain place, but that would not, as a matter of law, destroy the oral contract."

The evidence in the instant case shows that no receipt was issued at the time of the shipment, and that the receipt, under which appellant claims the shipment was made, was not issued until several weeks later. The evidence further shows that Bollin did not sign this receipt, nor did any one for him, and that, when subsequently the agent of the express company presented him with a receipt and requested him to sign it, he refused to do so. Under the authorities above cited, we are of the opinion that the only contract of shipment between plaintiff and defendant was an oral one, made at the time of the delivery of the goods at Cordell. This contract consisted only of a tender of the goods by the shipper and an acceptance by the express company, with no stipulation or understanding as to the limitation of the liability of the carrier. Under these facts, we are of the opinion that the common-law liability would obtain. *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589. In *McMillan v. Rail-*

way Co., 16 Mich. 79, 93 Am. Dec. 206, it was held that the fact that the consignor had previously accepted contracts restricting the carrier's liability in a certain manner would not amount to a contract limiting liability in a particular case, in the absence of express assent. In *Reed v. Fargo*, 54 Hun, 635, 7 N. Y. Supp. 185, it was held that the fact that the shipper knew that the defendant company always inserted stipulations in its receipts and bills of lading limiting its liability would not release the company from its common-law liability; it appearing that no receipt or bill of lading was given to the shipper. While the rule may be, as sustained by many authorities, and followed in this state in the case of *Ryan v. Railway Co.*, supra, that the acceptance at the time of the shipment by the shipper of the receipt, containing stipulations limiting the liability of the carrier, will sustain the presumption of assent on the part of the shipper to said limitation, yet no such implied assent will be presumed by reason of a delivery of a receipt long subsequent to the shipment, although such delivery was made in response to the request of the shipper. See authorities collated in 10 Corpus Juris, p. 138 et seq.

As we have concluded that the evidence fails to sustain the theory that the appellee agreed or assented to the limitation of appellant's common-law liability, and as it further appears that the evidence in support of defendant's allegations presenting this defense was admitted without objection, although the plaintiff's special exceptions directed to these allegations were sustained, it follows that the judgment of the trial court must be sustained, irrespective of whether or not error was committed in sustaining such special exceptions. Hence, we overrule assignments 1 to 5, inclusive, alleging error by reason of the action of the court in sustaining said special exceptions, and overrule assignments 6 to 9, inclusive, directed to the failure of the court to instruct the jury to limit the recovery for plaintiff to \$107.50, the amount to which plaintiff would have been entitled had defendant's contention as to the limitation as to liability been sustained. Other assignments in the brief present questions which are controlled by what we have heretofore said.

All assignments are overruled, and the judgment is affirmed.

#### On Appellant's Motion for Rehearing.

Upon a further consideration of the law questions in this case and a re-examination of the authorities, we have concluded that we erred in the disposition of this appeal on original hearing. It would seem, under the authority of *A., T. & S. F. Ry. Co. v. Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901, and *Boston, etc., Ry. Co. v. Hooker*, 233

U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, that unless the shipper declares a value greater than \$50 per hundred weight, and pays the excess rate for the higher valuation, the liability of the carrier is limited to such lower rate. Rule 13, sections (a), (b), and (c), of the Interstate Commerce Commission, introduced in evidence, reads as follows:

"(a) The rates governed by this classification are based upon a value of not exceeding fifty dollars on each shipment of one hundred pounds or less, and not exceeding fifty cents per pound actual weight on each shipment weighing more than one hundred pounds, and the liability of the express company is limited to the value above stated, unless a greater value is declared at the time of shipment, and the declared value in excess of the value above specified is paid for or agreed to be paid for under the schedule of charges for excess value.

"(b) When the value declared by the shipper exceeds fifty dollars on a shipment weighing 100 pounds or less, or exceeds fifty cents per pound on a shipment weighing more than one hundred pounds the charge for such excess value will be at the rate of ten cents on each \$100 or fraction of \$100. \* \* \*

"(c) When the weights of separate packages are aggregated under rule 2, declared values of the separate packages must also be aggregated, and if the value so ascertained exceeds fifty dollars for 100 pounds weight or less, or fifty cents per pound, when the weight exceeds one hundred pounds, additional charge for the excess value must be assessed as provided in paragraphs a and b.

"Trunks: First Class. Cordell, Okla., to Alvarado, Texas, \$1.80.

"Schedule of first-class express rate in cents. \$1.80 per hundred pounds. Charges on shipments of over 100 pounds must be computed as per instructions on page 3. Item 2, page 3: Rates for shipments over 100 pounds first-class rate. When the scale number is known first class charges on shipments of only 100 pounds must be ascertained by multiplying the rate for a hundred pound package by the number of pounds in the shipment and dividing the product by one hundred.

"Example: Under rate scale 45 what is the charge for 583 pounds of first-class matter? The rate for 100 pounds being \$2.75,  $2.75 \times 583$  equals 1603.25. 1603.25 divided by 100 equals 16.0325. Under the rule of classification that all fractions of a cent shall be equalized as one cent, the charge would be \$16.04."

It is uncontroverted that appellee declared no higher valuation, in fact declared no valuation at all. Under such circumstances, under the authorities above cited, he would be chargeable for only basic rate and would be limited in his recovery to the valuation of \$50 per hundredweight. Hence the judgment below is reformed so as to allow appellee a recovery of only \$107.50. The motion for rehearing is granted, and the judgment as reformed will be affirmed, with costs of appeal adjudged against appellee.

FREEPORT TOWN-SITE CO. v. S. H.  
HUDGINS & SONS. (No. 7618.)

(Court of Civil Appeals of Texas. Galveston.  
March 29, 1919. Rehearing Denied  
April 17, 1919.)

1. LIMITATION OF ACTIONS  $\S$ 127(8)—STAT-  
UTE OF LIMITATIONS—AMENDED PETITION.

Where petition for loss of barges, filed with-  
in two years of the loss, alleged that defendant  
was in their possession "without hire," an al-  
legation contradicted by the specific facts re-  
cited, another amended petition filed more than  
two years after the loss, and eliminating the  
improper allegation that the barges were in  
defendant's possession without hire, did not  
change the cause of action, and was not barred  
by the two-year statute of limitations.

2. EVIDENCE  $\S$ 472(4) — OPINION — MIXED  
QUESTION OF LAW AND FACT—REASONABLE  
CARE.

In an action for loss of barges, testimony of  
a witness, who had been in charge of another  
party's barge at the time of the flood which  
caused the loss, that he considered it reasonable  
care and ordinary prudence on his part to have  
five men on his barge to protect it from the  
flood, *held* inadmissible as opinion involving a  
mixed question of law and fact.

3. APPEAL AND ERROR  $\S$ 1052(8)—HARMLESS  
ERROR—EVIDENCE.

In an action for loss of barges, improper  
admission of opinion testimony as to what was  
reasonable care in his own management of the  
barge of another party *held* harmless, where  
without such testimony the result of the trial  
would have been the same.

4. APPEAL AND ERROR  $\S$ 1050(2)—HARMLESS  
ERROR—ADMISSION OF ABANDONED PLEAD-  
INGS.

In an action for loss of barges tried on the  
third amended petition, admission in evidence  
of defendant's abandoned original and first  
amended answers, if incompetent and irrele-  
vant as to any issue, *held* harmless.

5. SHIPPING  $\S$ 58(2)—LOSS OF BARGES—IS-  
SUES, PROOF, AND VARIANCE.

A petition in action for loss of barges at  
wharf which, after charging several negligent  
omissions in protecting barge, contained clause  
"or otherwise protect said barges," is broad  
enough to let in proof of any negligent omission  
causing loss of barges.

6. EVIDENCE  $\S$ 410—PAROL EVIDENCE AF-  
FECTING WRITING — ABSENCE OF WRITTEN  
CONTRACT.

In an action for loss of barges while in de-  
fendant's possession, testimony of a plaintiff  
as to the agreement between the parties *held*  
not inadmissible as varying the terms of any  
written contract; a letter not having been con-  
sidered by the parties as constituting the con-  
tract.

7. SHIPPING  $\S$ 54—INJURY TO BARGES—LI-  
ABILITY.

Where defendant took entire possession and  
control of plaintiff's barges under contract to

use ordinary care to protect the barges, it  
was defendant's duty to compel the owners of  
a boat moored to them to cut loose in time of  
flood and danger if the tying up of the boat en-  
dangered the barges.

Appeal from District Court, Brazoria  
County; Samuel J. Styles, Judge.

Suit by S. H. Hudgins & Sons against the  
Freeport Town-Site Company. From judg-  
ment for plaintiffs, defendant appeals. Af-  
firmed.

W. T. Andrews, of Stamford, Wilson &  
Follett, of Angleton, and Andrews, Street-  
man, Logue & Mobley, of Houston, for ap-  
pellant.

A. R. Rucks, of Angleton, for appellees.

LANE, J. This suit was brought by appel-  
lees, Hudgins & Sons, against appellant, Free-  
port Town-Site Company, to recover the value  
of two barges, alleged to have been of the  
value of \$3,000 each. Judgment was ren-  
dered for the appellees for the sum of \$2,000.

That the nature of the case, the proceed-  
ings of the trial, and the contentions of the  
parties may be clearly presented at the out-  
set, we deem it advisable to make the fol-  
lowing statement:

Following certain oral conversations and  
agreements between the parties forming the  
contract between them with relation to the  
matters in controversy, one W. A. Randle  
wrote the following letter to appellees:

"Houston, Tex. Oct. 7, 1912.

"Mr. Hudgins—Dear Sir: I am writing Mr.  
Burns to draw up and send contract to be  
signed for the delivery of 4,000 cu. yards, ap-  
proximately, of shell for the shelling of the  
streets of Freeport. The shell to be a good  
grade, and suitable for the purpose to be used.  
You to load the shell, assume the government  
charge for shell, sand or gravel (should there  
be any), and deliver at the bank ready to un-  
load, the location to be at some point near the  
east line of the townsite property. Mr. Burns  
to unload the shell as soon as convenient and  
practical to do so. The consideration being one  
dollar (\$1.00) per cu. yard delivered on barge  
at the bank. Payments to be made on shell  
delivered at the bank during each month.

"Yours very truly, W. A. Randle."

The contract referred to in this letter was  
never drawn up, and there was no written  
contract made by the parties unless this  
letter, copied above, can be so construed.

On or about the 27th day of October, 1913,  
appellees delivered the two barges herein-  
before mentioned, loaded with shell, to ap-  
pellant at the place agreed upon by them by  
the aforesaid contract. These barges were  
tied by appellees to certain piling driven in  
the bed of the Brazos river by appellant  
alongside its wharf for the purpose of pro-  
tecting the wharf and for tying boats and

barges to be unloaded thereat. While these barges were so tied, a large flood of water came down the river, and on the 28th day of November, 1913, broke them loose, and they were carried out into the gulf and destroyed.

On the 9th day of June, 1914, appellees filed their original petition. On the 8th day of March, 1916, they filed their first amended petition in lieu of the original petition. The original is not set out in the statement of facts or elsewhere in the record. We shall assume that the cause of action in the two petitions was the same, as no contention is made to the contrary. On the 19th day of February, 1917, they filed their second amended petition in lieu of their first amended petition. In this petition they alleged the contract substantially as in the preceding abandoned petitions. The specific allegation that the barges were in possession of appellants "without hire," found in the second amended petition, however, did not appear in the abandoned petitions. They also alleged therein that by the agreement between the parties, which constituted the contract between them, the appellant agreed to erect a safe place and anchorage for the barges and would accept and receive the shell on said barges at said places; that it would take possession and control of the barges, and would unload the shell as soon as convenient and practicable and within a reasonable time after delivery; that it agreed that during the time it was engaged in unloading the barges they were to be in its possession, control, and care; that said contract was based upon oral agreements and the letter above set out; that on the 27th day of October, 1913, in pursuance of said contract they delivered to appellant two barges loaded with shell at the place designated and prepared by it for unloading; that appellant accepted said shell and took exclusive possession and control of the barges; that they securely tied and anchored the barges to the piling and wharf so prepared by appellant. They further alleged that appellant negligently failed to unload said shell and redeliver the barges as soon as convenient and practicable and within a reasonable time, but kept them tied to said wharf an unreasonable and unwarranted length of time. They alleged that the place prepared and designated for the anchorage of the barges was negligently constructed and was not a safe place of anchorage; that the piling set for tying the barges to were not down deep enough into the ground to hold the barges, and that by reason thereof the flood waters of the river caused the piling to give way and the consequent loss of the barges. They alleged that appellant knew of the approaching flood in the river, but did nothing whatever to protect the barges. They also alleged that appellant had exclusive possession and control of said barges without hire. They further alleged as follows:

"That plaintiffs frequently requested of the defendant the possession of said two barges, but plaintiffs allege that at the time such requests were made the defendant stated to plaintiffs that they had not yet unloaded said barges and promised and assured plaintiffs that the defendant would take proper care of and protect said two barges from all injury and loss; that plaintiffs advised the defendant that a rise in the said river was approaching and of the resulting danger therefrom to said barges, and specially requested of the defendant the possession of said two barges, a few days before the arrival of said flood waters, that they might take said barges to a place of safety and care for and protect them from such approaching flood, but that the defendant again stated they had not yet unloaded said barges and not yet ready to deliver the possession thereof to the plaintiffs, but at such time again promised and assured plaintiffs that the defendant would care for and protect said barges from all injury and loss. Plaintiffs allege that, notwithstanding that plaintiffs had delivered the possession and use of said barges to the defendant, and notwithstanding defendant's promises and assurances that they would care for and protect said barges, they wholly failed and neglected to provide a safe place, harbor, or wharf in which to securely hold and care for said barges, and failed and neglected to provide a proper and secure place to which said barges could be tied and anchored, and wholly failed and neglected to securely tie and anchor said barges and to care for and protect the same, and as a result of such negligence said barges were torn from their anchorage and were washed away and lost and destroyed, to plaintiffs' great damage in the sum of \$6,000 as aforesaid."

On the 31st day of August, 1917, appellees filed their third amended petition in lieu of the next preceding petition, and therein alleged substantially the same facts as in the abandoned petitions. But in this last petition, upon which they went to trial, they alleged that appellant had agreed to pay appellees for the shell, and for the use of the barges while awaiting the unloading, the sum of \$1 per cubic yard of shell; while in the abandoned petitions, after setting up the specific agreement as to the uses to be made of the barges by appellant, they alleged that the barges were in the exclusive possession and control of appellants without hire. The negligence alleged in the third amended petition, upon which appellees relied for a recovery, is: First, that appellant held possession of the barges and failed, neglected, and refused to unload and redeliver same to appellees for an unreasonable and unwarrantable length of time, thus holding them in a place of danger; second; that appellant kept the barges tied to its wharf and anchorage piling, which did not, within the knowledge of appellant, constitute a safe anchorage, in that said piling were carelessly and negligently driven, and not driven to a sufficient depth in the ground to make them secure for the purpose of anchorage for the barges; third, that appel-

lant took no steps whatever, after being advised of danger threatening the barges from the flood waters of the river, to repair said anchorage for the barges and to remove them to a place of safety, or otherwise care for or protect the same.

Appellant answered by general demurrer, by general denial, and specially pleaded contributory negligence on the part of appellees in that they tied the barges to the piling along the side of appellant's wharf with full knowledge of the dangers alleged by them, and, having such knowledge, failed to use any care of diligence whatever to protect their barges or to remove them to a place of safety. It also pleaded the two-year statute of limitation in bar of appellees' action upon the theory that the third amended petition, filed August 31, 1917, set up a new and different cause of action from that set up in the abandoned petitions.

The case was submitted to a jury. After stating the nature of the suit as made by the plaintiffs' petition and the defense made by the answer of defendant, and after defining "ordinary care" as used in the charge, the court further instructed the jury as follows:

"Now, if you believe from a preponderance of the evidence that, according to the contract, if any, entered into by and between the plaintiffs and the defendant in this case, it was understood and agreed by and between the plaintiffs and the defendant that the plaintiffs were to deliver the shell at the point as shown by the evidence, on the barges, and that after the delivery of the shell on the barges at the place designated the defendant was to take charge, care, and control of the shell and the barges, and you further believe from a preponderance of the evidence that on or about the 27th day of October, 1913, the plaintiffs, in accordance with their contract, delivered certain shell upon two barges at the point designated by the defendant, and that the defendant then and there under said contract took charge, care, and control of said shell and two barges, and that thereafter, while the said barges and shell were in care and control of the defendant, if they were in the care and control of the defendant, if they were in the defendant's care and control, the said barges broke from their moorings and were washed out to sea and destroyed, and that such breaking from the moorings of said barges, if any, was caused by the defendant not exercising that degree of care in the care, management, and control of said barges as a man of ordinary prudence under the same or similar circumstances would exercise if the property had been his own, and that by reason of such negligence, if any, the said barges were caused to break from their moorings and wash out to sea, and be destroyed, then you will find for the plaintiffs in such sum as you may find from the evidence to be the reasonable market value of said barges at Freeport, Tex., at the time the same were destroyed.

"On the other hand, if you find from the evidence that the defendant did not contract with

the plaintiffs to take charge, care, and control of the said barges, or if you believe that they did take charge, care, and control of said barges, and you believe from the evidence that the defendant exercised that degree of care in the care and control of said barges as a person of ordinary prudence would exercise under the same or similar circumstances if the property was his own, or if you believe from the evidence that the barges broke from their moorings and washed out to sea and were destroyed from any other cause than that of the negligence of the defendant as charged in the plaintiffs' petition, then you will find for the defendant.

"The burden of proof is upon the plaintiffs to establish their case by a preponderance of the evidence."

The court also gave to the jury a special charge requested by the defendant as follows:

"If you believe from the evidence that the defendant used ordinary care and prudence in the construction of the unloading place for said barges, that is, such care as a person of ordinary care and prudence would have used under the same or similar circumstances, then you are instructed that the defendant would not be liable on account of any defect in said unloading facilities, although such defects may have resulted in the loss of said barges."

Upon such charges the jury returned a verdict in favor of appellees for the sum of \$2,000. Judgment was accordingly entered. From this judgment the Town-Site Company has appealed.

[1] We shall first dispose of the contention of appellant that the court erred in not instructing a verdict for it upon request, because under the pleading and the evidence the cause of action sued upon was shown to have been barred by the two-year statute of limitation pleaded by it.

This contention is based upon the theory that appellees had alleged in their second amended petition, filed in lieu of their petition theretofore filed, that appellant was in possession of the barges at the time of their loss, without hire, while in their third amended petition, upon which they went to trial, filed in lieu of their abandoned petitions, they alleged that appellant had agreed and contracted to pay appellees for the shell and for the use of the barges, thus in their said third amended petition declaring upon a new and different cause of action from that declared upon in their abandoned petitions, and that, as the last petition was filed more than two years after the cause of action accrued, to wit, November 28, 1913, same was barred by the statute of limitation pleaded by appellant.

As hereinbefore stated, appellees in their original and first amended petitions, filed within two years after the accrual of the cause of action, set out in minute details the terms, conditions, and considerations of the contract between the parties under which

the barges were delivered to appellant, the promises and agreements of appellant to take exclusive possession, control, and care of the barges, and its agreement to protect the same while in its possession, the failure of appellant to exercise any care whatever to protect and take care of the barges while in its possession so as to protect them from danger or destruction, and the loss of the barges by reason of the negligent failure of appellant to exercise any care to prevent such loss, and that in their second amended petition the appellees set out substantially the same matter as in the two preceding petitions, but in this, their second amended petition, they alleged, in addition to such matter, that the barges were in possession of appellants "without hire."

We think the allegations in all the abandoned petitions sufficiently allege and show that the sum agreed to be paid to appellees by appellant under the contract was not only for the shell, but was in payment for both the shell and the use of the barges for holding the shell until appellant should unload the same. While the allegation that the barges were in possession of appellant "without hire" was contradictory of the detailed statement of the contract theretofore made, we nevertheless conclude that the contract as alleged shows that a part of the consideration paid was for the use of the barges, and the use of the words "without hire" in the petition did not destroy the effect of such detailed statement of the terms of the contract and agreement.

We also conclude that appellees, by the omission in the third amended petition of the contrary statement in the second amended petition that bailment was without hire and in more explicitly alleging the terms of the agreement in the last petition, did not set up a new and different cause of action from that declared upon in the abandoned petitions. *Hitson v. Hurt*, 45 Tex. Civ. App. 360, 101 S. W. 292; *Johnson v. Railway Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *T. & N. O. Ry. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155; *Schauer v. Von Schauer*, 138 S. W. 146; *Cotter, Truelove & Co. v. Parks*, 80 Tex. 542, 16 S. W. 307; *G., H. & S. A. Ry. Co. v. Perry*, 38 Tex. Civ. App. 81, 85 S. W. 68.

The only material change made in the last petition is that in it the pleaders' misconception of the facts were corrected and the allegation that the barges were in possession of appellant "without hire" was eliminated. The court did not err in refusing the requested instruction.

[2] *W. T. Denson*, having been called by the defendant, upon direct examination testified that he was in the employ of the H. & B. V. Ry. Co. in November, 1918, and at the time the barges of appellees were lost; that at the time said barges broke loose from

their moorings he was on a barge owned by the railway company situated about 300 or 400 feet down the river from them; that he had five men on the railway barge to protect it from the flood; and that they saved it. On cross-examination by counsel for plaintiffs he was asked the following question: "You considered that reasonable care and ordinary prudence?" To which the witness answered: "Yes, sir." This question and answer were objected to by appellant. Appellant assigns the act of the court in permitting the question and answer as error.

The contention of appellant is: First, that such testimony was irrelevant and improper; second, that it was a conclusion of the witness upon a mixed question of law and of fact; third, that such conclusion of the witness was not proper and legitimate evidence of what ordinary care required appellant to do to protect the barges.

The testimony objected to related to situation of the railway barge and the means used by the witness and his men to protect it from the flood. No reference was made by the witness as to what was necessary to be done to protect the barges of appellees. Evidently, however, it was the purpose of counsel for appellees, in asking the question objected to, to have the witness testify that he used five men in protecting the railway barge, and that such act was the exercise of reasonable care and ordinary prudence, to lead the jury to infer that it was the opinion of the witness that the failure of appellant to place men in appellees' barges was an act of negligence. There can be no doubt but that the question objected to and the answer given thereto were improperly admitted. A witness should not be permitted to draw conclusions and testify as to his opinion in a matter involving a mixed question of law and fact, such as what acts would have been necessary to constitute ordinary care and prudence to protect appellees' barges from the flood waters of the river in which they were moored. The determination of what would or would not constitute ordinary care on the part of appellant was one for the jury to determine from all the facts proven. *H. & T. C. Ry. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808; *Bryan Press Co. v. Railway Co.*, 110 S. W. at bottom of page 101, column 2, and authorities therein cited; *Kirby Lumber Co. v. Dickerson*, 42 Tex. Civ. App. 604, 94 S. W. at page 153.

[3] We do not think, however, that the judgment of the trial court should be reversed because of the improper admission of such question and answer, as we are of the opinion that it may be fairly and safely said that without the testimony of the witness *Denson* the result of the trial would have been the same, and hence appellant has suffered no material injury by the admission of the testimony.

We think the evidence shows that it was the duty of appellant to take such steps and use such means to protect the barges in question as a person of ordinary care and prudence would have used under like or similar circumstances to protect barges of his own. The evidence also shows that appellant was advised of the approaching flood and the danger of the loss of appellees' barges; it shows that appellant could have probably prevented the loss of the barges by the exercise of ordinary care, and yet, notwithstanding these facts, it did nothing whatever to prevent such loss.

[4] By its second assignment appellant complains of the action of the court in permitting appellees to introduce in evidence the original and first amended answers of appellant for the purpose of showing that the defenses set up in both of said answers were substantially the same as the defenses set up in appellant's second amended answer, and to show that each of said answers were made to substantially the same cause of action as that declared upon by appellees' third amended petition, upon which the trial was had, and to further show that said first two answers did not plead the statute of limitation as a defense. The reasons assigned for such complaint are that said abandoned answers were "incompetent and irrelevant for any purpose, and because neither of the purposes for which they were offered in evidence are in any wise relevant or have any material bearing upon the facts or law in the case."

The admission in evidence of these answers, even if incompetent and irrelevant to any issue in the case, and for these reasons erroneously admitted, would constitute, at most, harmless error only, and not be cause for a reversal of the judgment of the trial court.

[5] The third assignment complains of the general charge of the court in that it did not limit the plaintiffs' right of recovery to the specific acts of negligence set forth in plaintiffs' petition.

We overrule this assignment. We have hereinbefore stated the acts of negligence pleaded by the plaintiffs, and have also set out the general charge of the court, and are of the opinion that the pleadings of the plaintiff and evidence adduced authorized the charge as given. After charging several negligent omissions of defendant in protecting the barges, the petition contains the clause "or otherwise protect said barges." We think this allegation was sufficient to let in proof of any negligent omission of defendant which caused the loss of the barges.

S. H. Hudgins in effect testified that W. A. Randle, agent of defendant, came to witness and said that defendant wanted to make a trade for some shell, and wanted witness to give his prices, and that witness told said

Randle he would deliver defendant shell f. o. b. on witness' barges at the wharf of the defendant at \$1 per yard, and that, if defendant would unload them, witness would let defendant have the use of said barges until defendant could get them unloaded in a reasonable time; that defendant agreed to pay \$1 per cubic yard for said shell and the use of said barges. Appellant makes the admission of this evidence the grounds of its fourth and fifth assignments.

[6] Appellant's contention under these assignments is that the letter from Randle to Hudgins set out herein constituted a written contract between the parties covering the matters involved in this suit, and that the testimony objected to was an attempt to vary the terms of said written contract by proof of oral agreements between the contracting parties, and therefore such testimony was inadmissible.

We think this contention untenable. Mr. Hudgins testified:

"Mr. Randle came to me and said they wanted to make a trade for some shell, wanted me to give them my prices, and I told them that I would deliver them shell f. o. b. my barges at their wharf at \$1 a yard; and that, if they would unload them, I would let them have the use of the barges until they could get them unloaded in a reasonable time. In so far as this letter goes, it stated the contract correctly, I think. The letter did not constitute the entire agreement between us; we had a verbal agreement, but no written contract was ever fixed up; they promised to fix up a contract, but never did so. The agreement I had with Mr. Randle was as follows: Mr. Randle came to me and said they wanted to make a trade for some shell, wanted me to give them my price, and I told them I would deliver them shell f. o. b. my barges at their wharf at \$1 a yard, and that, if they would unload them, I would let them have the use of the barges until they could get them unloaded in a reasonable time.

"The agreement as finally made was to the effect that they should unload the shell from the barges as soon as convenient and practicable. In a way, Mr. Randle did accept my proposition through this letter. I received this letter from Mr. Randle, and he said that they would get up a contract and cover all the details later on, but there was never a written contract drawn up."

Mr. Randle, agent of appellant, who wrote the letter referred to herein, testified, among other things, that the letter was the only written contract ever drawn; that he had prior to writing the letter discussed the matter of making a contract for shell with Mr. Hudgins; that he told Hudgins where the appellant would prepare a wharf at which to deliver the barges and unload the shell; that, while he agreed to prepare such wharf for such purposes, he did not mention that part of the agreement in the letter.

We think it clearly appears from the evidence that neither of the contracting parties considered the letter as constituting a writ-

ten contract between them. The main objection to the testimony of Hudgins now being discussed was that he testified that appellant had agreed to unload the shell in a "reasonable time," while in the letter it was stated that the shell should be unloaded "as soon as convenient and practicable." It will be noted, however, from the testimony of the witness Hudgins above quoted, his final conclusion was that the agreement was that the shell was to be unloaded by appellant as soon as "convenient and practicable." We do not think the court erred in admitting the testimony. However, we think the question here discussed but of little importance, as it is apparent that appellees' case as submitted to the jury is not one for damages for breach of an express contract, but, reduced to its last analysis, it is a suit for damages for the failure of appellant to use ordinary care to protect property of appellees, held by it under a contract of bailment. It is alleged by the plaintiffs that they delivered the barges to the defendant; that defendant took complete possession and control, and held such possession and control of them until they were lost; and that such loss was incurred by reason of the negligence of the defendant in not exercising any care whatever to protect them from the flood water of the river. We overrule the assignment.

What we have said under the assignment first discussed herein sufficiently disposes of assignments 6, 7, and 8. A further discussion of the complaints presented by said assignments is therefore unnecessary. We overrule the assignments.

[7] By the ninth assignment complaint is made of the refusal of the court to give the following charge requested by the defendant:

"It is shown by the evidence that at the time the two barges in question went away from the unloading place where they had been tied that there was a certain boat, named the Ora, alongside said barges. You are instructed that, if you believe from the evidence that said barges would not have been broken loose but for the fact, if you believe it to be a fact, that said boat Ora was at said time fastened to said barges, then you are instructed that the plaintiff would not be entitled to recover, and, if you so believe from the evidence, you will find for the defendant."

We do not think the court erred in refusing this charge. We think it was shown that appellant took entire possession and control of the barges under the contract between the parties, and was under the obligation to use such care as a man of ordinary care and prudence would have used to protect the barges from injury or loss, and that it was its duty to have compelled the owners of the boat Ora to cut loose from the barges,

if the tying of said boat to them would endanger the barges.

We overrule the tenth and last assignment. There is no evidence which would justify the court in submitting the question of contributory negligence on the part of appellees.

The judgment of the trial court is affirmed.

Affirmed.

#### BARBER v. STATE. (No. 453.)

(Court of Civil Appeals of Texas. Beaumont. April 25, 1919.)

##### 1. TAXATION $\Leftrightarrow$ 589 — ACTION FOR DELINQUENT TAXES—MAINTENANCE.

Under the express provisions of Vernon's Sayles' Ann. Civ. St. 1914, arts. 7687a and 7688a, relating to delinquent taxes, a suit for delinquent taxes for a period between 1896 and 1910 could not be maintained by the county attorney subsequent to January 1, 1918.

##### 2. TAXATION $\Leftrightarrow$ 586 — ACTION FOR DELINQUENT TAXES—MAINTENANCE.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 7687a and 7688a, a suit for delinquent taxes for years between 1896 and 1910 cannot be maintained where the tax collector of the county did not mail to defendant or the record owner of the land a written notice showing the amount of taxes appearing delinquent prior to May 1, 1916.

Appeal from District Court, Orange County; E. L. Bruce, Special Judge.

Action by the State of Texas against R. S. Barber. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions to dismiss.

Smith & Crawford and John Hancock, all of Beaumont, for appellant.

Tom C. Stephenson, of Orange, for appellee.

BROOKE, J. In this case no brief has been filed for appellee. Therefore we are compelled to use appellant's brief. This suit was filed by the county attorney of Orange county in behalf of the state of Texas on March 30, 1918, to recover delinquent taxes claimed to be due on a part of the Fisher Henderson survey in Orange county for the years 1896, 1897, 1898, 1901, 1902, 1903, 1904, 1905, 1906, 1909, and 1910 by the appellant, R. S. Barber.

Appellant specially excepted to the petition of appellee, plaintiff below: (a) That said petition failed to allege that prior to May 1, 1916, the tax collector of Orange county mailed to R. S. Barber, or the record owner of the land, a notice in writing showing the amount of taxes delinquent or past due and unpaid against the land described in



plaintiff's petition, as required by section 1 of chapter 147 of the Acts of the 34th Legislature (Vernon's Sayles' Ann. Civ. St. 1914, art. 7687a); and (b) that the county attorney, who filed this suit on March 30, 1918, was without authority to file the same under section 3 of chapter 147 of the Acts of the Regular Session of the Thirty-Fourth Legislature (Vernon's Sayles' Ann. Civ. St. 1914, art. 7688a), which provides that such suits shall be filed "not later than January 1, 1917." These matters were also pleaded by way of defense to plaintiff's cause of action.

The uncontroverted facts show that R. S. Barber became the owner of the land involved in this suit prior to January, 1912, at which time his deed was duly filed for record in the deed records of Orange county, Tex., since which time he has continued to be the owner of said property; that no notice of the delinquency of the taxes sued for was ever mailed to the appellant, R. S. Barber; that this suit was filed on March 20, 1918. The court overruled the exceptions urged by appellant, and in a trial to the court judgment was rendered for appellee, to which appellant duly excepted, and has seasonably perfected his appeal to this court.

[1, 2] There are three assignments of error in appellant's brief, viz.:

(a) "The court erred in overruling defendant's special exception numbered 'b' to plaintiff's cause of action because it appears that this suit was filed subsequent to January 1, 1918, and at which time, as provided by section 3 of chapter 147 of the Acts of the Thirty-Fourth Legislature of the state of Texas, the county attorney was without power and authority to file this suit."

(b) "The court erred in rendering judgment in favor of plaintiff and against defendant because it appears from the facts proven in this case that the tax collector of Orange county, Tex., did not mail to R. S. Barber, or the record owner of the land, a notice in writing showing the amount of taxes appearing delinquent or past due and unpaid against said land described in plaintiff's petition, as shown by delinquent tax records of Orange county, Tex., prior to May 1, 1916, as provided by section 1 of chapter 147 of the Acts of the Thirty-Fourth Legislature of the state of Texas."

(c) "The court erred in rendering judgment in favor of plaintiff and against the defendant because it appears from the facts proven in this case that this suit was filed by the county attorney of Orange county, Tex., subsequent to January 1, 1918, at which time he was without authority and power to file this suit as provided by section 3 of chapter 147 of the Acts of the Thirty-Fourth Legislature of the state of Texas."

Article 7687a, Vernon's Sayles' Texas Civil Statutes, provides as follows:

"Not later than the first day of May, 1916, in all counties of less than 50,000 inhabitants, and not later than the first day of May, 1917, in all counties of more than 50,000 inhabitants, and not later than the first day of June in every

year following thereafter, it shall be the duty of the collector of taxes in the various counties of this state to mail to the address of every record owner of any lands or lots situated in such counties, a notice showing the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots according to the delinquent tax records of their respective counties on file in the office of the tax collector, and a duplicate of which shall also have been filed in the office of the comptroller of public accounts of the state of Texas and approved by such officer; such notice shall also contain a brief description of the lands or lots appearing delinquent, and various sums or amounts due against such lands or lots for each year they appear to be delinquent according to such records, and it shall also be the duty of the tax collectors of the various counties in this state not later than the dates named, and every year thereafter, to furnish to the county or district attorneys of their respective counties duplicates of all such statements mailed to the taxpayers in accordance with the provisions of this act, together with similar statements, or in lieu thereof, lists of lands and lots located in such counties containing amounts of state and county taxes due and unpaid, and the years for which due, on lands or lots appearing on such records in the name of 'Unknown' or 'Unknown Owners,' or in the name of persons whose correct address or place of residence in or out of the county said tax collector is unable by the use of due diligence to discover or ascertain; and it shall be the further duty of the tax collector to furnish on demand of any person or persons, firm or corporation, like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office attached; said notices or statements herein provided for shall also recite that unless the owner or owners of such lands or lots described therein shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within 90 days from date of notice, then, and in that event, the county or district attorney will institute suits not later than January 1, next, for the collection of such moneys, and for the foreclosure of the constitutional lien existing against such lands and lots; and whenever any person or persons, firm or corporation shall pay to the tax collector all of the taxes, interest, penalties and costs shown by the records aforesaid to be due and unpaid against any tract, lot or parcel of land for all of the years for which said taxes may be shown to be due and unpaid, then it shall be the duty of the tax collector to issue to such person or persons, firm or corporation a redemption receipt covering such payment as is now required by law."

Article 7688a provides:

"Not later than January 1, 1917, in counties of less than 50,000 inhabitants, and not later than January 1, 1918, in counties of more than 50,000 inhabitants, and not later than June 1 of each year thereafter, it shall be the duty of the county attorney, or the district attorney if there be no county attorney, to file and institute suits as otherwise provided by law for the collection of all delinquent taxes due at the

time of filing such suit on land or lots situated in such county, together with interest, penalties and costs then due as otherwise provided by law; provided, that for the work of filing such suits, the county or district attorney shall receive a fee of \$5 for the first tract of land included in each suit, and \$1 for each additional tract included therein; provided, that where unimproved town lots are sued upon or included in a suit with other land or improved town lots in the same town, only one such additional fee shall be added for each twenty lots or any number less than twenty; and, provided further, that in counties containing over 50,000 inhabitants such attorney's fee shall be \$2.50 for the first tract and 50 cents for additional fees as above provided.

"The tax collector shall, in addition to the compensation and costs now allowed by law, be entitled for making up the delinquent record or supplements thereto where necessary under this act the sum of 5 cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, such compensation to be paid out of the general fund of the county upon the completion of said record or supplement. The tax collector shall also receive a commission of 5 per cent. on the amount of all delinquent taxes collected in addition to the commissions now allowed him by law."

This statute has been passed upon in this state. In the case of *State v. Sedell*, 194 S. W. 1118, the court said:

"In section 1 of the same act it is provided that, in all counties of less than 50,000 inhabitants, the collector of taxes shall, not later than May 1, 1916, mail to the address of every record owner of any land or lots situated in their respective counties a notice, showing the amount of taxes appearing delinquent or past due and unpaid against such land and lots, such notice to contain a brief description of the land or lots appearing delinquent according to the records, giving the amount due for each year, and also furnish the county or district attorney duplicates of the statements, 'or in lieu thereof, lists of lands and lots located in such counties containing amounts of state and county taxes due and unpaid, and the years for which due, on lands or lots \* \* \* in the name of "Unknown" or "Unknown Owners" or in the name of persons whose correct address or place of residence in or out of the county said tax collector is unable by the use of due diligence to discover or ascertain.' \* \* \*

"The act in question went into effect on or about July 29, 1915, and expressly repealed article 7707 of the Revised Civil Statutes of 1911, and all other laws and parts of laws in conflict with the act. The act has made it incumbent upon the tax collector to furnish certain statements to the county or district attorney, and that statement is a necessary and es-

sentia] matter of allegation and proof. The suits are to be filed and instituted as otherwise provided by law, but, in order to prosecute to a successful termination the suits authorized by the act, certain duties are enjoined upon the tax collector, and a statement of the performance of those duties and of certain facts are absolutely essential to be alleged and proved.

"The last date, May 1, 1916, on which the notice can be given, in counties of less than 50,000 inhabitants, does not enjoin upon the tax collector the duty of sending out the notice on that date or afterwards as contended by appellant, but fixes the date after which no notice can be given. It means that in the counties having less than 50,000 inhabitants the notice must be given at some time between the date on which the law went into effect and May 1, 1916. The statute is too clear to demand construction.

"When this suit was brought on January 11, 1916, the law of 1915 was in effect, and the suit purports to have been brought under the provisions of that law, and it devolved upon appellant, in order to successfully prosecute the suit, to allege and prove that the requirements of the act had been complied with. There was no such allegation in the petition.

"When certain things are prescribed in a statute for the protection of a citizen and to prevent the sacrifice of his property, and by a disregard of which his rights may be jeopardized and injuriously affected, they are not directory, but mandatory. They must be followed, or any acts thereunder will be null and void. *Cooley on Taxation*, pp. 480-486; *French v. Edwards*, 13 Wall. (80 U. S.) 508, 20 L. Ed. 702. Any notice required as to assessments, or as to any subsequent proceedings, must be given in the time and in the mode prescribed. It has been held that to obtain jurisdiction by publication, as was attempted in this case, it must affirmatively appear that the statute has been pursued strictly, and strict compliance with its provisions followed. *Cooley, Tax*, p. 484; *Payson v. People*, 175 Ill. 267, 51 N. E. 588. The unbroken current of authority sustains the proposition that property cannot be taken from the owner for taxes unless every statutory requirement affecting the property is strictly complied with. *Carrier v. Comstock*, 108 Ark. 515, 159 S. W. 1097; *Meredith v. Coker*, 65 Tex. 29; *McCormick v. Edwards*, 69 Tex. 106, 6 S. W. 32; *Bean v. Brownwood*, 91 Tex. 684, 45 S. W. 897."

Therefore, from a reading of the statute and from the decision quoted, it appears that the exceptions should have been sustained, and the cause dismissed. We see no necessity for bringing this case to this tribunal in the teeth of a plain, statutory provision.

Therefore the cause will be reversed and remanded, with instructions to the lower court to dismiss the same from its docket.

BLACK et al. v. SOUTHERN FILM SERVICE, Inc. (No. 7655.)

(Court of Civil Appeals of Texas. Galveston.  
April 4, 1919. Rehearing Denied  
April 24, 1919.)

1. SALES ⇨479(1) — CONDITIONAL SALES—  
REMEDIES OF SELLER — IMPROPER RELIEF  
GIVEN.

In a suit by the seller to recover the title and possession of picture machines, conditionally sold, and in the alternative to recover part of the purchase price with interest and foreclosure, the seller cannot recover both the machines and the purchase price.

2. APPEAL AND ERROR ⇨1152—GROUNDS FOR  
REVERSAL—ERRONEOUS JUDGMENT NOT RE-  
FORMABLE.

A judgment, which grants improper relief to a seller suing the buyer, under a conditional sale contract, cannot be reformed and affirmed where neither the verdict, the lower court's finding of fact, nor the evidence in the record shows what judgment should have been rendered, so that the judgment will be reversed, and the cause remanded.

Error from Harris County Court; W. E. Montelith, Judge.

Action by the Southern Film Service, Incorporated, against the Xydias Amusement Company, a partnership composed of G. L. Black and others. From a judgment for plaintiff, defendants bring error. Reversed and remanded.

A. B. Wilson, of Houston, for plaintiffs in error.

Fred R. Switzer, of Houston, for defendant in error.

PLEASANTS, O. J. This suit was brought by the defendant in error against the Xydias Amusement Company, a partnership composed of A. J. Xydias, Callie Xydias, and G. L. Black. The suit was for the recovery of title and possession of two picture machines, and in the alternative for recovery against defendants of the sum of \$280, with interest, and for foreclosure of a mortgage lien upon the machines, and for recovery of the further sum of \$48 for repairs on said machines and films furnished defendants.

The property was seized under sequestration proceedings, and was replevied by the defendants G. L. Black and Callie Xydias.

Defendants answered under oath by general demurrer, and general denial, and alleged that Mrs. Callie Xydias was a married woman at the time plaintiff's cause of action is alleged to have accrued, and was not bound or obligated to plaintiff, and pleaded her coverture. Further answering, Mrs. Callie Xydias alleged that she held a chattel mortgage upon the moving picture machines

described in plaintiff's petition, to secure the payment of \$1,600 loaned by her to Xydias Amusement Company October 4, 1916, which \$1,600 was her sole and separate property, and that she had a first and prior lien upon said machines by reason of the execution of said mortgage.

Further answering, defendants alleged plaintiff warranted said machines would not cause the pictures to jump, and would give a steady and flickerless light, and that said machines had not given satisfaction in that respect, and had not filled the warranties, but that said machines had required constant attention, and had never produced a flickerless, steady light, and picture; that defendants had paid plaintiff the fair and reasonable value of said machines, and was not indebted to plaintiff in any sum.

Plaintiff filed a supplemental petition, consisting of a general demurrer and general denial, and alleged that the chattel mortgage given by Xydias Amusement Company to Callie Xydias disclosed on its face that the obligation to be secured was the community estate of herself and husband; that defendants had no notice until the filing of the answer that it was her sole and separate estate, and that plaintiff accepted the conveyance set out in its amended petition, thinking and relying upon the fact that the chattel mortgage and the obligation thereby secured was the community property of herself and husband.

The cause was submitted to a jury in the court below upon special issues. Upon return of the verdict the court rendered the following judgment:

"Be it remembered that on the 3d day of October, 1917, the above entitled and numbered cause came on in its regular order for trial, when came the plaintiff by its attorney and announced ready for trial; also came the defendant Xydias Amusement Company, a firm composed of A. J. Xydias and G. L. Black and G. L. Black individually and Callie Xydias, by their attorney, and announced ready for trial; the defendant A. J. Xydias, having been outside of the state of Texas since the filing of this suit, was not served with citation. A jury having been demanded, thereupon came Newton Eno and five other good and lawful men, who were duly impaneled and sworn to try the said cause. The taking of testimony continued till October 4, 1917, whereupon the court submitted his charge to the jury in the form of special issues, and after the argument of counsel the jury retired to consider of its verdict in the form of answers to special issues submitted by the court, as follows:

"Special Issue No. 1: 'Did the plaintiff warrant the two machines purchased by defendant to produce a flickerless, steady picture?' To which the jury answered, 'No.'

"Special Issue No. 2: 'Did the said two machines produce a steady, flickerless picture?' To which the jury answered, 'No.'

"Special Issue No. 3: 'If you have answered

the two preceding issues in the affirmative, and only in that event answer the following question: 'Was the failure of the machines to produce a steady, flickerless picture due to the defendant's failure to properly operate the machines?' To which the jury answered, 'No.'

"Special Issue No. 4: 'What was the fair, reasonable value of the two machines at the time of their purchase?' To which the jury answered, 'Machines' value, \$560.00.'

"Special Issue No. 5: 'What is the fair, reasonable value of said two machines at this time?' To which the jury answered, 'Two machines' value, \$400.00.'

"Special Issue No. 6: 'What is the fair rental value of said two machines per month?' To which the jury answered, 'The rental value of two machines, \$60.00 per month.'

"Special Issue No. 7: 'On December 29, 1916, the date of the purported transfer of said machines from the Xydias Amusement Company to plaintiff, did plaintiff have notice of a dissolution of the partnership between A. J. Xydias and G. L. Black?' To which the jury answered, 'No.'

"Special Issue No. 8: 'Was there an understanding between plaintiff and defendant at the time of the purchase of said two machines that the title to said machines would remain in the plaintiff until they were accepted and the balance paid thereon?' To which the jury answered, 'Yes.'

"Which verdict of the jury was in open court duly received and filed, and the plaintiff has remitted the amount of \$100.00 from the said sum of \$400, being the value of said two machines as found by the jury in response to special issue No. 5.

"From the evidence adduced upon the trial of said cause the court finds that the two motionograph picture machines involved in this suit are of equal value, and from the findings of the jury by its verdict, and from other facts adduced in evidence and found by the court, the court is of the opinion that the plaintiff should recover, and here now enters the following as the judgment and decree of this court on this 1st day of November, 1917:

"It is ordered and decreed by the court that the plaintiff, Southern Film Service, Incorporated, a corporation, duly incorporated under the laws of the state of Texas, have and recover of and from A. J. Xydias and G. L. Black, doing business under the firm name of Xydias Amusement Company, the title and possession of two motionograph picture machines, one now in the Star, and one in the Red Theater, in the city of Houston, Tex., being the same machines described in the plaintiff's petition, and that the plaintiff have its writ of possession therefor.

"It further appearing to the court that on or about the 10th day of January, 1917, plaintiff caused a writ of sequestration to be levied on the above-described two machines, and that on the 10th day of January, 1917, the defendants Callie Xydias and G. L. Black, as principals, and J. Rosson and Herman H. Gieseke, as sureties, executed a replevy bond as provided by law in the sum of \$600, it is ordered, adjudged, and decreed by the court that the plaintiff have and recover of and from the defendants Callie Xydias and G. L. Black, as principals, and J. Rosson and Herman H. Gieseke, as sureties,

jointly and severally, the sum of \$300, the value of the said two machines, for all of which let execution issue.

"And that if either or both of the machines be returned within the time and as provided by law, the judgment herein rendered against the said G. L. Black individually and Callie Xydias and the said sureties for the sum of \$300 be credited with the sum of \$150 for each machine returned, less such reasonable amount of injury or damages since said replevy bond has been filed as may be adjudged by the sheriff or constable who may be authorized under the law to make such adjudication, and in the event of payment of the sum of \$150 in lieu of either of the said machines is made, the judgment herein rendered against the said A. J. Xydias and G. L. Black, doing business under the name of Xydias Amusement Company for the title and possession of said machines shall be discharged and released on each machine for which the said payment of \$150 has been made.

"It appearing to the court that the plaintiff, as against the claim of Callie Xydias, under the chattel mortgage set up in her answer, has a prior lien to secure the payment of the sum of \$140, principal, and \$11.20, interest accrued to date, making the total sum of \$151.20 on each of said machines, it is ordered by the court that the said lien in favor of the plaintiff for the payment of \$151.20 on each of the said machines is hereby established, and in the event of the return of either of said machines within the time and as required by law, the plaintiff shall have an order of sale, commanding the sale of such machine or machines that may be returned, and, after deducting the costs of sale, that the proceeds be applied to the payment of said sum of \$151.20 against each of the said machines as may be returned.

"It further appearing to the court that the plaintiff has entered a remittitur of all rent on said two machines in excess of the sum of \$300, it is ordered and decreed by the court that the plaintiff, Southern Film Service, Incorporated, have and recover of and from G. L. Black, Callie Xydias, as principals, and J. Rosson and Herman H. Gieseke, jointly and severally, the sum of \$300, rent and said machines, for all of which the plaintiff shall have its execution.

"It is further ordered and decreed that the plaintiffs have and recover of and from the defendants A. J. Xydias and G. L. Black, partners doing business under the name and style of Xydias Amusement Company, and G. L. Black individually for the further sum of \$48.60, due on open account, and interest thereon from January 1, 1917, till paid at the rate of 6 per cent. per annum, and for all costs in this cause incurred or expended; and, because there has been no service of process upon the said A. J. Xydias, it is ordered that execution do not issue against the individual property of A. J. Xydias, but do issue against the estate and property of G. L. Black and the partnership property and estate of Xydias Amusement Co."

[1, 2] This judgment is so uncertain and contradictory in its terms that it cannot be sustained. It goes without saying that, if plaintiff owns the machines and is entitled to recover their value from defendants and

rents for their wrongful detention, it is not entitled to recover the \$280 with interest, a part of the agreed purchase price of the machines. It is equally clear that if plaintiff can recover the \$280, with interest and a foreclosure of a lien on the machines, it cannot recover the machines or their rental value. This judgment appears to give both remedies. There is nothing in the verdict of the jury, the findings of fact by the trial court, nor the evidence from which this court can determine what judgment should have been rendered, and we can therefore neither reform this judgment nor render such judgment as should have been rendered by the court below.

Upon this state of the record the judgment must be reversed and the cause remanded, and it has been so ordered.

Reversed and remanded.

#### WYSS et al. v. BOOKMAN et al. (No. 7622.)

(Court of Civil Appeals of Texas. Galveston. Feb. 26, 1919. On Motion for Rehearing, April 3, 1919.)

#### 1. APPEAL AND ERROR $\S$ 722(1) — ASSIGNMENTS OF ERROR—CONFORMITY TO MOTION FOR NEW TRIAL.

In cases tried before the court without a jury, the objection is no longer available that assignments cannot be considered because they are not the same as contained in the motion for new trial and were not filed at the same time.

#### 2. APPEAL AND ERROR $\S$ 880(3)—RIGHT TO COMPLAIN OF JUDGMENT—LACK OF SUPPORT IN EVIDENCE.

Where there was full proof as to appealing defendants they cannot raise any question as to whether or not the judgment against other parties defendant not appealing rested on any evidence.

#### 3. JUDGMENT $\S$ 91 — DECREE BY CONSENT—BINDING FORCE.

In suit on vendor's lien notes, the judgment entered by agreement *held* binding on the appealing defendants, as made in open court and entered of record in full compliance with rule 47 for the district and county courts (142 S. W. xxi), in the absence of objection even to the form of the decree, except in two particulars; one respecting a remedy not available to appellants, the other matter otherwise provided for.

#### 4. COURTS $\S$ 475(2, 3)—FORECLOSURE OF LIEN—PENDENCY OF ADMINISTRATION.

In suit on vendor's lien notes, provision of a consent judgment directing sale of the interest of a decedent's estate through the district court, which had taken jurisdiction of the entire controversy as to all parties having any interest to be affected by the foreclosure was not void merely because administration of the estate was pending in the probate court.

#### 5. JUDGMENT $\S$ 91—BY CONSENT—DISPOSITION OF RIGHTS OF DEFENDANT—FAILURE TO MENTION BY NAME.

A consent judgment in a suit on vendor's lien notes, which recited that all defendants had been duly and legally cited, were properly before the court, and that the rights and interests of all were determined, *held* to have disposed of the rights of a defendant whose name was not specially mentioned.

#### On Motion for Rehearing.

#### 6. APPEAL AND ERROR $\S$ 1116—DISPOSITION—DECLARATION AS TO VOID CHARACTER OF JUDGMENT—REFORMATION.

In suit on vendor's lien notes, where some of the vendors, owning 55 acres of the land among themselves, were under the consent judgment entitled to have their lands free through releases on payment of costs, but the matter was not originally assigned as constituting error, and the incoherent and bulky record does not disclose precisely who the parties were, or what tracts were owned, the Court of Civil Appeals cannot declare the judgment void, or reform it to decree releases to those entitled.

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Suit by P. B. Bookman and another against William Wyss and others. From judgment for plaintiffs, certain defendants appeal. Affirmed.

Stewarts, of Galveston, and Thos. P. Bufington, of Anderson, for appellants.

H. L. Lewis, of Navasota, for appellees.

GRAVES, J. Appellees, P. B. Bookman and W. S. Craig, brought this suit upon two vendor's lien notes given to them May 3, 1909, by Frank H. Thaman in part payment of the purchase money on 1,125 acres of land in the Mary Austin league No. 14, in Galveston county, which they had contemporaneously conveyed to him with reservation of a vendor's lien to secure payment of the notes. Thaman and wife, together with many other persons who were alleged to have acquired whatever claims they might have against any parts of the land through or under Thaman, and therefore subject to the terms of the prior lien he had so given against the whole of the land, were made parties defendant. This lien was also declared upon, and foreclosure thereof sought against all the defendants, but judgment for the debt evidenced by the notes was asked against Thaman alone.

Frank H. Thaman appeared and answered. Hon. Pat N. Fahey, an attorney of the Grimes county bar, who had been appointed by the court for that purpose, appeared and answered for all the minor defendants and for all defendants cited by publication who did not otherwise answer. Certain other defendants who are the appellants in this

court, appeared and answered by their attorneys, Messrs. Stewarts, of Galveston, and Thomas P. Buffington, of Anderson, Tex.

The court disposed of the case without the aid of a jury, and on July 19, 1917, filed the judgment, entered as of date June 14, 1917, from which this appeal proceeds. On July 28, 1917, the appellants filed a motion for and specifically asked a new trial, termed in their brief here a motion to vacate and set aside the judgment, which the court upon the same day overruled, and they appealed.

Besides a bill of exceptions allowed to appellants and designated in the transcript here "Defendants' Statement of Facts," there are two separate statements of facts in the record, one signed by attorneys for plaintiffs below and by Pat N. Fahey in behalf of the defendants for whom he had answered, reflecting the proceedings as affecting those persons, and showing that judgment upon full proof had been rendered as to all of them, which was approved by the judge, and the other signed by the judge alone, and containing this recitation:

"And the statement of facts, here now prepared by the court and ordered to be filed as a part of the case, applies only to the cause of action and controversy as between plaintiffs and all parties represented by the Stewarts and Judge T. P. Buffington."

None of the parties so represented by Mr. Fahey have appealed, the issues here being such only as are presented in behalf of those for whom Messrs. Stewarts and Judge Buffington acted; they being, as before stated, the sole appellants.

[1] Objection is made to consideration of any of the assignments upon the ground that they are neither the same ones as were contained in the motion for new trial, nor were they filed at the same time, the following authorities being referred to: Rule 29 (142 S. W. page xii); article 1612, Vernon's Sayles' Civil Statutes 1914; *Edwards v. Youngblood*, 160 S. W. 288; *Dees v. Thompson*, 166 S. W. 56; *Barkley v. Gibbs*, 203 S. W. 161.

Much to the liking of this court, however, in its preference for being always permitted to consider causes upon their merits, this objection is no longer available in cases tried before the court without a jury, as this one was, under the recent decision of our Supreme Court in *H. & S. Eng. Co. v. Turney et al.*, 208 S. W. 593. It is therefore overruled.

[2] After a careful consideration of this very voluminous record, in the light of the different contentions made upon it by the appellants, we are unable to say they have pointed out any such error as entitle them to a reversal. Their main position is:

"The bill of exceptions and statement of facts of the court herein show conclusively that no trial was ever had of the case, and no facts were

ever submitted to the court upon which to base its judgment."

As is recited in the preceding statement, however, there was full proof as to the main defendant, Thaman, who executed the notes sued on, and as to all those for whom the attorney appointed by the court answered. The statement of facts embodying this proof, which was approved by the court, showed that the two vendor's lien notes declared upon against Thaman, together with the deed to him reserving the lien upon the 1,125 acres to secure their payment, and all the various subsequent deeds and instruments down from and under him, through which any rights in any of the other parties to this suit, including the appellants, might have flowed, were in evidence. Neither Thaman nor any of the other defendants as to whom that proof applied are complaining, having entered no appeal from the court's judgment against them. In these circumstances, with the judgment itself reciting that a jury had been waived, that all matters of fact in controversy as well as of law had been determined by the court after fully hearing and understanding the pleadings, the evidence, and the argument of counsel, it is not perceived how any question can in this court be raised by appellants as to whether or not the judgment of the court below against other parties not appealing therefrom rested upon any evidence.

[3] So far as appellants themselves are concerned, however, both the bill of exceptions awarded to and the judgment rendered against them below recite that the judgment was an agreed one as between them and the appellees Bookman and Craig; that portion of the judgment being as follows:

"The said counsel each and all appeared in open court and announced that they had agreed upon the terms [of] a judgment, and announced the terms to the court, and they authorized the court to enter the judgment upon the agreement, and they said they would prepare a decree and submit same to the court for entry upon the minutes of the court. A decree was prepared by the plaintiffs' attorneys and submitted to me, together with letters and telegrams passing between attorneys for plaintiffs and defendants, and a decree submitted by counsel for defendants was shown me by counsel for plaintiffs. I approved the decree submitted by plaintiffs' counsel as being in accordance with the agreement, which agreement made in open court was that the plaintiffs should have judgment foreclosing their lien as set out in their petition against all of the defendants, the land to be sold in the inverse order in which same was sold by Thaman to the other defendants. There had previously been entered an interlocutory judgment against the defendant Thaman. The agreement further was that upon payment of all costs by defendants holding 55 acres of the land that these defendants should have their lands free. There is no motion for new trial by defendant Thaman, and he does not complain of the judgment.

"Before I approved the judgment finally recorded, I satisfied myself that the plaintiffs had executed a release as to the 55 acres of land to be delivered on payment of costs. These were executed, as I am informed, and no question has been raised as to their execution; they being tendered into court on the hearing on the 28th day of July, A. D. 1917, upon the effort to settle differences as to the terms of the judgment. There was only one difference in the two judgments tendered outside of the 55 acres, and that was this: The judgment rendered by counsel for defendants provided for judgment over against Thaman, and I told Gibson I was perfectly willing to enter this if he would file a sufficient pleading and get a waiver from Thaman. He agreed that the judgment would be void unless he did so. This left only one point of difference in the two judgments, and that was the release of the 55 acres of land, which was to be done upon payment of costs, as the agreement was made in open court, and as counsel now admit was the agreement. The costs had not been paid, and I had entered the foreclosure; but Judge T. P. Buffington made the agreement to pay the costs, and as he is amply solvent, and I personally know will carry out his agreements, I, in open court, on July 28, 1917, at said hearing, told counsel for the defendants that I would enter an order or judgment correcting the original judgment as to the 55 acres of land, and Mr. Gibson went off to prepare this judgment, but, instead of preparing it, prepared and filed the motion for new trial."

Just why this agreed judgment is not binding on appellants is not apparent. It was "made in open court and entered of record" in full compliance with the requirements of rule 47 for the district and county courts (142 S. W. xxi). There was no pretense of objection even to the form of the decree as entered, except in two particulars: First, appellants were not given judgment over against their codefendant Thaman; second, release of the 55 acres was not therein expressly provided for. In the state of their pleadings, counsel for appellants himself conceded that the first of these remedies was not available and could not legally be accorded them; the second was provided for in the court's acceptance of Judge Buffington's assurance that the costs would be paid, and evidently appellants have but to await compliance therewith in order to obtain the releases. Upon neither ground, therefore, can it be rightly said that any invalidity appears in the judgment, nor is any right to complain here against it disclosed.

Through a number of assignments it is further contended, however, that the judgment is void for several reasons—among them: That it directs a sale through the district court of lands belonging to the estate of Thos. A. Oxley while an administration thereon was pending; that in effect it authorizes personal recovery against defendants cited by publication only, who did not answer in the action; and that it fails to

dispose of the defendant Clem Schneider. It may be that these objections disclose some irregularities in the general judgment entered; but, if so, since they relate to other and nonappealing parties exclusively, except as to Oxley's administrator, they are neither such as necessarily render the judgment invalid as to appellants, nor of a nature entitling them to complain, after fully agreeing to the judgment below in so far as it affected their own rights.

[4] As to the Oxley estate's interest, the provision directing its sale through the district court, which had taken jurisdiction of the entire controversy as to all parties having any interest to be affected by the foreclosure, would not be void merely because an administration upon that estate was then pending in the probate court. See *Lauraine v. Masterson, Vaughan, et al.*, 193 S. W. 708, 712, et seq., in which cases writs of error have been denied by our Supreme Court.

[5] We do not think the contention that defendant Clem Schneider was not disposed of borne out by the record. An examination of the judgment discloses that, while his name is not specially mentioned, it is therein recited that all the defendants had been duly and legally cited, were properly before the court, and that the rights and interests of each and all of them were thereby determined.

There are other similar criticisms presented; but after careful consideration of them all, in the light of the record brought up, the conclusion is reached that none of them point out reversible error.

It follows that the judgment should be affirmed; that order has accordingly been entered.

**Affirmed.**

#### On Motion for Rehearing.

In the motion for rehearing attention is called to an inadvertent but wholly immaterial error of recitation in the original opinion. It was there stated:

"So far as appellants themselves are concerned, however, both the bill of exceptions awarded to and the judgment rendered against them below recite that the judgment was an agreed one as between them and the appellees Bookman and Craig, that portion of the judgment being as follows."

This sentence should have read:

"So far as appellants themselves are concerned, however, both the bill of exceptions awarded to them and the statement of facts prepared and signed by the court, which applied only to the issues between themselves and the appellees, recite that the judgment was an agreed one as between them and the appellees Bookman and Craig, that portion of the statement of facts reading as follows," etc.

In acknowledging the opportunity to make the correction, it may be added that the

matter then copied from the record in the former opinion was correct in every particular, being merely attributed to the judgment, instead of the statement of facts.

[6] It is quite evident from the portions of the statement of facts there quoted, as appellants now contend, that some of the defendants owning among themselves 55 acres of the land were, under the judgment rendered, entitled to have their lands free through releases thereof upon payment of costs; but this matter was neither originally assigned as constituting error, nor does the bulky and somewhat incoherent record presented to this court disclose just who these parties were, or what particular tracts of land they severally owned. Manifestly under these conditions, this court is in no position either to declare the entire judgment void, or even to so reform it as to decree releases to those entitled thereto, which might be done, were the necessary facts before us.

After a most careful consideration of every contention upon rehearing, presented as they are under a criticism of the action of both this and the trial court lacking somewhat in that high degree of helpful courtesy usually accorded the courts by the able counsel for appellants, we conclude that our former disposition of the appeal was correct, and must be adhered to. The motion is therefore overruled.

Overruled.

#### KEY v. BIG SANDY OIL & GAS DEVELOPMENT CO. et al. (No. 9149.)

(Court of Civil Appeals of Texas. Ft. Worth. March 22, 1919. Rehearing Denied May 17, 1919.)

##### 1. MINES AND MINERALS $\S$ 55(3)—OIL LEASE—CONSTRUCTION.

Instrument executed by the owner of supposed oil land and designated as an oil lease held a conveyance of the mineral rights in the land subject to defeasance for failure to pay the rentals as stipulated, and subject to the further contingency of termination after expiration of a five-year period by failure to discover the minerals mentioned in paying quantities, and failure to exercise ordinary diligence after discovery to mine same.

##### 2. MINES AND MINERALS $\S$ 74—OIL LEASE—AGREEMENT BY LESSOR — BINDING FORCE UPON PURCHASER AND HIS LESSEE.

The agreement by the lessor of supposed oil land that the well drilled by the lessee company to a depth of 2,000 feet was a complete well within the meaning of the lease was binding upon her and upon the buyer from her, who bought the land with full notice of the construction of the lease, and also upon the buyer's lessee, who took his lease with notice of the same fact.

##### 3. MINES AND MINERALS $\S$ 75—OIL LEASE—CONTINUATION — PAYMENT OF CONSIDERATION.

The \$500 paid by the lessee of supposed oil land in addition to a full performance by his assignee of the drilling contract stipulated in the lease held a full payment of the consideration required for continuation of the lease for the five-year period stipulated in it.

##### 4. MINES AND MINERALS $\S$ 78(1)—OIL LEASE—PERFORMANCE OF CONTRACTUAL CONSIDERATION.

The contractual consideration of a five-year oil lease having been fully performed by the lessee by drilling a well, the lessee was under no obligation to drill another well in order to hold the lease for the five-year period.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Suit by George D. Key against the Big Sandy Oil & Gas Development Company and others. From an order dissolving temporary writ of injunction, plaintiff appeals. Affirmed.

Marshall Spoons, of Ft. Worth, and Earl Conner, of Eastland, for appellant.

J. J. Butts, of Cisco, and O. L. McCartney, of Brownwood, for appellees.

DUNKLIN, J. George D. Key has appealed from an order of the judge of the district court of Eastland county, dissolving a temporary writ of injunction theretofore issued, restraining the Big Sandy Oil & Gas Development Company, a private corporation, and John Leonard and T. K. Simmons, from drilling an oil well on a tract of 2,840 acres of land situated in Eastland county.

At the time of the institution of the suit by Key, the defendant Simmons was making preparations to put down a test well for oil, and was claiming the right so to do under and by virtue of what is commonly known as an oil and gas lease, dated December 9, 1914, executed by Mrs. Willie Scarborough to Herbert Lane, who transferred all his interest therein to the defendant company, and which in turn assigned the lease to Simmons. The lease contained the following stipulations:

"The lessors in consideration of \$500, the receipt whereof is hereby acknowledged, do hereby grant, demise and let unto the said lessee all the oil, gas, gold, silver, lead and zinc in and under the following described land with covenant for the lessee's quiet enjoyment from the title and that lessor has the right to convey the premises to the said lessee. \* \* \*

"To have and to hold unto and for the use of lessee for the term of five years from the date hereof and as much longer as gas, oil, gold, silver, coal, lead, or zinc is produced in paying quantities. Royalty to the lessors Willie Scarborough and her assigns  $\frac{1}{8}$  of all the oil pro-



duced and saved from the premises, delivered free of expense into the tanks or pipe lines to the lessors' credit. Should a well be found producing gas only then the lessor shall be paid for each well the sum of \$100 for each year as long as gas is sold therefrom payable quarterly when so marketed.

"Lessee agrees to complete a well on said premises within one year from date hereof or pay lessor Willie Scarborough or her assigns 25 cents an acre per annum payable quarterly from the 9th day of December, 1915, until said well is completed or this lease surrendered, which surrender is made complete and binding upon failure of lessee to make such payment. And the drilling of such well shall be full consideration to lessor for grant herein made to lessee with exclusive right to drill one or more additional wells on said premises during the existence of the lease."

After the execution of the lease, Mrs. Scarborough, who then owned the fee-simple title to the land, conveyed that title to E. J. Ward, who purchased the land with full notice of the lease, which had been duly recorded in the deed records of Eastland county. On October 17, 1918, Ward executed an oil and gas lease on the land to plaintiff, George D. Key, upon the supposition that the lease theretofore executed to Herbert Lane had lapsed and was no longer of any legal effect.

The record before us contains a statement of facts showing the evidence introduced upon the hearing of defendant's motion to dissolve the temporary writ of injunction. The evidence so introduced established without controversy the following facts, additional to those already cited above: After Herbert Lane transferred the lease to the Big Sandy Oil & Gas Development Company, that company began drilling a well on the land for oil, and the well was drilled to a depth of 2,000 feet prior to December 9, 1915. The discovery of oil had been expected at a depth of 1,700 or 1,800 feet, and after the depth of 2,000 feet had been reached Mrs. Scarborough agreed with the defendant company that the well had been completed within the meaning of the terms and conditions of the lease, and that the entire consideration for the lease for the full period of five years from and after December 4, 1914, had been paid. However, the company concluded to drill the well deeper, and with the consent of Mrs. Scarborough did sink it to a depth of 2,500 feet, but no oil or gas was found even at that depth. The company expended about \$40,000 in drilling the well. During the summer of 1916 the derrick and machinery was moved off the land, and no further drilling was done thereon.

The deed from Mrs. Scarborough to E. J. Ward was not made until after the company had ceased drilling operations, and at the time Ward purchased the land he had notice of Mrs. Scarborough's agreement with tl

defendant company that the well had been completed in compliance with the terms of her lease to Herbert Lane; the plaintiff, Key, had notice of the same facts at the time he leased the land from Ward.

The only two grounds alleged in plaintiff's petition for avoiding the lease to Herbert Lane which are brought forward in appellant's briefs are: First, that the lease was made for the benefit of the lessor, and as there has been no production of oil, Ward, as assignee, of the lessor, was entitled to again lease the land for the purpose of developing oil thereon, in the absence of proper diligence on the part of the original lessee or his assignees to further test the land for the discovery of oil; second, that the original lease had been abandoned by the lessee and his assignees by reason of the fact that, after making an unsuccessful attempt to discover oil, the machinery had been moved off the land, and no further attempt had been made to develop oil thereon.

As shown by the facts already stated, the five-year period stipulated in the lease to Herbert Lane will not expire until the 9th day of December, 1919. The defendant Simmons acquired his lease from the Big Sandy Oil & Gas Development Company on October 8, 1918, and he was preparing to begin the drilling of a well on the land on December 14, 1918, when he was prevented from so doing by the temporary writ of injunction issued in this cause, sued out by the plaintiff.

[1] It cannot be doubted that the instrument executed by Mrs. Scarborough to Herbert Lane, and designated as an oil lease, was a conveyance of the mineral rights in the land subject to defeasance for failure to either drill a well or pay the rentals stipulated in the lease, and subject to the further contingency of a termination of such title after the expiration of the five-year period mentioned in the lease, by failure to discover the minerals mentioned in the lease in paying quantities, and failure to exercise ordinary diligence after such discovery to mine the same. *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989.

[2] The agreement of the lessee to "complete the well" might be said to be ambiguous, but Mrs. Scarborough and the oil company that drilled the well agreed upon the meaning of that term, and the agreement by Mrs. Scarborough that the well drilled to a depth of 2,000 feet was a complete well within the meaning of the terms of the lease was binding upon her and upon Ward, who bought the land with full notice of that construction of the lease by his vendor, and also upon Key, who took his lease with notice of the same fact. *Heidenheimer v. Cleveland*, 17 S. W. 524, and authorities there cited.

[3, 4] Herbert Lane paid \$500 for the lease

at the time he acquired it. That consideration, in addition to a full performance of the drilling contract stipulated in the lease, was a full payment of the consideration for a continuation of the lease for the period of five years ending December 9, 1919. The contractual consideration for drilling having been fully performed the lessee was under no obligation to drill another well in order to hold the lease for the five-year period. *O'Neill v. Sun Co.*, 58 Tex. Civ. App. 167, 128 S. W. 174; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 59. Since the consideration for the exclusive right to develop oil on the land for the full period of five years had been fully paid, the owner of the title cannot be heard to complain that the lessee did not drill another well within the five-year period as a further consideration for the lease for that period.

Under such circumstances we are unable to perceive how the question of abandonment of the lease could arise, in the absence of any plea of innocent purchaser or any supposable facts upon which to base such a plea. Furthermore, according to the testimony of Key himself, prior to his lease from Ward, he had notice from Herbert Lane that defendant company was still claiming rights under the original lease.

For the reasons indicated the judgment of the trial court is affirmed.

### ROWDEN v. ROWDEN. (No. 6218.)

(Court of Civil Appeals of Texas. San Antonio. May 7, 1919.)

#### 1. DIVORCE $\S$ 99 — PLEADING — CRUEL AND INHUMAN TREATMENT — ALLEGATION OF FACTS.

Cross-action in divorce suit alleging "cruel, harsh, and inhuman treatment," though in words of statute, does not state cause of action for divorce; it being necessary to state the facts and circumstances constituting the cruel, harsh, and inhuman treatment.

#### 2. DIVORCE $\S$ 88, 124 — PLEADING — PROOF.

Accurate pleading and clear and convincing proof should be demanded before the marriage relation is dissolved.

Error from District Court, Bexar County; S. G. Tayloe, Judge.

Suit by Eugene G. Rowden against Gertrude Rowden, in which defendant filed cross-action. Decree for defendant, and plaintiff brings error. Reversed and remanded.

Bee & Lange and Leonard Doughty, all of San Antonio, and J. N. Townsend, of Dallas, for plaintiff in error.

FLY, C. J. This is a suit for a divorce and custody of a male child eight years of age, instituted by plaintiff against defendant. The suit was filed on January 10, 1918, and sought a divorce on the ground of abandonment and cruel and unkind treatment of plaintiff by defendant, and on April 29, 1918, defendant answered by a denial of the charges and filed a cross-action alleging "cruel, harsh, and inhuman treatment" of her by plaintiff, and she sought a divorce. The court decreed a divorce in favor of defendant and gave her custody of the boy, James Rowden, with the privilege to plaintiff of visiting him once a month. This writ of error was applied for on August 21, 1918.

[1] The first assignment of error assails the cross-action on the ground that it fails to allege a sufficient cause for divorce. The pleadings of appellee are very general, merely stating that cruel, harsh, and inhuman treatment caused her to leave her husband on October 13, 1917. What language was used or acts done constituting the cruel treatment was not pleaded. Using the words of the statute are not sufficient. As said by Chief Justice Hemphill in *Wright v. Wright*, 3 Tex. 168:

"The allegations of the petition tested by the provisions of the statute and the rules of pleading, particularly in controversies of this character, are vicious from want of specification of facts constituting the offenses, or even averments of a course of misconduct, from which the class of facts relied upon might be inferred. The terms of the statute 'excesses,' cruel treatment and outrages, are conclusions from facts, or are rather compound questions of law and facts; the constituent acts and circumstances of which should be set forth, that the court may judge whether in legal contemplation they are within the description of the offenses that are by statute good grounds for divorce."

No court could discover from the allegations of the cross-action what the cruel and inhuman acts were. For 14 years the allegations show defendant had sustained the relation of wife to plaintiff and had borne him a son, now over 8 years of age. After all these years, for some reason not apparent from the pleading, she abandons him and seeks to annul her marriage on vague and indefinite charges, insufficient to form the basis for a judgment of divorce. The petition is no better, and fails to state any cause for divorce.

[2] No cause of action is alleged in either petition or cross-action, but there is an utter disregard of the rules and the requirements of good pleading. No kind of a partnership should be dissolved, much less one which at one time was considered the most sacred of human relations, upon pleadings so loose, indefinite, and unsatisfactory. In the interest of a clean civilization, accurate pleading and clear and convincing proof should be demand-

ed before the marriage relation is dissolved.

No physical violence is pleaded, nor such cruel conduct as would produce such mental distress that would at least threaten to impair or destroy the health of the injured party. As said by the Supreme Court in *Eastman v. Eastman*, 75 Tex. 473, 12 S. W. 1107:

"It has generally been held that, when there is no physical violence, the cruel conduct, in order to warrant a divorce, must be such as will produce a degree of mental distress which threatens at least to impair the health of the injured party."

The pleadings in this case do not pretend to meet any such rules, which, although sanctified by the experienced and hallowed by the civilization which has come from their observance, have become a mere whisper from the past, to which heed is no longer given. It is well to take our bearings occasionally, to ascertain our location and discover the breakers ahead of our social and domestic life, which, if wrecked, in the long run will destroy our political life and civilization.

The judgment is reversed, and the cause remanded.

#### PENNINGTON v. FLEMING et al. (No. 976.)

(Court of Civil Appeals of Texas. El Paso.  
May 8, 1919.)

#### 1. APPEAL AND ERROR $\S$ 846(5)—REVIEW—ABSENCE OF FINDINGS OF FACT OR CONCLUSIONS OF LAW.

No findings of fact or conclusions of law having been filed by the court below, the judgment must be sustained, if there is sufficient evidence to support it upon any theory of the case.

#### 2. PARTNERSHIP $\S$ 217(3) — EVIDENCE TO SUPPORT FINDING—PARTNERSHIP DEBT.

In an action against two defendants as partners, where the record disclosed an admitted partnership and the evidence supports a finding of partnership debt, and that the various undisputed items of the account were personally obtained by one of defendants and charged to the partnership account, the evidence is sufficient to support findings for plaintiff.

#### 3. FRAUDS, STATUTE OF $\S$ 14—PROMISE TO ANSWER FOR ANOTHER'S DEBT—PARTNERSHIP DEBT.

In an action upon an open account for goods sold to an alleged partnership, where one defendant denied the relation, alleged that the other defendant was primarily liable, and pleaded the statute of frauds, *held*, that, where the debt was a partnership one the statute of frauds had no application.

#### 4. PARTNERSHIP $\S$ 219(1)—ACTION FOR PARTNERSHIP DEBT—JUDGMENT FOR ONE PARTNER AS AGAINST ANOTHER.

Where judgment was entered against two partners, it must be presumed that the court found the debt to be a partnership one as al-

leged, and one partner could not obtain judgment over against another without going into a settlement of the partnership accounts, which would not be proper in such an action.

Appeal from Palo Pinto County Court; J. T. Ranspot, Judge.

Action by W. W. Fleming against W. H. Pennington and another. Judgment for plaintiff against both defendants, and that the defendant W. H. Pennington take nothing on his cross-action against defendant W. P. Alexander, and the defendant Pennington appeals. *Affirmed*.

Penix & Miller, of Mineral Wells, for appellant.

P. C. Sanders, of Strawn, for appellees.

HIGGINS, J. Fleming sued appellant Pennington, and appellee W. P. Alexander, upon an open account for goods, wares, and merchandise, sold and delivered, alleging that defendants were partners, and that the items in the account were sold to the partnership. Pennington, under oath, denied the partnership, and further pleaded the statute of frauds. He also asked judgment over against Alexander for any judgment which might be rendered against him upon the theory that the debt sued upon was the personal debt of Alexander, who was primarily liable therefor. The account was carried in the name of Alexander upon Fleming's books. The case was tried without a jury, and judgment rendered in favor of Fleming against Alexander and Pennington, and that Pennington take nothing by his cross-action against Alexander.

#### Opinion.

[1] 1. No findings of fact or conclusions of law having been filed by the court below, the judgment must be sustained if there is sufficient evidence to support the same upon any theory of the case.

[2] 2. There is no dispute as to the items of the account nor of the prices charged therefor. An examination of the record discloses an admitted partnership between Alexander and Pennington, and the evidence is sufficient to support a finding that the debt was a partnership debt. It is shown that various items of the account were personally obtained by Pennington, and that he had same charged to the account. Without detailing the evidence at length, we conclude that it was sufficient to support the finding indicated.

[3] 3. The debt being a partnership one, the statute of frauds has no application.

[4] 4. Since it must be presumed that the court found the debt to be a partnership one, Pennington could not obtain judgment over against Alexander without going into a settlement of the partnership accounts. This

was not attempted to be done, and it would not in this suit have been proper so to do.

Judgment over against Alexander was therefore properly refused. *Lockhart v. Lytle*, 47 Tex. 452; *O'Neill v. Brown*, 61 Tex. 34.

Upon the views expressed, the assignments are all without merit.

Affirmed.

### BARRY v. STATE. (No. 9169.)

(Court of Civil Appeals of Texas. Ft. Worth. April 26, 1919.)

#### 1. INJUNCTION $\S$ 118(1) — PETITION—SUFFICIENCY—VIOLATION OF SUNDAY LAWS.

In suit by the state to enjoin the operation of a moving picture show on Sunday as in violation of Penal Code, art. 302, a petition failing to allege facts showing that defendant was actually conducting such a show in violation of the statute held insufficient.

#### 2. INJUNCTION $\S$ 102—GROUNDS—VIOLATION OF CRIMINAL STATUTES.

An injunction will not issue to restrain the operation of a moving picture show on Sunday, where such operation constitutes a misdemeanor, punishable under Pen. Code 1911, art. 302, and no property rights of complainant are involved.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Proceedings for injunction by the state of Texas against A. J. Barry. From an order granting a temporary writ, defendant appeals. Order vacated, and writ annulled.

Earl Conner, of Eastland, for appellant.  
G. G. Hazel, of Eastland, for the State.

DUNKLIN, J. A. J. Barry has appealed from an order of the judge of the district court granting a temporary writ of injunction restraining him from operating a moving picture show on Sunday in Eastland County.

The writ was granted in chambers on an ex parte hearing of a petition presented by the county attorney and duly verified by him. The following is a copy of the petition:

"G. G. Hazel, county attorney of said county, represents unto your honor that an information has been presented in the county court of Eastland county, and is now pending therein, against A. J. Barry, the same being criminal cause No. 8417, on the docket of said court, wherein said A. J. Barry is charged with operating a moving

picture show on Sunday, February 23, A. D. 1919; that the said A. J. Barry will continue to carry on said business in violation of the law of the state, unless restrained by your honor; that your applicant is interested herein, he being a resident of said neighborhood, and county attorney of said county in which said business is being carried on by the said A. J. Barry. Wherefore your applicant prays that the said A. J. Barry be cited to appear and answer therein, and that your honor hear proof and make an order restraining the said A. J. Barry from carrying on said business on Sunday, or such other order in the premises as your honor may deem advisable."

[1] By article 302 of the Penal Code of the state it is made a misdemeanor punishable by fine for any one to conduct on Sunday a place for public amusement where an admission fee is charged. But, while the petition contains the allegation that an information has been filed against Barry as a basis for criminal prosecution for the offense mentioned, there is no allegation that he has in fact been engaged in operating a moving picture show on Sunday and charging admission fees thereto. The allegation to the effect that Barry "will continue to carry on said business in violation of the law of the state unless restrained by your honor" is a mere conclusion of the pleader without stating the facts which would constitute such a violation of the criminal statute. The absence of any allegation of fact showing that Barry was conducting a moving picture show on Sunday in violation of the criminal statute would, of itself, render the petition for injunction wholly insufficient as a basis for the writ that was issued, even though it could be said that an injunction will lie to restrain a violation of that criminal statute.

[2] Furthermore, in the absence of some special statutory authority therefor, it is a familiar rule that an injunction will not issue to restrain the commission of an act constituting a misdemeanor punishable under the criminal statutes where no property rights of the complainant are involved. *York v. Ysaiguirre*, 81 Tex. Civ. App. 26, 71 S. W. 563; *Manor Casino v. State*, 34 S. W. 769; 14 R. C. L. pp. 376 to 380.

For the reasons indicated, the order made by the district judge granting the temporary writ of injunction is vacated, and the writ issued thereunder annulled, and this judgment will be certified to the trial court for observance.

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

C. H. ROBINSON CO. et al. v. HUDGINS  
PRODUCE CO. (No. 225.)

(Supreme Court of Arkansas. May 19, 1919.)

## 1. SALES ⇨179(1) — EFFECT OF ACCEPTANCE.

Where a produce company bought a carload of apples from defendant, not knowing that defendant was acting only as a broker until the car arrived, and accepted the shipment only after being notified by an agent of the United States government that it must receive the apples in order to conserve food during the war with Germany, such acceptance did not entitle the owner to the proceeds of a draft paid by the produce company; the apples being rotten and of not sufficient value to pay the freight. .

## 2. PRINCIPAL AND AGENT ⇨143(5) — UNDISCLOSED PRINCIPAL.

Where an undisclosed principal sues on a contract made by his agent in the agent's name with the defendant, who had no knowledge of the agency, the suit is subject to any defense which the defendant had against agent before notice of the principal's rights.

## 3. EVIDENCE ⇨542 — EXPERT WITNESS — QUALIFICATION.

A witness, who testified that he had handled apples for over 27 years, qualified as an expert, and could give his opinion as to when certain apples had been frozen, and that it takes the decay in apples some time to show after they have been frozen.

## 4. SALES ⇨420 — DAMAGES — JURY QUESTION.

In an action by a buyer of apples for damages, whether or not the apples were frozen before they were loaded into the car for shipment a month before they were inspected by the buyer held for the jury.

## 5. SALES ⇨418(4) — DAMAGES — MEASURE OF DAMAGES.

In an action by a consignee of apples, which consignee was required to take under orders of the government, the measure of plaintiff's damages was not the difference between the contract and the market price of the apples at the time they were delivered, where apples were not merchantable and did not have a market price; the correct measure of damages being the difference between the contract price and the amount they brought when sold for the best price obtainable.

## 6. APPEAL AND ERROR ⇨966(1) — CONTINUANCE ⇨7 — DISCRETION OF COURT.

The granting or refusing of a continuance is within the sound legal discretion of the trial court, and will not be reviewed on appeal, save for an abuse of discretion to the prejudice of the party appealing.

## 7. CONTINUANCE ⇨35 — ABUSE OF DISCRETION.

Where a case had been continued for one term of the court and the witnesses embraced in the motion all lived beyond the jurisdiction of the court, so that it would have been necessary to take their depositions, and the motion for a continuance was read as testimony to the

jury, and the testimony of the witnesses appeared in it as fully as it could have been taken in depositions, the court did not abuse its discretion in refusing to grant a continuance.

## 8. CONTINUANCE ⇨12 — ABSENCE OF COUNSEL.

Court did not abuse its discretion in refusing to grant a motion for continuance, on account of sickness of chief counsel at the time it was necessary to prepare the case for trial, where the case was thoroughly prepared for trial by other counsel.

## 9. TRIAL ⇨260(1) — INSTRUCTIONS.

It was not error to refuse requested instructions covered by the given instruction.

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Suit by the Hudgins Produce Company against the C. H. Robinson Company, in which the Wenatchee Produce Company intervened. Judgment for plaintiff, and defendant and the intervener appeal. Affirmed.

This was a suit in attachment brought by the Hudgins Produce Company, a domestic corporation, against C. H. Robinson Company, a nonresident corporation, to recover the sum of \$526.40, damages alleged to have been occasioned by the spoiled condition of a car of apples, which the plaintiff had purchased from the defendant.

The defendant C. H. Robinson Company filed an answer denying the material allegations of the complaint, and alleged that the plaintiff, Hudgins Produce Company, had purchased the apples in question through it as a broker from the Wenatchee Produce Company, a corporation domiciled at Wenatchee, Wash.

The Wenatchee Produce Company intervened, claiming the proceeds of the car of apples except the sum of \$30 brokerage due the C. H. Robinson Company.

The facts are as follows: The C. H. Robinson Company is a nonresident corporation doing a brokerage business with a branch office at Kansas City, Mo. The Wenatchee Produce Company is a corporation domiciled at Wenatchee, Wash., and is engaged in the business of selling apples by carload lots. The Hudgins Produce Company is a domestic corporation engaged in selling apples and other produce at Texarkana, Ark. On February 21, 1918, C. H. Robinson Company from its office at Kansas City, Mo., wired the Hudgins Produce Company at Texarkana, Ark., its offer of a car of apples. The Hudgins Produce Company wired its acceptance of the offer. On the 13th day of February, 1918, the Wenatchee Produce Company loaded a car of apples at Wenatchee, Wash., and consigned same to itself at Kansas City, Mo. On the 23d day of February, 1918, the C. H. Robinson Company, by an agreement with the Wenatchee Produce Company, changed

the destination of this car of apples from Kansas City, Mo., to Texarkana, Ark., in fulfillment of its contract with the Hudgins Produce Company. An inspection of the car of apples was allowed. On the same day, the C. H. Robinson Company wrote from its office at Kansas City, Mo., to the Hudgins Produce Company at Texarkana, Ark., notifying the latter that it had diverted the car of apples to Texarkana, Ark., and had drawn a draft on the Hudgins Produce Company for \$528.40, the price of the car of apples. The car of apples was consigned to the shipper's order at Texarkana, Ark., with directions to notify the Hudgins Produce Company. The draft with the bill of lading attached was sent to the latter company. The car of apples arrived at Texarkana on the 11th day of March, 1918. An inspection was made by the Hudgins Produce Company, and the apples were found to be in bad condition.

Several witnesses testified that they examined the apples, and that most of them were rotten, on the inside; that they were not in a merchantable condition; that most of them appeared sound on the outside, but were rotten on the inside, and were not fit for sale in the usual way.

The Hudgins Produce Company first refused to receive them on account of their damaged condition. They were notified by the food administrator of the county that, under the rules and regulations of the United States government during the war with Germany, they would have to accept the apples in order to conserve the food value of the shipment. The Hudgins Produce Company then paid the freight and expense bill, amounting to \$408.13, and also paid the draft for the purchase money drawn by the C. H. Robinson Company. The draft for the purchase price of the apples was paid on March 16, 1918. The Hudgins Produce Company bought the apples from the C. H. Robinson Company, and did not know that the Wenatchee Produce Company had any claim to them until after the apples had arrived at Texarkana.

Evidence was adduced by the Hudgins Produce Company tending to show that the damaged condition of the apples was due to the fact that they had been frozen either before they were loaded into the car or after they were loaded into the car, but before the car of apples was diverted to Texarkana, Ark. The apples were loaded on board the car on February 13, 1918, and the car was diverted to Texarkana, Ark., on February 23, 1918. During this interval the weather was extremely cold. The Hudgins Produce Company sold the car of apples to the best advantage possible, and the amount received lacked \$80 of paying the freight charges.

On the part of the defendant and intervenor, it was shown that the apples were in good condition when loaded in the car at Wenatchee, Wash., and were also in good con-

dition when the car was diverted from Kansas City, Mo., to Texarkana, Ark. Other facts will be stated in the opinion.

The jury returned a verdict for the plaintiff, Hudgins Produce Company, against the defendant C. H. Robinson Company, in the sum of \$528.40, and found against the interplea of the Wenatchee Produce Company.

The case is here on appeal.

Will Steel and H. M. Barney, both of Texarkana, for appellants.

Webber & Webber and W. H. Arnold, all of Texarkana, for appellee.

HART, J. (after stating the facts as above).

[1] The first assignment of error is that the judgment should be reversed because the court gave instruction No. 1, which is as follows:

"If you find from the evidence that Wenatchee Produce Company loaded the car of apples in controversy at Cashmere, Wash., and took bill of lading subject to their own order, and that the car was shipped February 13, 1918, to Kansas City, and if you further find that Charles H. Robinson Company accepted an order from Hudgins Produce Company for a car of apples on February 23d, and that under some agreement between Wenatchee Produce Company and said Robinson Company the said car was diverted from its route by the order of Chas. H. Robinson & Co. and shipped it to said Hudgins Produce Company and sold it to them, and that said Hudgins Produce Company took and paid for said car, and that said shippers Wenatchee Produce Company intended that said Robinson should take and sell the same, then you are instructed that said Wenatchee Produce Company cannot recover on their interplea."

There was no error in giving this instruction. The undisputed evidence shows that the Hudgins Produce Company bought the car of apples from the C. H. Robinson Company, and did not know that the Wenatchee Produce Company had any claim to the apples until after the car had arrived at Texarkana and the plaintiff had been notified by an agent of the United States government that it must receive the car of apples in order to conserve food values during the war with Germany.

[2] The present suit was a suit in attachment by the Hudgins Produce Company against C. H. Robinson Company, but the Wenatchee Produce Company was allowed to intervene and claim the proceeds of the car of apples. This, in effect, amounted to an institution of a suit by the Wenatchee Produce Company against the Hudgins Produce Company for the price of a car of apples. The law is that where an undisclosed principal sues on a contract made by his agent in the latter's own name with the defendant, who had no knowledge of the agency, but supposed that the agent dealt for himself, the suit is subject to any defense by the

defendant against the agent before he had notice of the principal's rights. *Frazier v. Poindexter*, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33, 8 Ann. Cas. 552; *Quinn v. Sewell*, 50 Ark. 380, 8 S. W. 132; *Beatrice Creamery Co. v. Garner*, 119 Ark. 558, 179 S. W. 160. The doctrine rests upon the ground that the principal who has permitted an agent to deal with his goods as his own must not only take the contract as the agent made it, but is virtually estopped from alleging that the agent is not the real plaintiff in his (the principal's) suit.

[3,4] It is next insisted that the court erred in giving instruction No. 3, which reads as follows:

"If you find from the evidence that the apples were in damaged condition when received by Hudgins Produce Company, and that such damaged condition existed before the apples were loaded in the car for shipment, or that they were in said condition before the order for the car was accepted by Chas. H. Robinson Company and the car diverted for shipment to Hudgins Produce Company, then you are instructed that plaintiff is entitled to recover from said Chas. H. Robinson Company the damages sustained, if any, and not against the railway company which issued the bill of lading to Wenatchee Produce Company; and you are further instructed that plaintiff had the right to take said car without waiving its claim for damages against said defendant, should you find that the apples or a part of them were not merchantable or reasonably fit for the purpose for which they were purchased."

It is claimed that it was error to give this instruction because it submits to the jury the question as to whether or not the car of apples was in a damaged condition before the apples were loaded in the car for shipment. It is insisted that the undisputed evidence shows that the apples were in good condition when they were loaded in the car for shipment.

It is true the evidence for the defendant and intervener shows that when the car was loaded it was inspected and the apples were found to be in good condition. The jury might have found, however, from the evidence introduced by the plaintiff, that the apples were in a damaged condition when loaded in the car for shipment. On this point A. F. Elder testified that he was familiar with the handling of shipments of apples by wholesale in the winter time and with the storage of apples, gained by an experience of 27 years. He examined the car of apples in question after it arrived at Texarkana, and found upon inspection that the apples showed decay. He found that the apples in the center of the car showed more decay than did those on the sides of the car. He said that this indicated that the apples were loaded in the car in that condition, and that they had been exposed to extreme heat, heated in piles, or had been

frozen before packing; that while the apples from the peeling appeared perfectly good, when you opened them up they were bad inside. His opinion was that the decay had set up in the apples three or four weeks before he examined them; that it takes the decay in apples some time to show after they have been frozen. In response to a question on cross-examination he stated that it would be hard to determine the exact time it would take; that it would take real expert knowledge beyond his knowledge to tell that. Because of this answer counsel insist that the witness was not an expert, and that his testimony should not be taken to contradict that of the defendants. We do not agree with counsel in the contention.

As we have already pointed out, he had gained his knowledge by an experience in handling apples extending over 27 years. He testified in detail about the matter, and from his testimony the court might have found that the apples had been frozen before they were loaded into the car. Although this was a month prior to the time that he had examined the apples, the jury might have found that, although frozen before they had been loaded, the apples did not show their decay at that time. From the testimony of other witnesses the jury might have found that the apples were frozen on their way south after they had been loaded into the car. It was shown that the weather was extremely cold for ten days after their shipment. It was about one month from the time they were shipped until they arrived at Texarkana. Therefore we do not think that the court erred in giving this instruction.

It is next insisted that the court erred in giving instruction No. 4, which reads as follows:

"If you find for the plaintiff, the measure of damages will be the amount you find from the evidence that plaintiff paid the railway company for freight on delivery of the apples and the amount paid on the draft drawn by Robinson & Co., less whatever amount you find from the evidence that plaintiff realized in the sale of the apples. Your verdict herein should not exceed the amount sued for, \$523.40, with interest from March 16, 1918, thereon at the rate of 6 per cent. per annum."

[5] It is contended that the court should have told the jury that the measure of the plaintiff's damages was the difference between the contract price and the market price of the apples at the time they were delivered at Texarkana. Counsel would have been correct in this contention, provided there had been a market price for them in their condition when received there. The undisputed testimony shows that nearly all of the whole car of apples was in a damaged condition, and that it was necessary to sell them at once. All the witnesses said that they were not merchantable apples. The

plaintiff sold them for the best price obtainable, and the instruction was correct under the evidence in this case. *Merideth v. Matthews*, 117 Ark. 442, 174 S. W. 1192.

[6] It is also insisted that the court erred in not granting the motion for a continuance. It is well settled in this state that the granting or refusing a continuance is a matter in the sound legal discretion of the court below, and will not be reviewed on appeal save for an abuse of discretion to the prejudice of the party appealing.

[7] Tested by this well-established rule, there was no error in refusing to grant the motion for a continuance. The case had been continued for one term of the court, and the witnesses embraced in the motion all lived beyond the jurisdiction of the court, so that it would have been necessary to take their depositions. The motion for a continuance was read as testimony to the jury, and the testimony of the witnesses appeared in it as fully as it could have been taken in depositions.

[8, 9] It is also insisted that the motion should have been granted because the chief counsel for the defendant and intervener was sick at the time it was necessary to prepare the case for trial, and the local counsel was not familiar enough with the facts to properly prepare the case for trial. The record affirmatively shows that the case was as thoroughly prepared for trial as could have been done by any other attorneys.

Therefore there was no error in refusing to grant the motion for a continuance. Counsel for the defendant and intervener requested the court to give many instructions, and now assign as error the action of the court in refusing to give them. We do not deem it necessary to discuss them separately. The court fully and fairly submitted the disputed issues of fact in the case to the jury, and it has been uniformly held that it is not necessary to repeat instructions to the jury.

We find no prejudicial error in the record, and the judgment will be affirmed.

#### DONIPHAN LUMBER CO. v. CLEBURNE COUNTY. (No. 198.)

(Supreme Court of Arkansas. April 28, 1919.)

##### 1. TAXATION $\S$ 40(1)—UNIFORMITY.

There must be uniformity in laying taxes upon taxable property, and an assessor or assessment board cannot discriminate against one tract of land in favor of all other property of the same kind in the county.

##### 2. APPEAL AND ERROR $\S$ 1010(1)—QUESTIONS OF FACT—REVIEW.

On appeal in a proceeding under Acts 1917, p. 1243,  $\S$  8, to reduce an assessment and

valuation of land, Supreme Court cannot reverse unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous.

##### 3. TAXATION $\S$ 499—PROCEEDING TO REDUCE ASSESSMENT—BURDEN OF PROOF.

In a proceeding under Acts 1917, p. 1243,  $\S$  8, to reduce an assessment and valuation of several tracts of land as discriminatory, the burden is on the petitioner to show by proof that the valuations placed upon the several tracts were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated.

##### 4. TAXATION $\S$ 499—PROCEEDING TO REDUCE ASSESSMENT—COST.

In proceeding under Acts 1917, p. 1243,  $\S$  8, to reduce assessment and valuation of land, the costs are to be taxed against the petitioner, and not the county, although the assessment and valuation is found discriminatory and is reduced, Kirby's Dig.  $\S$  965, not being applicable to such proceeding, nor to any other special statutory proceedings; no authority existing in any such proceeding for taxing costs against the county, unless imposed by the act.

Appeal from Circuit Court, Cleburne County; Jno. I. Worthington, Judge.

Petition by the Doniphan Lumber Company to reduce assessment and valuation of its lands in Cleburne County. From a judgment granting only partial relief, the petitioner appeals. Affirmed.

Brundidge & Neely, of Searcy, for appellant.

Appellee pro se.

HUMPHREYS, J. On the 1st day of October, 1917, appellant filed a petition in the Cleburne county court, which was the next succeeding term of court after the assessment and valuation of its property for purposes of taxation, under section 8, Act No. 234, Acts of 1917, seeking to reduce its assessment by the assessor and boards of assessment to a fair valuation in the following townships in said county: Center Post, Morgan, Francis, Clayton, Saline, Mountain, Pine, and River Bend—particularly describing each tract of land and the assessed value thereof. It was alleged in the petition that a good portion of the lands in question were lands from which the timber had been removed, or what is known as "cut-over" lands, and that they were assessed generally at the value of improved lands in cultivation in the same vicinity and community, and, in some instances, assessed at a greater amount than such lands. On November 7th, which was a day of the regular October, 1917, term of said county court, the matter was submitted to the county court upon the petition and the testimony of the various members of the assessment boards



of the townships mentioned in petitioner's petition, together with the evidence of B. R. Smith, county tax assessor, upon which the court sustained the assessment made by said boards of assessment in all the townships set forth in appellant's petition, except Clayton township, in which township the valuation was reduced to the valuation as originally assessed by appellant. From the judgment sustaining the assessments of the several boards appellant appealed to the Cleburne circuit court by filing an affidavit and executing a bond conditioned that it would prosecute the appeal and save the county all costs on account of the appeal. In the circuit court appellant filed petition for injunction, or restraining order, to prevent the tax collector from collecting the taxes upon the assessment returned by the several boards. The collector was temporarily restrained under injunction bond given by appellant.

At the September, 1918, term of the circuit court of said county the cause was heard de novo by the court upon the petition and the several witnesses introduced by appellant and appellee. No finding was made, or judgment rendered, pertaining to the assessment of the lands in Center Post township. The assessment of the lands returned by the several boards in Morgan, Saline, and River Bend townships were affirmed. The court reduced the assessment of appellant's land in Francis township to \$2.60 per acre, in Mountain township to \$2.90 per acre, and in Pine township to \$3.90 per acre; also rendered judgment against appellant for the costs of the proceeding. From the findings and judgment aforesaid of the circuit court an appeal has been duly prosecuted to this court.

[1-3] The contention of appellant is that its property, in the several townships set out in the petition, was assessed by the several boards of assessment at an unfair valuation in comparison with lands of the same kind and character similarly situated, belonging to other parties. It is provided by the Constitution of the state of Arkansas that—

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state." Article 16, § 5.

Under the Constitution, statutes, and adjudications of this state, there must be uniformity in laying taxes upon taxable property. The assessor or assessment boards cannot discriminate against one tract of land in favor of all other property of the same kind in the county. *Drew County Timber Co. v. Board of Equalization of Cleveland County*, 124 Ark. 569, 187 S. W. 942, and cases there cited in support of the rule thus announced. Unless the undisputed facts in

the case establish that the findings and judgment of the circuit court are erroneous, this court cannot reverse on appeal. The case falls within the general rule that the findings of the trial court will not be disturbed by this court on appeal where the findings are sustained by sufficient legal evidence. *St. Louis & San Francisco R. Co. v. Ft. Smith & Van Buren Bridge Dist.*, 113 Ark. 498, 168 S. W. 1066; *Mo. Pac. R. Co. v. Conway County Bridge Dist.*, 134 Ark. 292, 204 S. W. 630; *C., R. I. & P. R. Co. v. Road Imp. Dist. No. 1*, 209 S. W. 725. Under the rule thus announced, it is only necessary in the instant case for us to examine the record sufficiently to ascertain whether the findings and judgment of the trial court are sustained by sufficient legal evidence. It goes without saying that it was incumbent upon appellant, in attacking the assessments of the several boards, to show by proof that the valuations placed by them upon the several tracts of land were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated. Appellant introduced no proof at all as to the values of its lands in Center Post township and no evidence showing that the valuation placed upon its lands in Morgan, Saline, and River Bend townships by the boards of assessment were discriminatory as compared with lands belonging to others, of the same kind and character similarly situated. For the reason that appellant wholly and entirely failed to sustain the allegation in its complaint that its lands in Center Post, Morgan, Saline, and River Bend townships were inequitably assessed, it follows that the finding and judgment of the county court pertaining to the assessed value of the lands in Center Post township was final, and the finding and judgment of the circuit court sustaining the assessed values of said lands in Morgan, Saline, and River Bend townships must be affirmed. The evidence, which is legally sufficient to sustain the judgment of the court in reducing the assessment of appellant's lands in Francis township to \$2.60 per acre, in Mountain township to \$2.90 per acre, and in Pine township to \$3.90 per acre, is that of John W. Gunn. He stated, in substance, that he selected from the assessment lists 17,275 acres in Mountain township, 13,439 acres in Francis township, and 9,613 acres in Pine township belonging to other parties, both residents and nonresidents, of about the same value as the company's lands, and found that they had been assessed by the several boards at an average of \$2.90 per acre in Mountain township, \$2.59 per acre in Francis township, and \$3.91 per acre in Pine township; that, in making this average, he had not included bottom lands, because the company owned no lands of that character; that, in selecting the lands of

other parties around over the townships for purposes of comparison, he did so with a view to getting an average assessment valuation of lands similar to the lands owned by appellant. The assessments, as reduced by the court, fairly and equitably equalized the assessed valuation of the company's lands in Francis, Mountain, and Pine townships with lands of about the same kind, character, and value belonging to other parties in said townships.

[4] It is also insisted by appellant that the judgment should be reversed because the court adjudged the costs of the proceedings against appellant. In support of its contention in this regard appellant has cited the case of *Jefferson County v. Philpot*, 66 Ark. 243, 50 S. W. 453. That suit was for the enforcement of a claim against the county and in a case in which it was proper to render a judgment against the county. The court properly ruled in that case that the costs followed the judgment. *Kirby's Digest*, § 965. This section of *Kirby's Digest*, however, is not applicable to special statutory proceedings. *Fancher v. Kenner*, 110 Ark. 117, 161 S. W. 166. The proceeding in the instant case is a special proceeding authorized by section 8 of Act 234, Acts 1917. That act, in so far as it defines the special proceeding, is as follows:

"Any person who shall be aggrieved by the action of the assessor and the boards of assessment and valuation in valuing his property may appeal to the county court, which shall have the same power now exercised by law to correct any error or injustice that may be done any person by filing his petition in said court," etc.

No authority is found in the act for the rendition of a judgment against the county. Nor does the act itself impose any liability upon the county for costs. No authority existed for taxing costs against the county unless imposed by the act. *Chicot County v. Matthews, Sheriff*, 120 Ark. 506, 179 S. W. 1002.

No error appearing, the judgment is affirmed.

#### MILLER et al. v. ILLINOIS BANKERS' LIFE ASS'N. (No. 195.)

(Supreme Court of Arkansas. April 28, 1919.)

#### 1. INSURANCE §438 — LIFE INSURANCE — DEATH IN MILITARY SERVICE—VALIDITY OF EXEMPTION PROVISIONS.

Provision of a life insurance policy exempting the insurer from liability for death in the military or naval service in time of war, or merely while in the service of the army and navy of any government, held not void as against public policy.

#### 2. INSURANCE §438 — LIFE INSURANCE — DEATH IN MILITARY SERVICE—"SERVICE IN ARMY OR NAVY."

The death of insured from pneumonia while at a camp in the United States, in the military service of the United States, during the war with Germany, was "in the service in the army or navy of the government in time of war," within his life policy, exempting the insurer from liability for such death.

#### 3. INSURANCE §392(1) — LIFE INSURANCE — EXEMPTION PROVISION — WAIVER BY ACCEPTANCE OF PREMIUMS.

A life insurer by policy exempting it from liability for death in the military service in time of war, by accepting premiums with knowledge that insured was serving in the army, did not waive the exemption provision of the policy, which did not call for a forfeiture, such as would be waived by the acceptance of premiums.

#### 4. INSURANCE §129—LIFE INSURANCE—APPARENT AUTHORITY OF AGENT—INTERPRETATION OF POLICY.

The county agent of a life insurer, without authority to issue policies or to alter or interpret their terms, had no apparent authority to bind the insurer by a statement as to his interpretation of a clause of the policy exempting the insurer from liability for death in military service in time of war.

Appeal from Circuit Court, Conway County; A. B. Priddy, Judge.

Action by Columbus W. Miller and others against the Illinois Bankers' Life Association. From judgment for defendant, plaintiffs appeal. Affirmed.

W. P. Strait, of Morrilton, for appellants.  
Webber & Webber, of Texarkana, for appellee.

McCULLOCH, C. J. Appellant instituted this action against appellee to recover on a life insurance policy issued by the latter on March 6, 1915, to Arl E. Miller, who died at Camp Beauregard, La., on December 28, 1917, while in the military service of our government. Death of the insured resulted from pneumonia. The facts of the case are undisputed, and the trial court decided that there was no liability under the policy, except to the extent of the small sum paid to the company by the insured as premiums.

The policy contained the following clause:

"It is expressly provided that death while in the service in the army or navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon."

There is another clause in the policy which reads as follows:

"This policy shall be incontestable two years from its date except for nonpayment of pre-

mium calls, or death while engaged in or caused by violation of the law or while in the service of the army or navy of any government, which is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the association thereon."

The application contained a clause similar to the one last quoted. The clauses quoted above are not entirely consistent with each other, in that the one first quoted provides for an exemption from liability on account of death of the assured while in the army or navy service of the government "in time of war," and the other two clauses contain much broader provisions, exempting the company from liability for death while in the army or navy of the government without restriction as to it occurring during time of war. The death of the assured occurred while he was in the military service of this government during the period of the war with the Central Powers of Europe, and it is unimportant, therefore, to attempt to reconcile the apparently conflicting clauses, or to determine which of them controls.

[1] It is suggested by learned counsel for appellant that the above-mentioned provisions exempting the company from liability under the circumstances named ought to be held void for the reason that it is against public policy to permit such contracts of insurance to be made in that the tendency is to prevent voluntary enlistments in the army or navy of the government, or to induce the holder of such a policy to evade or resist involuntary enlistment under the draft laws. We do not think the argument is well founded. An insurance company has the right to select the particular risks it is willing to assume, and there is no public policy against a contract of this sort exempting the insurance company, in advance, from liability for death of the insured while in the military or naval service of the government. The stipulation does not provide for a forfeiture of the policy, but merely for an exemption from liability under certain circumstances and conditions. It holds out no inducements to the assured to refrain from enlistment in his country's service, and does not constitute, in any sense, an agreement not to enlist or to evade the draft law. No authorities are cited by counsel in support of the contention, and we are unable to find any cases in which the question has been raised. The subject of exemptions from liability on insurance policies in case of service in the army or navy is discussed by Mr. Joyce in his work on the Law of Insurance (volume 4, § 2237), but there is no suggestion there by the author of any question of doubt about the validity of such a provision. There is likewise a discussion on the subject in Cooley's Briefs on the Law of Insurance (volume 3, p. 227, et seq.), but nothing is said by that author about the possibility of those pro-

visions being held to be void. We find two cases on the subject, in one of which the insurance company was held not to be liable under such an exemption (*La Rue v. Insurance Co.*, 68 Kan. 539, 75 Pac. 494), and in the other (*Welts v. Conn. Mutual Life Ins. Co.*, 48 N. Y. 34, 8 Am. Rep. 518) the company was held liable for the reason that the death of the insured did not fall within the terms of the exemption as interpreted by the court rendering the decision. In each of the cases, the assured was in the services of the government during the pendency of war; but in one of the cases it was decided the assured was not in the military service, and that the case was for that reason not within the exemption.

[2] The trial court was therefore correct in the present case in holding that the death of the insured fell within the exemption clause set forth in the policy.

[3, 4] The principal contention of counsel for appellant is that there was a waiver of the exemption provision of the policy. In support of that contention on the trial below appellant introduced as a witness, Mr. Scroggins, who testified that he was the agent of the insurance company at Morrliton, where Arl E. Miller resided, and that he stated to Miller, in response to an inquiry by the latter, after he had enlisted in the army, as to whether or not, under the terms of the policy, the full amount would be paid in the event of death while in that service, that he (witness) construed the policy to mean that there was only an exemption in case of death of the assured in battle, and that the exemption clause did not apply to death from natural causes. The exact statement of the witness was as follows:

"He asked me if the policy would be good in event of his death in the service, and I told him that it was my construction of the war clause in this policy, if he died of natural causes, it would be paid, but if he died by violence, while in battle, it would not. I also called his attention to the Fulkerson claim as my conclusion of the matter. And he says, 'Well, if it won't be good, I don't want to pay any more, but, if it will, I want to continue my policy;' and I told him it would be good in event of his death by natural causes. So one year's premium was paid to me a few days later, almost on the same spot of ground. \* \* \* Mr. Ben Fulkerson had a policy. He volunteered in the service at Jefferson Barracks, Mo., in September, 1916, and this country was not at war at that time, and he died of contagious disease in the army, and the company paid his claim."

The witness testified that he was the county agent for the company, and that his duties were to solicit insurance, forward applications to the home office of the company, and deliver policies sent to him from the home office for that purpose, and to collect the initial premiums on delivery of a policy. He also testified that he sometimes collected premiums on policies already delivered, but that

this was generally for the convenience of the parties, though the company paid him a commission on all such collections.

It will be observed that the provision of the policy now under consideration is not for a forfeiture, but is merely an exemption from liability on account of death occurring under certain circumstances. It is not a case where acceptance of premiums with knowledge of the forfeiture constitutes recognition of the continued valid existence of the policy; nor does the case fall within the principle that a forfeiture is waived, where an insurance company, when it enters into a contract, has knowledge through any of its authorized agents of facts which would work a forfeiture. *Insurance Co. v. Goyne*, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373; *Lord v. Des Moines Fire Ins. Co.*, 99 Ark. 476, 138 S. W. 1008; *Peebles v. Eminent Household of Columbian Woodmen*, 111 Ark. 435, 164 S. W. 296.

There was no forfeiture provided for at all, but the company had, as before stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the government, notwithstanding the exemption of the company from liability for death occurring during the period of that service, and the mere acceptance by the company of the premium with knowledge of the fact that the assured was in the military service of the government, did not constitute a waiver of the stipulation in regard to exemption. In other words, when the assured paid his premium, his policy was kept in force, and would have remained in force, if the assured had survived the period of his service in the army.

Conceding, therefore, that the knowledge of Scroggins, the agent of the company, was the knowledge of the company itself, there was no waiver on account of acceptance of the premium with knowledge of the fact that the assured was serving in the army. The statement of Mr. Scroggins to the assured on the occasion mentioned by Scroggins as to his interpretation of the exemption clause of the policy was not binding on the company, for

it was not done within the apparent scope of the agent's authority. There is not the slightest evidence that the statement was made for the fraudulent purpose of inducing Miller to pay the premium or that it was not made in good faith in response to Miller's inquiry. It was only an expression, given in obvious good faith of the personal opinion of the witness as to the proper construction of the language of the policy. Scroggins had no authority to issue policies, or to alter or interpret the terms thereof. The policy had already been issued and delivered more than two years before this conversation occurred and the agent had no duty to perform with respect to the matter, and it was entirely beyond the apparent scope of his authority to advise the assured as to the legal effect of the various clauses in the policy. *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113.

Counsel rely especially on the case of *Standard Life & Accident Insurance Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112, where the court held that knowledge on the part of the company at the time of the issuance of an accident policy that certain risks necessarily pertained to the occupation and employment of the assured constituted a waiver of a provision in the policy exempting the company from such liability. We think that decision has no application to the facts of the present case, for in that case the policy would have had no force at all, unless it embraced the risks mentioned in the exemption clause, and the knowledge of the company of the existence of facts which brought the circumstances of the assured within the exemption clause necessarily operated as a waiver, by treating the policy as being in force notwithstanding the facts which would render it inoperative. Here we have a case, as before stated, where the policy remains in force, notwithstanding the temporary existence of conditions—i. e., the service by the insured in the army—which exempted the company from liability, and the mere acceptance of premiums with knowledge of that service did not constitute a waiver of the exemption.

Our conclusion is that the circuit court was correct in its decision, and the judgment is therefore affirmed.

WEIL v. CHICAGO PNEUMATIC TOOL CO.  
(No. 227.)

(Supreme Court of Arkansas. May 19, 1919.)

1. CONTRACTS  $\Leftrightarrow$  10(4) — FOR SALE OF MANUFACTURED PRODUCTS—MUTUALITY.

Contract under which dealer was given exclusive right to sell manufactured products of manufacturer of motor trucks held lacking in mutuality in view of provision that dealer could not recover for loss of profits due to company's failure to fill orders and unenforceable in so far as it was executory, so that dealer could not recover loss of profits due to company's failure to deliver.

2. SALES  $\Leftrightarrow$  54—DRAWN ON BLANKS OF COMPANY—CONSTRUED AGAINST COMPANY.

Contract for sale of manufactured products of a company by a local dealer, which contract was drawn upon blank forms of the company, should be construed most strongly against the company.

McCulloch, C. J., dissenting in part.

Appeal from Circuit Court, Jefferson County; W. B. Sorrells, Judge.

Suit by the Chicago Pneumatic Tool Company against S. C. Weil, in which defendant filed a cross-complaint. From an adverse judgment, defendant appeals. Affirmed.

Irving Reinberger and Bridges, Wooldridge & Wooldridge, all of Pine Bluff, for appellant. Mehaffy, Reid, Donham & Mehaffy, of Little Rock, for appellee.

SMITH, J. The parties to this litigation entered into a contract which we copy in full, and for convenient reference we have numbered its paragraphs consecutively from 1 to 31. We set it out notwithstanding its extreme length because of the earnest insistence that all of its paragraphs must be read and construed together in order to arrive at the intent of the parties:

Dealer's Agreement between the Chicago Pneumatic Tool Company and S. C. Weil,  
Pine Bluff, Arkansas.

Expires May 31, 1918.

This agreement, made and entered into this first day of June, A. D. 1917, by and between the Chicago Pneumatic Tool Company, a New Jersey corporation, party of the first part (hereinafter called the Company) and S. C. Weil, of Pine Bluff, Ark., party of the second part (hereinafter called the Dealer), witnesseth:

That whereas, the Company is engaged in the manufacture and sale of Little Giant motor trucks, together with spare parts and appurtenances used in connection therewith, and is willing to sell said motor trucks to said Dealer exclusively in the territory hereinafter described:

Now, therefore, in consideration of the mutual promises of the parties hereto, it is agreed as follows:

The Company agrees:

1. To sell to the Dealer upon the terms and conditions hereinafter set forth, and during the period commencing June 1, 1917, and ending May 31, 1918, any number of its said motor trucks and parts and appurtenances used in connection therewith, which the Dealer may desire to purchase for resale by him in the following described territory: Entire state of Arkansas.

2. The Company will not, during said above-mentioned period, sell within above-described territory any of its said cars or parts and appurtenances used in connection therewith, to any person, firm, or corporation other than the said dealer.

3. To ship any and all cars ordered from it by the Dealer within thirty (30) days from the receipt by it of orders for the same: Provided, however, the Company shall not be liable in any way for failure or delay in making shipments caused by strikes, fires, or other causes beyond its control, or delays occurring in the manufacture of its product or in the manufacture and delivery of parts thereof, and the Company shall not be liable for any loss of profits or damage for its failure to deliver goods ordered, or for the cancellation of this agreement.

4. The Company will refer to said Dealer any and all inquiries for relating to said motor truck which it may receive from any person, firm, or corporation residing or being in said above-described territory.

5. The Company shall furnish the Dealer with catalogues and other advertising matter prepared by it and relating to said cars and the parts and appurtenances; the amount thereof, however, to be determined by the Company.

The Dealer hereby agrees:

6. To purchase from the Company immediately upon the execution of this agreement at least \_\_\_\_\_ of said motor trucks to be used by him in said above-mentioned territory for the purpose of demonstration and show exclusively.

7. That he will maintain a repository and repair station for the satisfactory display, care, and repair of said motor trucks; respond promptly to all inquiries respecting the purchase of said motor trucks; keep the Company fully informed as to the number of inquiries for, and sales of motor trucks within said territory, and any other matters affecting the interests of the Company in connection with this agreement; sell all motor trucks covered by this agreement, and all their parts and attachments in harmony with the policy of the Company, to maintain the reputation of its products.

8. That he will appoint a subdealer or establish a branch for the sale and delivery of Little Giant motor trucks in every city or town within his territory that may at any time be designated by the Company, in order that the Company's products shall be adequately represented therein; that, if the Dealer fails to secure a satisfactory representative for himself in any such city or town as above provided, the Company shall be at liberty to appoint any other dealer in such unoccupied territory, in which case Dealer shall not be entitled to commission or credit for the volume of business handled by such additional dealer.

9. That he will be responsible to the Company for all acts of subdealers appointed by him, and that any acts of his subdealers which, if committed by the Dealer, would be in violation of the terms hereof, shall be considered as acts of the Dealer.

10. That in order to secure adequate and uniform service to the users of Little Giant motor trucks, all agreements with subdealers shall be made on forms to be furnished by the Company, containing such of the provisions of this agreement as are necessary for the purpose, and such subdealer's agreement shall not be put into effect until approved by the Company in writing in like manner as this agreement. All such agreements shall be made in triplicate and one copy filed with the Company immediately upon the execution of same.

11. To purchase from the Company all such motor accessories and repair parts as the Company sells and the Dealer supplies for use on Little Giant motor trucks.

12. That accounts for parts shall be due and payable on the 15th of each month for all parts shipped during the preceding month.

13. That he will not alter any motor truck sold by the Company hereunder; that he will do nothing that will in any way infringe, impeach or lessen the value of the patents or trade marks under which Little Giant motor trucks or the parts thereof are made or sold.

14. That in respect to sales of Little Giant motor trucks for use outside his territory, he will abide by the Company's policy, and, further, that he will refer to the Company, whose decision shall be final, all controversies that may arise between him and another dealer with regard to sales of motor trucks outside of said territory, or claims relating thereof; that he will pay all claims decided by the Company to be due from him within ten (10) days after receipt of notice of the Company's decision. However, nothing herein contained shall be construed as a liability on the part of the Company to any dealer for such profit.

15. That the Dealer will not deal in motor trucks not sold by the Company in such a manner as in the judgment of the Company will prejudice the sale or reputation of Little Giant motor trucks, or the good will of the name Little Giant, and as a matter of such business policy shall consult the Company before doing so.

16. That at the end of each month the Dealer will report to the Company the names, addresses, and the business in which they are engaged of all purchasers of Little Giant motor trucks, together with factory number of same.

17. That he will not transfer or assign this agreement or any rights hereunder.

The parties hereto further agree as follows:

18. That this agreement shall be interpreted and construed according to the laws of the state of Illinois.

19. The price to be paid by the Dealer for all complete chassis ordered by him from said Company shall be the full list price, less 25 per cent., f. o. b. cars factory, Chicago Heights, Ill., 20 per cent. of said price to be paid at the time order is given, and the balance at the time shipment is made, or by sight draft attached to the bill of lading.

20. The price to be paid by the Dealer for all parts and appurtenances purchased by him here-

under shall be the full list price, less 25 per cent.

21. The Dealer is not in any manner authorized or empowered to conduct the business in the name of or for the account of the Company, nor in its name, nor on its behalf, to enter upon any contract whatsoever, or to bill goods to third persons, nor to make promises or representations with respect to said commercial cars, parts, or other goods manufactured or sold by the Company other than those contained in the current catalogues issued by the Company.

22. It is expressly understood by the Dealer that no car will be sold by him, or shall be resold by him, upon any guaranty or warranty of any kind or nature except as follows: "The Chicago Pneumatic Tool Company will, for a period of one (1) year, from date of shipment of any car manufactured by it, replace at its factory, at Chicago Heights, Ill., free of cost except for transportation, such parts of said car as shall in the sole judgment of the Chicago Pneumatic Tool Company prove to be defective in material or workmanship, and provided further that such parts shall be shipped to the Company at its factory, when claim is made, charges prepaid, properly tagged, giving the serial number of motor truck from which same was taken, name and address of owner, and such other information as may from time to time be required by the Company. No claims will be allowed or adjustments made by the Company under the terms of this guaranty, unless Dealer's claim is presented, together with the alleged break or service failure within (10) days of discovery and that after the expiration of such ten (10) days no such claims will be allowed. This provision does not apply to parts or equipment not made by the Company, such as tires, rims, magnetos, batteries, coils, and other electrical equipment, etc., for which purchaser must make all claims to their respective makers for damages of any nature growing out of this agreement, or for the sale or use of the motor trucks sold by it." This guaranty shall not in any way apply to or cover any motor trucks which may be in any manner altered or repaired outside of the factory of the Chicago Pneumatic Tool Company or any of its branches.

23. That this agreement shall expire by limitation on May 31, 1918, or may be canceled by either party upon sixty (60) days' written notice given to the other through the usual course of mail or otherwise: Provided, however, that for any violation thereof by either party the other party may terminate the same forthwith. Termination or cancellation of this agreement as herein provided shall immediately cancel all orders for motor trucks, motor truck parts, or attachments which may have been received from the Dealer, but which have not been delivered prior to the date of termination or cancellation, including such orders as may have been accepted by the Company. After the termination or cancellation of this agreement, as hereinbefore provided, the continuance of the sale of such motor trucks or the referring of inquiries by the Company to the Dealer shall not be construed as a renewal of this agreement, but all orders hereafter accepted by the Company and sales thereafter made by the Dealer shall be governed by the terms and conditions of this agreement.

24. That all claims for shortage must be made by the Dealer within ten days of receipt

of the shipment on which shortage is claimed, and that after the expiration of ten days no such claims will be allowed.

25. That the responsibility of the Company for loss of or damages to goods ordered shall cease upon delivery thereof to the common carrier, and that the Company makes no warranties or representations of any kind other than contained in this agreement, as to the goods sold hereunder.

26. That the Company reserves the right to change all list prices at any time.

In witness whereof, the parties hereto have duly executed this agreement the day and year first above written.

Chicago Pneumatic Tool Company.  
S. C. Weil, Dealer.

Attest: \_\_\_\_\_

27. Addendum:

Model H-4—1-ton chain-driven chassis complete .....	\$1,400.00
Model H-4—1½-ton chain-driven chassis complete .....	1,500.00
Standard platform and stake bodies for same .....	150.00
Standard open flare bodies for same ..	100.00
Standard open flare bodies with canvas top for same .....	150.00
Standard cabs built on for same .....	50.00
Standard wind shields built on for same .....	25.00

Shown and described in circular 282.

Model 1 15—1-ton worm-driven chassis complete .....	1,500.00
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Furnished with either solid or pneumatic tires.

Model 16—2-ton worm-driven chassis complete .....	\$2,250.00
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This can be furnished with 168" wheel base, making length back of driver's seat 140½", at the same price.

Model 17—3½-ton worm-driven chassis complete .....	\$3,250.00
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Model 18—5-ton worm or chain driven chassis complete .....	4,250.00
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Built to order only.

Shown and described in catalogue No. 285.

28. Advertising:

To agree to appropriate a sufficient amount of money to properly advertise locally in newspaper and outdoor publicity with the following understanding: First, that this amount of expenditure is not to exceed one hundred (\$100.00) dollars on each complete chassis; and, second, that fifty (50) per cent. of the moneys so spent are to be charged by us to you; or, in other words, for every dollar you are willing to spend we will also spend the same amount as outlined above.

29. Your discount from list when sold for cash:

First car ordered by you on contract 15 per cent.

Second car ordered by you on contract 17½ per cent. with credit memorandum to make first car same price.

Third car ordered by you on contract 20 per cent. with credit memorandum to make first and second cars same price.

Fourth car ordered by you on contract 22½ per cent. with credit memorandum to make first, second, and third cars same price.

Fifth car ordered by you on contract 25 per cent. with credit memorandum to make first, second, third, and fourth cars same price.

30. Your discounts from list when sold on deferred payment plan:

First car ordered by you on contract 10 per cent.

Second car ordered by you on contract 12½ per cent. with credit memorandum to make first car same price.

Third car ordered by you on contract 15 per cent. with credit memorandum to make first and second cars same price.

Fourth car ordered by you on contract 17½ per cent. with credit memorandum to make first, second, and third cars same price.

Fifth car ordered by you on contract 20 per cent. with credit memorandum to make first, second, third, and fourth cars same price.

31. We would expect you to contract for not less than 25 Little Giant chassis, same to be taken by you during the period of this contract, which we would make for one year, at intervals to be decided on, but specifications must be furnished 30 days in advance and furnish us a deposit of \$50.00 for each chassis, same to be refunded as you place orders.

We adopt the designations used in the contract, and will refer to appellant as the Dealer and to appellee as the Company.

The Dealer had ordered and there had been delivered two trucks, in part payment of which the Dealer had executed his note. A third truck had been ordered, but shipment and delivery had been refused by the Company. In addition, the Dealer had executed a note for \$1,250 in accordance with paragraph 31. This note was renewed and later paid by the Dealer; but the note given in part payment of the trucks was not paid, and this suit was brought to enforce its payment. By way of cross-complaint the Dealer prayed judgment for the portion of his deposit made under paragraph 31 which had not been applied to the purchase of trucks as there provided; and, in addition, the Dealer prayed judgment for the loss of profits which he alleged had been sustained as a result of the Company's failure and refusal to fill his order for trucks. Under the direction of the court the jury allowed the Dealer credit for the unapplied portion of his deposit made under paragraph 31, but disallowed anything on account of loss of profits, and the right to recover these profits is the question involved in this appeal.

[1] The court below had the view that paragraph 3, which exempted the Company from damages for its failure to deliver goods as required by other paragraphs of the contract, rendered it void for the lack of mutuality, and that, while it controlled the rights and obligations of the parties in so far as they had operated under it, it was unenforceable as against the Company in so far as it was executory. We have reached the conclusion that this is the correct construction of the contract, and that the court, there-

fore, correctly told the jury that there could be no recovery of profits.

[2] It is argued that we should construe this contract most strongly against the Company, as it has used its blank form in its preparation; and so we should. It is also insisted that in arriving at the intent of the parties we should construe the instrument as a whole; and the correctness of this contention is likewise conceded. And it is argued that when this has been done the plan under which the Company proposed to operate has been disclosed, and that, if it has no valid and enforceable agreement with the Dealer here, it has no valid and enforceable contract with any dealer anywhere; that its plan is to give exclusive rights to sell its goods to agents in assigned territory; that the purpose and policy of the Company is to sell the largest possible quantity of the output of its factory, and as a means to this end has assigned the territory throughout which it proposes to operate to agents who are given the exclusive right of sale in their respective territories; and that, having adopted this policy, as disclosed by the contract, we should not construe the contract as making its performance optional on the part of the Company.

It must, of course, be true that the contract lacks mutuality if one of the parties thereto has reserved the option of performing or not performing as he pleases, and while, indeed, this right is not reserved in terms, we think this is the effect of paragraph 3. What does it matter that the Dealer may have assigned to him exclusive territory in which to sell the Company's goods if "the Company shall not be liable for any loss of profits or damage for its failure to deliver goods ordered or for the cancellation of this agreement"? If the language means what in its ordinary acceptation it apparently says, we have a writing which will determine the rights of the parties in so far as they operate under it, but which has in advance excused and exempted the Company from legal liability for its nonperformance through failure to deliver the goods ordered.

In 6 R. C. L. § 96, p. 691, the law is stated as follows:

"Again, a contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality."

And in the case of *El Dorado Ice & Planing Mill Co. v. Klnard*, 96 Ark. 188, 131 S. W. 462, this court said:

"A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise, would not be binding on the other."

See, also, 7 A. & E. Enc. of Law (2d Ed.) 114; 1 Page on Contracts, §§ 302-306; St.

*Louis, I. M. & S. R. Co. v. Clark*, 90 Ark. 508, 119 S. W. 825.

There appears to have been much litigation in the federal courts involving contracts more or less similar to the one now under consideration, and in these cases contracts having clauses similar to paragraph 3 have been held to be void for the want of mutuality. Some late cases which collect a number of others are: *Vellie Motorcar Co. v. Kopmeyer Motorcar Co.*, 194 Fed. 824, 114 C. C. A. 248; *Oakland Motorcar Co. v. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319; *Wilson v. Studebaker Corporation of America* (D. C.) 240 Fed. 801. See, also, *Goodyear v. Koehler Sporting Goods Co.*, 159 App. Div. 116, 143 N. Y. Supp. 1046; *Wood v. Glens Falls Automobile Co.*, 174 App. Div. 830, 161 N. Y. Supp. 808.

Judgment affirmed.

**McCULLOCH, C. J.** (concurring). The mutuality in the contract consists of this: The manufacturer obligated itself to assign to the local dealer certain territory—the state of Arkansas—within which the latter was to have the exclusive right, for a given period of time, to sell the manufacturer's products; and, on the other hand, the dealer obligated himself to sell those products, and no others which might come in competition with them, to establish agencies throughout the territory, and to purchase from the manufacturer as many as 25 cars at a stated price. The right thus acquired by the dealer was a valuable one, notwithstanding the fact that the manufacturer was, under the express language of the contract, to be exempt from liability for damages on account of failure to deliver cars.

"A contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other party." 6 R. C. L. 689.

It was to the interest of the manufacturer to sell the output of its factory in the various territories assigned to local dealers, and, even though there was no corresponding obligation on its part to deliver to this dealer the cars which he might order, yet the obligation to assign this territory exclusively to the dealer, and not to sell to any one else in that territory constituted sufficient consideration for the various undertakings of the dealer, including the agreement to purchase a certain number of cars. The manufacturer was unwilling to bind itself to deliver any particular number of cars in a given territory for the reason, doubtless, that it could not be definitely known in advance what the sales in various territories would be, but we ought to assume, and the dealer had the right to assume, that the manufacturer would pursue a course consonant with its own interest by delivering as many cars as it could, consistent with its trade advan-



tages in other territories, and the dealer was therefore willing to contract for the exclusive right to purchase for resale cars which the manufacturer might find it convenient to furnish in that territory. That constituted a valuable consideration for the whole contract and renders it mutual in its undertakings. There was a corresponding privilege to each of the contracting parties of canceling the contract on notice for 60 days, but that did not destroy its validity. The right to cancel the contract without notice for an appreciable length of time would have rendered the contract wholly nugatory, the immediate right of cancellation being inconsistent with the binding force of the contract; but, when notice must be given for a length of time, it makes a valid contract because the obligation remains in force until the expiration of the specified period of notice. *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823.

I do not agree with the majority, therefore, that the contract lacks mutuality, but I think that the manufacturer has by plain and unambiguous language in the contract exempted itself from liability "for any loss of profits or damage for its failure to deliver goods ordered," and for that reason the judgment of the circuit court was, upon the undisputed evidence, correct.

#### STATE et al. v. MISSISSIPPI, A. & W. RY. CO. (No. 217.)

(Supreme Court of Arkansas. May 12, 1919.)

##### 1. TAXATION $\S$ 317(3)—ASSESSMENT—POWER OF TAX COMMISSION—STATUS OF LUMBER COMPANY'S "RAILROAD."

Where a lumber company organized a railroad company and built a road and operated it as such, but extended it over its property for some 12 miles, and used the extension wholly as a log or tram road in connection with the railroad owned and operated by the subsidiary company, such extension did not constitute a "railroad" within Acts 1911, p. 233, and was not assessable as such to the railroad company by the Arkansas tax commission, which has no authority to assess tram or log roads used for private purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad.]

##### 2. TAXATION $\S$ 317(1)—AUTHORITY OF TAX COMMISSION.

The only authority possessed by the Arkansas tax commission is that conferred upon it by statute in express terms or by necessary implication.

##### 3. TAXATION $\S$ 446—TAX COMMISSION—FINALITY OF FINDINGS AND ORDERS.

The findings and orders of the Arkansas tax commission are final except when attacked for fraud or want of jurisdiction.

##### 4. CONSTITUTIONAL LAW $\S$ 284(1)—TAXATION $\S$ 608(2)—ILLEGAL ASSESSMENT BY TAX COMMISSION—LACK OF FINALITY—INJUNCTIVE RELIEF—DUE PROCESS.

Where the Arkansas tax commission in fixing the assessment of a railroad has considered and included elements of value of private property not owned or used by the road or by any one for it as public carrier, the action amounted to an illegal exaction or the taking of property without due process of law, and the railroad, though it has petitioned the commission to reduce the assessment, and requested inspection of its property, may have relief by injunction against an enforcement of the illegal assessment. While the state is bound by an assessment made by its officers and assessing boards unless otherwise provided by statute, individual taxpayers are entitled to injunctive relief against enforcement of illegal exactions or assessments.

Appeal from Chicot Chancery Court; Z. T. Wood, Chancellor.

Suit by the Mississippi, Arkansas & Western Railway Company against the State of Arkansas and the Arkansas Tax Commission. From decree for plaintiff, the State and Commission appeal. Affirmed.

Jno. D. Arbuckle, Atty. Gen., and Jas. R. Yerger, of Lake Village, for appellants.

J. C. Gillison, of Lake Village, and Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellee.

HUMPHREYS, J. Appellee instituted suit against the collector of taxes in Chicot county, in the Chicot chancery court, to enjoin the collector from collecting taxes on more than 7.37 miles of railroad track in that county, alleging that the Arkansas tax commission assessed it on a mileage basis of 19 miles, instead of 7.37 miles, of railroad track, and that the assessment was unjust, illegal, and void.

The state of Arkansas and the Arkansas tax commission were made parties by request, and filed an answer in which it was admitted that the assessment was based on a mileage of 19 miles, alleged that appellee owned and operated a railroad of that length in Chicot county, and denied that the assessment was unjust, illegal, and void. By way of further defense appellants pleaded that appellee applied to said tax commission for a reduction of the assessment, setting up that it owned only 7.37 miles of railroad in Chicot county, and not 19 miles; that the tax commission made an investigation and personal inspection, upon which it dismissed the petition; that the assessment based upon a mileage of 19 miles and dismissal of the petition requesting a reduction to a mileage basis of 7.37 miles constituted a final adjudication of the assessment not reviewable by the chancery court.

A preliminary order was made by the chancery court, directing the collector to separate the assessment of the property and accept payment of taxes on 7.37 miles of track, and upon the execution of an injunction bond by appellee not to return the balance of the assessment as delinquent.

On November 7, 1918, the cause was submitted to the court upon the pleadings, an agreed statement of facts, and the depositions of Monroe Smith and F. L. Gregory, from which, among other findings, the court found that 7.37 miles of railroad, as assessed by the tax commission, belonged to appellee, and that the remaining 12 miles was built, equipped, used, and operated exclusively as a tram or log road by the Bliss-Cook Oak Company, and not owned or operated by appellee as a railroad; that the Bliss-Cook Oak Company had assessed the tram or log road with the county assessor in the manner required by law, and paid all taxes due thereon. A judgment was rendered in accordance with the findings exempting appellee from the payment of that portion of the assessment placed by the tax commission on appellee railroad in excess of 7.37 miles. From the judgment an appeal has been duly prosecuted to this court, and the cause is before us for trial de novo.

The facts summarized are about as follows: The Chicot Lumber Company, an Illinois corporation, was organized some time prior to 1902. It owned a large tract of timber land and a lumber mill at Blissville, and also 2 miles of tramway with laterals used by it for hauling its timber to the mill. It conceived the idea of constructing a short railroad for the purpose of doing a railroad business in addition to hauling its own timber to the mill and from the mill to the Iron Mountain Railroad in order to get the proper railroad connections and a proper division of freight rates with the Missouri Pacific Railway Company. As a result the appellee railroad was organized on January 10, 1902, and the Chicot Lumber Company subscribed for 98 per cent. of the railroad stock, and bought \$200,000 worth of bonds from said railway. Thereafter the Chicot Lumber Company sold its property, including its railroad stocks and bonds, to A. T. Bliss. On April 19, 1905, the Bliss-Cook Oak Company was organized and purchased the lands, mill, railroad stocks, and bonds from A. T. Bliss. Subsequently F. L. Gregory became manager of the Bliss-Cook Oak Company, as well as the railroad company, took up laterals belonging to the Bliss-Cook Oak Company, and extended the railroad on the right of way survey, according to the charter of the railroad company, to a total length of 7.37 miles. As between the companies, the railroad, as thus extended, was treated as the property of the railroad company because it was laid on the right of way belonging to said railroad company, and listed by

it for taxation with the Arkansas tax commission in the manner provided by law. As thus constructed, the railway company was operated by the Bliss-Cook Oak Company, and, as it became necessary to reach its timber, at its own expense extended the road over its own land and land which it leased from other parties, building it out of about the same kind of rails and ties used in the construction of the first 7.37 miles. The extension made by the Bliss-Cook Oak Company in this manner was 12 miles. This additional extension of 12 miles was treated by the Bliss-Cook Oak Company as its private property and assessed with the county assessor. At the time the Arkansas tax commission assessed the 19 miles of railroad as belonging to appellee, the Bliss-Cook Oak Company was operating trains with appellee's equipment over the entire 19 miles of trackage for the purpose of hauling its own timber to the mill, and finished product from the mill to the Iron Mountain Railway. It also hauled cars over a portion of the line for a hickory mill near Blissville, owned by other parties, for which service it received \$8 per car. It did not run passenger trains or freight trains for general traffic. The only freight hauled consisted of logs and materials owned by the Bliss-Cook Oak Company and from the independent hickory factory located near Blissville. It does not appear that the product hauled for the independent hickory mill was hauled over the 12-mile extension. During the year 1912 the Interstate Commerce Commission decided that the railroad was not a common carrier, but was an auxiliary to the mill owned by the Bliss-Cook Oak Company. Prior to that time the railroad company had kept a perfect system of accounting, but thereafter kept no books. Appellee was notified to appear before the Arkansas tax commission on July 26th for the purpose of assessing the entire mileage of 19 miles of railroad. By request the hearing was adjourned until the 3d day of August, on which date the whole mileage of 19 miles was assessed at \$53,235. On September 5th following appellee filed a petition to reduce the assessment from a mileage basis of 19 to 7.37 miles, and requested a personal investigation and inspection of the road. The inspection was made, and on November 23, 1917, the reduction was refused, and petition dismissed.

[1, 2] It is contended by appellants that the 12-mile extension over the private property of the Bliss-Cook Oak Company, operated in connection with the 7.37 miles owned by appellee, constitutes a railroad within the meaning of Act 251, Acts 1911, and assessable under the provisions of that act by the Arkansas tax commission. Section 1 of the act just referred to authorizes the Arkansas tax commission to assess the property of railroads "chartered, organized or operated under the provisions of chapter 133 of Kirby's Digest." By reference to that chapter,

it is quite apparent that the railroads to be assessed by the Arkansas tax commission are railroads operated as public carriers, and not tramways or log roads operated by individuals or private corporations for the sole purpose of hauling their timber to market. It is established by the undisputed evidence in this case that the 12-mile extension was owned by the Bliss-Cook Oak Company, and not by the Mississippi, Arkansas & Western Railway Company, and by the overwhelming weight of the evidence that the road, as operated by the Bliss-Cook Oak Company, was not operated as a public carrier. It does not appear that passengers and freight were hauled over the 12-mile extension for pay. So far as the record discloses, the only use made of the 12-mile extension was to haul logs and lumber belonging to the Bliss-Cook Oak Company. In other words, the 12-mile extension was used wholly and entirely as a private tram or log road for the benefit of the latter corporation. For this reason the assessment by the Arkansas tax commission of the 12-mile tram or log road was without authority, an illegal exaction, and void. The only authority possessed by the Arkansas tax commission is that conferred upon it by statute in express terms or by necessary implication. *Bank of Jonesboro v. Hampton*, 92 Ark. 492, 123 S. W. 753; *State v. Little*, 94 Ark. 217, 126 S. W. 713, 29 L. R. A. (N. S.) 721. There is nothing in the statute granting authority, directly or impliedly, to the tax commission to assess trams or log roads owned or used for private purposes by individuals or private corporations.

[3, 4] It is contended by appellants, however, that, because the Arkansas tax commission notified appellee and the Bliss-Cook Oak Company of the assessment, and because appellee filed a petition in the form of a letter to reduce the assessment and requested an inspection of the railroad property, and because the tax commission made a personal inspection, considered the matter, and denied a reduction, it became a final adjudication of the tax commission, which cannot be reviewed by the chancery court. It is true, as suggested, that no appeal is provided from the Arkansas tax commission, and that its findings and orders are final except when attacked for fraud or want of jurisdiction. *St. L., I. M. & S. R. Co. v. Worthen*, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374. This case, however, comes clearly within the exception because the board has considered and included elements of value in fixing the assessment of private property not owned or used by appellee, or any one for it, as a public carrier. This would clearly amount to an illegal exaction or the taking of property without due process of law. While the state is bound by the assessment made by its officers and assessing boards, unless other-

wise provided by statute, individual taxpayers are entitled to injunctive relief against the enforcement of illegal exactions or assessments. *State Board of Equalization et al. v. People of the State of Illinois ex rel. Catherine Goggin et al.*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; *State v. Little*, 94 Ark. 217, 126 S. W. 713, 29 L. R. A. (N. S.) 721.

No error appearing, the decree of the chancellor is affirmed.

# WALKER v. STATE. (No. 210.)

(Supreme Court of Arkansas. May 12, 1919.)

## 1. CRIMINAL LAW §1054(1) — APPEAL — EXCEPTIONS—ADMISSION OF EVIDENCE.

Admission of evidence will not be reviewed on appeal, where court's ruling on objection thereto was not excepted to.

## 2. CRIMINAL LAW §1054(1) — WAIVER — OBJECTIONS TO EVIDENCE.

Objection to evidence is waived by failure to except to court's ruling thereon.

## 3. CRIMINAL LAW §448(12) — EVIDENCE — OPINION—ILL FEELING TOWARD DEFENDANT.

In homicide prosecution, testimony that witness heard deceased make statement indicating ill feeling toward defendant was inadmissible, being merely an opinion of the witness that such statement indicated ill feeling, which is inadmissible as evidence of the fact.

## 4. HOMICIDE §339 — APPEAL — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In homicide prosecution, exclusion of testimony as to whether witness had heard deceased make statements indicating hatred toward defendant was harmless, where witness had prior thereto testified that he had never heard deceased make any threats that he was going to fight or injure defendant.

## 5. CRIMINAL LAW §338(4, 5) — HOMICIDE §166(2)—EVIDENCE—MOTIVE—LETTER.

In homicide prosecution, a letter, reflecting upon character of defendant's daughter, was inadmissible, where no effort was made to prove that deceased had written letter, or that defendant suspected him, prior to the time of the killing, of having any connection with it; the letter therefore throwing no light upon the question of motive.

## 6. CRIMINAL LAW §1036(1) — APPEAL — OBJECTION AND EXCEPTION—ADMISSIBILITY OF EVIDENCE.

Admission of evidence will not be reviewed on appeal, where no objection was made or exception thereto saved.

## 7. HOMICIDE §166(2) — EVIDENCE — ILL FEELING—COLLATERAL MATTERS.

In homicide prosecution, evidence that defendant had suspected others than deceased of having written letter reflecting upon virtue of

defendant's daughter was inadmissible to prove that defendant harbored no ill will toward deceased, being evidence as to collateral matters.

**8. HOMICIDE §339 — HARMLESS ERROR — EXCLUSION OF TESTIMONY.**

In homicide prosecution, exclusion of testimony that prior to time of killing defendant had not suspected deceased of having written letter reflecting upon daughter's character, but had suspected others of being the authors thereof, if error, was harmless, being favorable to defendant.

**9. HOMICIDE §233 — EVIDENCE — MOTIVE.**

Proof of motive is not essential to a conviction, but where established tends to strengthen the case for the prosecution, while absence thereof is a circumstance favorable to accused.

**10. CRIMINAL LAW §465 — NONEXPERT EVIDENCE—MENTAL CONDITION.**

Nonexpert witness could testify to mental condition of deceased in making dying statement, after having stated facts upon which his opinion was based.

**11. CRIMINAL LAW §719(1)—TRIAL—REMARKS OF COUNSEL.**

Statement by defendant's counsel during argument that, when he had asked certain witnesses if deceased or his wife had written letter reflecting upon character of defendant's daughter, deceased's wife nodded her head so that jury could have seen it was improper.

**12. CRIMINAL LAW §780(7)—REMARKS OF COUNSEL—ADMONITION OF COURT.**

Where defendant's counsel during argument made improper remark, court's facetious statement, upon prosecutor's objection that he did not want defendant's counsel to testify, that "you can't keep S. (defendant's attorney) from testifying with 40 log chains," was improper; and court, instead of allowing argument to proceed with facetious remark, should have promptly reprimanded counsel and instructed jury not to consider his remarks.

**13. CRIMINAL LAW §706 — POWER OF COURT — OBSERVANCE OF RULES OF EVIDENCE.**

The trial court has plenary power to compel the attorneys of the parties to observe the well-established rules for the production of evidence.

**14. CRIMINAL LAW §699—TRIAL—ARGUMENT OF COUNSEL—DUTY OF COURT.**

It is court's duty to prevent counsel from transcending the bounds of legitimate argument and to reprimand or punish counsel who make improper remarks, and to instruct jury not to consider such remarks.

**15. CRIMINAL LAW §1171(1) — APPEAL — REVERSIBLE ERROR—ARGUMENT.**

Improper remarks by counsel during argument constitutes reversible error, where it is likely that prejudice has resulted therefrom.

**16. CRIMINAL LAW §655(5)—REMARKS OF COURT.**

Court's facetious remark, following improper argument by defendant's counsel, that "you

can't keep S. (defendant's attorney) from testifying with 40 log chains," was not prejudicial to defendant; the facetious character of the remark being apparent, and the argument to which it had reference having been made by defendant's attorney.

**17. CRIMINAL LAW §864(5) — EVIDENCE — RES GESTÆ.**

In homicide prosecution, testimony that defendant, after having chased deceased across street, stated, upon returning, that he had followed deceased to prevent him from getting a club was not admissible as part of res gestæ.

**18. CRIMINAL LAW §363 — EVIDENCE — "RES GESTÆ."**

Res gestæ are the acts talking for themselves, not what people say when talking about the act, and the words must stand in immediate casual relation to the act, unbroken by interposition of voluntary, individual wariness seeking to manufacture evidence for itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Gestæ.]

**19. CRIMINAL LAW §805(3) — INSTRUCTIONS—"PROOF"—"EVIDENCE."**

Proof in a strictly accurate and technical sense is the result or effect of evidence, while evidence is the medium or means by which a fact is proved or disproved, but the words "proof" and "evidence" may be used interchangeably and synonymously in court's charge especially where attention of court is not specifically called to the real difference in meaning (citing Words and Phrases, Evidence; Proof).

**20. CRIMINAL LAW §1048(2) — INSTRUCTIONS—GENERAL OBJECTIONS.**

Error cannot be predicated upon court's failure to use the words "proof" and "evidence" in their technical meaning, under a general objection to the instruction.

**21. CRIMINAL LAW §763, 764(5)—INSTRUCTIONS—PROOF.**

Instruction containing words "as the proof tends to show" was not objectionable as on weight of evidence, since it was apparent that the word "proof" was not used in its strict legal sense, but in its ordinary sense as a synonym for "evidence."

**22. CRIMINAL LAW §763, 764(5)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

An instruction, stating that evidence tends to prove a certain fact, and then leaving the jury to ascertain whether that fact was proved, is not objectionable as on weight of evidence.

Smith, J., dissenting.

Appeal from Circuit Court, Clay County; R. E. L. Johnson, Judge.

John M. Walker was convicted of murder in the first degree, and appeals. Affirmed. See, also, 209 S. W. 86.

Following is instruction No. 16 referred to in opinion:

If the defendant entertained a grudge against the deceased, Bryant, as the proof tends to show, and used language in the hearing of Bryant for the purpose of provoking him to anger, and causing him to bring on an attack whereby the defendant might have the opportunity of killing him, or doing him great bodily injury, then defendant would not be excused or justified in the killing, and would be precluded from claiming the right of self-defense, until he had, in good faith, withdrawn from the combat as far as he could, and had done all in his power consistent with his safety to avoid the danger and avert the necessity of the killing.

W. E. Spence, of Piggott, and S. R. Simpson, of Paragould, for appellant.

John D. Arbuckle, Atty. Gen., Robert C. Knox, Asst. Atty. Gen., and T. W. Campbell, of Little Rock, for the State.

WOOD, J. Appellant was convicted of the crime of murder in the first degree, for the killing of one J. C. Bryant, and was, by the judgment of the Clay county circuit court, sentenced to punishment at confinement in the state penitentiary for life.

There was evidence adduced by the state tending to show that on the 23d day of December, 1918, appellant and Bryant were attending the trial of certain parties that was being conducted by a justice of the peace in a certain tin shop in the town of Piggott, Clay county, Ark. During the trial, appellant had a knife in his hand, whittling.

One of the witnesses testified that he was in the house when Bryant and the appellant first went out on the walk. Appellant walked back a piece, and was talking to somebody. He didn't hear what he said, but heard Bryant say, "How do you know?" and the appellant said, "You come out here, and I will show you." Bryant and the appellant went out of the front door, appellant in front and Bryant following at a distance of about six feet. Witness did not hear anything that occurred between them after they got out of the door. Bryant turned and went east, towards town, about 50 feet, stopped, and came back. Witness then saw appellant going towards Bryant, he next saw Bryant running across the street and appellant after him. Witness "did not think either was mad at the time the remarks were made between them; did not think Bryant was mad, but appellant seemed to be. Neither said anything that indicated that they were mad and about to fight."

Another witness testified that he saw Bryant and appellant going out of the house, and after they got out of the house, he heard appellant say to Bryant, "I haven't got a d— thing; if you want me, get on me." Bryant started towards town, and the next thing witness saw he was going back towards the tin shop. The next thing he saw Bryant was going backwards, and the appellant was going towards him. Bryant made four or

five steps backwards, and appellant ran him possibly 35 yards.

Another witness stated that he heard the two men quarreling after they went out of the house, but did not hear anything that was said. He heard the constable tell them to stop quarreling or he would arrest them. After that he saw them going towards each other. Bryant had his overcoat on his left arm, which he dropped, and squared himself and struck toward appellant. The appellant appeared to lean back, or was knocked back, and straightened up and struck Bryant a sound lick with his right hand. Bryant struck the appellant about the neck on the right side, and appellant struck Bryant, who immediately wheeled and ran.

According to other witnesses for the state, the appellant and Bryant were seen to go out of the house, and after going out they were engaged in a dispute, each accusing the other of inviting him out, and daring the other to strike. The altercation at this point was interrupted by the constable, and Bryant went off a short distance in the direction of town, then turned back, whereupon the appellant said to him, "You are coming back to attend to me," and Bryant replied, "I have a right to go back to the courthouse."

One of the witnesses said that about that time, while Bryant was walking away, they renewed the quarrel, and witness heard Bryant ask the appellant what he had against him, and the appellant replied "Your wife's G— d— lies." Whereupon Bryant laid down his overcoat and struck appellant. Appellant threw up his arms and gave back from the lick to protect his face, at which time the appellant must have cut Bryant, though witness did not see the lick.

The court admitted in evidence as the dying declaration of Bryant the following:

"Piggott, Ark. Dec. 23rd. 5. p. m. 1918.

"J. C. Bryant makes the following statement: On this day during the trial of Mrs. Annie Terry before Frank Underwood in Piggott J. M. Walker made several shurring remarks to me and about my wife who were here to be a witness in a similar case against Mrs. Russell and ask me to go out of the house and he would settle. I went out with him and he had his knife, I told him if he would put up his knife and come out and give me a fair fight I would fight him but could not fight a knife. The constable commanded the peace. I walked away but turned to go back Court House to get my wife when I went Pass Walker He curated me and said you are coming back to me I told him no—I was going back to the Court Room to get my wife. He said your wife is nothing but a lying bitch and swore a lie on me. I then struck at him but he knocked off my lick and stabbed me and I ran away from him."

There was testimony tending to show that Bryant was a small man, about 5½ feet tall and weighing about 140 pounds, and that appellant weighed 170 pounds.

Witness C. N. Walker on behalf of the

state testified, without objection, that on the morning of the day of the killing appellant asked him if he had heard about the trouble that his (appellant's) daughter was in in the neighborhood, and said, "I am going to kill a d—s— of a bitch either to-day or before this thing is over." Appellant did not say whom he was going to kill. He was talking about some stories that had been circulated about his daughter that reflected on her virtue.

There was testimony tending to prove that the knife, with which appellant killed Bryant, was an ordinary pocketknife of two-inch blade in length and half inch wide, with a keen point.

There was testimony tending to prove that after the trouble was over the appellant, in telling about the fight, said "he was not excited"; that "he did just what he meant to do."

The testimony of the appellant tended to prove that there was trouble between the neighbors and appellant's only daughter from rumors or tales that were told that reflected on her, and of which appellant had been informed. He was mad at this, but did not connect Bryant or his wife with the statement. He had no ill will or malice toward Bryant. His neighbors, Mrs. Terry, Mrs. Russell, and his daughter had been arrested on the charge of breach of the peace, and Mrs. Terry was on trial, and he was in attendance. He had not, previous to the difficulty, said a word to Bryant that was in any way insulting or that was derogatory or reflected upon him.

The effect of the appellant's testimony, without setting the same out in detail, is that Bryant was the aggressor in the fight; that he invited the fight; that he did not want any trouble with him; that "Bryant looked right straight" at witness, and said, "Walker, d—m you; I aim to kill you;" that Bryant threw his coat off with his hand in his pocket; that witness was watching his left hand; that Bryant hit witness on the left side of the neck; that witness lost his balance and fell backwards, threw his knife up, and struck as he fell; did not attempt to strike Bryant any more; that the cutting of Bryant was an accident; that Bryant started to run, and witness chased after him a few steps to where there was a club lying in the road. Witness thought that he was going to get the club, and chased him until Bryant passed the club; then witness turned back; that he did not intend to kill or seriously hurt deceased or cut him at all; had only struck to protect himself.

The testimony is voluminous, and, without setting it all out, the above gives the essential facts concerning the rencounter, as the testimony may be considered from the viewpoint of the state and also of the appellant.

Appellant asked a witness, Fred Russell,

whether or not Bryant in a conversation with the witness made "any statement whatever that indicated that he had any kind of malice or ill will towards Walker."

The state objected to the question, and the court sustained the objection, but the appellant did not except to the court's ruling.

[1, 2] Even if the above question were competent, we could not review and reverse the ruling of the court in sustaining the objection to it, for the reason that the appellant did not follow his objection with an exception. "If a party does not follow the ruling on his objection by clinching it with an exception, he waives the objection." *Melsenheimer v. State*, 73 Ark. 407, 84 S. W. 494; *American Ins. Co. v. Haynie*, 91 Ark. 47, 120 S. W. 825; *McKinley v. Broom*, 94 Ark. 147, 148, 126 S. W. 391.

The appellant asked another witness the following question: "State to the jury whether or not you heard him (Bryant) make any statement to indicate he had any ill feeling or malice or hatred toward this defendant." The court sustained an objection to the question, and appellant duly excepted to the ruling. Whereupon counsel for appellant stated that he expected to show that the witness would have answered, "Yes." The appellant did not offer to show what statement Bryant made.

[3] In the absence of proof of the statement itself tending to show malice or ill will, the question propounded and an affirmative answer thereto would show no more than that in the opinion of the witness Bryant had made a statement which showed that he harbored malice and ill will towards the appellant. But the opinion of a witness in matters of this kind could not be received as evidence of the fact. Nor would the trial court in the absence of any statement made by Bryant be able to determine whether or not the statement, if made, was prejudicial to appellant's rights. See *Fowler v. State*, 130 Ark. 365, 197 S. W. 568.

[4] Before the above answer was propounded the trial court had permitted the witness, in answer to a question propounded by counsel for appellant, to answer that he had never heard Bryant "at any time or place make any threats, statements, or intimations whatever that he was going to do any harm, fight, or kill, or do any injury" to appellant. Appellant, therefore, does not make it appear that there was any prejudice in the ruling of the court.

About six weeks before the killing, appellant's son-in-law, Robbins, received a letter reflecting upon the virtue of his wife, appellant's daughter. The court refused to permit appellant to prove the contents of this letter.

[5] There was no attempt upon the part of the appellant to prove that Bryant wrote the letter or that the appellant even suspect-

ed that he had any connection with the letter prior to the time of the killing; on the contrary, the appellant himself testified that he did not connect Bryant in any way with the rumors or the information that he had received, calling in question the virtue of his daughter. The letter, therefore, could not have thrown any light upon the question as to the motive of the parties to the rencounter, and was wholly irrelevant.

While appellant was testifying, he was asked by the attorney for the state on cross-examination the following question: "Did you go right to old man Walker's restaurant and say to him, 'I am going to kill a d— s— of a bitch to-day?'" The appellant answered, "No, sir; I did not."

Other questions asked show that the above question had reference to the day of the killing.

[6] Counsel for appellant contends in his brief that the court erred in permitting the state to prove by Mr. O. N. Walker that the appellant, on the day of the tragedy, stated that "he was going to kill a d— s— of a bitch, either to-day or before this thing is over with." The record does not show that the appellant objected to this testimony or saved exceptions to the ruling of the court in admitting the same. The alleged error, therefore, is one that we cannot review. See *Harding v. State*, 94 Ark. 65, 126 S. W. 90.

The appellant contends that the court erred in refusing to permit witness Robbins to testify concerning the physical condition of his wife, appellant's daughter; that appellant had been shown the letter which reflected on the virtue of his daughter; that appellant's daughter and the wives of two of his neighbors had become embroiled in a quarrel, which had resulted in their arrest, and for which they were being tried on the day of the killing; that appellant's daughter had pleaded guilty; that appellant did not accuse Bryant or his wife of having written the letter, but that after the killing appellant learned that Bryant and his wife were the authors of the letter.

[7] The above testimony was irrelevant and inadmissible. These were all collateral issues, and the court correctly ruled in limiting the evidence to the issue involved, namely, as to whether or not the appellant had killed Bryant after premeditation and deliberation, and with malice aforethought, as charged in the indictment. The state had introduced no evidence tending to prove that the appellant had killed Bryant because he suspected the latter as being the author of the letter which traduced the character of his daughter. In the absence of such testimony on behalf of the state, testimony to the effect that appellant was angry at other persons because he believed that they were the authors of the letter, and that he had no ill will towards Bryant, growing out of the

writing of the letter, was irrelevant and incompetent.

[8, 9] It occurs to us that the ruling of the court in excluding any testimony tending to prove that the writing of the letter did not furnish a motive for the killing of Bryant was more favorable to the appellant than otherwise. He was not prejudiced, as we see it, by the exclusion of this testimony, and therefore is not in an attitude to complain. If testimony had been adduced to the effect that Bryant was the author of the defamatory letter concerning appellant's daughter, written six weeks before the killing, and that appellant so believed, and harbored ill will and malice towards Bryant on that account, it would have strengthened the case for the prosecution, because it would have tended to show a motive for the killing. "While proof of motive is not essential to a conviction, yet, where it is established, it tends to strengthen the case for the prosecution, and, on the other hand, the absence of motive is regarded as a circumstance favorable to the accused." *Stokes v. State*, 71 Ark. 117, 71 S. W. 250.

Witness Harlan identified a written statement which was introduced in evidence as the dying declaration of Bryant. Counsel on both sides examined the witness with respect to the circumstances under which this declaration was made and reduced to writing. The court then propounded to the witness certain questions which were designed to elicit from the witness information as to the mental condition of Bryant when the writing was being read, so as to enable the court to determine the question of the competency or incompetency of the evidence. We find nothing in the question that could be construed as an opinion of the court, or an intimation by the court to the jury on any fact which it was necessary for them to decide.

[10] Witness Harlan, over the objection of the appellant, was permitted to testify that Bryant, at the time the written statement was read to him, "was in a weak condition," but, as witness believed, "was mentally at himself." Appellant objected to this testimony on the ground that the witness had not qualified as an expert. The issue involved was not such as could be determined only by the opinion of experts. It was competent for nonexperts to testify as to the mental or physical condition of Bryant at the time the alleged dying declaration was made by him. The examination of the witness in detail, which it is unnecessary to set forth, shows that he had stated the facts before giving his opinion as to the mental capacity of Bryant. This was sufficient to bring the testimony within the rule allowing nonexperts to be admitted on the issue of sanity or insanity, where they state the facts upon which their opinion is based. See *Hankins v. State*, 133

Ark. 38, 63, 201 S. W. 832, L. R. A. 1918D, 784, and cases there cited.

[11, 12] Counsel for appellant in his argument to the jury said:

"When I asked certain witnesses whether or not the deceased or his wife wrote the letter about defendant's daughter, the wife of the deceased, who sat behind the prosecuting attorney, nodded her head so the jury could have seen it."

The special prosecuting attorney objected. Counsel for appellant repeated the statement, and said that it was true. The special prosecutor again objected, saying, "I don't want Mr. Simpson to testify." The trial judge thereupon said, in the presence and hearing of the jury, "You can't keep Simpson from testifying with 40 log chains." The record shows that the above remarks, made by counsel for the appellant, were not predicated upon any facts adduced in evidence, but were made by the attorney for appellant while arguing the details of offered testimony concerning the letter, which the court had not admitted as evidence. The trial judge, as the record discloses, upon objection being made to the argument, "remarks in a facetious way, not intending it in any other way," that "it would be impossible to hold Mr. Simpson in the record with 16 log chains," and "permitted him to proceed with the argument just as he desired, and to say whatever he desired to say, notwithstanding the prior ruling of the court."

This whole proceeding was improper. The trial court, instead of allowing the argument to proceed with the facetious comment upon the conduct of the attorney in making it, should have promptly reprimanded counsel when he first began the improper argument, and should have instructed the jury not to consider the same.

[13] The most serious business that could possibly engage the attention of our circuit courts is the conduct of trials involving life and liberty. Therefore it is the duty of the presiding judge at such trials to see that nothing is said or done which is calculated to disturb the solemnity of the proceedings, to detract from the dignity of the tribunal, and to distract the minds of the jury, as a part of it, from the importance of the function which they are to perform. The trial court has plenary power to compel the attorneys of the parties to observe the well-established rules for the production of evidence. If attorneys violate these rules by attempting to supply in argument what they have failed to prove by testimony, the court cannot correct the error, where the rights of either party are prejudiced by a facetious reference to the disposition of counsel to transcend the bounds of legitimate argument.

[14-16] The duty of the court is to prevent the argument, if possible, or, if already made, to reprimand or punish counsel for making it; to instruct the jury not to consider it, and, in short, to do everything that can be done to see that the verdict of the jury is in no manner produced or influenced by such argument. "Whenever it occurs to us that any prejudice has most likely resulted therefrom, we shall not hesitate to reverse on that account." *Vaughan v. State*, 58 Ark. 353, 368, 24 S. W. 885, 889. But here, as the record discloses the court permitted counsel for appellant to proceed with the argument "just as he desired, \* \* \* and the counsel proceeded with his argument just as if the objection of the prosecuting attorney had never been made," it is inconceivable that the appellant could have been prejudiced by the remarks of the court concerning appellant's counsel. It is easy to see that the state might have been prejudiced by the argument of the appellant's counsel, but appellant had no ground to complain, for the statement by his counsel of fact, outside of the record, was made solely for his benefit, and the remarks of the court, made in humorous vein, as the record shows, could not have been prejudicial to appellant. At most it could only have been considered as but a mild rebuke to counsel for going out of the record, but the remarks of counsel were not excluded.

[17, 18] There was no error in the ruling refusing to permit a witness to testify that appellant said, immediately upon his return after chasing Bryant across the street, that "he followed him to prevent him from getting a club." This declaration by the appellant was not a spontaneous emanation growing out of the act of stabbing Bryant. The fight was then over, and although but a few moments had passed, appellant had had time to reflect, and the declaration under the circumstances was in the nature of a self-serving declaration, and it could not be properly considered as a part of the *res gestæ*. "*Res gestæ* are the acts talking for themselves, not what people say when talking about the act. In other words, they must stand in immediate casual relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself." *Whart. Ev.* § 259; *Elder v. State*, 69 Ark. 648, 652, 65 S. W. 938, 86 Am. St. Rep. 220; *Baker v. State*, 85 Ark. 300, 107 S. W. 983; *Spivey v. State*, 114 Ark. 267, 169 S. W. 804, and other cases cited in 2 *Crawford's Digest*, § 88.

[19] Counsel for appellant contend that the court erred in giving instruction No. 16. (Reporter set forth in note.) It is insisted that the words "as the proof tends to show" was the expression of opinion by the court on the weight of the evidence. One witness testified



that he heard appellant say just after the killing that he was not excited, but did just as he aimed to do, and Bryant in the dying declaration said that appellant had been tantalizing him and using abusive language to him at various times during the day. This testimony tends to prove that appellant (to use the language of the instruction) "entertained a grudge against the deceased." Now the word "proof" in a strictly accurate and technical sense "is the result of effect of evidence, while evidence is the medium or means by which a fact is proved or disproved." But the words "proof" and "evidence" are so frequently used interchangeably and synonymously by the best legal writers as to warrant such use of them, especially where the attention of the court is not specifically directed to the real difference in their meaning by an objection calling for the distinction to be made. See Jones on Ev. p. 4, § 4; Best on Ev. § 10; Words and Phrases, vol. 3, pp. 2522, 2523; vol. 6, pp. 5684, 5685, and cases cited.

[20] It is manifest from the context that the court used the word "proof" not in its strict legal sense, but in its ordinary acceptation when used as a synonym for "evidence." The court doubtless would have used the words "as the evidence tends to prove" instead of the words "as the proof tends to show," and would have so corrected the instruction if its attention had been called to it. Counsel under a general objection could not predicate error upon the ruling of the court in giving this instruction. *Sons v. State*, 116 Ark. 357, 172 S. W. 1029; *Teel v. State*, 129 Ark. 180, 195 S. W. 32, and other cases cited in the state's brief.

[21, 22] The court in another instruction told the jury that they were the "sole judges of the weight and sufficiency of the evidence and the credibility of witnesses." So it is clear that the court did not mean, by use of the language to which objection is here urged specifically for the first time, to express an opinion on the weight of the evidence. The court intended merely to tell the jury that there was evidence tending to prove a certain fact, and to leave them to ascertain whether that fact was proved. The language of the instruction when thus construed does not invade the province of the jury, as has been determined by our own courts as well as the courts of other jurisdictions. See *Edmonds v. State*, 34 Ark. 754; *Hogue v. State*, 93 Ark. 316, 320, 124 S. W. 783, 130 S. W. 167. Cases in other jurisdictions to the same effect are cited in the Attorney General's brief.

The record does not disclose any errors in the ruling of the trial court prejudicial to the rights of the appellant.

The judgment is therefore affirmed.

SMITH, J., dissenting.

# FREE v. MAXWELL. (No. 230.)

(Supreme Court of Arkansas. May 19, 1919.)

## 1. APPEAL AND ERROR ⇐931(1) — PRESUMPTIONS—FINDINGS.

Where the record does not affirmatively show that the findings of the court are contrary to evidence or negated in it, the appellate court must assume that the findings are sustained by the evidence.

## 2. COURTS ⇐202(5)—PROBATE COURT—AFFIDAVIT FOR APPEAL—WAIVER.

Failure to file an affidavit for appeal before an appeal was granted by a probate court is waived, where the other party proceeds to the trial in the circuit court without objection on that account.

## 3. COURTS ⇐202(5)—PROBATE COURT — APPEAL BOND.

A bond on appeal from probate court to circuit court, required by Acts 1909, p. 956, bound appellant and her sureties for all costs that might accrue, either in the circuit or the Supreme Court of the state, and it was unnecessary to give an additional bond as a prerequisite to granting of an appeal to the Supreme Court.

## 4. EXECUTORS AND ADMINISTRATORS ⇐219—CLAIMS OF EXECUTOR.

Kirby's Dig. § 109, providing for a special proceeding by which the probate court may allow any claim in favor of an administrator against the estate of intestate, is broad enough to include equitable demands.

## 5. HUSBAND AND WIFE ⇐207 — CLAIMS AGAINST ESTATE OF DECEASED HUSBAND—ACTION.

Under Laws 1915, p. 684, § 1, providing that a married woman may sue and be sued as a feme sole, a widow may sue her deceased husband's estate in a court of law.

## 6. HUSBAND AND WIFE ⇐208 — CLAIMS AGAINST DECEASED HUSBAND'S ESTATE — ACTIONS AT LAW.

Under Acts 1915, p. 684, § 1, providing that a married woman may sue and be sued as a feme sole a widow may sue her husband's estate for money advanced by her before the passage of the act; such statute being one of procedure only.

## 7. WITNESSES ⇐128, 158 — TRANSACTIONS WITH DECEASED PERSON—SPECIAL PROCEEDINGS.

Kirby's Dig. § 3093, relating to transactions with deceased persons, applies in all civil actions, special as well as ordinary proceedings, and prevents a wife, in a proceeding in the probate court against her husband's estate, from testifying as to transactions with him, but does not prevent her from testifying that she had money of her own when she married, and that after marriage she taught school for a certain number of months at a certain rate of pay and received warrants in payment of such services.

8. EXECUTORS AND ADMINISTRATORS §221(6)  
—CLAIM AGAINST ESTATE—SUFFICIENCY OF EVIDENCE.

In a proceeding by a widow to establish a claim against her husband's estate, evidence held sufficient to warrant a finding that he borrowed money from her.

9. TRIAL §194(1)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A requested instruction which would charge the jury on the weight of the evidence was properly refused.

Appeal from Circuit Court, Polk County; J. S. Lake, Judge.

Claim by Laura O. Maxwell against the estate of Henry Maxwell, deceased. From an allowance of the claim by the probate court, Mary A. Free, heir of deceased, appealed to the circuit court, and from the judgment, said Mary A. Free appeals. Reversed and remanded.

Pole McPhetrige, of Mena, for appellant.  
Prickett & Pipkin, of Mena, for appellee.

HUMPHREYS, J. Appellee, widow and administratrix of the estate of Henry Maxwell, deceased, presented a claim, properly authenticated, for \$500 and interest against the estate for money loaned her husband in his lifetime. She allowed the claim in her capacity as administratrix. It was then filed with the probate clerk of Polk county. The probate judge made the following indorsement on the claim: "Allowed as 4th class. 6—10—18." A judgment, which bears no date of making or entry, was rendered by the probate court, allowing said claim as a fourth-class claim. On the 9th day of October, 1918, appellant, mother and only heir of Henry Maxwell, deceased, filed a bond for costs, prayed and obtained an appeal from the judgment rendered by the probate court at its October term, 1918, pertaining to the estate of Henry Maxwell, wherein Laura Maxwell was administratrix. Before the cause was called for trial in the circuit court, appellee filed a motion to dismiss the appeal because the record did not identify the appeal as an appeal from the order of allowance made on the 10th day of June, 1918. The motion was overruled, and appellee excepted. Appellant then interposed a demurrer to the claim of appellee, challenging her right to sue her deceased husband's estate, and the jurisdiction of the probate court, or the circuit court on appeal, to adjudicate the matter. The court overruled the demurrer, and appellant excepted. The exception was noted of record and saved in appellant's motion for a new trial. The cause proceeded to a hearing de novo in the circuit court, and was submitted to a jury on the evidence adduced and instructions given by the court, upon which a verdict was

returned and judgment rendered in favor of appellee for \$600. From the verdict and judgment, an appeal has been duly prosecuted to this court.

A Mr. Farless, brother of appellee, testified that he resided with Henry and Laura Maxwell in 1914, at which time appellee and her husband were teaching school; that appellee was receiving \$55 a month, and turned her school warrants over to her husband for the purpose of paying their debts; that Henry Maxwell told him afterwards that he owed his wife money that she had advanced to him in school warrants, and that it was his intention to replace the money; that he heard Henry say nothing about the matter shortly before he died; that he died about the 24th day of May, 1918. On cross-examination he modified his evidence by saying that Henry paid the money on his debts.

Roy Farless, appellee's nephew, testified that he resided with Mr. and Mrs. Maxwell during the time they were teaching a nine months' school, beginning in 1914; that Mrs. Maxwell received \$55 a month for teaching and turned nine warrants, in his presence, over to her husband, Henry Maxwell; that he sold a part of his land for \$600 and deposited the money in the bank in their joint names; that about ten months before his death Henry Maxwell told him that he intended to live on the money and that he intended to sell the balance of the land and pay Mrs. Maxwell's school money back; that he did not know whether Mrs. Maxwell got the money deposited in the bank after her husband died.

Appellee testified, over the objection and exception of appellant, that she began teaching school on the 31st day of August, 1914, and continued for nine months at a salary of \$55 per month, and turned her earnings, from month to month, over to her husband, together with some money she had when they married, the total amount being \$500, for the purpose of paying his indebtedness; that he agreed at the time to pay the money back to her; that he afterwards sold a part of his land and paid some indebtedness he owed, and deposited something like \$600 in the bank to their joint credit; that he told her they would live on that money, and, when he sold the other land, he would repay the school money she had advanced to him; that he never repaid it prior to his death. Appellant's exception was noted of record and saved in her motion for a new trial.

It is suggested by appellee that the judgment should be affirmed for the following reasons: First, that the order granting the appeal identifies it as an appeal from a judgment rendered at the July, 1918, term of court, and not from the allowance made on the 10th day of June, 1918; second, that the record fails to show that an affidavit for ap-

peal was filed before the appeal was granted by the probate court; third, that no bond for costs was filed in the circuit court before the appeal to this court was granted.

[1] 1. It does not appear that a judgment was rendered by the court allowing appellee's claim on June 10, 1918, as suggested by appellee. The probate judge made the following indorsement on the claim as of that date: "Allowed as fourth class." The judgment allowing the claim incorporated in the transcript bears no date. The order granting the appeal refers to a judgment rendered at the July, 1918, term of court in the matter of the estate of Henry Maxwell, wherein Laura Maxwell was administratrix. In overruling the motion to dismiss the appeal, the court found and recited in its judgment that appellant had appealed as the sole heir of the estate of Henry Maxwell, deceased, from a judgment and order of the probate court of Polk county allowing the claim of appellee, Laura Maxwell, in the sum of \$622.50, against the estate of the said Henry Maxwell, deceased, which claim was, by the probate court, placed in the fourth class. It is impossible for us to know upon what evidence the court made this finding. Where the record does not affirmatively show that the findings of the court are contrary to it, or negated in it, this court must presume that the findings are sustained by the evidence.

[2] 2. If no affidavit for appeal was filed before the appeal was granted by the probate court, appellee waived the filing thereof by proceeding to trial in the circuit court without objection on that account. *Ex parte Morton*, 69 Ark. 48, 60 S. W. 307; *Stricklin v. Galloway*, 99 Ark. 56, 137 S. W. 804; *Wulff v. Davis*, 108 Ark. 291, 157 S. W. 384.

[3-6] 3. According to the recital in the matter of the probate court granting an appeal, appellant gave a bond for costs required by Act 327, Acts 1909. This bond bound appellant and her sureties for all costs that might accrue, either in the Polk circuit court or the Supreme Court of the state. It was therefore unnecessary to give an additional bond as a prerequisite to granting an appeal to the Supreme Court by the circuit court. Appellee has called our attention to the latter clause of section 1 of said act, which is as follows:

"And any such heir, legatee, devisee or judgment creditor of an estate may likewise upon executing bond for costs prosecute an appeal to the Supreme Court from the circuit court."

The heirs, legatees, devisees, or judgment creditors referred to in this clause have reference to those who had not become parties and filed the necessary bond before the cause reached the circuit court on appeal, and not to those who had already become parties and filed the necessary bond before the appeal was granted by the probate court. Appellant insists that the trial court erred in holding

that appellee had capacity to sue her deceased husband's estate in a court of law. Section 109 of Kirby's Digest provides for a special proceeding by which the probate court may allow any claim in favor of an administrator against the estate of his intestate. The statute is broad enough to include equitable demands. The language is that any demand may be established against the intestate by the administrator or executor. Even if this were not so, section 1, Act 159, Session Laws of 1915, provides that a married woman may sue and be sued as a feme sole. In construing the statute, this court said in *Flitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772, that the lawmakers "evidently meant to confer upon her [a married woman] the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried." This court said in *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165, in reference to Act 159, Acts 1915, that the act "in the broadest terms enables a married woman to sue and be sued." The suggestion that the money was advanced by appellee to her husband before the passage of this act can have no effect as to her right to sue. In that respect the statute is one of procedure, and no one has a vested right in methods of procedure.

Our construction of section 109 of Kirby's Digest, just announced, renders it unnecessary to discuss appellant's further contention that the probate court had no jurisdiction to entertain and allow the claim.

[7] Again, appellant insists that the court erred in admitting the testimony of Laura O. Maxwell pertaining to a transaction between herself and her husband in his lifetime. Appellee, as a claimant, was not entitled to testify in reference to transactions between herself and her intestate husband in an action against herself, as administratrix. That part of appellee's evidence showing that she had money of her own when she married and that she taught school for nine months at \$55 a month and received warrants in payment of her services was admissible. *Nunnally v. Becker*, 52 Ark. 550, 13 S. W. 79. That part of her evidence touching upon the transaction between herself and her husband in his lifetime was inadmissible. Kirby's Digest, § 3093; *Nunnally v. Becker*, supra. The statutory inhibition against the evidence applies in all civil actions, special as well as ordinary proceedings, without considering her own evidence tending to show that she loaned her husband \$500, and that he owed her that amount when he died, it cannot be said that her claim was fully established by the undisputed evidence. Therefore the court committed prejudicial error in admitting that part of her evidence over the objection of appellant. Appellee let her husband have the money in 1914-1915, took no note

or other evidentiary of indebtedness, received no interest, and made no demand for its repayment. Her brother testified, in his direct testimony, that the money was used to pay their debts. Her brother and nephew both testified that, when her husband sold a part of the land, he deposited the money to their joint credit in the bank. The jury could have drawn the inference from this testimony that appellee permitted her husband to so use her money that it became his own, or that, if borrowed, he repaid it.

[8] Appellant requested a peremptory instruction upon the theory that, omitting the evidence of appellee, the evidence was insufficient to support the verdict. The evidence of appellee's brother and nephew tended to show that appellee loaned her husband \$495 in monthly amounts of \$55 per month, beginning in September, 1914, and that he made acknowledgement of the indebtedness ten months before his death, and expressed the intention of repaying it as soon as he sold the balance of his real estate. Upon the record made, the jury might have drawn the inference from the legal evidence that Henry Maxwell owed his wife \$495 and interest at the time he died. For the reasons given, the court did not err in refusing to give the peremptory instruction requested by appellant.

[9] Lastly, appellant contends that the court erred in refusing to give her requested instruction No. 2. The court properly refused the instruction because it charged the jury on the weight of the evidence.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial, unless, upon remand, the court should find that the appeal was not taken from a judgment rendered at the July, 1918, term of the probate court, allowing the claim, in which event the court will sustain the motion to dismiss the appeal.

#### EVANS et al. v. WELLS. (No. 207.)

(Supreme Court of Arkansas. May 5, 1919.)

#### 1. HUSBAND AND WIFE ⇨49½(1)—WIFE'S SEPARATE PROPERTY—GIFT TO HUSBAND—RECOVERY BY WIFE'S HEIRS.

Deceased wife's heirs cannot recover from surviving husband money given husband by wife during her lifetime, notwithstanding Const. art. 9, § 7, and Kirby's Dig. §§ 5207, 5227.

#### 2. WITNESSES ⇨76(3)—COMPETENCY—HUSBAND AND WIFE—WAIVER OF OBJECTION.

In action by deceased wife's heirs against husband to recover wife's money and have trust declared in their favor upon land purchased therewith by husband, husband was properly permitted to testify that wife gave him the mon-

ey, notwithstanding Kirby's Dig. § 3095, prohibiting testimony between husband and wife, where deceased wife's heirs developed such testimony on their original examination of husband as a witness as well as in answers made by husband to interrogatories propounded in complaint.

#### 3. HUSBAND AND WIFE ⇨40½(6)—WIFE'S SEPARATE PROPERTY—SUFFICIENCY OF EVIDENCE.

In deceased wife's heirs' action against surviving husband to recover wife's money, or have trust declared in their favor upon land purchased therewith by husband, finding that wife had given money to husband held not clearly against preponderance of the evidence.

#### 4. APPEAL AND ERROR ⇨1012(1)—REVIEW—DECREE.

Decree must be affirmed where court's finding is not clearly against the preponderance of the evidence.

Appeal from Randolph Chancery Court; Geo. T. Humphries, Chancellor.

Suit by G. W. Evans and others against G. W. Wells. Decree of dismissal, and plaintiffs appeal. Affirmed.

G. B. Oliver, of Corning, for appellants.

Jerry Mulloy and S. A. D. Eaton, both of Pocahontas, for appellee.

SMITH, J. Appellee, G. W. Wells, was married to Millie Harbison, a widow, on August 21, 1900, at which time she owned 40 acres of land in her own right and had dower and homestead in two hundred acres more. On October 27, 1905, she sold her interest in these lands for \$5,000 cash, and on October 30th, deposited this money in the Bank of Corning in the name of Millie and G. W. Wells, the latter of whom at the time had an individual account with the Bank of Corning. This \$5,000 was at various times and in various amounts, beginning March 27, 1906, and ending December 7, 1909, passed to the credit of G. W. Wells' individual account by means of debit slips and by him checked out. Mrs. Wells died without descendants on April 25, 1912, and her heirs, who are the appellants here, began this suit on May 12, 1913, to recover this money and to have a trust declared in their favor against certain lands which G. W. Wells had purchased, upon the ground that the lands had been purchased with portions of this money. The answer denied the use of any of this money in the purchase of the lands, but admitted the appropriation of the deposit, and alleged that Mrs. Wells had given him the money, and that he had expended it for their common use and benefit.

The plaintiffs filed two amendments to their complaint, consisting of interrogatories propounded to the defendant, all of which he answered under oath, as he was requested

to do. These questions and answers related to the acquisition and disposition of the deposit. The court dismissed the complaint as being without equity, and this appeal has been duly prosecuted to reverse so much of the decree as found that Mrs. Wells had given the deposit to appellee. No complaint is made here of the finding adverse to appellants' contention that no trust existed in the lands.

[1] Appellants cite sections 5207 and 5227 of Kirby's Digest as being applicable and controlling under the issues joined in the case. The first of these sections is section 7 of article 9 of the Constitution, which gave to any feme covert the same property rights enjoyed by feme soles; while the second section is taken from Act No. 91 of the Acts of 1875, p. 172, entitled "An act to protect married women in the enjoyment of their separate property." We think, however, that the sections of the Digest referred to are of no controlling importance here. Indeed, section 5207, which provides that the fact that a married woman permits her husband to have the custody and management of her separate property shall not, of itself, be sufficient evidence that she has relinquished her title to said property, but that there shall be a presumption of agency, also provides that this presumption may be rebutted by any evidence establishing a sale or gift by the wife to the husband of such property. So that the question to be decided is one of fact, which may be stated to be: Did Mrs. Wells give this money to her husband?

[2] Appellants now complain that appellee was permitted to testify that his wife did in fact give him this money as being in violation of section 3095 of Kirby's Digest. But, if this be true, and we do not so decide (*Hannaford v. Dowdle*, 75 Ark. 131, 86 S. W. 818), appellants are in no position to complain, as they developed this testimony on their original examination of appellee as a witness as well as in the answer which appellee filed to the interrogatories propounded in the complaint.

The testimony is discussed at length in the briefs, and appellants call attention to alleged discrepancies in appellee's testimony, and it is insisted that his testimony should be disregarded on that account. Much stress is also laid on the fact that appellee testified that his wife wrote a letter to the bank advising that she had given to her husband the money she then had on deposit; whereas the president and cashier of the bank testified that they had no recollection of having received such a letter, and that the letter could not be found in their files. Appellee testified that much of this deposit was used to pay the traveling and medical expenses of his wife, who was an invalid during a large part of the time they were married; and

there was testimony that it was appellee who was the invalid, and not his wife, and that the money was spent on him, and not on her. But it is almost undisputed that a comparatively large amount of the money was spent in this way and it is unimportant on which spouse it was spent. The important question is whether Mrs. Wells had given the money to appellee and knew that he was spending it. The circumstances and habits of appellee and his wife make it highly probable indeed almost certain, that she must have known that appellee was using the money, and that the deposit was being exhausted, and that the last of the money had been transferred to the individual account of appellee three years before the death of his wife. The testimony is undisputed that Mrs. Wells deposited the check with the bank, not to her individual account and credit, but to the joint account and credit of herself and her husband, and the president of the bank testified that Mrs. Wells directed the transfer of the first \$1,000 transferred from the joint account to appellee's individual account. The remainder from time to time was transferred under the directions of appellee. There was testimony that Mrs. Wells had stated that she had no relatives except some cousins (these appellants) who would pass her on the road without speaking to her, and that she did not intend for them to have any of her property. It was also shown, and not denied, that the bank rendered statements at various times of the account, seven of which statements are made exhibits to appellee's deposition. The statements show a constantly decreasing balance, and appellee testified that they were all received through the mail, and that his wife saw them all and knew how the money was used. A portion of appellee's testimony as abstracted makes it appear that appellee testified that his wife was dissatisfied with his appropriation of this money; but we think this is not the effect of his testimony when taken as a whole. Indeed, the officers of the bank testified that Mrs. Wells never at any time made any objection to the transfer of the funds from one account to the other, although the account had been practically depleted by the end of 1907, and the final balance of \$200 was transferred in 1909, and Mrs. Wells did not die until 1912.

[3, 4] Inasmuch as this suit was not brought for more than four years after the death of Mrs. Wells, appellee has interposed the defense of laches. We do not decide that question, however, as we think the finding of the court below that Mrs. Wells had given this money to her husband is not clearly against the preponderance of the evidence, and it follows, therefore, that the decree must be affirmed on that account; and it is so ordered.

**BLANTON et al. v. FORREST CITY MFG. CO. et al. (No. 224.)**

(Supreme Court of Arkansas. May 19, 1919.)

**1. CONTRACTS ⇨10(1)—MUTUALITY.**

There must be mutuality in a contract to make it enforceable.

**2. CONTRACTS ⇨22(1)—ACCEPTANCE OF OFFER — GRATUITOUS PROMISES — PERFORMANCE OF CONDITION.**

An offer without acceptance is not a contract. Gratuitous promises or propositions to pay money upon condition or upon happening of some event or the doing of some act, or incurring some expense, loss, or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition.

**3. VENDOR AND PURCHASER ⇨16(1)—CONTRACT TO SELL LAND—GRATUITOUS PROMISE—LACK OF CONSIDERATION.**

Contract with city to sell land for stipulated price to any third party who desired to purchase land for manufacturing purposes, without consideration to support the contract, was not binding until the third party incurred some expense, loss, or legal obligation thereunder, being merely an offer without acceptance.

**4. SUBSCRIPTION ⇨4—ACCEPTANCE.**

The acceptance of a subscription is ineffectual unless within the lifetime of the subscriber.

**5. EXECUTORS AND ADMINISTRATORS ⇨96—CONTRACTS—AUTHORITY OF EXECUTRIX.**

Executrix cannot create a new liability where none existed before, by binding estate on a contract which had come to an end by testator's death.

**6. JUDGMENT ⇨489—COLLATERAL ATTACK—JURISDICTIONAL FACTS.**

In determining the validity of a judgment on collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and the subject-matter and those quasi jurisdictional facts without allegation of which the court cannot properly proceed and without proof of which decree should not be made; the absence of the former rendering judgment void upon collateral attack.

**7. JUDGMENT ⇨18(2) — VALIDITY — PLEADING SHOWING UNENFORCEABLE CONTRACT.**

Probate court's judgment ordering specific performance of deceased's land contract under Kirby's Dig. § 213, was void, where it appeared upon the face of the judgment reciting the contract that the contract lacked mutuality, and was therefore unenforceable.

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Suit by Annie Mabel Blanton and another against the Forrest City Manufacturing Com-

pany and others. Decree of dismissal, and plaintiffs appeal. Reversed and remanded.

Annie Mabel Blanton and John Cecil Blanton brought a suit in equity against Forrest City Manufacturing Company, Forrest City Compress Company, and the city of Forrest City to have their interest declared in certain lands in the possession of the Forrest City Compress Company and for an accounting of the rents and profits thereof. The material facts are as follows:

Annie Mabel Blanton and John C. Blanton are the children of Jas. P. Blanton, deceased, who in his lifetime owned the lands in controversy. Jas. P. Blanton made a will in which his wife, Mary E. Blanton, and his two children, Annie Mabel Blanton and John Cecil Blanton are the principal beneficiaries. After directing that all of his just debts and funeral expenses be paid, and giving a bequest of \$5 each to his brother and sister, the testator devised to his wife one-half of all the residue of his estate and to his son, John Cecil Blanton, and to his daughter, Annie Mabel Blanton, each one-fourth of the residue of his estate. By a subsequent clause of the will the testator provided that his wife should have the use of and control of the portions of his estate bequeathed to his son and daughter until each should respectively become of age, at which time his wife is directed to pay each of them his or her portion of the estate. The will then directs that the homestead located in Forrest City, Ark., should be included as a part of the one-half devised to his wife. The testator appointed his wife as the executrix of his will. On the 8th day of February, 1904, Jas. P. Blanton and Mary E. Blanton, his wife, signed the following instrument in writing:

"J. P. Blanton and Wife to W. Gorman, Mayor, et al.

"Agreement and Option.

"Know all men by these presents that we, J. P. Blanton and Mary E. Blanton, his wife, of Forrest City, St. Francis county, Arkansas, in order to aid in the locating of industries at said place, do hereby agree with Walter Gorman, as mayor of the incorporated town of Forrest City, and his successor and successors in said office, and such third or other persons as may desire locations hereunder, as follows:

"Beginning at a stake on the half section line running north and south dividing the northeast quarter and the northwest quarter of section thirty-three (33), township five (5) north, range three (3) east, at a point where said line intersects with the south line of the present right of way of the Choctaw, Oklahoma & Gulf Railway, thence running south 70 degrees west with the said south line of said railroad right of way 2,692 feet to a stake; thence running south 12 degrees and 45 minutes east 255 feet and 5 inches to a stake; thence north 89 degrees and

45 minutes east 2,557 feet to a stake; thence running north on said half section line to the place of beginning—containing in all forty-four and fifty-seven hundredths (44.57) acres of land.

"And it is expected that portions of said land will from time to time be wanted by parties desiring to establish manufacturing plants or other industries.

"Therefore the first parties hereto agree to accept one hundred dollars per acre for any portion of said land and to convey the same by good and sufficient warranty deed, upon payment of the purchase money, which shall immediately be due, and any person or persons whose purpose and selection and extent of site has the approval of the mayor and common council of the incorporated town of Forrest City shall be taken and considered a party to this agreement and stand in the relation of a purchaser by title bond from the first parties hereto, and have immediate right of possession, in advance of execution and delivery of deed, provided the right to select locations thereunder shall be limited to such as are approved by said mayor and common council within three years from this date.

"Witness the hands of the first and second parties hereto this 8th day of February, 1904."

Jas. P. Blanton departed this life on the 10th day of May, 1904, and his will was duly admitted to probate; his wife, Mary E. Blanton, being appointed executrix thereof. Subsequent to the death of Jas. P. Blanton, the town of Forrest City by its Mayor and common council passed a resolution accepting the donation of the land described in the written agreement above set forth. The resolution authorized the Merchants' & Planters' Compress Company to purchase 10 acres of said tract of land, and the company paid to Mrs. Mary E. Blanton therefor the sum of \$1,000, and she executed a deed for the same to the company. This was an adequate price for the land at that time.

The Merchants' & Planters' Compress Company, a corporation doing business at Forrest City, Ark., presented to the probate court its petition reciting the above facts and asking for the specific performance of the contract of the 10 acres of land, being a part of the land described in the written instrument above set forth. The petition was presented to the probate court at its July term, 1907, and an order was entered of record reciting substantially the facts above set forth and authorizing and directing Mary E. Blanton, as executrix of the estate of Jas. P. Blanton, deceased, to execute to the Merchants' & Planters' Compress Company a deed conveying to it the 10 acres of land in controversy.

Pursuant to this order of the probate court, on the 26th day of July, 1907, Mary E. Blanton executed to said Merchants' & Planters' Compress Company a deed to said lands. The Forrest City Compress Company is a corporation, and is the successor of the

Merchants' & Planters' Compress Company. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendants, and dismissed the complaint of the plaintiffs for want of equity. The plaintiffs have appealed.

C. W. Norton, of Forrest City, for appellants.

Mann, Bussey & Mann, of Forrest City, for appellees.

HART, J. (after stating the facts as above). It is deemed appropriate to state at the outset that Annie Mabel Blanton became 18 years old on the 25th day of August, 1917, and John Cecil Blanton arrived at the age of 21 years on the 30th day of September, 1917. The present suit was commenced on the 24th day of September, 1917. It may be also appropriately stated here that this is not a case of mutual subscription for a given object where the promise of others is a good consideration for the promise of each.

[1] The contract which we have copied in our statement of facts is the basis of this suit. It is well settled that there must be mutuality in any contract to make it enforceable.

[2] It is the contention of counsel for the plaintiffs that the instrument in question was in effect a subscription of the lands and constituted a mere offer which must have been accepted or some expense or legal obligation incurred thereunder in order that a legally enforceable contract might be effected. In this contention we think counsel are correct. The rule is well stated in *Wayne, etc., Collegiate Institute v. Smith*, 36 Barb. (N. Y.) 576, where the court said:

"Gratuitous promises or propositions to pay money upon condition, or upon the happening of some event, or the doing of some act, or incurring some expense, loss, or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition. \* \* \* Upon this principle all difficulty in regard to this class of subscriptions seems to be obviated, and a recovery upon them can be had without resorting to the questionable expedient of patching up a contract by extrinsic parol evidence, from which to help out the subscription paper by the implication of a promise. The object of the subscription is expressed in the paper itself. The terms upon which the defendant agrees to pay are therein specified. When these terms are complied with, or engagements and liabilities incurred on the faith thereof, a complete contract is made, and the liability of the defendant has become absolute."

The rule was recognized and applied by this court in the case of *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. See, also, *Elliott on Contracts*, vol. 1, § 228. Many other cases upholding,

the rule are reviewed in a case note to 17 Ann. Cas. pp. 1076-1078.

[3] There was no consideration for the contract, and, until the other party incurred some expense, loss, or legal obligation, it did not constitute a binding contract, but was only an offer. An offer without acceptance is not a contract.

[4] The record shows that Jas. P. Blanton died before the terms of the contract were accepted by the town of Forrest City and before that town or the manufacturing companies seeking to benefit by the contract incurred any expense, loss, or legal obligations under it. This brings us to the question of whether or not his death amounted to a revocation of the subscription. It is well settled that the acceptance of a subscription is ineffectual unless made during the lifetime of the subscriber. *Grand Lodge, etc., v. Farnham*, 70 Cal. 158, 11 Pac. 592; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Twenty-Third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *In re Helfenstein*, 77 Pa. 328, 18 Am. Rep. 449; *Elliott on Contracts*, vol. 1, § 35; and 39 Cyc. 1189.

In *Pratt v. Baptist Soc.*, supra, the court said:

"Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor before the offer is acted upon is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

[5] So in the present case the executrix could not create a new liability where none existed before. She has no authority to bind her husband's estate by a contract which had come to an end by his death, and thereby convert an invalid promise of her testator into an enforceable liability of his estate. The contract was a one-sided one, and, being only an offer or promise, as has been often said, the offer or promise died when the one making it died.

Counsel for defendant seek to uphold the decree upon the validity of the probate order wherein the executrix of the estate of Jas. P. Blanton, deceased, was ordered to make a deed to the Merchants' & Planters' Compress Company. It is claimed that the order was made pursuant to section 213 of Kirby's Digest, conferring upon probate courts the power to decree the specific performance of contracts of deceased persons for the sale of real estate in certain instances upon the petition of their executors or administrators.

[6] It is contended that the complaint in the present case is a collateral attack upon that order, and is therefore unavailing to the plaintiffs. In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter and those quasi jurisdictional facts, without allegation of which the court cannot properly proceed and without proof of which a decree should not be made. The absence of the former renders the judgment void upon collateral attack. *Whitford v. Whitford*, 100 Ark. 63, 139 S. W. 653.

In *Oliver v. Routh*, 123 Ark. 189, 184 S. W. 843, the court said that the authority to grant specific performance of an executory contract to convey land against the executor or administrator of a decedent is a special power conferred upon the probate court by sections 209-214 of Kirby's Digest. Therefore it was held that the facts essential to the exercise of the special jurisdiction by the probate court must appear upon the record.

The court further held that the probate court is without jurisdiction to render a judgment of specific performance of an executory contract made by the decedent to convey the homestead. The court said that the sections of the Digest just referred to contemplate that there should be a valid executory contract to convey land made by the decedent before the probate court can order it to be specifically performed. The court again had occasion to consider this question in *Arkansas Valley Trust Co. v. Young*, 128 Ark. 42, 195 S. W. 36. In that case the court held that section 213 of Kirby's Digest gives an administrator, with the approval of the probate court, authority to convey land belonging to a decedent to a third party in pursuance of an oral agreement between decedent and the third party where the administrator is satisfied that payment has been made according to the contract.

The court again recognized that the authority given under the statute was a special power to be exercised in a special manner, and not according to the course of common law.

In the present case the petition filed in the probate court sets out the written instrument under which the defendants claim and which we have copied in our statement of facts. This instrument is also recited in the judgment of the probate court as the basis of its action in authorizing and directing the executrix to make the deed and recites that it is done pursuant to the contract in question.

[7] The judgment of the probate court also shows that there was no acceptance, either express or implied, by Forrest City or by the Forrest City Manufacturing Company or



the Merchants' & Planters' Compress Company prior to the death of Jas. P. Blanton. As we have already seen, the contract lacked mutuality, and was therefore unenforceable. The lack of jurisdictional facts appears in the probate judgment, and it is therefore void.

What we have said applies with equal force to the 20 acres claimed by the Forrest City Manufacturing Company, and the same conclusion is reached as to it.

It follows that the decree must be reversed, and the cause remanded for further proceedings according to the principles of law and equity and not inconsistent with this opinion.

#### RHODES v. BARTON et al. (No. 229.)

(Supreme Court of Arkansas. May 19, 1919.)

#### CONSTITUTIONAL LAW §80(3) — ROAD IMPROVEMENT DISTRICT—STATUTORY POWERS OF COMMISSIONERS—VALIDITY OF ACT.

Act No. 55 of Acts 1919, creating road improvement district No. 9 in Crittenden county, by section 8 authorizing district commissioners to determine what roads it was most necessary to improve and to file improvement plans, specifications, and plat with county clerk for approval of county court, does not delegate such authority to commissioners as to invalidate act because interfering with county court's constitutional, exclusive jurisdiction over public roads of county.

Appeal from Crittenden Chancery Court; Archer Wheatley, Chancellor.

Suit for injunction by W. B. Rhodes against Louis Barton and others, as Commissioners of Railroad Improvement District No. 9 in Crittenden County. General demurrer to complaint sustained, and complaint dismissed for want of equity; and plaintiff appeals. Decree affirmed.

Harry Spears, of Memphis, Tenn., for appellant.

A. B. Shafer, of Memphis, Tenn., and S. V. Neely, of Marion, for appellees.

HUMPHREYS, J. Appellant, an owner of lands in road improvement district No. 9 in Crittenden county, created by Act No. 55, Acts 1919, of the General Assembly of Arkansas, instituted suit in the Crittenden chancery court against appellees, commissioners of said district, to enjoin them from taking any steps under said act. It was alleged in the complaint that the act empowered appellees to select the roads in the district which are to be improved, which delegation of authority rendered the act void because it interfered with the constitutional jurisdiction of the

county court. Appellees filed a general demurrer to the complaint, which was sustained by the court. Appellant declined to plead further, and the complaint was dismissed for want of equity. From the decree of dismissal, an appeal has been prosecuted to this court.

It is insisted by appellant that the act in question is void because the Legislature delegated the right to the commissioners to select the roads to be improved within said district. The authority challenged as unconstitutional is conferred in section 8 of said act on the commissioners "to determine what roads within their respective districts it is most necessary to improve at the present time, and when they have determined what roads they deem it best to improve, they shall make plans for the improvement thereof, and when their plans are completed they will file the same, with a plat showing the outlines of the district and the course of the roads which they contemplate improving, and accompanied by specifications giving the details of the work and an estimate of the costs thereof with the county clerk of Crittenden county. Said plans shall also be submitted to the state highway department, and if approved by it, shall be deemed a federal and state aid highway project, and the commissioners of each of said districts shall lay the plans before the county court of Crittenden county, and if said county court approve the same, they shall be the plans and specifications of the district, and the approval of said plans shall operate as the laying out as a public highway of any new road which may appear upon said plans. \* \* \* " There is nothing in the section just quoted which indicates the usurpation of the exclusive, original jurisdiction of the county court over the public roads of the county. The act requires that the selection of the roads by the commissioners and their plans for the improvement thereof must be submitted to, and approved by, the county court before they can become the improvements of the district. The statute does not substitute a tribunal for the county court and confer upon it the exclusive, original jurisdiction conferred upon the county court by the Constitution of the state. The selection of the roads and the plans for improving them are in the nature of suggestions and in no sense restrictions upon the judgment or discretion of the county court. In upholding the constitutionality of a statute similar to the one in question, in the recent case of *Sallee v. Dalton* (unreported), this court interpreted the statute as invoking, and not invading, the jurisdiction of the county court. The court took occasion to say that the effect of such a statute "was not to compel the county court to accept the judgment of the board of commissioners in the selection of routes," also, that its effect was "not absolutely to impose the will of the commissioners upon the county

court in the changing of roads or the establishment of new roads." The identical question involved in the instant case was adjudicated in the case of *Sallee v. Dalton*, supra, and that case rules this.

The constitutionality of the act in question has not been assailed on any other ground than the one assigned and discussed in this opinion, so we have refrained from discussing the validity of its other provisions.

The decree is affirmed.

SMITH, J., not participating.

#### DICKERSON v. TRI-COUNTY DRAINAGE DIST. et al. (No. 222.)

(Supreme Court of Arkansas. May 19, 1919.  
Dissenting Opinion June 9, 1919.)

##### 1. STATUTES §159 — REPEAL — CONFLICT WITH LATER STATUTES.

To the extent of any conflict between earlier and later statutes, the earlier must yield to the later.

##### 2. EMINENT DOMAIN §70—TAKING OF PRIVATE PROPERTY FOR PUBLIC USE—COMPENSATION—CONSTITUTION.

Const. art. 2, § 22, declaring that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor," relates entirely to the right of the owner to have compensation, and has nothing to do with the owner's remedy, which is left to the Legislature.

##### 3. EMINENT DOMAIN §31—RIGHT OF STATE — TAKING PROPERTY FOR DRAINAGE DITCHES.

Taking private property for use of drainage districts for construction of ditches falls within the state's right of eminent domain.

##### 4. EMINENT DOMAIN §71 — LEGISLATIVE PROVISIONS FOR ASCERTAINING COMPENSATION—CONSTITUTIONAL GUARANTIES.

Where the Legislature provides a method for the ascertainment of compensation to be allowed owners for land taken under eminent domain for construction of ditches in drainage districts, all constitutional guaranties are complied with, and the right to exact compensation is made effectual.

##### 5. DRAINS §32 — TAKING PRIVATE LANDS FOR DITCHES—DAMAGES—FORM OF COMMISSIONERS' REPORT—STATUTES.

The provision of Acts 1911, p. 193, relating to drainage districts and the taking of private lands for ditch construction, that where the commissioners make no return of damages to a particular tract "it shall be deemed a finding by them that no damage will be sustained," merely relates to the form of the report and is entirely proper, since no finding need be reported where no damages are found or those found are exceeded by the benefits.

##### 6. CONSTITUTIONAL LAW §281—DUE PROCESS—EMINENT DOMAIN—STATUTES.

The provisions for an appeal, or for appearance and demand for a jury in Drainage District Acts 1906, p. 143, 1909, p. 829, 1911, p. 193, 1913, p. 738, amply protect the rights of owners whose property is taken for construction of ditches for public drainage districts, and constitute due process of law.

##### 7. DRAINS §36(2)—TAKING PRIVATE LAND FOR DITCHES—PROCEEDING IN REM—OWNERS' RIGHT TO APPEAL.

The whole proceeding to obtain privately owned land for ditches for drainage districts is one in rem, and when the statutory notices are properly given, all owners of property thereby becomes parties to the proceeding, and have the right of appeal whether they actually appear at the hearing or not.

##### 8. EMINENT DOMAIN §209—CONDEMNATION PROCEEDINGS—JURY TRIAL.

Const. art. 12, § 9, guaranteeing jury trial in condemnation proceedings, relates only to condemnations by private corporations, and there is no express constitutional provision requiring assessments of damages by a jury where private owners' lands are taken by a drainage district for construction of a ditch.

Wood and Hart, JJ., dissenting.

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Action by Fred R. Dickerson against the Tri-County Drainage District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. W. Norton, of Forrest City, for appellant.

A. B. Shafer, of Memphis, Tenn., for appellees.

MCCULLOCH, C. J. Tri-county drainage district is, as its name implies, a drainage improvement district, and was established by order of the circuit court of Crittenden county pursuant to the general statutes of the state authorizing the creation of such districts. Acts 1909, p. 829; Acts 1911, p. 193; Acts 1913, p. 738. The district embraces lands in Crittenden, Cross, and St. Francis counties. Appellant is the owner of a certain tract of land situated in the district and in St. Francis county, and he instituted this action to recover the value of about 19 acres of land alleged to have been taken and used by appellee drainage district in the construction of one of the ditches which constitutes the drainage system authorized in the organization of the district. Appellee filed an answer in which appellant's ownership of the land was admitted, and it was also admitted that the land was taken for use in construction of the ditch, but other proceedings were pleaded in the answer as a bar to the right of appellant to recover compensa-

tion in this action. The court overruled the demurrer to the answer, and appellant elected to stand upon the demurrer, and suffered judgment to be rendered against him, from which an appeal has been prosecuted to this court.

The statute under which the drainage district was organized provides, in substance, that a drainage district may be created upon the petition of property owners, and that after the preliminary survey is made and filed showing the extent of the improvement, notice of the hearing shall be given by publication, and that on the day mentioned in the notice a public hearing shall be held by the court, and that owners of property in the proposed district may protest against its organization. Upon that hearing the court either establishes the district or refuses to do so, and when the district is established by an order of the court a board of commissioners is named for the purpose of carrying out the project. Where the district is to embrace lands in a single county the proceedings are to be had in the county court, but where the district embraces lands in more than one county, the statute provides that the proceedings shall be had in the circuit court of one of those counties, and that in the latter case the words "county court" and "county clerk" where found in the statute shall mean "circuit court" or "circuit clerk." The statute provides for an appeal by any property owner from the order of the court either creating or establishing the district. The statute then provides that upon the creation of a district and the appointment of a board of commissioners, said board shall prepare plans for the proposed improvement and procure estimates as to the cost thereof. One of the provisions in that respect reads as follows:

"Such plans and specifications shall show, not merely the location, width and depth of the ditches, but the work to be done in removing obstructions from water courses, building of pumping stations, flumes, floodgates, and fences to protect the ditches, together with all other work contemplated." Section 4, Acts 1911, *supra*.

These plans are to be filed with the clerk of the court, accompanied by a map showing the location of all main and lateral ditches, and specifications describing the character of improvements to be made, the width and depth of the ditches, and the probable cost of all the work to be done. Those parts of the statute which relate to the assessment of damages, if any, to the lands in the district read as follows:

"The commissioners shall also assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such assessment of damages as to any tract of land, it shall be deemed a finding

by them that no damage will be sustained.  
\* \* \*

"When their assessment is completed the commissioners shall subscribe said assessment and deposit it with the county clerk, where it shall be kept and preserved as a public record. Upon the filing of said assessment the county clerk shall give notice of the fact by publication, two weeks in some weekly newspaper issued in each of the counties in which the lands of the district may lie. Said notice shall give a description of the lands assessed for drainage purposes in said district; that the owners of said lands, if they desire, may appear before the county court on a certain day (naming the day) and present complaints, if any they have, against the assessment of any lands in said district.

"Any owner of real property within the district who conceives himself to be aggrieved by the assessment of benefits or damages or deems that the assessment of any land in the district is inadequate, shall present his complaint to the county court at the first regular, adjourned or special session, held more than ten days after the publication of said notice; and the said court shall consider the same and enter its finding thereon, either confirming such assessment or increasing or diminishing the same; and its finding shall have the force and effect of a judgment, from which an appeal may be taken within twenty days, either by the property owners or by the commissioners of the district." Section 1, Act of 1913, *supra*.

Section 8 of the act of 1909, *supra*, reads as follows:

"Any property owner may accept the assessment of damages in his favor made by the commissioners; or acquiesce in their failure to assess damages in his favor, and shall be construed to have done so unless he gives to said commissioners within thirty days after the assessment is filed, notice in writing that he demands an assessment of his damages by a jury; in which event the commissioners shall institute in the circuit court of the proper county an action to condemn the lands that must be taken or damaged in the making of such improvement; which action shall be in accordance with the proceedings for condemnation of rights of way by railroad, telegraph and telephone companies, with the same right of paying into court a sum to be fixed by the circuit court or judge, and proceeding with the work before assessment by the jury. If there is more than one claimant to the lands, all claimants may be made parties defendant in such suit, and the fund paid into court, leaving the claimant to contest in that action their respective rights to the fund."

We must, in the state of the pleadings before us, treat it as conceded that the terms of the statute were complied with concerning the assessment of damages to lands taken or damaged in the construction of the improvement, but appellant seeks to uphold his right of action under Act of 1905, p. 143, which provides that whenever any levee or drainage district "may have appropriated, or shall appropriate any land for right of way for the construction and maintenance of either levees, ditches, canals, or drains,

and constructed levees or drains thereon, without having procured the consent of the owner, or owners, of such land to construct the levees or drains, or procured the right of way, either by purchase, donation, or condemnation, such owner, or owners, where their cause of action has not been barred by the statute of limitation, shall have a cause of action against such \* \* \* levee or drainage district for the market value of the land at the time it was actually occupied."

[1] The act of 1909 is the last expression of the legislative will on this subject, and the statute of 1905 must yield to the extent that it may be found to be in conflict with it. Whether or not there is in fact any irreconcilable conflict in the statutes we need not now stop to decide. The former statute was construed by this court, and its validity upheld in the case of *Young, Adm'r, v. Red Fork Levee District*, 124 Ark. 61, 186 S. W. 604.

[2-4] According to the allegations of the complaint, appellant's land has already been taken and used in the construction of the improvement, and there is not involved in this controversy any question about the method of taking. The only question involved relates to the compensation for the property thus taken for the public use. The statute hereinbefore referred to provided a method for the ascertainment of damages or the compensation to be rendered to the owner of property taken or damaged, and we discover no sound reason why that statutory method should not be upheld. It provides for an appraisalment of damages by the board of commissioners and for a report to the court which established the district, and where the proceedings are pending, and each property owner is given a hearing after the publication of notice. Two remedies are provided to an aggrieved property owner; first, an appeal to the higher court, and, next, the right within a certain time to demand a jury for an appraisalment of the damages.

The only constitutional provision on the subject is found in section 22, art. 2, declaring that—

"Private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

This constitutional provision relates entirely to the right of the property owner to have compensation, and it has nothing to do with the remedy afforded to the injured property owner, and that matter is left entirely to the legislative will. Taking property for public use of this character falls within the state's right of eminent domain, and we have held that that right may be exercised without notice to the property owner or without giving a hearing upon that question. *Sloan v. Lawrence County*, 134 Ark. 121, 203 S. W. 260. It is, of course, not to be implied from that decision that the right to compensation

may be ignored by the Legislature, but where a method is provided for the ascertainment of compensation to be allowed, all constitutional guaranties are complied with, and the right to exact compensation is made effectual. The method of ascertaining compensation prescribed in the act of 1905, *supra*, was somewhat similar in principle to the method prescribed in the statute now under consideration, and we upheld its validity in the case of *Young, Adm'r, v. Red Fork Levee District*, *supra*.

[5-7] The drainage statute provides, as has already been shown, that where the commissioners make no return of damages to any particular tract of land "It shall be deemed a finding by them that no damage will be sustained." This provision relates merely to the form of the report of the commissioners, and is, we think, entirely within the legislative power. The requirement is that where damages are found by the commissioners they shall report the amount, but where no damages are found, or where the benefits exceed the damages and the assessment to be levied, no finding need be reported as to that particular tract.

We are unable to discover any violation of the rights of the property owners in prescribing this form of report, for when read in the light of the statute any property owner in examining the report of the commissioners will know that there has been a finding against him as to damages to his property where no amount is specified. The provision for an appeal or for an appearance and demand for a jury amply protects the rights of property owners, and constitutes due process of law. The whole proceeding is one in rem, and when the notices provided for in the statute are properly given, all owners of property thereby become parties to the proceeding, and have the right of appeal whether they actually appear at the hearing or not. *Foster v. Bayou Meto Drainage District*, 132 Ark. 141, 200 S. W. 792.

[8] The principle involved in this case has been declared in the decision of this court in *Young, Adm'r, v. Red Fork Levee District*, *supra*, in construing the act of 1905. That statute provided that levee and drainage districts, after selecting the route for the improvement, should, upon failure to obtain the consent of the owners of the property to be taken, present their petition to the judge of the circuit court who should appoint a board of appraisers composed of three landowners, and that the appraisalment of said board when approved by the court should become final, unless the interested landowners appeared and demanded a trial. In passing on that statute the court said:

"We discover no reason for declaring this legislative provision invalid. It is contended that its provisions wrongfully deprive the owner of a trial by jury for the ascertainment of

damages, but the answer is that the act itself provides that there shall be a jury trial in the event the owner appears within the time given and demands such trial. There is no express provision of our Constitution requiring the assessment of damages by a jury in this class of proceedings. The constitutional guaranty of trial by jury in condemnation proceedings relates only to condemnations by private corporations. Article 12, section 9, Constitution of 1874. In other words, the statute is valid in all respects material to this controversy because it gives the landowner a day in court by personal service if he resides in the county and is known, and by publication where it is a proceeding in rem; and also he is given a day in court by proper service of summons or warning order in the event of uncertainty as to ownership and the payment of the money to the clerk of the chancery court. Every constitutional requirement is therefore covered in the statute."

The act under consideration in that case provided for actual service of notice on landowners residing in the county, whereas the present statute provides only for published notice, but that difference is not material, as it is a proceeding in rem, and constructive service is as effectual as actual notice for the purpose of bringing into court the interested parties. *Foster v. Bayou Meto Drainage District*, supra. The same principle has been announced by this court in decisions with respect to condemnation proceedings in laying out public roads under orders of county courts. After publication of notice of the presentation of petition for laying out a road, the county court appoints viewers to select the route and assess the damages, giving notice to interested landowners, who have an opportunity to appear in court and object to the confirmation of the appraisal made by the viewers, or to appeal from an adverse ruling of the court. Our decisions on that subject have been that the original notice confers jurisdiction upon the county court of the subject-matter, and that the property owners are bound by the subsequent proceedings, whether they appear in court or not, even though there is a failure to give notice of the appraisal, that being treated as a mere irregularity which does not defeat the validity of the proceedings. *Howard v. State*, 47 Ark. 431, 2 S. W. 331; *Lonoke County v. Carl Lee*, 98 Ark. 345, 135 S. W. 833; *Road Improvement District v. Winkler*, 102 Ark. 553, 145 S. W. 209.

The statute now under consideration confers jurisdiction on the circuit court where the lands are situated in several counties, and we have upheld the statute in that respect. *Grassy Slough Drainage District v. National Box Co.*, 111 Ark. 149, 163 S. W. 512.

Decisions of courts of other states have been cited which might appear to be in conflict with the views we have expressed, but

in those states there are constitutional provisions which require payment of compensation before the taking or damage of property for public use, but we have no such provision in our Constitution. Section 9, article 12, of the Constitution, which prohibits the appropriation of property to the use of any corporation until compensation "shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction," does not apply to anything except condemnation proceedings by private corporations. *Cribs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Ritter v. Drainage District*, 78 Ark. 580, 94 S. W. 711.

We are, therefore, of the opinion that the statute under consideration is valid, and that appellant has had his day in court for the ascertainment of damages for the taking of his property, and that he is barred from prosecuting the present action. The circuit court was correct in so deciding, and the judgment is affirmed.

WOOD and HART, JJ., dissent.

HART, J. (dissenting). Mr. Justice WOOD and the writer, after giving this case that careful consideration which its importance demands, have reached the conclusion that the act is unconstitutional and void, and therefore feel impelled to dissent. We are not unmindful that it is the duty of courts to hold an act constitutional where from the language used by the Legislature it is susceptible of that construction; but with equal propriety it may be said that the framers of the act must listen to the voice of the Constitution in passing it.

Article 2, section 22, of our Constitution reads as follows:

"The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

The parts of the statute which contravene this section of the Constitution are in section 7 and section 8 of the act. See Acts of 1909, p. 829. The part of section 7 referred to is as follows:

"The commissioners shall also assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such assessment of damages as to any tract of land, it shall be deemed a finding by them that no damage will be sustained."

Section 8 is as follows:

"Any property owner may accept the assessment of damages in his favor made by the commissioners; or acquiesce in their failure to as-

sess damages in his favor, and shall be construed to have done so unless he gives to said commissioners within thirty days after the assessment is filed, notice in writing that he demands an assessment of his damages by a jury; in which event the commissioners shall institute in the circuit court of the proper county an action to condemn the lands that must be taken or damaged in the making of such improvement; which action shall be in accordance with the proceedings for condemnation of rights of way by railroad, telegraph and telephone companies, with the same right of paying into court a sum to be fixed by the circuit court or judge, and proceeding with the work before assessment by the jury. If there is more than one claimant to the lands, all claimants may be made parties defendant in such suit, and the fund paid into court, leaving the claimant to contest in that action their respective rights to the fund."

The determination of the question of just compensation is in its nature judicial. We think it is readily apparent from the part of section 7 of the act just quoted that it is in conflict with the section of the Constitution quoted above. It is true it provides that the commissioners shall assess all damages which will accrue to the landowner by the reason of the proposed improvement including all the injuries to the land taken or damaged; still the concluding part of the sentence offends the Constitution. It provides that where the commissioners return no such assessment of damages as to any tract of land it shall be deemed a finding by them that no damage will be sustained. This is legislative dictation and contrary to the Constitution. The vice of the section can best be shown by illustration. For instance, suppose the commissioners for reasons of their own, or through negligence or mistake, fail to estimate the damages to a tract of land or a part thereof appropriated for the right of way of the drainage ditch, they would naturally make no return of any assessment of damages as

to that tract of land. Under the language of the act their failure to return such assessment of damages is deemed a finding by them that damage will be sustained. So without any action at all on the part of the commissioners, the owner has his lands taken away from him. This cannot be done. The effect of it would be to take the owner's land away from him by a mere presumption that the commissioners acted, when in fact they might or might not have done so. The question of whether they did act is one of fact, and the right of property would not be before and higher than any constitutional sanction if it could be taken away by a mere presumption that the board had acted, when in fact it had not done so. The section provides that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor. Under that part of the statute in question it is readily apparent that this could be done. For whether the commissioners acted or did not act in making an assessment of damages, the statute provides that their failure to act shall be deemed a finding that no damages shall be sustained. Thus the owner's property might be taken without compensation being made him by the mere failure of the commissioners to act. We cannot subscribe to any such doctrine.

We also think that section 8 of the act offends in the same way. It provides that the landowner shall be construed to have acquiesced in the failure of the commissioners to assess damages to his land when it is taken or damaged by the drainage district if he fails to give notice in writing within 30 days that he demands an assessment of his damages by a jury. We do not think that the framers of the Constitution meant that the landowner's property could be taken away from him by mere nonaction on his part.

We therefore respectfully dissent.

## STATE v. FERGUSON. (No. 20684.)

(Supreme Court of Missouri. In Banc. May 18, 1919.)

## 1. INDICTMENT AND INFORMATION ⇨4—CONCURRENT REMEDIES.

Since under Const. art. 2, § 12, and Rev. St. 1909, §§ 5055, 5077, the remedies of prosecution by indictment and information are concurrent, where accused had been held without bail after preliminary examination before a justice to await the action of the grand jury, the prosecuting attorney was not precluded from filing an information; the requirement of section 5055, that the mode of procedure, whether indictment or information, which is first instituted, shall be pursued to the exclusion of the other, applying only to proceedings instituted in courts having jurisdiction to hear and determine the guilt or innocence of accused, and not to informations filed before a justice merely to commit accused to jail or to bind him over to await the action of the grand jury.

## 2. INDICTMENT AND INFORMATION ⇨47—SHOWING OF PRELIMINARY STEPS.

The criminal court of Greene county having exclusive jurisdiction of all criminal cases in that county, under Rev. St. 1909, § 4200, its consideration of an information filed by the prosecuting attorney is within its general jurisdiction, and not such a special or exceptional exercise of it as to require that there be shown on the face of the information all preliminary steps leading up to such filing, such as the reduction to writing of testimony at the preliminary examination, signed by the witnesses, certified by the magistrate, etc., as required by sections 5083, 5042.

## 3. CRIMINAL LAW ⇨225—PRELIMINARY EXAMINATION—WAIVER.

The rule that a defendant will be held to have waived preliminary examination where he pleads the general issue of not guilty is based on the fact that the right to a preliminary examination is a matter which goes to the regularity of the previous proceedings, and not to the merits of the trial.

## 4. INDICTMENT AND INFORMATION ⇨41(6)—PRELIMINARY EXAMINATION.

The right to a preliminary examination as a condition precedent to the filing of an information is not jurisdictional, and a failure to accord this right can only be taken advantage of by calling the trial court's attention to same by an appropriate motion and offering proof to establish such failure.

## 5. INDICTMENT AND INFORMATION ⇨51(1)—SIGNATURE OF PROSECUTING ATTORNEY—OMISSION OF NAME OF COUNTY.

It is not a valid objection to an information that there is not appended to the signature of the prosecuting attorney the name of the county.

## 6. INDICTMENT AND INFORMATION ⇨110(17)—HOMICIDE—OMISSION OF WORD "WILLFULLY."

The requirement of Const. art. 2, § 22, that accused shall be apprised of the nature and

cause of the accusation, is not infringed by omitting the word "willfully" from the body of the charge in information for murder, although such word is included in the statutory definition of murder in the first and second degrees (Rev. St. 1909, §§ 4448, 4450).

## 7. INDICTMENT AND INFORMATION ⇨112—HOMICIDE—COMMON LAW.

An indictment for murder under Missouri statutes mean just what it did at common law.

## 8. CRIMINAL LAW ⇨915—NEW TRIAL—FAILURE TO INDORSE NAMES OF WITNESSES—OBJECTION.

To render effective objection to failure to comply with Rev. St. 1909, §§ 5057, 5097, requiring the indorsement of the names of the state's witnesses upon an indictment or information, motion to quash must be made or application filed for continuance on account of such omission; and such objection first appearing in motion for new trial is not timely.

## 9. CRIMINAL LAW ⇨666(8), 1159(2)—DUTY OF STATE TO CALL SUBPENAED WITNESSES.

It is not compulsory on the state to examine all the witnesses subpoenaed, but, to sustain a conviction on account of the sufficiency of the evidence, it is only necessary that those examined give substantial testimony in support of the required material facts.

## 10. CRIMINAL LAW ⇨1031(3), 1049—OBJECTIONS AND EXCEPTIONS TO SUMMONING AND IMPANELING JURY.

Where no objections were made or exceptions saved at the time to the manner in which the trial jury was summoned and impaneled, and such objections were first made in motion for new trial, they could not be considered on appeal.

## 11. CRIMINAL LAW ⇨451(3) — EVIDENCE—CONCLUSIONS AND OPINIONS.

Testimony as to the accused's appearance immediately after firing the fatal shot, held not objectionable as mere conclusions or opinions, the facts being otherwise incapable of exact description.

## 12. CRIMINAL LAW ⇨1170½(3)—CROSS-EXAMINATION—PREJUDICE.

The mere inquiry by prosecuting attorney on cross-examination of accused, whether accused had not made a contradictory statement in regard to a certain matter, held not prejudicial, being excluded and not answered.

## 13. CRIMINAL LAW ⇨485(1) — EVIDENCE—HYPOTHETICAL QUESTIONS.

The state, in putting a hypothetical question to an expert witness, may frame it in accordance with the state's theory of the evidence, and it is not essential that the facts should be stated as they actually exist, nor is the question improper because it includes only a part of the facts in evidence.

## 14. CRIMINAL LAW ⇨1137(3)—INVITED ERROR—INSTRUCTIONS.

Under Rev. St. 1909, § 5115, as to error committed at accused's instance or in his favor, accused cannot complain of an erroneous

instruction given at his instance, although it is a literal copy of one for the state formerly condemned by the Supreme Court.

Faria, Blair, and Graves, JJ., dissenting.

Appeal from Criminal Court, Greene County; Arch A. Johnson, Judge.

Farmer Ferguson was convicted of murder in the second degree and appeals. Affirmed.

Frank B. Williams and Delaney & Delaney, all of Springfield, for appellant.

Frank W. McAllister, Atty. Gen., and Shrader P. Howell, Asst. Atty. Gen., for the State.

**WALKER, P. J.** The appellant was charged by information in the circuit court of Greene county with murder in the first degree in having shot and killed his wife, Clara Ferguson. Upon a trial he was convicted of murder in the second degree, and his punishment assessed at 10 years' imprisonment in the penitentiary. From this judgment he appeals.

At the time of the homicide the appellant was 62 years of age, and his wife was 48 or 49. They had been married 29 years, and six children had been born to them. Prior to September, 1915, the family had resided in Camden county. At this time the wife, for the ostensible purpose of affording a 14 year old daughter better educational advantages, removed with their household effects to Springfield. Although appellant remained in Camden county, there was no breach in his family relations, his business as a caretaker of an estate requiring his presence in that county. Up to within a few months before the tragedy he sent his wife money, corresponded with her, and visited his home as circumstances permitted. Sometime in August, 1916, appellant sent his wife \$40, but received no reply to the letter inclosing same. Later, he received a letter from his 14 year old daughter, who was then at Lebanon, stating that her mother had sent her to the latter place to a married sister who resided there, and that the mother had started, or was about to start, to St. Louis to hunt work. Surprised at this information, he went to Springfield to see his wife. Upon meeting her, she treated him with indifference, and he tried to secure an explanation of her conduct and effect a reconciliation. Failing in this, he proceeded to Lebanon, and brought the young daughter home with him. When he returned he found a man named Smithmier at his house with his wife. This Smithmier, it appears, had a few months before resided next door to where the wife of appellant was living. Upon the death of Smithmier's wife, a short time prior thereto, he had gone to board

duct towards each other had excited the comment of those residing in the vicinity. After supper, the evening succeeding the arrival of appellant and his little daughter from Lebanon, Smithmier and appellant's wife played cards until bedtime, when the wife informed appellant that he would sleep up stairs in Charley's bed—Charley being a young son who ran as a newsboy on a railroad train—until other arrangement could be made. Appellant complied with his wife's wishes in this regard, and the next day sought to have her explain her treatment. She refused to make any explanation. When night came she again directed him to sleep upstairs. She and Smithmier slept in separate rooms on the first floor. About midnight appellant heard his wife arise and go into Smithmier's room. The next morning he told his wife what he had heard, and she vouchsafed no reply. This was on Wednesday. On the succeeding Thursday and Friday he again remonstrated with his wife as to her conduct, and urged her to explain why she had become estranged from him; but she treated him with indifference and refused to agree to a reconciliation. After their last conversation the appellant, who instead of leaving the house had secreted himself in a closet, heard his wife say to Smithmier: "Where did he go? He is not here, and you had better watch him. He is crazy enough to do you some injury." Smithmier replied: "Let him come if he wants to. I will be ready for him." Appellant then went down town, and, returning later, saw through the window his wife arranging Smithmier's tie. Appellant entered and ordered Smithmier to leave the house. The latter refused to do so. This was just before dinner on Saturday. Immediately after ordering Smithmier to leave the house, appellant went up town, bought a pistol, and returned to find his wife and Smithmier at dinner. Appellant again insisted upon Smithmier leaving. He replied, "I will not do it," and, applying vile epithets to appellant, he threw a teacup at and hit appellant. The latter drew the pistol and shot him. Three shots, one of which killed Smithmier, were heard by persons near at hand. Immediately following the shots, they saw appellant's wife run out of the house, followed by the little girl. After them came the appellant with a pistol in his hand. The wife ran to the end of the porch, and was fired at by appellant just as she was about to jump off on the ground. In jumping off, she fell on her knees. The little girl had in the meantime gotten between her father and mother, and was trying to prevent the former from again firing the pistol. After a struggle, appellant succeeded in pushing her aside, and shot his wife, inflicting the wound from which she died in a few minutes. He was arrested a short time thereafter. Ap-



pellant's own testimony, so far as concerns his actions preceding the homicide and that pertaining to the killing of Smithmier, is embodied in the foregoing statement. Its correctness is not questioned. The account of the killing of the wife is that detailed by other witnesses.

[1] I. Appellant contends that the proceeding against him by information was unauthorized; that having been held without bail, after a preliminary examination before a justice of the peace, to await the action of the grand jury, the prosecuting attorney was precluded from filing an information and subjecting appellant to trial and conviction upon same. Under our law, constitutional and statutory, one may be prosecuted for a crime either by indictment or information (article 2, § 12, Const.; sections 5055, 5077, R. S. 1909), the remedies being, as stated in the Constitution, "concurrent." This leaves the manner of proceeding to the discretion of the prosecuting attorney. Despite the fact, therefore, that a grand jury had been ordered, as stated by appellant, to consider this case, this did not preclude the filing of an information by the prosecuting attorney. The discretionary power thus granted has been construed by this court in *State v. Anderson*, 252 Mo. loc. cit. 96, 158 S. W. 821, in which we held that "it was not an invasion of the rights of the defendant for the prosecuting attorney to file on March 4th, an information charging a felony, when a grand jury had already been summoned to convene on March 6th." This followed a ruling in *State v. Harvey*, 214 Mo. loc. cit. 408, 114 S. W. 21, that a preliminary examination held before a justice of the peace, resulting in defendant being bound over to "answer the charge before the court in which the same was cognizable," did not preclude the state from proceeding by information filed in the circuit court. These rulings, applied to the instant case, do not conflict with that portion of the statute (section 5055) which requires that mode of procedure, whether by indictment or information, which shall first be instituted, to be pursued to the exclusion of the other, so long as the same shall be pending and undetermined. The limitation of this provision, as we held in *State v. Gleseke*, 209 Mo. loc. cit. 339, 108 S. W. 525, applies only to proceedings instituted in courts having jurisdiction to hear and determine the guilt or innocence of the accused, and not to informations filed before a justice of the peace merely for the purpose of committing the defendant to jail or binding him over to await the action of the grand jury. The preliminary examination, being thus limited in its purpose, did not constitute a commencement of "one of the modes of procedure" prescribed by the statute, and the prosecuting attorney was, in the exercise

of his discretion, authorized to file in the criminal court in vacation the information upon which the accused was tried.

[2-4] II. It is urged that the information filed by the prosecuting attorney conferred no jurisdiction on the trial court because the testimony taken at the preliminary examination was not reduced to writing, signed by the witnesses, certified by the magistrate taking same, and by him delivered to the clerk of the court having cognizance of the offense, as required by sections 5033, 5042, R. S. 1909. The contention as to the absence of jurisdiction is not tenable. The criminal court of Greene county is clothed with exclusive original jurisdiction of all criminal cases in said county (section 4200, R. S. 1909). Thus panoplied, the consideration by it of an information filed therein by the prosecuting attorney is within the limits of its general jurisdiction, and not such a special or exceptional exercise of same as to require that all of the preliminary steps leading up to such filing be shown on the face of the information. We have held affirmatively in a number of cases that a preliminary examination may be waived not only before the examining tribunal, but at the time the defendant is required to plead to the information in the trial court, and that if he pleads the general issue of not guilty, as was done here, he will be held to have waived such examination. This presumption as to a waiver is based on the fact that the right to a preliminary examination is a matter which goes to the regularity of the previous proceedings, and not to the merits of the trial, as we held in *State v. Jeffries*, 210 Mo. loc. cit. 319, 109 S. W. 614, 14 Ann. Cas. 524; *Ex parte McLaughlin*, 210 Mo. 657, 109 S. W. 626; *State v. McKee*, 212 Mo. loc. cit. 147, 110 S. W. 729; *Ex parte Buckley*, 215 Mo. 98, 114 S. W. 954; *State v. Pritchett*, 219 Mo. loc. cit. 703, 119 S. W. 386; *State v. Green*, 229 Mo. loc. cit. 655, 129 S. W. 700. The ruling reason of these cases is that the right to a preliminary examination as a condition precedent to the filing of an information is not jurisdictional, and a failure to accord this right can only be taken advantage of by calling the trial court's attention to same by an appropriate motion and offering proof to establish such failure.

III. Objection is made to the information in that (a) there is not appended to the signature of the prosecuting attorney the words "of Greene county," and that (b) the word "willfully" is omitted from the body of the charge.

[5] (a) There is no complaint that appellant suffered any prejudice by reason of the omission of the name of the county. In the absence of any showing to this effect, there exists no reason to sustain this contention. In *State v. Walker*, 221 Mo. loc. cit. 518, 108

S. W. 615, 120 S. W. 1198, it was held that the omission of the name of the county was not error. While no reason was assigned for the ruling, it is evident that it was on account of the nonprejudicial nature of the omission, as we held in *State v. Brock*, 186 Mo. loc. cit. 459, 85 S. W. 595, 105 Am. St. Rep. 625, 2 Ann. Cas. 768, in passing on a similar objection, based on a failure of the prosecuting attorney to write his full name in the body of the information and in signing it in like manner at its conclusion. *State v. Campbell*, 210 Mo. loc. cit. 215, 109 S. W. 706, 14 Ann. Cas. 403. A prosecuting attorney is one of the officers of the court, of which fact it will take judicial notice. This being true, we have held that when an information had nothing more than the name of the prosecuting attorney appended thereto, without stating his official title, that the error was immaterial, and constituted no ground to quash. *State v. Kinney*, 81 Mo. loc. cit. 102; *State v. Kyle*, 166 Mo. loc. cit. 307, 65 S. W. 763, 56 L. R. A. 115; *State v. Salts*, 263 Mo. 304, 172 S. W. 373.

[6] (b) The information, omitting the formal preliminary and closing averments, concerning which there is no question, alleges that the defendant—

"Did then and there feloniously, deliberately, premeditatedly, and of his malice aforethought make an assault upon one Clara Ferguson with a certain deadly weapon, to wit, a revolving pistol, then and there loaded with gunpowder and leaden balls, which said pistol in his hand had and held, he, the said Farmer Ferguson, did then and there feloniously, premeditatedly, deliberately, and of his malice aforethought shoot off and discharge at and against her, the said Clara Ferguson, and with the pistol aforesaid and the gunpowder and leaden balls aforesaid did then and there feloniously, deliberately, premeditatedly, and of his malice aforethought shoot, strike, and wound her, the said Clara Ferguson, giving to her, the said Clara Ferguson, with the pistol aforesaid, and with the gunpowder and leaden balls aforesaid, in the front part of the breast of her, the said Clara Ferguson, one mortal wound, of the breadth of one-half inch and of the depth of six inches, of which said mortal wound the said Clara Ferguson then and there instantly died, and so the said Sam M. Wear, prosecuting attorney as aforesaid, under his oath aforesaid, does say that the said Farmer Ferguson in the manner and form aforesaid, and with the weapon aforesaid, her, the said Clara Ferguson, feloniously, deliberately, premeditatedly, and of his malice aforethought did kill and murder."

Other than in the omission of the word "willfully" the information conforms to approved precedents. While it is an inflexible rule in criminal pleadings that nothing in indictments or informations for felonies can be left to intentment or implication, that the accused may be clearly apprised of the nature and cause of the accusation against him, it remains to be determined whether

this rule has been violated in the instant case. The statute (section 4448, R. S. 1909), as applied to the facts, defines murder in the first degree to be any willful, deliberate, and premeditated killing. Omitting the averment of deliberation, the same essential elements are necessary to properly charge murder in the second degree, of which appellant was convicted, as authorized by our procedure (section 4450, R. S. 1909). The same canons of construction will, therefore, apply in testing the sufficiency of the information in one case as in the other, barring, as stated, the averment of deliberation not required in a charge of murder in the second degree. Technically considered, therefore, does the word "willfully," as employed in the statute, necessitate its use in such an indictment or information as is here under review? As to the use of statutory words in a criminal charge, this well-established rule is of general application:

"If the words used in the statute do not, in view of the nature of the offense and the recognized principles of law, describe the offense so as to convey to the mind a full and clear idea of everything necessary to constitute the crime, the full measure of the offense must be charged by the use of such words as are necessary and proper, under established rules of law, to characterize it."

While this rule has more particular reference to offenses created by statute, its application in determining whether a criminal charge conforms to the statute can only be properly invoked where the offense is fully and clearly defined by the statute (*State v. McCoy*, 162 Mo. loc. cit. 389, 62 S. W. 991). That murder in the first degree is defined by statute, in so far as it designates the particular homicides which constitute this grade of offense, it must be admitted, but in such classification it does not attempt to set forth all of the material allegations required in such a charge. To illustrate, there is an absence from the statute (section 4448) of the words "feloniously," "with malice aforethought," and "murder," uniformly held necessary in charging this offense. We find the use of these words necessary because they are embedded in the old English statute (23 Hen. VIII, c. 1, § 3), enacted in 1531, defining murder, and which has become with its subsequent modification, hereinafter noted, the common law of this and other states in regard to this crime.

[7] An indictment for murder, therefore, under our statutes, means just what it did at common law. *Ex parte Slater*, 72 Mo. loc. cit. 106; *State v. Meyers*, 99 Mo. loc. cit. 116, 12 S. W. 516; *State v. Sanders*, 158 Mo. loc. cit. 612, 59 S. W. 993, 81 Am. St. Rep. 330; *State v. Cook*, 170 Mo. loc. cit. 214, 70 S. W. 483. Not only is this conclusion evident from these well-reasoned rulings, but we have expressly held that forms of in-

dictments for murder in this state are to be measured by the rules of the common law in that behalf prescribed. *State v. Cline*, 264 Mo. loc. cit. 418, 175 S. W. 184. But an examination of the statute of Henry discloses that it contains the word "willfully," as well as the other words held material in a charge of murder. From which counsel for appellant, buttressed by the presence of the word in our statute, reasons that it is equally essential to the validity of the charge at bar. However, we find that in 1547 an English statute was enacted (1 Ed. VI, c. 12, § 10), which was a re-enactment of the statute of Henry, from which the word "willfully" was omitted. The effect of the statute of Edward, according to the reasoning of the *recondite*, was to "take away the right of clergy from defendants attainted or convicted of malice prepensed," omitting the word "willful." *State v. Harris*, 27 La. Ann. 572; 1 Hale's P. C. 466; 11 Bish. New Cr. Pro. §§ 545, 546, p. 1553. A more practical reason urged by American jurists in construing this statute is that the employment of the word "willfully" in conjunction with the words "feloniously" and "with malice aforethought" is expletory, in that an act committed feloniously and with malice aforethought must necessarily be willful and unlawful. *State v. Arnold*, 107 N. C. 861, 11 S. E. 990; *Burnett v. Commonwealth*, 172 Ky. 397, 189 S. W. 460; *Carroll v. State*, 71 Ark. 404, 75 S. W. 471; *Ward v. State*, 66 Ala. 100, 11 South. 217. The words "with malice aforethought" being of like import, but even more intense in their meaning than the word "willfully," the former may reasonably be said to supply the place of the latter. This being true, in the omission of the word "willfully" the rule is not violated which forbids in criminal pleadings the leaving of any material allegation to intendment or implication, nor is the constitutional requirement infringed which provides that the accused shall be apprised of the nature and cause of the accusation against him. Article 2, § 22, Const. of Mo. We therefore overrule this contention, and hold the information sufficient.

[8] IV. It is urged as error that the names of all of the witnesses examined by the state were not indorsed on the information, and that certain eyewitnesses were not produced or examined. It is necessary to render effective an objection to a failure to comply with the statutes (sections 5057, 5097, R. S. 1909), requiring the indorsement of the names of the state's witnesses upon an indictment or information, that a motion to quash be made, or that an application be filed for a continuance on account of such omission. *State v. Leach*, 193 S. W. 916; *State v. Ferguson*, 183 S. W. 336; *State v. Jeffries*, 210 Mo. 324, 109 S. W. 614, 14 Ann. Cas. 524; *State v. Barrington*, 198 Mo. loc.

cit. 68, 95 S. W. 235. Neither course was pursued here, and appellant's contention first appears in the motion for a new trial. This is not timely.

[9] It is not compulsory upon the state to examine all the witnesses subpoenaed. To sustain a conviction on account of the sufficiency of the evidence it is only necessary that those examined give substantial testimony in support of the required material facts. Others called would serve only to corroborate those examined. This is not necessary. *State v. Ivy*, 192 S. W. 736; *State v. Dixon*, 190 S. W. 294; *State v. Swain*, 239 Mo. 729, 144 S. W. 427; *State v. McAfee*, 148 Mo. 370, 50 S. W. 82; *State v. Billings*, 140 Mo. 193, 41 S. W. 778; *State v. David*, 181 Mo. 380, 33 S. W. 28. The assignment, therefore, lacks merit.

[10] V. No objections were made or exceptions saved, at the time, to the manner in which the trial jury was summoned and impaneled. Such objections first find expression in the motion for a new trial. Thus sought to be preserved, they are not entitled to our consideration. *State v. Page*, 212 Mo. loc. cit. 238, 110 S. W. 1057; *State v. Grant*, 152 Mo. loc. cit. 71, 53 S. W. 432; *State v. Sansone*, 116 Mo. loc. cit. 11, 22 S. W. 615; *State v. Smith*, 114 Mo. loc. cit. 423, 21 S. W. 827.

VI. Error is assigned in the rulings of the trial court upon the admission and exclusion of testimony. It is contended that "a wise judicial discretion" was not exercised in admitting in rebuttal the testimony of certain witnesses named. In the absence of any showing, or even a claim, of prejudice resulting therefrom, we have held that the order of proof is within the discretion of the trial court. *State v. Burgess*, 193 S. W. 821; *State v. Baker*, 262 Mo. loc. cit. 699, 172 S. W. 350; *State v. Diltz*, 191 Mo. loc. cit. 673, 90 S. W. 782; *State v. Murphy*, 118 Mo. loc. cit. 15, 25 S. W. 95; *State v. Buchler*, 108 Mo. 203, 15 S. W. 331.

[11] It is contended that error was committed in permitting certain witnesses to testify as to the condition of appellant immediately following the firing of the fatal shot. These objections are based on the assumption that the testimony thus adduced constitute mere conclusions and are opinions rather than statements of fact. We have recently had occasion in *State v. Stewart*, 274 Mo. 640, 204 S. W. loc. cit. 13, to review the cases in which this court has held such testimony admissible on the ground of necessity. We will not burden this opinion with a repetition of the reasons assigned for this ruling, or a citation of the cases, other than to say that in the instant case, as in that of *State v. Stewart*, the testimony had reference to the manifestations and condition of the appellant immediately after the commission of the crime; and being open to

the senses, but otherwise incapable of exact description, could not be gotten before the jury except by asking the witnesses to state the appellant's appearance. No material reason appearing, therefore, for a variance from the rule heretofore announced in this regard, we overrule this contention.

[12] It is further contended that undue latitude was permitted in the cross-examination of the appellant. The record does not sustain this contention. The inquiry made by the prosecuting attorney of the appellant on cross-examination was excluded by the court upon the objection of counsel for the appellant and was not answered. The question itself could have had no prejudicial effect, because it was simply an inquiry as to whether the appellant had not made a contradictory statement in regard to a certain matter to that testified to by him.

[13] The objection to the hypothetical question propounded by the state has not been preserved in a manner to entitle it to a review. If, however, the absence of our authority to review this question, under well-established rules of procedure, be waived, there is no substantial ground of objection to the inquiry as made. The question was framed in conformity with the state's theory of the evidence. It was therefore not error under the rule which authorizes the state, in putting a hypothetical question to an expert witness, to frame the same in accordance with the state's theory of the evidence; and it is not essential that the facts should be stated as they actually exist; nor is the question improper because it includes only a part of the facts in evidence. *State v. Bell*, 212 Mo. loc. cit. 124, 111 S. W. 24; *State v. Privitt*, 175 Mo. loc. cit. 225, 75 S. W. 457.

The testimony of third parties sought to be introduced by appellant as to the relations existing between him and his wife prior to the homicide, and her relations to the creature Smithmier, was, measuring its import by the questions propounded in regard thereto, not of such relevancy as to authorize its admission; if this testimony had been admitted, it could not have disclosed such facts as to have constituted a defense to the crime charged. There was no error, therefore, in its exclusion.

VII. The court of its own motion gave sixteen instructions and five additional ones requested by the defendant. These instruc-

tions covered murder in the first and second degrees, manslaughter in the fourth degree, the presumptions of innocence, reasonable doubt, and that arising from the use of deadly weapon, what constitutes heat of passion, how far proof of illicit sexual relations between the wife and her paramour afforded an excuse for the crime charged, insanity as a defense, good character, and that the jury are the judges of the weight of the evidence and the credibility of witnesses. These instructions fully covered the evidence submitted on the trial and substantially followed forms approved by this court. We do not deem it necessary, in view of their correctness, to review them in detail.

[14] One exception we note to this general approval—although instruction numbered 21, given at the request of the appellant, is, in all of its material features, the same as that condemned by a majority of this court in *State v. Finkelstein*, 269 Mo. 612, 191 S. W. 1002, in regard to the weight to be given appellant's testimony, it does not constitute error of which the appellant will be heard to complain: First, because, being one of appellant's instructions, it is not preserved as error for our consideration; second, having been given at the instance of the appellant, it comes within the saving clause of the statute (section 5115, R. S. 1909), which provides that "no trial, judgment or other proceedings shall be stayed, arrested or in any manner affected for any error committed at the instance or in favor of the defendant." In construing this statute, as applied to an erroneous instruction given at the instance of the defendant, we have expressly declared that complaint in regard thereto will not be heard, although such instruction is a literal copy of one for the state formerly condemned by this court. *State v. Jackson*, 99 Mo. 60, 12 S. W. 367; *State v. Mancke*, 139 Mo. 548, 41 S. W. 223; *State v. Payne*, 223 Mo. 117, 122 S. W. 1062.

The evidence was ample to sustain the verdict; the appellant was awarded a fair trial, and the judgment should be affirmed. It is so ordered.

PER CURIAM. The foregoing divisional opinion is adopted. BOND, C. J., and WOODSON and WILLIAMS, JJ., concurred.

FARIS, BLAIR, and GRAVES, JJ., dissent.

HUNICKE v. MERAMEC QUARRY CO.  
(No. 20783.)

(Supreme Court of Missouri, In Banc. May 16, 1919.)

MASTER AND SERVANT §92(1)—INJURY TO  
SERVANT—DUTY TO FURNISH FIRST AID—  
INSTRUCTIONS.

In an administrator's suit for damages on account of failure of decedent's employer to furnish prompt first aid and proper medical attendance to decedent when injured, instructions held to be correct statement of the law and consistent.

Bond, C. J., dissenting.

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

Suit by August Hunicke against the Meramec Quarry Company. From judgment for defendant, plaintiff appeals. Affirmed.

See, also, 189 S. W. 1167.

This suit was brought by plaintiff, as administrator of the estate of his son, Fred R. Hunicke, deceased, in the circuit court of Jefferson county, Mo., on March 31, 1909, against defendant, to recover damages on account of the alleged failure of the latter to furnish prompt first aid and proper medical assistance to said Fred R. Hunicke, whose leg was crushed while in defendant's employ on March 12, 1909. It is not claimed in petition that deceased was injured on account of defendant's negligence. He was hurt by cars being switched into defendant's yard. He had never been married, and the petition alleges that he left surviving him his father, mother, and certain brothers and sisters, who would be entitled to share in whatever might be recovered in this action.

The plaintiff obtained a verdict for \$2,000 in Jefferson county. A new trial was granted on account of error in plaintiff's instruction on the measure of damages. The cause was then transferred, by stipulation, to the circuit court of the city of St. Louis, Mo., where there was a *mistrial* because of the inability of the jury to agree upon a verdict. The third trial resulted in a verdict for defendant. This was set aside by the trial court because of an error in giving an instruction at the request of defendant. From the order granting a new trial, defendant appealed to this court. The judgment below was affirmed (262 Mo. 560, 172 S. W. 43, L. R. A. 1915C, 789, Ann. Cas. 1915D, 493), and the cause was remanded. At the fourth trial in the circuit court, a verdict was again returned in favor of defendant. Plaintiff appealed to this court, and a new trial was awarded him, because of the giving of a modified instruction of plaintiff, by the court, and the giving of an instruction for defendant along the same line, both of which contained no reference to "first aid." 189 S. W. 1167. At the fifth

trial, plaintiff recovered a judgment for \$3,000, which was set aside by the court, because of an error in refusing an instruction asked by defendant, telling the jury that in no event could plaintiff recover more than nominal damages, having failed to show that any financial loss had been sustained by the death of Fred R. Hunicke. At the sixth trial, the jury returned a unanimous verdict in favor of defendant. Judgment was duly entered thereon, and plaintiff appealed to this court, where it now stands for review.

The main facts in the case are set out in Hunicke v. Quarry Co., 262 Mo. loc. cit. 567, 172 S. W. 43, L. R. A. 1915C, 789, Ann. Cas. 1915D, 493, and following. The testimony given at the last trial is fully set out in respondent's additional abstract of record. As the principal controversy here involves the consideration of plaintiff's instruction 1, given by the court, and defendant's instruction 2, given at its instance, in order to avoid repetition, we will refer to the testimony in defendant's abstract of record, as far as may be necessary, in the opinion to follow.

Joseph Wheless, of St. Louis, for appellant.

Watts, Gentry & Lee and J. E. Carroll, all of St. Louis, for respondent.

RAILEY, C. (after stating the facts as above). I. The first proposition presented in appellant's points and authorities, reads as follows:

"It was the duty of the defendant, in the emergency created by the accident, to render to the injured employé such *immediate* first aid, as well as *prompt* medical and surgical attention, as was reasonably possible under all the circumstances shown in evidence. This is the law of the case as adjudged by this court on the two former appeals. 'Held, that the evidence tended to show that the quarry company was guilty of negligence in not using *more diligence*.' Hunicke v. Meramec Quarry Co., 262 Mo. 560 [172 S. W. 43, L. R. A. 1915C, 789, Ann. Cas. 1915D, 493]; same case, second appeal, 189 S. W. 1167."

We are not advised as to what conclusion appellant's counsel intended to draw from the foregoing, for Presiding Judge Woodson, in 262 Mo. loc. cit. 571, 172 S. W. 51, L. R. A. 1915C, 789, Ann. Cas. 1915D, 493, speaking for the court in banc, said:

"In other words, the defendant's evidence tended to show that it was in no manner guilty of any negligence in the case, while that for the plaintiff tended to show the contrary."

As this is an action at law, the verdict of the jury is conclusive against plaintiff, unless we should find that defendant's instruction 2 is erroneous. Said instruction reads as follows:

"The court instructs the jury that if you believe and find from the evidence in this case

that, after the deceased, Fred Hunicke, was injured the defendant exercised ordinary care to secure and provide first aid for him, and exercised ordinary care as defined in another instruction to secure for him surgical and medical treatment at the hands of competent physicians and surgeons, then the defendant duly discharged its duty towards said Fred Hunicke, and is not liable to the plaintiff in this case."

This instruction is not only in accord with the law as declared by us on the former appeals, but clearly defined the duties devolving upon defendant under such circumstances.

"First aid" in 1 Century Dictionary is defined to be:

The "immediate attention given to the injured, with the object of arresting hemorrhage, relieving pain, and preserving life until the services of a physician can be obtained."

"First aid" is defined in the New Standard Dictionary as:

"Emergency treatment given to a person injured, as by an accident, while awaiting regular medical attendance."

Dr. Konzelmann, at the instance of plaintiff, testified as follows:

"Q. What is the proper thing to do in a case of injury of this character where one has a leg crushed, what is the proper step to do first? A. The first step that the doctor would take is to stop the flow of blood and try to save all the blood we can."

"Q. That is the step known as 'first aid' to the injured? A. Yes, sir."

"Q. That result can be accomplished by the use of ropes or wire or towels or anything than can be bound tightly around the limb, may it not? A. If there was a place to get it around; yes, sir, if it is possible to do so."

"Q. Those are recognized *first aid remedies*? A. Yes, sir; that is what a doctor would do; that is what a physician does, you know."

"Q. To bind the limb to stop the flow of blood? A. Yes, sir."

Turning to the evidence, let us see what was done to furnish this *first aid*. Mr. Buder, the foreman of defendant, died in December, 1909, after the accident in March of same year, without having testified in this case. Mrs. Buder testified, in regard to her husband in connection with the injury, that he couldn't go near anything like that at all. He would have fainted immediately. That she always had that to do. She testified that she heard of the accident, and went right down to the office before the boy was brought there. They got a cot, blanket, and comforters at her house, and the boy was brought to the office on the cot. She testified that she had had a great deal of experience in looking after sick people; that she often had occasion to look after injured men; that she would bind their injuries until they got a doctor; that since her husband's death she had been a practical nurse; that she and Dotzler removed some of the boy's clothing

by cutting it away; that the wound was about three inches below the joint; that it was so high they couldn't bind it at all; that they could not put anything on to bind it.

Geo. W. Dotzler, a hired man in the employ of defendant, was a witness for plaintiff, and testified that he had been a private in the army where they were taught about *first aid*; that as soon as possible after the boy was hurt they brought him to the store; that Buder, the foreman, telephoned Dr. Kirk at Kimswick, Mo., about two miles away. He asked the doctor to come right away, as the boy needed his attention at once. The doctor could not come. Buder then telephoned the doctor about three-quarters of an hour later, and he could not come. This witness, on cross-examination, testified as follows:

"Q. You never took a course at a hospital or medical college as a nurse, did you? A. No, sir."

"Q. When were you in the United States army? A. From June, 1903, until June, 1906."

"Q. You were a private soldier, were you not? A. Yes, sir; in the United States cavalry."

"Q. Who did put any sort of bandage or appliance on young Hunicke's leg while he was in the store? A. I, myself."

"Q. You, yourself, did? At what time did you do that? A. They gave me some clean linen from Buder's house."

"Q. About what time of day? A. About 15 minutes after the boy was brought to the store."

"Q. Was the linen brought there by Mrs. Buder? A. Yes, sir."

"Q. Did she ask you to put it on the boy? A. Yes."

"Q. Mr. Buder did not ask you to? A. No."

"Q. Mr. Buder did not give you any orders at all about taking care of the boy, did he? A. No, sir."

"Q. You were employed in the quarry company's yards as a laborer, were you? A. Yes, sir."

"Q. They had never at any time instructed you to assist or care for injured employes, had they? A. No, sir." (Italics ours.)

This witness further testified:

"Q. When you undertook to put some linen on the young man's leg, what did you do? Just describe the means you used and how you applied them. A. Mrs. Buder gave directions how the linen should be fastened around the boy's leg. She told me to put the linen around the boy's leg and leave it that way."

Witness said Gus Hunicke, another son of plaintiff, who was 21 years old, was working in the yard when the boy got hurt. Witness said he proposed to Buder, that he (witness) tie a cord around the leg, but Buder said it would do no good.

Plaintiff's counsel asked witness this question:

"Q. Was it (wound) in such a location that a cord could have been tied around his leg above the wound so as to have stopped the flow of blood? A. Well, you could have fastened a cord above the wound."

It will be observed that *witness did not say it would have stopped the blood, nor did either of the two doctors who examined the boy give it as their opinion that a cord could have stopped the flow of blood. On the other hand, they say it would have been a hard matter for an experienced doctor with a rubber bandage to have done so.*

Counsel for plaintiff asked Dr. Konzelmann, in chief, this question:

"Q. That is the first thing to be done in a case of that sort, to bandage the wound above it in order to stop the flow of blood? A. Yes, sir.

"Q. Do you know whether that had been done in this case? A. They had bandages on him, but I don't remember just what kind of bandages were on him, but they had them on him." (Italics ours.)

Dr. Kirk, witness for plaintiff, testified that Buder telephoned him to come and see the boy; that he had a fractured leg. The doctor told him he could not come. Dr. Kirk then testified as follows:

"Q. Was there anything said about sending the boy to you at Kimswick? A. Nothing was said."

Plaintiff testified that Buder told him he telephoned for Dr. Kirk, and he asked Buder why he didn't telephone for a different doctor. He said Buder told him he didn't know anybody else.

Mrs. Buder testified that they moved to the quarry in June, and the accident happened the following March; that she was not acquainted with any doctor except Kirk.

Everything that was done to aid the boy until a doctor could be procured was done promptly, immediately after the accident, and as first aid. Defendant's instruction 2 not only properly declared the law of the case, but it is based upon the undisputed facts relating to first aid. The boy was not only furnished first aid promptly and immediately, but the foreman promptly called the only doctor he knew, and urged him to come at once. The boy's brother Gus, who was 21 years of age, was present when he got hurt, and made no effort to procure a doctor, or to have his brother taken to one. The father knew of the accident by 10 o'clock, and likewise made no effort to secure the services of a doctor, although he said they were plentiful in the neighborhood. Neither the father, nor Gus, rendered the boy any assistance, although they were as well informed concerning such matters as the foreman. The jurors were the judges as to whether the defendant furnished prompt, immediate, and first aid. They were likewise the judges, as to whether the defendant was guilty of negligence in doing what was done for the boy. They could not have been misled by defendant's instruction 2, as it not only declared the law correctly, but was based on the evidence.

II. It is contended by appellant that his instruction numbered 1 is in conflict with defendant's instruction numbered 2. The latter referred the jury to another instruction as to defendant's duty in furnishing the boy surgical and medical treatment. As the instruction referred to has not been presented in either the abstracts or briefs, we can only determine whether there is any conflict between plaintiff's instruction numbered 1 and defendant's instruction 2, in respect to defendant's duty to furnish the boy first aid.

Plaintiff's instruction 1 reads as follows:

"The court instructs the jury that, if you believe and find from the evidence that on March 12, 1909, Fred R. Hunicke was in the employ of the Meramec Quarry Company at a stone quarry owned or operated by it in Jefferson county, and that while so employed said Fred was injured as shown in the evidence, and that an emergency was thus created which demanded prompt aid and medical or surgical attendance in endeavor to stop the flow of blood from his wound and save his life, then it became and was the legal duty of the defendant corporation, through its officers or employees at the place of accident, to promptly exercise ordinary care and diligence to render such aid and medical or surgical treatment in such emergency as was reasonably possible under all the circumstances surrounding the parties; and by 'ordinary care' is meant such care as ordinarily careful and prudent men would use in the same or similar circumstances; and failure to exercise such care would constitute negligence for which the defendant would be liable in damages.

"Therefore, if you further believe and find from the evidence that the defendant failed or negligently delayed to render such aid and to provide such treatment, as above defined, as were reasonably possible for it to render and provide under all the circumstances shown in the evidence, and that such failure and neglect (if such you find) was the direct and natural cause of said Fred's death, notwithstanding the injury he received, then the defendant corporation is liable for such death."

Great stress is laid upon defendant's failure to use the word "prompt" in its instruction 2, in describing "first aid." In Webster's International Dictionary, the word "prompt" is defined to mean "quick, ready, and quick to act as occasion demands." The New Standard Dictionary defines "prompt" to mean "quick to respond." As heretofore stated, first aid is defined in volume 1 of the Century Dictionary as follows:

"Immediate attention given to the injured, with the object of arresting hemorrhage, relieving pain, and preserving life until the services of a physician can be obtained." (Italics ours.)

First aid is defined in the New Standard Dictionary as:

"Emergency treatment given to a person injured, as by an accident, while awaiting regular medical attendance."

Both instructions called for ordinary care upon the part of defendant. Plaintiff's in-

struction called for *prompt aid*, while defendant's called for *first aid*.

As Dotzler testified he had bandaged the boy's leg within 15 minutes after he was brought to the store, there could be no doubt about defendant furnishing aid, *promptly and as first aid*. When considered in the light of the facts before us, the instructions above mentioned are entirely consistent and harmonious, although couched in different language. It would be a reflection upon the intelligence of an ordinary juror to hold that he was not sufficiently informed in this day as to that which constituted first aid, or prompt aid, in case of an injury.

III. It is insisted by appellant that the verdict of the jury was the result of prejudice, etc. We do not find any evidence of prejudice in the record before us. The jury was confronted with a case where the defendant was not charged with negligence in injuring the boy, but simply charged with failing to furnish him prompt aid and proper surgical treatment. The boy's own brother, 21 years of age, was present when he was injured, and rendered him no assistance whatever. He made no effort to procure a physician or to have his brother taken to a place where medical treatment could be administered. In addition to the above, the father was notified, by his son Gus, of the boy's injury about 10 o'clock, and made no effort to procure a doctor, although he said they were plentiful in the neighborhood. Yet the plaintiff and his son Gus are posing as beneficiaries in this action, and charging the defendant with dereliction of duty, in the face of their own conduct in failing to render the boy any assistance. Again, Dr. Konzelmann testified that the boy's "*leg was almost severed*"; that at the place where the leg was almost cut in two, it was terribly mashed. The plaintiff had three doctors testify in the case, two of whom *examined* the boy and knew all about his condition. Neither of these doctors told the court or jury that, in his opinion, the defendant's servants, with the instrumentalities at hand, could have rendered the boy any assistance which would have resulted in the saving of his life. In looking at the case from any angle, the verdict in favor of defendant is sustained by substantial evidence, without the semblance of prejudice upon the part of the jury.

IV. Counsel for plaintiff complains, in some respects, of the *statements* of defendant's counsel, in the presence of the jury, during the progress of the trial. We find, however, nothing in the assignment of errors, or under the points and authorities, relating to this subject, and hence, under rule 15 of this court, they should not be considered. Again, the *bill of exceptions* is the depository for all matters of exception. The affidavits filed in this case were never incorporated in the bill of exceptions, did not become

a part of the record herein, and cannot be legally reviewed here. Section 2081, R. S. 1909; *Forsee v. City of St. Joseph*, 175 S. W. loc. cit. 579; *Torreyson v. United Railways Co.*, 246 Mo. 696, 152 S. W. 32; *State v. Meals*, 184 Mo. loc. cit. 259, 83 S. W. 442; *State v. Welsor*, 117 Mo. loc. cit. 583, 21 S. W. 443; *State v. Musick*, 101 Mo. 260, 14 S. W. 212; *State v. Hayes*, 81 Mo. 574.

V. We have carefully examined all the questions presented for our consideration in this case, and have reached the conclusion that the case was properly tried and the verdict returned by the jury supported by substantial evidence. We accordingly affirm the judgment of the trial court.

BROWN, C., concurs.

PER CURIAM. The foregoing divisional opinion is adopted by the court in banc.

WALKER, FARIS, BLAIR, WILLIAMS, and GRAVES, JJ., concur in result.

BOND, C. J., dissents.

WOODSON, J., absent.

GILLILAN v. GILLILAN et al. (No. 19605.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

# 1. ESTATES TAIL §2—STATUTORY ABOLITION—PRIMOGENITURE.

The common-law doctrine of primogeniture was not adopted by R. S. 1909, § 2872, abolishing entails and providing that remainder upon death of first devisee in tail shall pass "according to the course of the common law"; that doctrine being "repugnant to federal Constitution and state laws" within section 8047.

# 2. WILLS §442—CONSTRUCTION—INTENT OF TESTATOR.

The lawful intent of testator will be given effect.

# 3. ESTATES TAIL §2—ABOLITION.

Under R. S. 1909, § 2872, general and special estates in fee tail do not exist in Missouri.

# 4. DEEDS §128—WILLS §606(1)—RULE IN SHELLEY'S CASE.

The rule in Shelley's Case does not exist either in deeds or wills in Missouri.

# 5. WILLS §506(4)—CONSTRUCTION—HEIRS—DEFEASIBLE FEE.

Devise to son and to his "heirs hereafter born to him" and to the "heirs of his body" construed not to refer to his children so as to give him a defeasible fee.

# 6. WILLS §506(4)—CONSTRUCTION—"HEIRS"—"CHILDREN."

The word "heirs" will be construed as meaning "children," and vice versa, if justice or rea-



son requires it, and if such construction will carry into effect manifest intention of testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Children; Heirs.]

#### 7. WILLS §607(2)—CONSTRUCTION—ESTATE TAIL—CONVERSION INTO LIFE ESTATE.

Will drawn by experienced lawyer devising land to a son "and to his heirs hereafter born to him" and to said son "and the heirs of his body hereafter born" created estate tail special, which by R. S. 1909, § 2872, abolishing entails, became a life tenure in the son with contingent remainder in fee in his direct descendants born after the making of the will.

#### 8. COURTS §92 — RULES OF DECISION — DICTA.

Where only point in issue was the nature of the estate a mother with six children took under a deed providing that the estate upon her death without issue was "to descend to her heirs at law," court's observation that she would have taken a fee if no children had been born to her was mere dictum.

#### 9. WILLS §448 — PRESUMPTION — DISPOSITION OF PROPERTY BY WILL.

Testator who makes will dealing with his entire estate will be presumed to have intended to die testate.

#### 10. WILLS §858(4)—LAPSE OF DEVISE—REVERSION—RESIDUARY CLAUSE.

Where testator left will dealing with his entire estate and providing for all his children and made devise to his "son G. and his heirs hereafter born," the estate remaining in testator upon defeat of the devise for lack of heirs thereafter born to G. passed under residuary clause of will, and not to testator's heirs at law, as in case of intestacy.

Appeal from Circuit Court, Daviess County; Arch B. Davis, Judge.

Suit by Gratia A. Gillilan against Lorenzo J. Gillilan, Annie F. Carr, Ann F. Gay, James Clendenen, Charles W. Clendenen, Sallie Clendenen Gillilan, Anna Clendenen Gillilan, Elizabeth Ella Weldon Hale, Cora Gillilan, Tobias Gillilan, K. B. Coffee, Florence B. Danberry, Aquilla M. Senff, Bessie Dixon, and others. From decree rendered, plaintiff and named defendants, except Lorenzo J. Gillilan, appeal. Affirmed.

E. M. Harber, of Kansas City, A. G. Knight, of Trenton, and J. W. Peery, of Albany, for appellant Gratia B. Gillilan.

P. C. Alexander and John C. Leopard, both of Gallatin, for appellants Lucas R. Gillilan and others.

Clinton A. Welsh, of Kansas City, for appellant Ann F. Gay and others.

Nat G. Cruzen, of Gallatin, for respondent Lorenzo J. Gillilan.

Culver & Phillip, of St. Joseph, for respondent Mary Lee Hayes.

BOND, J. I. Suit to determine title to 500 acres of land in Daviess county, Mo.

The case was tried and submitted on an agreed statement of facts setting out in detail the relationship of the parties and the history of the title. The material facts are as follows:

On December 17, 1882, Nathan Gillilan, the common source of title, died testate, owning a large amount of property, including the 500 acres in suit. His will was contested, but was finally established and recognized as valid, and we quote the two clauses thereof covering the devise of said land:

"Fifth. It is my will and I do hereby give, devise and bequeath to my son George W. Gillilan and to his heirs hereafter born to him, the following described real estate, situated in Daviess county, Missouri, to wit [description omitted] this devise and bequest however, in behalf of my son George W. Gillilan shall be to the exclusive use and benefit of my said son George and the heirs of his body hereafter born, excluding his present wife Martha I. Gillilan and her three children, Oma V., Anna F. and Independent N., from all benefit or interest or part whatever in my estate; I do hereby, to make my will clear of all doubt declare that it is my intention, and I do hereby disinherit and exclude the said Martha I. Gillilan and her three children, from all interest or part whatever in my estate."

"Ninth. It is my will and I do hereby provide that after the payment of the several legacies and bequests aforesaid out of and from my estate, the remainder of my said estate, if any, both real and personal, shall be the property of and belong to, and I do hereby give, devise and bequeath the same to my two sons, George W. and John D. Gillilan in equal parts, share and share alike."

Besides the two sons mentioned in the above clauses of the will, said Nathan Gillilan left a son Robert L., a daughter Ann F. Gay, the four children of his deceased daughter Mary Jane Clendenen, and the four children of his deceased daughter Elizabeth Gillilan, all of whom, or their heirs, are parties to this suit.

In 1882 George W. Gillilan was granted a divorce from his wife Martha (who is mentioned in the fifth clause of the will above), and thereafter married Gratia Kirkland. No children were born of this marriage, and at his death in 1914 George Gillilan left, by will, all his property to his widow, Gratia, the present plaintiff, with the exception of a bequest of \$100 each to the two surviving children of his wife Martha. Suit was brought by these two children (Annie Carr and Independence Gillilan) to contest this will, which contest was still pending at the institution of this suit.

In 1895 John D. Gillilan, the son mentioned in the ninth clause of the will of Nathan Gillilan, died, leaving as his sole heirs two sons, Lorenzo and Nathan, and a daughter, Mary

Lee Hayes. Thereafter Nathan Gillilan sold his interest in the land in question (if any) by warranty deed to his brother, Lorenzo.

The trial resulted in a decree by which the court gave one-half of the 500 acres in dispute to the two children of John D. Gillilan, deceased (one-sixth to Mary Lee Hayes and two-sixths to Lorenzo Gillilan, he having purchased the one-sixth interest of his brother, Nathan), and the other 250 acres to Anna Carr and Independent Gillilan, the two children of George Gillilan, deceased, by his former wife, Martha, subject to the dower rights of the plaintiff Gratia Gillilan and the settlement of the contest of the will of George Gillilan.

Gratia Gillilan appealed because she did not get, as devisee of her husband, a fee-simple title to one-half the land which was decreed to Anna Carr and Independent Gillilan (the children of Martha, the former wife of George Gillilan.) Ann F. Gay and those answering with her appealed, claiming they alone should have title to all the land as the only heirs at law of the late Nathan Gillilan, on the theory that the land in suit reverted to his estate upon the lapse of the devise in clause 5 of his will. Lucas R. Gillilan appealed, claiming all the land as the oldest son of Robert L. Gillilan, the oldest son of Nathan Gillilan, under the common law doctrine of primogeniture. The remaining children of Robert L. Gillilan appealed, claiming equal participancy with said Lucas R. Gillilan.

[1] II. It is contended on behalf of Lucas R. Gillilan that he, being the oldest child of Robert Gillilan, who was the oldest child of Nathan Gillilan, was entitled to the entire estate for the reason that by the statutory abolition of the fee tail the land so devised reverted to the common source (Nathan Gillilan) and then descended to him under the rule of primogeniture. The phraseology of so much of the present act (R. S. 1909, § 2872) relating to the vestiture of the estate after the death of the person who would have been the first tenant in tail under the English law is claimed to be susceptible of the construction that it was intended to vest the fee in the oldest son of the life tenant to the exclusion of his other children, since the statute uses this language:

"And the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass *according to the course of the common law*, by virtue of such devise, gift, grant or conveyance." (Italics ours.) R. S. 1909, § 2872.

We do not think the act bears that meaning. The doctrine of primogeniture is contrary to the theory upon which this and other commonwealths were built. This fact is conceded in the opinion of the commissioner cited by appellant Lucas R. Gillilan.

Stockwell v. Stockwell, 262 Mo. loc. cit. 677, 172 S. W. 23. All that the commissioner said in that case with reference to the underlined clause above, is that it might furnish "a verbal reason" for a claim that the statute had adopted primogeniture in this state. He, however, immediately added that no such doctrine could exist in this country, citing in support of his conclusion Tiedeman on Real Property, § 474; to the same effect, Miller v. Engsminger, 182 Mo. loc. cit. 203, 81 S. W. 422.

No part of the common law which was "repugnant to" or "inconsistent with" our federal Constitution or state laws was ever adopted as a part of the jurisprudence of this state. R. S. 1909, § 8047. The doctrine of primogeniture is radically opposed to the spirit, if not the letter, of both, and what the learned commissioner meant by the terms "verbal reason" was probably a satirical or derisive allusion to an argument which might be made a verbal play on the language of the statute, but which had no real substance. The idea that any such preference in the descent of real property could coexist in the laws of any of the states, with the axioms of the federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on these fundamental principles, is an unthinkable absurdity. Any intimations of a different import in any of the decisions of this court are hereby expressly disapproved. Our conclusion is that Lucas R. Gillilan has no claim whatever other than that possessed equally by his brothers and sisters.

[2-4] III. The questions which will decide the rights of the appellants in this case arise solely out of the view which we shall take of the intendment and effect of clauses 5 and 9 of the will of Nathan Gillilan, deceased. The lawful intent of a testator is the key which unlocks the legal meaning of his last will and testament. The language used in clause 5, supra, would have created an estate in fee tail special in 500 acres of land devised to George W. Gillilan and in the heirs of his body born after the making of the will, according to the common law of England. The words employed contained terms of both procreation and limitation, and therefore fall strictly within the established rule defining estates in fee tail. Gray v. Ward, 234 Mo. 291, 136 S. W. 405; Cox v. Jones, 229 Mo. loc. cit. 65, 129 S. W. 495; Hall v. French, 165 Mo. 430, 85 S. W. 769; Scudder v. Ames, 142 Mo. 210, 43 S. W. 659; Bone v. Tyrrell, 113 Mo. loc. cit. 182, 20 S. W. 796; Phillips v. La Forge, 89 Mo. 72, 1 S. W. 220; Tiedeman, Real Property (3d Ed.) § 41, p. 49; 3 Bacon's Abridg. 428, 430. No estates in fee tail, general or special, have existed in this state since 1825, if ever. R. S. 1909, §§

2872, 2874, 578; *Elsea v. Smith*, 273 Mo. loc. cit. 413, 202 S. W. 1071. Neither does the rule in *Shelley's Case* exist either in deeds or wills.

[5, 8] It is insisted, however, by the learned counsel for plaintiff, *Gratia Gillilan*, that this court should take the view, that clause 5 of the will of *Nathan Gillilan* devised a defeasible estate in fee to *George W. Gillilan*, which became absolute upon failure of issue to him, in which event the plaintiff would take all of the land under the devise to her in her husband's will in case it should be established in the contest suit still pending. We cannot concur in the view that the language employed in the devise in clause 5, supra, vested *George W. Gillilan* with an estate in fee of any kind. In support of that notion it is insisted that the term "heirs" (twice mentioned in clause 5) should be substituted by the term "children," and that after such substitution it should be held that *George W. Gillilan* took a defeasible fee which became absolute when no children were thereafter born to him. *Tindall v. Tindall*, 167 Mo. 218, 66 S. W. 1092. The answer to this contention is that the will, considered as a totality, does not evince a paramount purpose on the part of the testator so strong and controlling to devise by clause 5, supra, a defeasible fee to his son *George* as to make it our duty to carry out that purpose by substituting other language for that which the testator used in his will. We do not question the rule that the terms "children" and "heirs" may be construed to have been used the one for the other whenever such a construction is necessary to carry out the dominant thought of the testator as shown by the language employed in his will. We fully approve the statement of this rule in the cases cited by appellant:

"That, if the words used in the context warrant it, and such construction will carry into effect the manifest intention that moved the execution of the deed or the signing of the will, then such intention will be made effectual, and the words 'heirs' will be construed as meaning 'children,' and vice versa, and 'children' as 'issue,' 'grandchildren' or 'descendants,' if the justice or reason of the case requires it. 4 Kent (13th Ed.) 419; 3 Wash. Real Property (5th Ed.) 282; *Haverstick's Appeal*, 103 Pa. St. 394; *Warn v. Brown*, 102 Pa. St. 347."

We also agree to the statement of the rule cited by appellant, viz.:

"The presumption that the words 'heir of the body' or 'heirs of the body' are used in a technical sense, though it obtains in the large majority of cases, is not always conclusive. The law of construction that the intention of the testator, however expressed, must prevail, will be enough to vary the meaning of those words, if it is apparent that the testator, though using the technical words, has used them in a nontechnical sense." 2 Underhill, Wills, § 651.

To the same effect is *Brown v. Tuschoff*, 235 Mo. 458, 138 S. W. 497.

[7] In this connection it must be carried in mind that the draftsman of this will was an ex-judge and a trained lawyer, and as such was familiar with the technical meaning of the words and terms used. 40 Cyc. 1399. The terms of the devise in clause 5, supra, twice repeated, were: First, "to my son *George W. Gillilan* and to his heirs hereafter born to him"; second, "my said son *George* and the heirs of his body hereafter born," etc. It has been shown that these terms in the strictest and completest sense create an estate in special tail, which by the statute abolishing entails became a life tenure in *George W. Gillilan* with a contingent remainder in fee in his direct descendants born after the making of the will. The case therefore, in legal effect, is identical with the point in judgment in the case of *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979, where the life estate was conveyed to *Mary R. Goodman* and "then to the heirs of her body and assigns forever." In that case *Black, J.* (110 Mo. 630, 19 S. W. 980), said:

"There is nothing in this deed from which we can say the word 'heirs' means children, and this being so, we must give to it its ordinary legal signification."

He then held that the deed created a contingent remainder in fee in the plaintiff who was the granddaughter of the life tenant and fell within the description of "heirs of the body of the tenant for life." There can be no reason in this case ascribable to the paramount intent of the testator for construing the term "heirs" to have been used when children were meant which did not exist in that case. We are unable, therefore, to follow the theory that such was the intention of the testator and his draftsman when clause 5 of the will of *Nathan Gillilan* was executed.

[8] Having reached that conclusion, it is only necessary to add that the case of *Tindall v. Tindall*, 167 Mo. 218, 66 S. W. 1092, relied upon in the event this court should substitute "children" for "heirs," has no application. However, it may be said of that case that the only point held in judgment (under the facts showing that the devisee *Mrs. Tindall* had six children) was what estate she took in these circumstances under the terms of a deed providing, in case of her death without issue, that the estate was "to descend to her heirs at law." The court accordingly held that upon the birth of issue the contingent remainder in these heirs became a vested one in fee. The observation that *Mrs. Tindall* would have taken a fee if no children had been born to her was therefore a mere dictum, with only the persuasive force of an utterance by a learned judge.

IV. The only remaining question present-

ed by this appeal is what became of the estate remaining in Nathan Gillilan (which he had specifically devised in clause 5 of his will) upon defeat of that devise for lack of heirs thereafter born to George Gillilan, thereby causing a lapse of the contingent remainder to such heirs. In the solution of this question only two views are possible: First, that such a reversion in Nathan Gillilan passed to his descendants as in case of intestacy; second, that it was conveyed by the residuary clause of the will supra. The latter is the view taken by the learned trial court and is the view taken as a dernier resort by appellant Gratia Gillilan (as shown in her brief) in case this court should take, as it does, the view that clause 5 of the will created an estate tail special at common law, which was changed by the statute into a life estate in the tenant in tail with a contingent remainder in fee in certain subsequent heirs of the body of the life tenant. In considering this question it must be realized that Nathan Gillilan had a right, not a mere possibility, of reversion after carving out so much of his estate as was devised through the instrumentality of clause 5 of the will. The reversion so inhering in him was the proper subject of a grant by clause 9 of his will if he so desired; otherwise it would descend to his heirs at law under the statute of descents and distribution as in case of intestacy. Conceding, as claimed for Ann F. Gay and other appellants appearing with her as general heirs at law of Nathan Gillilan, that upon the lapse of a specific devise of realty the law indulges a presumption that the testator did not intend to make a further devise, yet no such presumption arises when he has made another devise. The question then presented is: What was his intention by the further devise? Did he thereby intend to dispose of the property described in the lapsed devise? For, if so, the property must pass thereby. The dominant thought of the author of this will was to provide in the various ways therein shown for his children and heirs. His secondary intent was to exclude from the benefits of clause 5 of his will the three children and the wife (soon afterwards divorced) of his son George W. Gillilan. Having excluded them from the purview of that clause, he apparently dismissed them from his thoughts and proceeded to dispose of whatever of his estate should remain after his previous bequests and devises. He did this by a further devise, to wit:

"The remainder of my said estate, if any, both real and personal, shall be the property of and I do hereby give, devise and bequeath the same to my two sons, George W. and John D. Gillilan in equal parts, share and share alike."

[9] At the time this residuary clause was inserted in the will, Nathan was the owner of a right to reversion in the land which he had previously devised in clause 5 of his will. This reversionary estate was the subject of a valid devise. We have reached the conclusion it was the intention of the testator to devise it by the terms of clause 9 of his will. The making of a will dealing with his entire estate and undertaking to dispose of all of it disclosed his intention to die testate. Such is the logical and legal presumption which arises from the execution of a will purporting to dispose of the whole estate of a testator. In the instant case the testator devised his property among his children and heirs in the manner specified in the various clauses of that instrument and then added clause 9 to cover any residue. He never for a moment forgot the interests of George; for, after having provided for him and his future heirs by a large devise of lands, in a manner which he had reasonable grounds to expect would vest the fee in the expected heirs, he continued to carry in mind the interests of George, and when he came to deal with the totality of his estate, he expressly provided that George and his son John should take what remained thereof in fee simple, share and share alike.

[10] Our conclusion is that the terms and provisions of this will, taken in its full scope and purpose and in view of the attending circumstances, manifest that it was the distinct purpose and intention of the testator to dispose of all of his estate by the will in question, and by the residuary clause thereof to devise his reversionary rights, upon the lapse of the devise under clause 5, to his two named sons, George W. and John D. Gillilan.

The judgment of the learned trial court was in accord with this view, and therefore correct, and must be affirmed.

It is so ordered.

PER CURIAM. The foregoing opinion in division is adopted by the court in banc. All concur, GRAVES, J., in result, except WOODSON, J., absent.

RAUCH et al. v. METZ et al.  
(Nos. 19928, 19930.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

**1. WILLS**  $\Leftrightarrow$ 502—CONSTRUCTION—DEVISE TO "RELATIONS" AND "RELATIVES."

Prior to Rev. St. 1909, § 546, a devise to one's "relations" and "relatives" included only the next of kin of the testator who would otherwise take as heirs at his death, provided nothing to the contrary appeared in the context of the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relation; Relative.]

**2. WILLS**  $\Leftrightarrow$ 552(3)—CONSTRUCTION—DEVISE TO RELATIVES—STATUTE.

Under a will executed when a son and his three children were testator's only living descendants, and when there was one living sister and seven children of two deceased sisters, bequeathing to such sister a money legacy, and an equal thirteenth share in income and distribution of a trust fund, and a like share to her, and on her death to "her heirs," in proceeds of residue, the legacies did not lapse on sister's death before testator, and under Rev. St. 1909, § 546, her lineal descendants at testator's death took same as she would have done had she survived him.

**3. COURTS**  $\Leftrightarrow$ 92 — PRECEDENTS — CASUAL STATEMENTS IN OPINIONS.

In view of the fact that the duty of the court is to construe the law as it exists in cases brought within its jurisdiction, it is unfair to give permanent and controlling effect to casual statements in opinions outside the scope of the real inquiry.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Suit by J. F. Rauch and Henry J. Ohlms, as executors of the will of Henry F. Pieper, deceased, and as trustees of certain funds, etc., against Callie A. Pieper and others, Herman C. Metz, and Mary Ensor, to obtain a construction of the will. From the adjudication Callie A. Pieper and others appeal, and Herman C. Metz takes a separate appeal. Reversed and remanded for further proceedings.

See, also, 212 S. W. 357.

William Waye, Jr., of St. Charles, and Brownrigg, Mason & Altman, of St. Louis, for appellant Ensor.

C. W. Wilson, of St. Charles, for appellants Pieper and others.

Hugo Muench and J. L. Hornsby, both of St. Louis, for respondent Metz.

BROWN, O. The plaintiffs, J. F. Rauch and Henry F. Ohlms, sue as executors of the will of Henry F. Pieper as well as trustees of certain funds thereby created. Rauch is also executor of the last will of Henry A.

Pieper, and sues in that capacity, and as curator of the estate of Henry Pieper, minor son of Henry A. Pieper, and beneficiary in his father's will, as well as in the will of Henry F. Pieper, his grandfather. Henry F. Ohlms also sues in his personal capacity as distributee in the will of which he is executor, but takes no appeal from the decree.

The defendants Callie A. Pieper, Kathleen Pieper, and Dorothy Pieper are beneficiaries in the will of Henry A. Pieper, a son of Henry F. Pieper and one of the legatees named in his will; Herman C. Metz and Mary Ensor, who claim in this distribution through Elizabeth Metz, deceased, one of the legatees in the will of Henry F. Pieper, the first-named being a son of said Elizabeth Metz, and the last-named claiming to be an adopted daughter. The other defendants include all the beneficiaries named in said will with the exception of Henry A. Pieper, Henry Pieper, Elizabeth Metz, and Henry F. Ohlms.

The object of the suit is to secure the judicial construction of certain terms and bequests contained in the will of Henry F. Pieper and directions for distribution thereunder.

Three separate appeals were taken. The appeal of the widow and two adult children of Henry A. Pieper is docketed here as case No. 19928; the appeal of Mary Ensor is docketed as No. 19929 (212 S. W. 357); and the appeal of Herman C. Metz is docketed as No. 19930.

The appeal of Mrs. Ensor stands upon the question whether or not she is the adopted child and heir of Mrs. Metz, and therefore entitled to share with Herman C. Metz in any amount which may be distributable by the executors and trustees on account of the several legacies bequeathed to her by the terms of the will of Henry F. Pieper. For this reason her appeal will be considered separately. The other defendants, with Henry Pieper and plaintiff Ohlms, comprise all the remaining legatees, as well as all the nephews and nieces of the testator, and are not appealing.

The will of Henry F. Pieper was executed September 12, 1913. The testator was then 76 years old. His son, Henry A. Pieper, and his three children above named were his only living descendants. Mrs. Metz was his only living sister. He had no brother, but there were two deceased sisters whose children are legatees in the will; so that his thirteen legatees consist of his son and his three children, Mrs. Metz and her only natural child, and the seven children of his two deceased sisters.

After a few charitable legacies the will proceeded as follows:

"Item 7. I give and bequeath unto my son, Henry A. Pieper, the sum of five thousand dollars.

"Item 8. I give and bequeath unto my granddaughter, Kathleen Pieper, the sum of five thousand dollars.

"Item 9. I give and bequeath unto my granddaughter, Dorothy Pieper, the sum of five thousand dollars, to be held by J. F. Rauch and Henry F. Ohlms, as trustees, until she arrives at the age of 18 years.

"Item 10. I give and bequeath unto my grandson, Henry Pieper, the sum of five thousand dollars, to be held in trust by J. F. Rauch and Henry F. Ohlms, as trustees, until he arrives at the age of 21 years.

"Item 11. The income from the two bequests made in favor of Dorothy Pieper and Henry Pieper shall be used in their behalf as may be needed for their wants and education, and the trustees are hereby authorized to use the same for that purpose.

"Item 12. I give and bequeath unto my sister, Mrs. Elizabeth Metz, the sum of five thousand dollars.

"Item 13. I give and bequeath unto my nephew, Herman C. Metz, the sum of five thousand dollars.

"Item 14. I give and bequeath unto my niece, Miss Kate Machens, of Rockford, Illinois, the sum of five thousand dollars.

"Item 15. I give and bequeath unto my niece, Aggie M. Rauch, wife of J. F. Rauch, the sum of five thousand dollars.

"Item 16. I give and bequeath unto my niece, Nettie Rummel, wife of H. U. Rummel, the sum of five thousand dollars.

"Item 17. I give and bequeath unto my niece, Clara Bliley, wife of Ed F. Bliley, the sum of five thousand dollars.

"Item 18. I give and bequeath unto my nephew, Henry F. Ohlms, the sum of five thousand dollars.

"Item 19. I give and devise unto my nephew, Edward A. Ohlms, the sum of five thousand dollars.

"Item 20. I give and bequeath unto my niece, Clara (Kruse) Borgmeyer, wife of — Borgmeyer, the sum of five thousand dollars."

The testator then placed his bank stock in a trust, making his executors the trustees, directing the income to be paid as received, and distribution of the stock to be made at the expiration of a period of 10 years—

"To the following named beneficiaries and in the following proportions, to wit:

"One-thirteenth (1/13) to Mrs. Elizabeth Metz.

"One-thirteenth (1/13) to Herman C. Metz.

"One-thirteenth (1/13) to Kate Machens.

"One-thirteenth (1/13) to Aggie M. Rauch.

"One-thirteenth (1/13) to Nettie Rummel.

"One-thirteenth (1/13) to Clara Bliley.

"One-thirteenth (1/13) to Henry F. Ohlms.

"One-thirteenth (1/13) to Edward A. Ohlms.

"One-thirteenth (1/13) to Clara (Kruse) Borgmeyer.

"One-thirteenth (1/13) to Henry A. Pieper.

"One-thirteenth (1/13) to Kathleen Pieper.

"One-thirteenth (1/13) to J. F. Rauch and Henry F. Ohlms as trustees for Dorothy Pieper.

"One-thirteenth (1/13) to J. F. Rauch and Henry F. Ohlms as trustees for Henry Pieper."

He then directed all the rest, residue, and remainder of his estate, real, personal, and mixed to be sold by his executors, and together with rents received by them from real estate, to—

"Be divided into thirteen equal parts, to be distributed share and share alike, and accordingly the following shall be and are entitled to distribution under this item, viz.:

"Elizabeth Metz, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Herman C. Metz, or in the event of his death his heirs shall receive one-thirteenth (1/13).

"Katie Machens, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Aggie M. Rauch, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Nettie Rummel, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Clara Bliley, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Henry F. Ohlms, or in the event of his death his heirs shall receive one-thirteenth (1/13).

"Edward A. Ohlms, or in the event of his death his heirs shall receive one-thirteenth (1/13).

"Clara (Kruse) Borgmeyer, or in the event of her death her heirs shall receive one-thirteenth (1/13).

"Henry A. Pieper, or in the event of his death his heirs shall receive one-thirteenth (1/13).

"Kathleen Pieper, or in the event of her death his heirs shall receive one-thirteenth (1/13).

"J. F. Rauch and Henry F. Ohlms, trustees for Dorothy Pieper, shall receive in trust for her one-thirteenth; to be paid over in the event of her death to her heirs.

"J. F. Rauch and Henry F. Ohlms, trustees for Henry Pieper, shall receive and hold in trust for him one-thirteenth, to be paid over in the event of his death to his heirs."

Mrs. Metz died February 6, 1914. The testator never learned or knew of her death. He himself died March 12, 1914, while Henry A. Pieper died October 20, 1914.

The circuit court held that the bequest to Mrs. Metz in items number 12 and 21 of the will lapsed by her death and became a part of the residuary fund provided in item 24, and adjudicated accordingly.

The appellants Callie A. Pieper and her two daughters are, with their brother Henry, entitled to the estate of Henry A. Pieper under his will. They are the appellants in case number 19028, and assert that, by reason of the lapse of the two bequests to Mrs. Metz, the amount so bequeathed descended to Henry A. Pieper and should be distributed to them and Henry Pieper under his will.

Herman C. Metz, the appellant in case number 19030, contends that these two legacies did not lapse, but passed to him as the only lineal descendant of the legatee.

I. The principal and controlling question in these two appeals is whether or not the legacy to Elizabeth Metz, the sister of the testator, lapsed by the death of the legatee during his lifetime, or took effect under the provi-

sions of section 546 of the Revised Statutes of Missouri, in her lineal descendants. The trial court held that the first two of these legacies lapsed, and became a part of the residuary estate disposed of in item 24, in which the bequest to her did not lapse. The widow and children of the son of the testator, in their appeal, are satisfied with this decree in respect to the lapse of the two legacies, but attack it by the assertion (1) that it is erroneous in its determination that they thus become a part of the residuary estate and subject to the residuary bequest, instead of passing to the son by virtue of the statute of descents and distributions, and (2) in holding that the residuary bequest to Mrs. Metz did not lapse by her death.

Herman C. Metz in his appeal complains of the holding of the court that the first two legacies lapsed by the death of Mrs. Metz, his mother, before the death of the testator. Mrs. Ensor, of course, takes this position as an incident to her own appeal, so that this opinion will necessarily determine the extent of the fund over which her own contest is waged. These questions call for a construction of section 546, already referred to, in its application to this particular will.

[1] II. The first step in the inquiry is the construction of the will itself; that is to say, we must evolve from its terms, which the law presumes to have been written down in contemplation of the provisions of this statute, the intent of testator.

The scheme of the will is apparent and unmistakable. His next of kin was his son alone, while he was blessed with twelve other near "relatives," as that word is defined in the dictionaries of our language and used by the most common consent. They were all kinsmen of his blood—grandchildren, nephews, nieces, and a sister. He concluded, for some reason which we have no lawful cause to question, to place them all, his son included, in precisely the same relation to his estate. Should he die intestate his son would take all if then living; if not, the grandchildren would take all, not through their father, but from him. He therefore deliberately formed a testamentary scheme by which he placed these 13 relatives in equal relation as beneficiaries of his estate. He placed them all by name on an absolute equality with each other as to the amount of their respective interests, without any regard to the degree of consanguinity in which they stood, and in connection with the name of each he carefully stated the relationship of the beneficiary to himself. The inheritable quality of each legacy was a necessary incident of this equality.

The death of Mrs. Metz has disturbed the placid surface of this testamentary stream by casting into it the question whether or not she was a "relative" of her brother within

the meaning of section 546 of our Statutes of 1909. As we understand the argument, it is contended that its meaning is ambulatory, and depends upon certain collateral conditions which remind us of a question asked by certain Sadducees many years ago. For example, should a testator bequeath legacies to a sister with children and to an only child, and the child should thereafter predecease him, leaving no descendants, one is curious to know when, if at all, the sister would, for the purposes of this section become her brother's relative. It is not plain to us whether the theory implies that it would be at the death of the child, or at her own death should she predecease the testator, or at the death of the latter. It does imply that she was not so at the date of the will.

These are, however, mere idle conjecture, in view of the fact that they rest their argument almost exclusively upon authorities which they say should settle the law of this case.

Long before the enactment of the statute we are now considering, or of any similar statute to which our attention has been directed, it had been held that a devise to one's "relations" or "relatives" in those terms included only the next of kin of the testator, who would otherwise take as heirs at his death. The reason for the rule, as stated almost uniformly in such cases is not only logical, but unanswerable, and is founded on the fact that otherwise such dispositions must necessarily be void for uncertainty in many cases, by reason of the impossibility of finding and including all persons who might answer popularly that description. In such cases, the description of the class being too indefinite and vague for identification, recourse is had to the statutes of descents and distributions. 2 Jarman on Wills (6th Ed.) p. 1627; Schouler on Wills (5th Ed.) § 537. Our own statute of descents and distributions affords a striking illustration of this difficulty in its closing clause: "and so on, in other cases, without end, passing to the nearest lineal ancestors and their children, and their descendants, in equal parts." This sends us back along the line of our own ancestors in the search for the ancestry of our collateral kin, to the origin of the human race, and when the next of kin is found the search for inheritable blood may well cease. If it cannot be found, the whole body politic is recognized and taken as kinsmen by escheat. No such reason, and therefore no such rule, exists in this case. "My sister Mrs. Metz" is no less my sister and no less my relative because I distinctly point out both those facts.

Although it is true, as we have said, that if I devise or bequeath by the descriptive designation of "relatives" only, the law seeks no further for my beneficiary than those who are entitled to take as next of kin if I do

not make a will, yet that convenient and labor-saving rule is modified by the condition founded in its very nature, that nothing to the contrary appears in the context of the will. 40 Cyc. p. 1458, and many cases cited. The rule was not established to embarrass the testamentary disposition of property, nor to prevent the testator from disinheriting whom he will, nor to frustrate his intention plainly and certainly expressed, but to assist him in making his intention more apparent and certain.

We do not understand the intention of this testator to treat all the objects of his bounty, whether descendants or collateral kindred, precisely alike, to be questioned. He left no room for question. It is only said, in effect, that the intention is frustrated by the terms of the statute. In passing from the will to the statute we simply pass from the intention of the testator to the intention of the Legislature. To both we must attribute the intention implied by the plain and ordinary significance of their words unless something to the contrary appears.

[2] III. We must first seek light on the intention of the Legislature from the words they have used in expressing themselves. If these are plain and unambiguous, the object of all interpretation is accomplished. In the first sentence it applies its rule to all cases where "any estate shall be devised to any child, grandchild or other relative of the testator." This sentence seems to have been written carefully. This appears from the use of the singular number, thus excluding the idea of classification, and adapting its provisions to each particular disposition coming within its terms. The careful selection of words proceeds. When the word "grandchild" was written the parting of the ways was reached. The finger of the guideboard pointed straight ahead to the word "descendant." Instead of following it, the legislators turned aside to the way along which the finger pointed to "next of kin." This was also rejected, and they turned to a path well beaten by the feet of those who, like this testator, would choose from their "kindred" those who should enjoy the fruitage of their lives. From the assortment before them the Legislature very properly selected the word that expressed this thought. We are now asked to place a barrier across the way they deliberately chose, not as lawyers and for lawyers, but as lawmakers for an English-speaking people, and force them back into the road which they rejected.

That the Legislature had in mind these distinctions when selecting the word "relative" is evident from the next clause, which expressly provides that the devise and bequests to relatives mentioned in the first clause shall be limited to and include only such relations as shall leave lineal descendants. They as-

sume by this the intention of the testator to invest his beneficiary with an estate which will inure to his descendants. This is a most reasonable inference. It implies no interest on the part of the testator in the descendants as a class, but suggests the natural sentiment that an interest in the relative implies an interest in his children. It is in line with this theory that the Legislatures of many of our states have enacted similar provisions, and that the courts in all these states have uniformly held that the word "relative," and others of similar import, refer to relationship by blood, and not by affinity, and that where the element of consanguinity is lacking the reason of the law does not operate. Copious citations of authorities to this effect will be found in 18 American and English Encyclopaedia of Law, p. 756; volume 24 of same work, at page 280, note 1; and 40 Cyc. p. 1938. Many of the cases cited hold that, under statutes similar to our own, a devise or bequest to any relative "by blood" is saved. Borrowing the language from the syllabus of the opinion in *Schaefer v. Bernhardt*, 76 Ohio St. 443, 81 N. E. 640, 10 Ann. Cas. 919, the word "relative" will be construed "as including those which are consanguineous, but excluding those which are affinitive merely." *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631; *Esty, Adm'r, v. Clark*, 101 Mass. 36, 3 Am. Rep. 320; *Moses v. Allen*, 81 Me. 268, 17 Atl. 66; *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203; *In re Pfuehl's Estate*, 48 Cal. 643; *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183; *Chenault v. Chenault*, 88 Ky. 83, 11 S. W. 424; *Woolley v. Paxson*, 46 Ohio St. 307, 24 N. E. 599; *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30; *Larwill v. Ewing*, 73 Ohio St. 177, 76 N. E. 503.

IV. We are cited to *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931, and *McMenamy v. Kempelmann*, 273 Mo. 450, 200 S. W. 1075, as authority for the proposition that the legacies to Mrs. Metz lapsed by her death before the death of the testator. It is not nor can it be contended that either of these cases involved the question here in controversy. In this case all the parties upon its numerous sides cordially agree that the word "relative," as used in our statute of wills in this connection, means relative by blood and not by affinity. In both the cases last cited it was admitted that the legatee was not related to the testator by blood, but only by marriage, and in each case the legacy was held to have lapsed for that reason alone. The late Judge Williams of this court, the learned and eminent jurist who wrote the opinion in the *Bramell Case*, supra, after holding that the granddaughter of the testator's wife was not his relative within the meaning of this statute, said:

"It has long been settled that a bequest to 'relations' applies only to those who, by virtue



of the statute of distributions, would take property as next of kin.' Anderson's Law Dictionary, p. 870. We think the word is used in the same sense in this statute."

[3] In view of the fact that the duty of the court is to construe the law as it exists, in cases brought within its jurisdiction, we think it would be unfair to the judge as well as to future litigants to give permanent and controlling effect to casual statements outside the scope of the real inquiry. We think the closing sentence was only intended to apply to the facts then before the court, and not to the law as presented by the facts of this case. The McMenamy Case, *supra*, has no bearing upon the question before us. Neither this statute nor any other was involved or mentioned. It involved the construction of the twenty-ninth clause of one Kaufhold's will, which is as follows:

"If there should be a residue left over in my estate after all debts and legacies are settled by the executors of this will, I direct that same shall be divided amongst all immediate relatives herein named proportionately as to the amounts hereinbefore given, but limited to those relatives residing in United States of America."

Whether this included relatives of the testator's wife was the only question. Division No. 2 of this court, in an opinion by Judge Williams, held as follows:

"Upon careful consideration, we are of the opinion that the trial court erred in decreeing that paragraph 29 included within its provisions the legatees who were the blood relatives of the testator's wife. That being true, the court did not err in granting a new trial.

"The rule here applicable, and which appears to be sanctioned by the overwhelming weight of authority, is to the effect that, 'unless the will discloses a plain purpose to the contrary,' the term 'relatives,' when used therein, 'does not *prima facie* refer to husband, wife, or marriage connections, but to those only of one's own blood.'"

He omitted all mention of the Bramell Case, the only direct Missouri authority on the question before him. Judge Walker, in a short opinion, "reluctantly" concurring, cited and quoted from that case, being careful to omit from his quotation the sentence relating to the construction of the statute. A careful reading of both these opinions impresses us strongly that both judges judiciously avoided any approval of the doctrine that the word "relative," as used in this statute, is confined in its meaning to such next of kin as happen to survive the testator.

We hold that by the terms of section 546 of the Revised Statutes the legacies bequeathed to Mrs. Metz in items 12 and 21 of the will were preserved from lapse by her predecease of the testator, and that by his death her lineal descendants took the same as she would

have done had she survived him. The appeal of Mrs. Ensor (No. 19930) depending, as it does, solely upon her relation to Mrs. Metz as lineal descendant or heir, will be considered in a separate opinion. In pursuance of the conclusions we have already announced, the judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with the principles stated in this opinion.

**PER CURIAM.** The foregoing opinion in division is adopted by the court in banc. All concur, BOND, C. J., and WILLIAMS, J., in result. WOODSON, J., absent.

RAUCH et al. v. METZ et al. (No. 19929.)  
(Supreme Court of Missouri, In Banc. May 16, 1919.)

1. WITNESSES  $\S$ 126—COMPETENCY—INTEREST—CONSTRUCTION OF STATUTE.

Rev. St. 1909,  $\S$  6354, making persons interested in a suit competent witnesses, is purely remedial in its nature, and was intended to remove the disability theretofore existing at common law, and is a qualifying, and not a disqualifying, statute, and the proviso as to testimony as to transactions with deceased parties, etc., creates no disability, but only limits the operation of the enabling part. Per Blair, Woodson, and Williams, JJ.

2. ADOPTION  $\S$ 7—STATUTORY ADOPTION—CONSENT OF CHILD.

Statutory adoption is the act exclusively of the adopting parent, and does not require the consent of the child or its parents or guardian. Per Blair, Woodson, and Williams, JJ.

3. WITNESSES  $\S$ 178(1)—INCOMPETENT WITNESS—ADOPTION BY OTHER PARTY.

In a suit by executors for construction of a will, to determine rights of certain defendants, the successful defendant, by the examination of the appealing defendant in his own behalf, adopted her as his own witness, and could not thereafter be heard to object to her competency to testify to transactions with a decedent as whose adopted child she was claiming. Per Blair, Woodson, and Williams, JJ.

4. EVIDENCE  $\S$ 291—DECLARATIONS—PEDIGREE.

In the construction of a will involving the issue as to whether defendant was the adopted daughter of a deceased sister of testator, through whom she claimed, evidence that defendant's father had stated that he had given her away "by the law" was admissible as pedigree or family history, regardless of the character of the litigation. Per Blair, Woodson, and Williams, JJ.

5. ADOPTION  $\S$ 8—RELATION—ACTS AND CONDUCT OF PARTIES.

Adoption may be created by the acts and undertakings of the parties fully executed on

behalf of the child, the act of adoption being liberally construed in favor of the adopted child. Per Blair, Woodson, and Williams, JJ.

**6. ADOPTION** ⚡17—RELATION—EVIDENCE.

A child of tender years, without ability to contract or to understand the contracts of others, who is placed in the hands of strangers, should receive the same consideration in respect to the establishment of her adoption that is extended to those able to control their own contractual relations. Per Blair, Woodson, and Williams, JJ.

**7. EVIDENCE** ⚡83(1)—PRESUMPTION—CORRECTNESS OF CENSUS ENUMERATION.

The court may indulge the presumption that the facts contained in an enumeration made as required by the state census law of 1885 were obtained in the usual manner, and that the information contained in them is *prima facie* correct. Per Blair, Woodson, and Williams, JJ.

**8. ADOPTION** ⚡17—ACTS OF PARTIES—EVIDENCE.

In an action by executors for the construction of a will under which appellant claimed as the adopted daughter of a sister and legatee of testator, so as to make her either the heir or the descendant of such sister within the will and the statute (Rev. St. 1909, § 546), evidence held to show an adoption by acts and undertakings of the parties fully executed in behalf of the child. Per Blair, Woodson, and Williams, JJ.

**9. HUSBAND AND WIFE** ⚡230—CONTRACT BY MARRIED WOMAN—PERSONAL DISABILITY—WAIVER.

The disability of a married woman to make a personal contract, such as a contract of adoption, is personal to herself, and will be taken as waived, unless she elects to interpose it as a defense in some proceeding against herself or her property, and no one else can interpose such defense for her or compel her to interpose it. Per Blair, Woodson, and Williams, JJ.

**10. HUSBAND AND WIFE** ⚡62—CONTRACTS OF MARRIED WOMAN—ESTOPPEL.

A married woman is estopped in equity from interposing coverture as a defense in cases where she is attempting to enforce a right inconsistent with her previous conduct, upon which the other party has relied. Per Blair, Woodson, and Williams, JJ.

**11. WILLS** ⚡506(5)—CONSTRUCTION—"HEIRS"—ADOPTED CHILD.

An adopted child of testator's sister had a right to participate equally with the sister's son in a residuary legacy bequeathed to the "heirs" of the sister, as by the terms of the statute relating to the distribution of estate, and right of adopted children to participate therein, she is within the meaning of that word. Per Blair, Woodson, and Williams, JJ.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

**12. ADOPTION** ⚡21—INHERITANCE BY ADOPTED CHILD.

Under the statute of adoption the child inherits only from his adopting parent, and does

not become the heir or the collateral kindred of such parent. Per Blair and Woodson, JJ.

**13. WILLS** ⚡552(3)—CONSTRUCTION—LEGACY—RIGHTS OF LEGATEE'S ADOPTED CHILD—"LINEAL DESCENDANT."

Under a will bequeathing a legacy in a certain amount to testator's sister, and bequeathing to her a share in the income and distribution of a trust fund, and where the sister predeceased the testator her adopted child did not take as a "lineal descendant" of the legatee, within that term as used in Rev. St. 1909, § 546. Per Blair and Woodson, JJ.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lineal Descendants.]

**14. WILLS** ⚡552(3)—CONSTRUCTION—LEGACY—RIGHTS OF LEGATEE'S ADOPTED CHILD—"LINEAL DESCENDANT."

Under a will bequeathing a legacy in a certain amount to testator's sister, and bequeathing to her a share in the income and distribution of a trust fund, and where she predeceased the testator, her adopted child was a "lineal descendant," within Rev. St. 1909, § 546, who would take what the legatee would have taken had she survived testator. Per Williams, J.

Appeal from Circuit Court, St. Charles County; Edgar B. Woolfolk, Judge.

Petition by J. F. Rauch and H. F. Ohlms, executors of Henry F. Pieper, deceased, etc., and others against Herman C. Metz and others and Mary Ensor for the construction of the will. From a decree in a separate controversy between defendants Metz and Ensor the latter appeals. Reversed and remanded.

See, also, 212 S. W. 353.

William Waye, Jr., of St. Charles, and Brownrigg, Mason & Altman, of St. Louis, for appellant Ensor.

C. W. Wilson, of St. Charles, for appellants Pieper and others.

Hugo Muench and J. L. Hornsby, both of St. Louis, for respondent Metz.

**BROWN, C.** This appeal taken by Mary Ensor, a defendant in the above-entitled cause, involves a separate controversy between her and the defendant Herman C. Metz over the legacies bequeathed to Elizabeth Metz by the terms of the will of Henry F. Pieper. All other controversies raised by the record are determined by us in the principal case, so far as they affect any of the parties to the suit. The questions here presented relate solely to the rights claimed by the appellant Mary Ensor under the will of Henry F. Pieper, as an adopted daughter of Elizabeth Metz. If it be determined that she sustained that relation it will be necessary to determine her rights, if any, under the will; otherwise she has no interest in

any part of the fund in controversy. The petition asked for the construction of the terms of the will, setting it out in *hæc verba*. It contained, among many others, three bequests to Elizabeth Metz, the first being a legacy of \$5,000, described as item 12. The next consisted of an interest in a trust fund consisting of bank stocks. The third directed the residue of his estate, after the payment of debts and legacies, to be converted into money, and divided in thirteen equal portions, one of which was bequeathed as follows: "To Elizabeth Metz, or in the event of her death her heirs shall receive one-thirteenth." Mrs. Metz was his sister, and died before the testator, and these legacies are the subject of this controversy between Herman Metz, her son, and this appellant. The petition states that the executors and trustees do not know to whom, as between the defendants Herman C. Metz and Mary Ensor, they should pay one-half of these legacies, and ask the advice and direction of the court. Herman C. Metz and Mrs. Ensor set up their respective claims, the former to the whole and the other to one-half of each of the three legacies. Mrs. Ensor claims as adopted daughter of Mrs. Metz, and issue was joined and a trial had thereupon. During the trial, which began February 14, 1916, the appellant took the witness stand in her own behalf, and the respondent's counsel said:

"It appearing now that Mrs. Ensor is the claimant as an adopted child of Mrs. Metz, and she being dead, so I take it that fact disqualifies Mrs. Ensor as a witness in this proceeding, and we object to her testifying.

"The Court: I will overrule the objection as to the witness being incompetent for any purpose.

"To which ruling of the court the defendant Herman C. Metz then and there duly excepted and saved his exceptions."

Mrs. Ensor then proceeded to testify in chief to the effect that she was 57 years old; that when a child, from 4 to 7 years of age, she was taken by her father to the home of Mr. and Mrs. Metz, and continued to reside with them until November, 1881, when she was past 22, her birthday being in April. About two years afterward her father, Patrick John McCauliff, who had remarried, came to take her away. Mrs. Metz and she both cried, and her father said the Metzses, who were both present, could keep her for a while longer. Mrs. Metz said: "No; if we can't keep her for good she did not want me at all; she did not want to bother." There was more conversation, which she could not remember. Dr. Bruere, through whom they had first obtained the child, was present, and some papers were drawn up and signed by Mr. and Mrs. Metz, and her father soon left. Mr. and Mrs. Metz embraced her, and told her she was now their little

girl. They had no children at that time, but shortly afterward a son was born to them, and two other children were afterward born, at intervals of about two years. She assisted in caring for them, and helped in the washing and other household work, and was sent to school until about 12 years old, when her schooling ceased and she assisted in the household work. Mr. Metz and the children were in delicate health and the work was hard. They loved her and she loved them, and always called them father and mother. She was called both Mary Metz and Mary Mack while in school. When she first came to them they seemed to be in comfortable circumstances, but became very poor—"barely existed," as she described it. When 16 or 17 she learned dress-making, at which she worked, clothing herself, and using all of her earnings not needed for that purpose in clothing the children and for other family expenses. After she was 18 she continued to live with them, and continued her work for the general support of all for more than four and a half years, going with them to St. Louis in 1879, and leaving their home in November, 1881, when nearly 23 years old. In the following February she married Dr. Ensor.

She was cross-examined at great length by the respondent's counsel respecting her life in the Metz family, as well as her conduct toward them from the time she left their home until and since the death of Mrs. Metz. The object of this was evidently to show that their ways parted when she left them, and that she ceased at that time to recognize them, even as friends; that while she maintained friendly relations with some of the Pieper family, including Kate Machens, one of the legatees in Judge Pieper's will, she had pointedly and absolutely repudiated Mrs. Metz and her son, the respondent in this appeal.

We have given this synopsis of appellant's testimony that we may have a better understanding of the ruling of the court after the completion of her entire examination. It said:

"Respecting the testimony of claimant, Mrs. Ensor, as to her competency as a witness, the court takes this position, so it may be understood by the counsel, that if there was a statutory deed or contract of adoption sufficient in and of itself to make the claimant an heir of Mrs. Metz, then she is not a party to the contract, but a party in interest, and therefore competent to testify; if there is not a sufficient deed or contract of adoption prescribed by our statute at the time, but that it is dependent upon ripening into a valid or sufficient contract of adoption, being a full performance of an initiatory understanding or agreement fully performed to take it out of the statute of frauds, then it is the position of the court that Mary Ensor and her testimony must become and is part of the contract, in substance and in fact,

and then she would be a party to the contract and party in interest both, and not a competent witness. It was suggested by counsel yesterday she was not a party to the contract, but a subject of the contract, party in interest, and not a party to the contract; hence competent. I wanted counsel to understand the position of the court."

Appellant's counsel excepted to this ruling as follows:

"Defendant Mary Ensor excepts to the ruling of the court in so far as the court rules she is incompetent for any purpose."

At the close of all the evidence the court made, at the instance of this respondent, several declarations of law, among which was the following:

"That the intervener, Mary Ensor, having alleged the existence of a contract of adoption on the part of the deceased, Elizabeth Metz, claimed to have been made with the interpleader, or with her father in her behalf, it is incumbent upon said Mary Ensor to prove a written contract with said Elizabeth Metz, valid and sufficient under the laws of Missouri when made."

The evidence will be stated in the opinion as the questions to which it must be applied are considered.

[1-3] I. The question is presented whether or not, at the time of the death of Elizabeth Metz, the appellant was her adopted daughter. No deed of adoption was produced, and there is no evidence that any such instrument was acknowledged and recorded by Mrs. Metz and her husband as provided by the statute. She was called and sworn as a witness in her own behalf, and the respondent thereupon objected to her competency on the ground that she claimed in this proceeding as an adopted child of Mrs. Elizabeth Metz, who was dead, and that she was thereby disqualified as a witness. This objection was by the court overruled, to which the respondent excepted. The witness then proceeded, in answer to questions, to testify to the facts and circumstances relating to her being placed by her father in the Metz home when she was less than seven years old, the execution of some writing by which she was told that she was adopted by Mr. and Mrs. Metz some two years later, and of her life with them during the next 16 years. Respondent's counsel then cross-examined her to the extent of about 25 pages of the printed record, including not only the matters referred to in her examination in chief, but many things not so referred to, and covering about 30 years of her subsequent married life, eliciting facts relating to an estrangement between her and Mrs. Metz, which they treated vigorously in their brief as a defense to her claim. After this was concluded the court withdrew her testimony from the case. The propriety of this action is before us for review. The question is an important one, upon which we get little light

from adjudicated cases. It is founded on section 6354 of the Revised Statutes of 1909, which provides that—

"No person shall be disqualified as a witness in any civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same as a party or otherwise. \* \* \* Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own behalf, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator."

We have frequently held that this statute is purely remedial in its nature, its object being to remove a disability which theretofore existed at common law, and that the proviso creates no disability, but only limits the operation of the enabling provision. *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480, and cases cited; *Wagner v. Binder*, 187 S. W. 1128, loc. cit. 1153, and cases cited; *Signaigo v. Signaigo*, 205 S. W. 23, loc. cit. 29, and cases cited. It is a qualifying, and not a disqualifying, statute. By its general terms it removes all disqualification by reason of interest in the event of the suit as a party or otherwise, so that we must look for the disqualification of this witness in the terms of the proviso alone, which applies only to cases in which one of the original parties to the contract or cause of action in issue and on trial is dead or insane. It is not her interest as a party to the suit which disqualifies her. That disqualification is removed. It is her interest as the only surviving party to the cause of action.

The question, then, is whether Mrs. Metz is one of the parties to the contract or cause of action in issue and on trial in this case. Neither she nor her estate has any interest whatever in the event. Her estate will not profit a single dollar by its winning, nor lose a dollar by its loss. She never in her lifetime had any interest in the question involved nor do her heirs as such have any interest now. The question is, who is the beneficiary or beneficiaries in Henry F. Pieper's will? It passes over the head of Mrs. Metz and falls into the hands of these litigants. Had not the statute to which we have referred been enacted, both would have been disqual-

ified from testifying in the case. Herman C. Metz, being interested as a party in the result of the action, could not have gone upon the stand and testified that he was a son of Mrs. Metz, nor could Mrs. Ensor have testified that she was her daughter by adoption. Both would have stood precisely on the same footing. If we understand the position of the respondent, it is that this disqualification is removed from Herman C. Metz while it is not removed in the case of Mrs. Ensor. We may assume this, because he testified at length in his own behalf. There would be force in this position did the disqualifying proviso refer to parties to contracts alone; but it does not. It refers to parties to the cause of action, whatever it may be. If the cause of action in this case is the legal relation of these parties to Mrs. Metz, then it is plain that the disqualification of interest applies to both alike. Each has the same right as the other to testify in that relation, whether it grows out of birth or adoption. And the disqualification does not end with the destruction of their competency to testify as to the facts relating to their identity as legatees in Pieper's will. If incompetent they are incompetent because of their interest, and the infirmity in this respect covers the entire cause.

The same question was before this court in *Lynn v. Hockaday*, supra. The only difference between the cases in this respect is that the witness sought to be disqualified in the *Lynn* Case was the wife of the deceased owner of the property in controversy, an interest in which was claimed by the adopted daughter. This court, through Judge Vallant, said:

"The case at bar presents no claim against the estate of the deceased; it is simply a question between the parties claiming to be heirs at law of the intestate, and affects only the partition of the estate between them; the estate itself is not to be augmented or diminished by the result. Suppose, instead of a question of adoption, it was a question of identification of one claiming to be an heir; could there be any doubt that the widow would be a competent witness?"

Let us put the same proposition in the terms of this case. If appellant is incompetent to testify that she is the adopted daughter of Mrs. Metz, how can the respondent be competent to testify that he is her natural son? This relationship is equally the foundation of the right of both. Mrs. Metz is equally the other party to that relationship, whether it came about by birth or adoption. Both were too young to remember the transaction which initiated it, and must depend alike on subsequent events and information for their knowledge. Both were equally irresponsible for the occurrence. How can it be said that she is disqualified

as a witness by reason of her interest in the result, while he, having an equal interest, is competent to testify as he did?

We do not wish to be understood as holding that had this been a suit in which the estate of Mrs. Metz or the interest of any one claiming under or through her had been involved, Mrs. Ensor would have been competent to testify. The expressions we have used are only intended to apply to the facts of this case, in which she is seeking to enforce a claim against the Pieper estate as a beneficiary of the Pieper will, and in which her adversary claims, not from his mother, but from the same source.

There is another reason equally persuasive to us why the testimony of Mrs. Ensor is properly before the court for its consideration.

Although the respondent, when she was called, objected to her competency on the ground that Mrs. Metz, the alleged adopting parent, was dead, the court overruled the objection, and satisfied its curiosity as to her knowledge of the case by permitting her to testify to the circumstances by which it is alleged her adoption was accomplished, up to the time when she left her adoptive home and married. The respondent then cross-examined her with respect not only to her life in the Metz home, but also during the 35 years of her subsequent married life. This, as appears from respondent's brief, was for the purpose of showing by her subsequent acts that she herself had repudiated whatever, if anything, might have been inferred by the conduct, acts, and words of the parties before her marriage. When it was all in the court announced the theory that had a perfect statutory adoption been shown, she would not have been a party to that adoption, and would therefore be a competent witness for all purposes; but in relying on an adoption otherwise than by the statutory deed she became a party thereto adverse to Mrs. Metz, and was therefore incompetent.

The law seems to be settled in this state that our statutory adoption is the act exclusively of the adopting parent, and does not require the consent of the child or its parent or guardian. *Haworth v. Haworth*, 123 Mo. App. 303, 309, 100 S. W. 531; *Clarkson v. Hatton*, 143 Mo. 47, 53, et seq., 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; In the Matter of Charles R. Clements, 78 Mo. 352. The theory of the trial court seems to be that a babe in arms, adopted without statutory formality, becomes thereby a contracting party, subject to contractual disabilities as if of full age.

It is unnecessary now to untangle the web of this reasoning because in the case before us the respondent, by the examination of the witness in his own behalf, adopted her as

his own witness, and made the most of her testimony. *Edwards v. Latimer*, 183 Mo. loc. cit. 627, 628, 82 S. W. 109, 114. In the case just cited we said:

"While we think defendant was incompetent because his mother, the opposite party to this contract, was dead, yet having permitted him to testify without objection in denying the conversations attributed to him and his mother and sister by his sisters, Mrs. Monroe and Mrs. Edwards, when his incompetency was apparent, plaintiffs could not afterwards be heard to object on that account."

As we then said:

"While the court finally excluded all the evidence of the defendant as incompetent, still it was admitted and is preserved in the record, and we are at liberty in an equity case to consider it under such circumstances,"

—so say we now in case of the testimony of Mrs. Ensor.

[4] II. Mr. Patrick J. McCauliff died 10 or 12 years before the trial. His daughters, Mrs. Gallagher and Mrs. Volke, were witnesses at the trial of this cause, and were permitted, over the objection of the respondent, to testify that during his lifetime he had frequently said in his family that he had given the appellant away to the Metz family in St. Charles, and greatly regretted it. The occasion of one of these talks was the burning of his house in Centralia, in which one of his daughters, a full sister of the appellant, lost her life. He wept and expressed his regret that he had given her sister away "by the law." The respondent contends that this evidence is incompetent, and should not be considered by this court. We do not concur in this view. It belongs to that class of evidence usually denominated "pedigree" or "family history," which embraces "any notable fact in the life of a member of the family or in the family history which might well be supposed to be known to the members in general. 1 Greenleaf on Evidence (16th Ed.) p. 202. "There is in truth no definite or formal limitation as to the kind of fact that may be the subject of the statement. The general inquiry should be: Were the circumstances named in the statement such a marked item in the ordinary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge and to be sincerely uttered?" 2 Wigmore on Evidence, § 1502. Under these circumstances the character of the litigation in which the evidence is offered is immaterial. It is the nature of the statement which determines its admissibility, and not the character of the litigation in which it is offered. 1 Greenleaf on Evidence, p. 203. The question was considered by this court in *Topper v. Perry*, 197 Mo. 581, 95 S. W. 203, 114 Am. St. Rep. 777, which involv-

ed the title to land, and the evidence offered and held to be admissible under this rule was a statement made by Ambrose G. Topper, deceased, in his lifetime, that he had been married to Anna Topper, and it was held admissible. We think that the giving away of his child was an important incident in the family life of Patrick J. McCauliff, an event which would naturally constitute an interesting subject of conversation in the home. It would be particularly appropriate under the circumstances related by Mrs. Volke. We have no doubt of the propriety of its admission.

[5-8] III. Before proceeding to the examination of the evidence, we will again state that the sole issue to which it is directed is the status of Mrs. Ensor. This is to be determined by the answer to two questions: (1) Is she an "heir" of Mrs. Metz within the meaning of that word as used in the twenty-fourth item of the Pieper will? And (2) is she a descendant of Mrs. Metz within the meaning of that word as used in section 546 of our own Revised Statutes? If the first of these be answered in the affirmative, she is entitled to take under the will, and not through Mrs. Metz, the residuary legacy bequeathed to "Elizabeth Metz, or, in the event of her death, her heirs." If the second question be answered in the affirmative, she is entitled, under the section cited, to participate with Herman C. Metz in the legacies bequeathed in items 12 and 21 of the will. Neither of these legacies constitutes any part of the estate of Mrs. Metz. This was admitted, in substance, at the trial, upon the introduction in evidence of her will, and is evident without argument.

Mrs. Ensor claims the status of both heir and descendant by virtue of an alleged adoption as the child of Mrs. Metz. We do not understand that her counsel contend that there was any adoption by deed executed and recorded under the provisions of the act of 1857 concerning the adoption of children, which is still continued in our statutes. R. S. 1909, §§ 1671-1673. There is, however, no principle of law more firmly settled in this state than that that relation may be created by the acts and undertakings of the parties fully executed on behalf of the child. *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Lynn v. Hockaday*, supra; *Grantham v. Gossett*, 182 Mo. 651, loc. cit. 670, 81 S. W. 895; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575; *Lindsley v. Patterson*, 177 S. W. 826, L. R. A. 1915F, 680; *Buck v. Meyer*, 195 Mo. App. 287, 190 S. W. loc. cit. 997; *Signalgo v. Signalgo*, supra; *Fisher v. Davidson*, 271 Mo. 195, 195 S. W. 1024, L. R. A. 1917F, 692.

Is the fact of her adoption by Mrs. Metz

established by the evidence in accordance with this rule? With respect to the nature and quality of evidence required for this purpose the respondent contends that it must be so cogent and convincing as to exclude all reasonable doubt. Disclaiming any intention to intimate that the application or not of so stringent a rule would affect our determination of the facts in this case, we will simply say that the issue here is materially different from those in which it has generally been applied. The rule is perhaps universal in all cases in which it is sought to avoid the ban of the statute of frauds by the enforcement in equity of a contract void within its provisions. Both the contract and the acts of performance relied upon to remove the ban must be proven by evidence which leaves no room for doubt. This suit is not brought upon a contract. It simply involves the recognition of a status which, if it exists, is an accomplished fact. It bears no resemblance to those cases in which it is sought to enforce the specific performance of an agreement to make a will or to otherwise compensate another at the death of the promisor. In *Hockaday v. Lynn*, 200 Mo. 456, loc. cit. 464, 98 S. W. 585, 586 (8 L. R. A. [N. S.] 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775), this court, after explaining that deeds of adoption have always been more or less strictly construed as against the adopted child, said: "Strict construction, however, is not extended to the act of adoption itself. That is liberally construed in favor of the child adopted;" citing *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894; *Lynn v. Hockaday*, supra; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270. It is evident that a child of tender years, without the ability to contract or to understand or appreciate the contracts of others, and placed in the hands of strangers with absolute power to control her childhood and direct her destiny, should receive from the court the same consideration in respect to the establishment of the rights incident to her position that is extended to those able to control their own contractual relations. A rule which places a greater burden upon her should be followed with circumspection. In this spirit we have read the entire evidence and find that it presents no difficulty.

IV. The evidence is not definite as to the time the child was taken by Mrs. Metz, but it was probably about 1865 or 1866. At that time Mrs. Metz was childless, her only child, a little girl, having died. The appellant was then being cared for in a convent according to the testimony of one of respondent's witnesses, where she had been only a week or two. Mrs. Metz's physician and the parish priest became interested in her condition, and one or both of them talked with her about taking this little girl. She determined

to "adopt" the child, and confided her determination to her friend Mrs. Schweikher. They talked the matter over, Mrs. Metz speaking of her grief when her child died, and that the priest thought it might make her feel better to take this one. The evidence shows that she also talked with witnesses for the appellant in the same strain. The result was that the child was brought to her house, where she remained for 15 years. She was placed in the public school, which she attended for a while, being enrolled as Mary Mack. She was enrolled the last time for the term beginning in March, 1869, and her age then stated as 10 years. So far as the record shows this ended her educational career. During that time Mrs. Metz had another talk with her friend Mrs. Schweikher, in which the matter of the adoption of the child was discussed, and Mrs. Metz said, in substance, that she had not yet adopted her, and that it was unnecessary to do so, as her mother was dead and her father had gone away and would never be back. Mrs. Schweikher suggested that she could keep the girl without adoption and hire her out. During all the time she was in the Metz family she called Mr. and Mrs. Metz "Pa" and "Ma" or "Father" and "Mother." She was taught the dressmaking business, and "hired out," when 16 or 17 years old, and earned money and contributed to the support of the family until late in the fall of 1881, when she determined to marry Dr. Ensor. A quarrel then took place between her and Mrs. Metz, and she left her home and took refuge with the family of one Bruns, a witness for the respondent, until she could get work, which she did in a couple of weeks. From this time on Mrs. Metz talked of her ingratitude in leaving her and marrying Dr. Ensor. What occurred between them is not shown, but in fact, although Mrs. Ensor maintained the most friendly relations with Kate Machens, one of defendants and legatees in the Pieper will, and with the family of Mr. Henry F. Ohlms, an executor and trustee as well as a legatee under the will, and in those capacities a plaintiff in this case, and also with Henry F. Pieper, the testator, who went to Omaha, where she resided, for the purpose of visiting her, all relations between her and Mrs. Metz ceased.

About two years after the appellant entered the Metz home a boy was born to Mrs. Metz. He was delicate and required constant care. Two and a half years afterward, Carl, another son, was born to the family, and after another interval this respondent was born, all of which, we will assume, gave the child enough to do without attending school.

The first chapter in the General Statutes contains what used to be known as the State Census Law of 1865. It required a census to be taken by the assessors of the respective

counties in each of the years 1868 and 1876, showing, among other things, the approximate ages of children and adults on blank forms to be prepared by the secretary of state. This law required the assessor to make an abstract of such assessment, to be returned to the secretary of state for submission to the General Assembly, and to deposit his original books in the office of the clerk of the county court, and made it "the duty of said clerks to preserve the same among the records of the county." This requires no other authentication. By their deposit they became public records, available as evidence of the facts they contain to the same extent as other records. The assessor of St. Charles county made the enumeration and deposited his books, identified on the outside as well as by the headings of the lists on the inside, in the office of the clerk of the county court, who produced them, and so far as the Metz family was concerned, they were introduced in evidence in this case. The children were enumerated by name in each case, including "Mary Metz," and giving her age as under 10 years in 1868 and over 10 years in 1876. We think that the court may indulge the presumption that the facts contained in the enumeration as required by law were obtained in the usual manner, and that the information contained in them is prima facie correct. One of the objects in the preservation of public records required by law to be made permanent is that the facts themselves may survive living witnesses.

Thus far we have confined ourselves to the discussion of matters recorded, admitted, or proven by respondent. These are the facts around which all contested matters must be grouped, and by reference to which they must be judged. We have already held that the testimony of Mrs. Ensor is before us for consideration. The earnestness of counsel in her cross-examination has furnished a background from which her courtesy and candor becomes apparent. She states, in substance, that her coming to the Metz home with her father is about her first recollection; that she worked from the beginning; that her father, who had married in the meantime, came in about two years to get her, and that Mrs. Metz did not want to let her go; that he finally offered to let her stay a while longer, but Mrs. Metz objected, saying, in substance, that she did not want her at all unless she could have her as her own child, and that finally, in the presence of Dr. Bruere, some papers were drawn up and signed by Mr. and Mrs. Metz, Mrs. Metz signing with her mark, as she could not write. They cried, and Mrs. Metz said she was their little girl and no one could take her away. The children were delicate, and she assisted in caring for them and in doing the family work when she was out of school.

Mrs. Metz took in plain sewing. She was delicate as well as the children. That she ceased going to school when 12 years old and devoted her time to the work. That when she was 16 or 17 years old she learned dressmaking, and during the next five years assisted in the support of the family in that way. That in the household and among the family connections she was always known by the name of Mary Metz, and called the Metzses "Father" and "Mother." Mrs. Metz told her to go by that name. That she always called Mr. Pieper Uncle Henry and he called her Mary. Her father visited her again in the Metz home when she was about 22 years old. She did not know him, and he was introduced by the Metzses. She also said that she was sometimes called Mary Mack outside the Pieper circle. She also said that she had had no association with the Metzses since she left her home before her marriage.

There were a number of witnesses testifying in appellant's behalf who had known her in the Metz home, and it was a notable characteristic of this evidence that she worked—as one of them expressed it, she always worked. The evidence on both sides said that she always called Mr. and Mrs. Metz "Father" and "Mother" or "Pa" or "Ma."

It is a notable feature of the trial that the respondent did not call upon any of the members of his family to testify in his behalf, although they must have known the facts relating to the appellant's life since she came to the Metz's home. The Piepers, Rauches, Ohlmses, and Metzses were a large circle in St. Charles, and his counsel tell us in their brief that these people are in position to know the facts relating to this alleged adoption. We are in perfect accord with them in this respect, and no reason is suggested why they would be unwilling to speak truthfully to prevent the consummation of a wrong against one of their own blood. There would be no indelicacy in calling upon them to protect him against a stranger. Under these circumstances, we are not convinced that it is indelicate in Mrs. Ensor to leave them perfectly free to favor him by their silence. That she did so has not made any unfavorable impression upon us. If Mrs. Metz is not protected by her coverture from the consequences which ordinarily follow the relation she voluntarily assumed during the 16 years which followed her first introduction to appellant, we think the relation of foster mother and adopted daughter is conclusively shown to have existed between them. Even before she ever saw the child she determined to adopt her as her own child. There can be no mistake about this, because it is the language of the respondent's own witness interrogated by his own counsel. It constitutes the foundation of the testimony of Mrs. Schweikher. It is true that



she was old and bedfast and almost blind, but this word "adopt" rose clearly in her mind as the morning sun. Under these circumstances, and with this declaration upon her tongue, the child was received by Mrs. Metz. When she had received her a new inspiration came to her. She saw Mrs. Schwelkher again, and apparently, in a confidential mood, suggested that having the child in her possession and its father having gone, probably never to return, it would be unnecessary to adopt it. With this in our minds we are prepared to interpret the next scene in the act of adoption. The wanderer returned. He had remarried and wanted his child and came for it. It is not clear from the testimony whether this was before or after the advice that Mrs. Schwelkher had given her that the child might profitably be hired out. It makes but little difference, for the hope of profit without adopting the child disappeared upon the reappearance of Mr. McCauliff. It then became a question whether she could keep her at all.

We learn from the inspection of the census enumeration of 1868 that Bernard had then been born to Mrs. Metz. He is described to us in the evidence as a weakly child, afflicted with eczema, which covered his entire body, so that he had to be wrapped in greased cloths and required great attention. The next child, Charles, was also imminent, for he is listed by name in the same enumeration. It is natural that Mrs. Metz would have been loth to part with the little girl at such a time. We have no reason to disbelieve the statement in evidence that she cried, or that she consented, when pressed, to put in writing the agreement to adopt the child upon Mr. McCauliff's demand. There was no lawyer present, and the testimony indicates that there was in that family little to pay for such a luxury. It is natural that Mr. McCauliff, bent only on protecting his child, should have put the paper in his pocket and carried it away.

The evidence is indisputable that the appellant, from the time she entered the Metz home at the age of seven years until November, 1881, nearly five years after she had attained her majority, industriously, lovingly, and faithfully performed every duty in and to that family as well as a natural child could have done. In reading the evidence we are impressed that the feeling that supported her in this respect was closely akin to true filial affection. The relation of adoption imposed no greater or more sacred duty upon her than would the relation of a natural child. One's duty of love and affection does not end with his majority, it is true, but an additional duty arises to make his own life fruitful. There is nothing in this case to suggest anything in the lives of the Metzses that call upon a daughter for further sacrifice. The defense against this claim is not

founded to any extent upon the theory that she failed to respond to the call of her foster parents in every need for her services. She remained in the family and helped care for the respondent until he was three years older than she was when she came. He, in his weakness, needed her services, which were freely given, and he suggests no reason why he should not have gladly surrendered her to her own life when the opportunity came to her to marry. It was, as we are told in the evidence, this laudable desire for a life of her own, to which she was entitled, which angered her foster mother and provoked the remark that she was ungrateful. We think that long before this she had, by her faithfulness established her right to be an adopted child, and that she did not forfeit it by her marriage. We think that the expression used in the respondent's brief to the effect that she is "a child for revenue only" comes in bad taste from one who has so evidently profited by her childhood.

V. It is not necessary to notice seriously the point made by the respondent that the appellant's answer, which states that she is an adopted child of Mrs. Metz, is insufficient to cover the facts of this case "because, unless expressly negatived, the allegation of such contract will be held to intend a written contract." In our quest for the meaning of this we note a reference to those authorities which hold that when under the Statutes of Frauds a written contract is necessary to support the action the contract alleged will be presumed to be in writing though not so pleaded. The rule has no application to this case.

[9, 10] VI. Mrs. Metz at the time of the adoption of the appellant by herself and husband, being a married woman, could not, it is contended, by reason of her coverture, make a personal contract, and that her attempt to create the relation was futile as to her. We think the great weight of authority is to the effect that this disability is personal to herself, and will be taken as waived, unless she elects to interpose it as a defense in some proceeding against herself or her property. It has been so held by this court in *Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738, in which the court, through Valliant, J., said: "She could make her defense good if she chose to do so, or she could waive it and let judgment go against her, and if she waived it and let the judgment go she could not afterwards complain." Elliott, in his excellent work on Contracts (volume 1, § 429), says: "Only the married woman or her privies in blood representation or estate can set up coverture as a defense. No one else can do it for her or compel her to do it." In this case the defense is interposed by one who is not claiming through her or seeking to recover any part of her estate, and who is only seeking

in a collateral proceeding, to participate in a legacy bequeathed in the will of one who had no connection with the adoption. The authorities seem to be numerous in all jurisdictions that a married woman is estopped in equity from interposing coverture as a defense in cases where she is attempting to enforce a right inconsistent with her previous conduct upon which the other party has relied. 2 Pomeroy's Jurisprudence, § 814. We cannot express the rule more tersely than in the language of the St. Louis Court of Appeals by Reynolds, P. J., in *Horton v. Troll*, 183 Mo. App. loc. cit. 690, 167 S. W. 1084, as follows:

"It is sufficient to say that, tested by the many cases which have been before our own courts, it establishes the fact of adoption by the acts which estop both Dr. and Mrs. Dunham, and those claiming under them, adversely to respondents, from now disputing it. That adoption may be established by acts and conduct, where no legal deed of adoption has been executed and recorded in due form of law, has been settled in our state by many decisions of our Supreme Court as well as of the Courts of Appeals. In passing see *Sharkey v. McDermott et al.*, supra; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489 [31 L. R. A. 810, 54 Am. St. Rep. 663]; *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885 [85 Am. St. Rep. 480]; *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 [8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775]; *Wales v. Holden*, 209 Mo. 552, 108 S. W. 89; *Westerman v. Schmidt et al.*, 80 Mo. App. 344; *Thomas v. Maloney et al.*, 142 Mo. App. 193, 126 S. W. 522."

The meaning of this is simply that the court will not permit itself to be made the instrument of fraud whether it be perpetrated by wife or spinster. We said in *Sharkey v. McDermott*, supra:

"In this class of cases it is impossible to estimate, by any pecuniary standard, the value to the recipient of the services rendered, and such services are not designed or intended to be so measured. The contract is originally so created that the consideration which the party receives cannot be returned, and after the performance of the services it is beyond the power of the party and of the courts to restore the plaintiff in such cases to the situation in which he was before the contract was made. *Browne*, Statute of Frauds, § 463."

Each and every word in the foregoing quotation applies with equal force in this case. It is a solemn farce to say that when one takes a child of tender years, absolutely incapable of contracting either in fact or in law, and appropriates it to all the purposes of her own convenience, teaches it to call her mother and to take the place of a child, it is simply a contract relation, which may be cast off after the fruit has been eaten. The state is necessarily a party to such a proceeding in its capacity as guardian and protector of the child.

It we should believe the testimony of Mrs. Schweikher, which was indorsed by the respondent when he introduced her deposition in his own behalf, this proceeding was fraudulently conceived and fraudulently conducted from the beginning. When Mrs. Metz received the child from the priest in pursuance of her determination to adopt it she determined its proposed status with respect to herself by the use of that word. When she determined not to adopt it because its father would never come back, and she could appropriate its companionship and services without that formality, she determined upon a deliberate wrong, which the courts cannot consummate. Although the respondent has been willing to press this theory in his struggle for these legacies, we do not believe his mother contemplated this wrong. We do believe that up to the time the appellant married, or determined to marry, and withdrew the contribution of her earnings from the family support, she intended honestly to perform the obligation she incurred in appropriating to her own control the life of the child, who thereby became her daughter by adoption.

[11] VII. Unless we can judicially create a new and special meaning of the word "heirs," as used in item 24 of Mr. Pieper's will, the appellant has the right to participate equally with Herman C. Metz in the residuary legacy bequeathed to the heirs of Mrs. Metz under that item. By the terms of the statutes relating to the distribution of estates, and the right of adopted children to participate therein, she is within the meaning of the word used by the testator in defining the objects of his bounty, and we can only see that this will, as indicated by its language, is given full effect.

[12, 13] VIII. The disposition under the will of the legacies bequeathed to Mrs. Metz under items 12 and 21—that is to say, the bequest of \$5,000 in the former and one-thirteenth interest in the bank stock trust created by the latter—presents much greater difficulty, depending, as it does, entirely upon the construction of the words "lineal descendants" in their application to these bequests as used in section 546 of the Revised Statutes of 1909.

In the late case *In re Cupple's Estate*, 272 Mo. 465, 199 S. W. 556, we held that under the terms of section 309 of the Revised Statutes of 1909, relating to the collateral inheritance tax, the children of Mrs. Scudder, adopted daughter of the testator, were his direct lineal descendants within the meaning of the clause which exempted any legacy to the father, mother, husband, wife, legally adopted children, or direct lineal descendants of the testator from the tax. In that case it will be observed that the daughter was the adopted child and heir of the testator himself, and that the legatees were in the direct line of descent from him through her. We very prop-

erly held in that case that adopted children were classified among the natural children of the adopter by the terms of the statute before us; that the statute of adoption made them heirs as well as children of the adopter; and that this conferred upon them the element of transmission as children through the channels provided by our statute of descents and distributions.

The case before us presents a very different aspect. Under the statute of adoption the child inherits only from his adopting parent and does not become the heir of collateral kindred of such parent. *Lynn v. Hockaday*, supra. In this case she was not an heir of Mr. Pieper nor could she become so by the death of any intermediate kindred, but was the heir of Mrs. Metz, by which description she was designated in the bequest. This case turns, therefore, so far as these two legacies are concerned, upon the meaning of the words "lineal descendants" as used in section 546 of the Revised Statutes, to which we have already referred.

We think the question so presented was determined by this court in *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931, and *McMenamy v. Kempelmann*, 273 Mo. 450, 200 S. W. 1075. In those cases we held that the word "relative," as used in the same section, referred to relatives by consanguinity only, and that the blood of the testator was the key to his intention. This principle, when applied to this case, leads irresistibly to the conclusion that the Legislature, which used the word in that restricted sense, did not forget the reason which actuated them before finishing the same sentence, and extend the meaning of the word "descendants" so as to divert his provision for his relatives to channels outside the flow of his own blood. We adhere to the reason of our former rulings, and hold that this appellant is not entitled to take as a lineal descendant of Mrs. Metz an interest in the legacies bequeathed to her in items 12 and 21 of the will.

The decree of the trial court is therefore reversed in so far as it applies to the respective rights involved in this appeal, and the matter remanded to the circuit court for St. Charles county for further proceedings in connection with the principal case, in accordance with the views here expressed.

RAILEY, C., dissents in separate opinion.

PER CURIAM. The foregoing opinion in Division is adopted by the Court in Banc. BOND, C. J., concurs in result. BLAIR and WOODSON, JJ., concur. WILLIAMS, J., concurs in part and dissents in part, in separate opinion. FARIS, J., dissents. GRAVES, J., dissents in separate opinion, in which WALKER, J., joins.

RAILEY, C. (dissenting). The original petition asked for the construction of the terms

of the will of Henry F. Pieper, deceased. Herman C. Metz and Mary Ensor were defendants in above action. This appeal, taken by defendant Mary Ensor, involves a separate controversy between her and the defendant Herman C. Metz over the legacies bequeathed to Elizabeth Metz by the terms of the will of Henry F. Pieper. Herman C. Metz is the son of Elizabeth Metz, and Mary Ensor claims to be her adopted daughter. At the time of the alleged adoption of Mary Ensor by Elizabeth Metz, between the years 1865 and 1870, it is conceded that Elizabeth Metz was a married woman and living with her husband. Mr. Metz died about 1892 or 1893. Elizabeth Metz died in February, 1914. Henry F. Pieper died March 12, 1914. Elizabeth Metz was the sister of Henry F. Pieper.

I. As Mrs. Metz was a married woman at the date of the alleged adoption of Mary Ensor in 1865 or 1866, and that relation continued until the death of her husband in 1892, and as she was not known to have had a separate estate or to be contracting with reference thereto, in regard to the alleged adoption, I am of the opinion that she was incapable of making the alleged agreement or contract for adoption. Nor does the record show that she, in any manner, rectified her original acts after she became discoverd.

It is not shown that any written contract of adoption was executed by Mrs. Metz and her husband. Nor does it appear that she, at the time of said alleged adoption, possessed a separate estate or any kind of property.

According to our conception of the laws of Missouri in 1865-66, Mrs. Metz had no legal capacity to adopt Mrs. Ensor, and could not confer upon the latter the status of an adopted child, under the facts disclosed by the record in this case. *Higgins v. Peltzer*, 49 Mo. loc. cit. 156, 157; *Wernecke et al. v. Wood, Adm'r*, 58 Mo. loc. cit. 358; *Boatmen's Savings Bank v. Collins*, 75 Mo. 280, 281; *Musick v. Dodson*, 76 Mo. loc. cit. 625, 43 Am. Rep. 780; *Alexander v. Lydick*, 80 Mo. loc. cit. 346; *Coe v. Ritter*, 86 Mo. loc. cit. 282, 283; *Gwin v. Smurr*, 101 Mo. loc. cit. 550, 14 S. W. 731; *Rush v. Brown*, 101 Mo. loc. cit. 590, 14 S. W. 735; *McReynolds v. Grubb*, 150 Mo. loc. cit. 363, 51 S. W. 822, 73 Am. St. Rep. 448; *Smoot v. Judd*, 161 Mo. loc. cit. 685, 61 S. W. 854, 84 Am. St. Rep. 738; *Smoot v. Judd*, 184 Mo. loc. cit. 541, 542, 83 S. W. 481; *O'Reilly v. Kluender*, 193 Mo. 576, 91 S. W. 1033. I do not agree with my Associate that it was a personal privilege with Mrs. Metz in seeking to avoid the alleged adoption agreement, as Mary Ensor, in this case, attempted to plead and relied upon a contract made with Mrs. Metz, and, in attempting to show same, the facts disclosed her incapacity to make any such agreement.

I do not think the case of *Smoot v. Judd*,

161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738, cited in Commissioner Brown's opinion, is applicable to the facts of this case. In the Smoot-Judd Case the husband and wife had been sued jointly, but the petition failed to allege that they were husband and wife. This was after the adoption of the Married Woman's Act of 1889 (Laws 1889, p. 168). The wife was served with process and failed to set up her coverture. It was held that on the record thus made, in a collateral proceeding, the judgment against her was not a nullity. It did not involve the question of personal privilege, because the wife was still alive during all the proceedings. Again, the son of Mrs. Metz is claiming the whole of the legacy in this case, and we see no reason why he would not be competent to challenge the invalidity of the agreement alleged to have been made with his mother in regard to said adoption. Especially is this so when Mary Ensor pleads such an agreement, as it devolves upon her to establish one authorized by the law.

In view of the foregoing authorities, I am of the opinion that the trial court reached a correct conclusion as to the status of Mrs. Ensor, and hence dissent from the opinion of my Associate as to her legal rights in the case.

GRAVES, J. I adopt the foregoing opinion of RILEY, C., as my dissenting opinion in this case.

WILLIAMS, J. (concurring in part and dissenting in part). [14] I concur in the result of all of the majority opinion except paragraph 8, to which paragraph I dissent.

In my opinion, Mary Ensor, the adopted child of Mrs. Metz (the legatee in the will), is a "lineal descendant" of said legatee, within the meaning of that term as used in section 546, R. S. 1909. The cases of *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931, and *McMenamy v. Kempelmann*, 273 Mo. 450, 200 S. W. 1075, cited and relied upon by the majority opinion as supporting the contrary view, are, as I read them, not in point.

In the *Bramell* Case the legatee was the child of a child of the testator's wife by a former marriage, and was therefore not related by blood to the testator. The court merely held that, since the legatee was not a blood relative of the testator, "she was not a relative" of the testator within the meaning of section 546, R. S. 1909, and that therefore the legacy lapsed when the legatee predeceased testator.

That case can supply no aid in the solution of the case at bar, because here the legatee was a blood sister of the testator, and was therefore, under any theory of construction, a "relative" of the testator, within the meaning of said statute. In the case at bar the question is whether an adopted child is a "lineal descendant" of an adoptive parent

(legatee) within the meaning of the same statute, and this point was in no manner involved or passed upon by the *Bramell* Case.

The *McMenamy* Case went no further than to construe the word "relative" contained in a clause of a will. It in no manner undertook to construe the phrase "lineal descendant" contained in said statute, for the very simple reason that the statute was in no wise involved.

Returning now to the case at bar: Mrs. Metz, the devisee, was the blood sister, and therefore undoubtedly a relative, of the testator, within the meaning of said statute. She died before the testator, leaving as one of her survivors her adopted daughter, Mrs. Ensor. The question arises, Is Mrs. Ensor a "lineal descendant" (within the terms of said statute), not of testator, but of her adopting mother, Mrs. Metz, the legatee named in the will?

So far as I am informed the question is one of first impression in this court.

The closest approach to the question is the recent decision by Division 1 in *Re Cupples' Estate*, 272 Mo. 465, 199 S. W. 556, holding that the natural child of an adopted child is "a direct lineal descendant" of the adoptive parent (the testator), within the meaning of section 309, R. S. 1909, of the Collateral Inheritance Tax Statute. I am unable to harmonize some of the logic of that case with the majority opinion in the present case, but, on the other hand, much of the language used in the *Cupples* Case might well be used to sustain the view that Mrs. Ensor is a "lineal descendant" of her adoptive parent, Mrs. Metz.

Almost the exact question now under discussion was passed upon in *Warren v. Prescott*, 84 Me. 483, loc. cit. 486-488, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370.

Section 10, c. 74, R. S. Maine 1883, reads as follows:

"When a relative of the testator, having a devise of real or personal property, died before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived."

The court held that an adopted child was a "lineal descendant" of the adoptive parent (legatee) within the meaning of said statute.

From a review of that case it appears that the status of an adopted child in Maine is not so unlike the status of an adopted child in Missouri as to render the case inapplicable here, but, on the other hand, the status of the adopted child in the two states is sufficiently similar to make the decision very much in point here. In that case the court used the following clear and concise language:

"The question is whether an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing,

when the legatee dies before the testator. There is no doubt that a child born in lawful wedlock can so take. But in this particular does an adopted child possess the same right? We think so. With two exceptions, neither of which is applicable to such a case, an adopted child becomes, 'to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock.' Such is the express language of our statute in relation to the adoption of children. R. S. c. 67, § 35.

"The exceptions are, first, that an adopted child shall not inherit property expressly limited to the heirs of the body of the adopters; and, secondly, that an adopted child shall not inherit property from their (the adopters') lineal or collateral kindred by right of representation. R. S., c. 67, § 35.

"It is plain that neither of these exceptions is applicable to the question now under consideration. They relate to the right to inherit as heirs at law, and not to the right to take under a will. To illustrate, we will suppose that one of the adopting parents is possessed of an estate expressly limited to the heirs of his body. By virtue of the first exception, an adopted child cannot inherit—that is, cannot take as an heir at law—this estate or any portion of it. It must go to those to whom it is expressly limited. But an adopted child may rightfully inherit an estate not so expressly limited. With respect to such an estate he must be regarded as a child, an heir, and a lineal descendant of his adopting parents, the same as if he had been born to them in lawful wedlock. By force of the second exception, an adopted child cannot be regarded as an heir at law of his adopting parents' kindred. By adoption the adopters can make for themselves an heir, but they cannot thus make one for their kindred. To this extent the two exceptions named operate as a limitation upon the rights of an adopted child. But in all other particulars he is the child, the heir, and a lineal descendant of the adopting parents, to all intents and purposes, the same as if he had been born to them in lawful wedlock. And within the rights and powers thus conferred upon him, and without infringement of either of the exceptions referred to, an adopted child may take a devise or legacy given by will to one of his adopting parents, and thus prevent the devise or legacy from lapsing, in case the parent dies before the testator, precisely the same, and with the same limitations, as if he were a child born to such parent in lawful wedlock.

"In such a case a child born in lawful wedlock does not 'inherit' the devise or legacy from his parents' kindred. One who takes under a will does not 'inherit.' To inherit is to take as an heir at law, by descent or distribution. To take under a will is not to inherit. And when an adopted child takes a legacy given by will to one of his adopting parents he does not take as an heir at law of the parents' kindred. He does not 'inherit' the legacy from the testator. He takes as a lineal descendant of the legatee, by force of the statute. R. S. c. 74, § 10. Not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth.

"It is as competent for the Legislature to place a child by adoption in the direct line of

descent as for the common law to place a child by birth there. And that is precisely what the Legislature has done, and what it undoubtedly intended to do, when, in strong and emphatic language, it declared that a legally adopted child becomes to all intents and purposes the child of the adopters, the same as if he were born to them in lawful wedlock, with the two exceptions named, neither of which, as we have already seen, is applicable to such a case. This conclusion is, in our judgment, as indisputable as a mathematical demonstration."

Further interesting side light upon the question will be found in the recent case of *Wilder v. Butler*, 116 Me. 389, loc. cit. 392, wherein the question is again discussed, and the decision in *Warren v. Prescott*, supra, is upheld.

For the reasons above expressed I am of the opinion that Mrs. Ensor, the adopted child of Mrs. Metz (legatee), is a lineal descendant of said legatee, and therefore under said statute is entitled to a distributive share of the Mrs. Metz legacy mentioned in items 12 and 21 of the will.

#### ARGERPOULOS v. KANSAS CITY RYS. CO. (No. 12884.)

(Kansas City Court of Appeals. Missouri.  
Feb. 17, 1919. On Rehearing,  
Feb. 17, 1919.)

On Motion to Dismiss.

#### 1. CONTRACTS ⇨129(1)—VALIDITY—SETTLEMENTS.

In the absence of fraud in its various forms or unlawful consideration, settlements to avoid litigation are not contrary to public policy.

#### 2. APPEAL AND ERROR ⇨1203(5)—VOLUNTARY NONSUIT—STATUTES.

Under Rev. St. 1909, §§ 1979, 1980, a nonsuit may be taken after reversal and remand for new trial at any time before trial, as the cause then stands for trial de novo.

#### 3. APPEAL AND ERROR ⇨1187—EFFECT OF OPINION REVERSING.

The handing down of an opinion reversing a judgment does not affect the judgment of the lower court until there is a judgment of the appellate court and the filing of a mandate based thereon, and hence a judgment of the lower court was not affected by an opinion reversing the judgment and remanding the case, where the opinion never ripened into a judgment, but was superseded by the sustention of a motion for rehearing and an argument and submission on rehearing.

#### 4. JUDGMENT ⇨841—ASSIGNMENT—CONSIDERATION—ATTORNEY'S LIEN.

Under Rev. St. 1909, §§ 964, 965, the lien of an attorney upon the plaintiff's cause of action which attaches to the judgment is a property right in the attorney, and is a good consideration for an assignment of the judgment.

**5. ATTORNEY AND CLIENT ¶190(1)—ATTORNEY'S LIEN—RIGHT OF CLIENT TO WITHDRAW APPEAL OR WRIT OF ERROR.**

Under Rev. St. 1909, §§ 964, 965, where it appears that litigation is such that it would, if successful, result in judgment on which counsel would have a lien for fees earned in the case, plaintiff cannot, over the attorney's objection, withdraw an appeal or writ of error; much less dismiss his cause of action, after it has become merged in the judgment.

**6. JUDGMENT ¶844—ASSIGNMENT—EFFECT.**

An assignment of a judgment carries with it all incidental rights, remedies, and advantages existing at the time of the assignment, and then available to the judgment creditor, being, of course, subject to reversal on appeal; the assignor being divested of all interest and control over the action or original liability.

**7. JUDGMENT ¶841—ASSIGNMENT—VALIDITY.**

A judgment debtor cannot question the validity of an assignment of the judgment, unless the assignment was taken for his benefit or paid for with funds advanced by him for that purpose.

**8. JUDGMENT ¶840—ASSIGNMENTS—ATTESTATION BY CLERK.**

Whether or not attestation by clerk to assignments of judgments is mandatory under Rev. St. 1909, § 2156, an assignment of a judgment, without such attestation, to attorney for the judgment creditor having a lien thereon will at least give the attorney the right to have the sufficiency of the judgment determined on an appeal, especially where the judgment debtor joined in the submission thereof after the judgment creditor had stipulated to dismiss his cause of action.

**On Rehearing.**

**9. STREET RAILROADS ¶85(3)—RIGHT OF DRIVERS OF VEHICLES.**

One driving a horse-drawn vehicle has an equal right with a street railway to use the streets of a city.

**10. STREET RAILROADS ¶118(4)—COLLISIONS—INSTRUCTIONS.**

An instruction allowing recovery if defendant's motorman saw, or by ordinary care could have seen, plaintiff in a position of peril in time by ordinary care to have avoided collision, "either by stopping car or by slackening its speed," was not faulty, although it was uncontroverted that the speed was slackened, and that motorman did not see plaintiff in time; it appearing that the motorman did not see plaintiff as soon as he should have.

**11. APPEAL AND ERROR ¶882(12)—INSTRUCTIONS—JOINING IN ERROR.**

A defendant cannot complain that an instruction given for plaintiff included a certain element, where he included such element in his own instructions.

**12. STREET RAILROADS ¶117(10)—COLLISIONS—WARNINGS—QUESTION FOR JURY.**

In an action for injuries in collision, whether defendant's motorman gave warnings of car's

approach held for the jury, although he testified positively that he rang the bell, and plaintiff only testified that he did not hear the bell.

**13. STREET RAILROADS ¶114(7)—COLLISION—QUESTION FOR JURY.**

In an action for injuries to one riding in a wagon struck by a street car, evidence held to sustain a finding that the motorman did not keep a lookout, and did not see plaintiff's peril as soon as he should.

**14. TRIAL ¶192—INSTRUCTIONS—ASSUMPTION AS TO FACTS.**

An instruction is not erroneous in assuming facts to be true which are uncontradicted on the trial.

**15. STREET RAILROADS ¶81(5)—COLLISIONS—LOOKOUTS.**

Where motorman of street car knew, or by ordinary care could have known, of the presence of a wagon driven along the track, and negligently failed to maintain a reasonable lookout, directly resulting in overtaking and colliding with the wagon, the street railway was liable.

**16. STREET RAILROADS ¶118(1)—COLLISIONS—NEGLIGENCE.**

In an action for injuries to one riding in a wagon struck by a street car, plaintiff was entitled to have his case submitted upon all charges of negligence which the evidence would support, notwithstanding there was a charge under the humanitarian doctrine in the petition.

**17. NEGLIGENCE ¶141(2)—PLEADING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

Where no charge of contributory negligence was pleaded or appeared in plaintiff's evidence, it was not necessary to refer to it in the instructions.

**18. TRIAL ¶260(1)—INSTRUCTIONS.**

It was not error to refuse a requested instruction, where every proper element contained therein was covered by the given instructions.

**19. STREET RAILROADS ¶114(2)—COLLISIONS—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.**

Evidence held to sustain a finding that failure to sound a warning was proximate cause of injury to one riding in a wagon struck by defendant's street car.

**20. DAMAGES ¶158(1)—MATERIALITY.**

In an action for personal injuries, where petition pleaded injury to the lungs, and that all the injuries were permanent, evidence that plaintiff coughed up blood was admissible.

**21. APPEAL AND ERROR ¶231(3)—MATTERS REVIEWABLE—OBJECTIONS.**

Where the only objection to testimony was that the question was leading and suggestive, complaint cannot be made that the evidence was admitted; the court having sustained the objection made.

**22. APPEAL AND ERROR ¶501(1)—MATTERS REVIEWABLE—EXCEPTIONS.**

Errors in the argument of counsel cannot be reviewed, where the record does not disclose an exception or a ruling thereon.

23. DAMAGES ~~6~~132(8) — PERSONAL INJURIES.

A verdict for \$5,000 was not excessive, where plaintiff's left shoulder and arm were permanently impaired, lungs and left ear permanently injured, so that from a strong vigorous man he was reduced to one greatly hampered in his movements, unable to do an ordinary man's work, and coughing up blood at intervals.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by James Argeropoulos against the Kansas City Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Clyde Taylor and Roscoe P. Conkling, both of Kansas City, for appellant.

Kimbrell & O'Donnell, of Kansas City, for respondent.

On Appellant's Motion to Set Aside Submission and Dismiss Respondent's Cause of Action.

TRIMBLE, J. The original cause of action involved in the appeal herein was tried in the circuit court of Jackson county, Mo., and a judgment was rendered in favor of the plaintiff, James Argeropoulos, on November 23, 1916. His attorneys were Kimbrell & O'Donnell, a firm composed of I. B. Kimbrell and Martin J. O'Donnell. A motion for new trial was filed by defendant November 27, 1916. At the January, 1917, term of said court, this motion was overruled, and an appeal allowed to the appellate court.

On April 8, 1918, the cause in our court was submitted on briefs. On May 20, 1918, an opinion by Bland, J., was handed down, reversing and remanding the cause. On May 29, 1918, respondent filed a motion for rehearing, which was sustained July 1, 1918. All of the foregoing was at the March, 1918, term of this court.

At the October term, and on October 16, 1918, the appeal was orally argued and submitted by appellant and respondent, acting through and by their attorneys.

After the opinion on the case under the last submission had been prepared and was ready for delivery at the sitting for announcement of opinions on January 6, 1919, but before it was announced, the appellant, on January 2, 1919, filed a document reading as follows:

"In the Kansas City Court of Appeals, at Kansas City, Missouri. March Term, 1918. Robert J. Dunham and Ford F. Harvey, Receivers of the Metropolitan Street Railway Company, Appellant, v. James Argeropoulos, Respondent. Stipulation of Dismissal. I, James Argeropoulos, the above-named respondent, hereby dismiss the above-entitled cause with prejudice against the institution of fur-

ther proceedings herein, and personally authorize and direct any attorney at law to appear for me and have the order of dismissal made of record; and the above court is requested and directed to dismiss said cause with or without the appearance of an attorney; the unpaid costs to be paid by the above-named appellants.

"James Argeropoulos, Respondent.  
"Gust West."

It will be observed that this paper is not dated, but in the caption it gives the term of court in which it is apparently to be used as the "March Term, 1918."

On January 9, 1919, Kimbrell & O'Donnell, acting as attorneys for respondent, filed an application in his behalf to be permitted to withdraw the document purporting to be a dismissal, because it was not the act of respondent. And Martin J. O'Donnell, one of said firm of attorneys, acting for himself, and I. B. Kimbrell, the other member of said firm, acting as attorney for said O'Donnell, filed a motion to have the court strike out said document entitled "Stipulation for Dismissal," and to proceed to dispose of the case regardless of, and without giving effect to, such alleged dismissal. The grounds of this motion were that on November 25, 1916, Martin J. O'Donnell became the assignee for value of the judgment appealed from, which assignment was placed on the margin of the record of said judgment on said November 25, 1916; that appellant had notice of said assignment prior to the March, 1918, term of this court, at which term the so-called stipulation purports to have been executed; and that by virtue of said assignment all of the right, title, and interest of plaintiff and respondent, James Argeropoulos, in and to said judgment became vested in the said assignee, Martin J. O'Donnell.

On January 17, 1919, appellant filed a motion to set aside submission of the cause, and to enter an order dismissing plaintiff's cause of action. This motion is based on the hereinabove quoted "Stipulation for Dismissal" and upon facts alleged to be as follows: That on May 23, 1918, three days after the cause had been ordered reversed and remanded by the opinion handed down on May 20, plaintiff settled his cause of action, and accepted \$315 in full settlement and discharge thereof; that at said time plaintiff executed the dismissal of his cause of action in this court hereinabove quoted, but "through inadvertence and oversight \* \* \* the same was not filed in this court until recently."

Affidavits and other evidence were prepared and filed with this court bearing upon the respective sides of the controversy, and suggestions in support thereof, and the matter is now before us for consideration.

On the margin of the record of the judgment appears the following:

"For value received I hereby assign all my right and title to the within judgment to Martin J. O'Donnell. James Argeropoulos.

"Attest: \_\_\_\_\_, Clerk.

"In the Circuit Court of Jackson County, Missouri, at Kansas City, 1916. James Argeropoulos, Plaintiff, v. Ford F. Harvey, R. J. Dunham, Receivers of Metropolitan Street Railway Company, and Kansas City Railways Company, Defendants. No. 101283. Assignment of Judgment. On this 25th day of November, 1916, I, James Argeropoulos, for value received, hereby assign all my right, title and interest in and to the judgment rendered in my behalf in division No. 2 of the above court on the 24th day of November, 1916, to Martin J. O'Donnell. James Argeropoulos.

"State of Missouri, County of Jackson—ss:

"On this 25th day of November, 1916, before me personally appeared James Argeropoulos, to me personally known to be the person whose name is signed to and who is mentioned in the above instrument; and the said James Argeropoulos, having first read the same and being familiar with its contents, did acknowledge the same as his free act and deed.

"Pearl M. Craig, Notary Public. [Seal.]"

Appellant's evidence is to the effect that James Argeropoulos, the plaintiff and respondent in this cause, came to the office of appellant's legal department on May 23, 1918, with a companion by the name of Gust West; and there agreed to take, and did take, \$315 in full settlement of his cause of action, and was paid that amount, and executed a release thereof, and signed the hereinabove quoted dismissal. Also that Argeropoulos came to Kansas City shortly before May 23, 1918, and, not being satisfied with the progress of his case, and wanting no further delay in getting some money in the matter, requested Gust West to get in touch with the legal department of the Street Railway Company and effect a settlement; that the latter took said Argeropoulos, or accompanied him, to said department, where the case was settled and the money paid, and Argeropoulos left Kansas City that evening, May 23, 1918. Sworn copies of the release, voucher, and check executed in settlement of the case were filed; all of these are dated May 23, 1918.

[1-3] Appellant, relying on sections 1979 and 1980, R. S. 1909, says that a plaintiff has the right at any time and at any stage of the proceedings to dismiss his cause of action, except in those instances where the defendant's rights would be prejudiced. The former section provides that a plaintiff in any court of record may dismiss his suit in vacation upon the payment of all costs therein; and the latter provides that a plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court, and not afterward. There is no question but that, in the absence of fraud in its various forms or unlawful consideration, settlements tending to

avoid litigation are not contrary to public policy. *Brandenburger v. Puller*, 266 Mo. 534, 181 S. W. 1141. Indeed, they are looked upon with favor by the courts. It is also true that a nonsuit may be taken after reversal and remand for a new trial under a statute allowing a nonsuit at any time before trial, as the cause then stands for trial de novo. 14 Cyc. 406. But in the case at bar there was no reversal of the judgment nor remand of the cause, only an opinion to that effect, which never ripened into a judgment, but which was superseded by the sustentation of a motion for rehearing and the argument and submission on such rehearing. The motion herein considered is a motion to dismiss the cause of action, not the appeal. But the cause of action has been merged in the judgment. *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495, 503, 21 Am. Rep. 385; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739. The handing down of the opinion on May 20th did not affect the judgment below. That could only be affected by our judgment and the filing of a mandate based thereon. *State ex rel. v. Broadbush*, 234 Mo. 358, 137 S. W. 268.

[4, 5] If we give effect to the assignment of the judgment to O'Donnell, then he is the assignee thereof "for value." And whether the consideration therefor be for a pecuniary consideration or solely for the services rendered, yet, either is good, since under sections 964 and 965, R. S. 1909, the latter is a property right in the attorney, being the lien upon the plaintiff's cause of action which attaches to the judgment, and "cannot be affected by any settlement between the parties before or after judgment." Said statutes vest a property right in the attorney rendering the services in the case. *Walt v. Atchison, etc., R. Co.*, 204 Mo. 491, 103 S. W. 60; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150. 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155. Under such statutes giving an attorney a lien, it is held that he has a property right in the judgment or such interest therein as entitles him to oppose a motion to dismiss; and where it appears that the litigation is such that it would, if successful, result in a judgment on which counsel would have a lien for fees earned in the case, the plaintiff cannot, over the attorney's objection, withdraw the appeal or writ of error. *Walker v. Equitable Mortgage Co.*, 114 Ga. 862, 40 S. E. 1010; *Kimbrough v. Pitts*, 63 Ga. 496; *Richmond County v. Richmond County Reformatory Institute*, 141 Ga. 457, 81 S. E. 232. It would seem that this would apply with much more force where the plaintiff is attempting to withdraw, not his appeal, but to obliterate his cause of action after it has become merged into a judgment and the rights of his attorneys have clearly attached.

[6, 7] The assignment of the judgment, if



It is to be given the effect of an assignment, is to a member of the firm of attorneys entitled to a lien; and said firm is not objecting to the assignment, but is satisfied therewith. Treating the assignment as valid, it transfers the judgment to the assignee, and carries with it all incidental rights, remedies, and advantages existing at the time of the assignment and then available to the judgment creditor. *Applegate v. Mason*, 18 Ind. 75; *Reed v. Lozier*, 48 Hun, 50; *Richmond, etc., Ass'n v. Richmond, etc., Ass'n*, 100 Pa. 191. Of course, the assignment is subject to the reversal of the judgment on appeal if that contingency arose. The effect of a valid assignment of a judgment is to divest the assignor of all interest in it and all control over it. *Howard v. Graybehl*, 16 Colo. App. 80, 63 Pac. 953. And the assignor is powerless to interfere with the proceedings by which the judgment is sought to be affected. *Ford v. Rosenthal*, 74 Tex. 28, 11 S. W. 904. The assignor can take no action with reference to the original liability, which is merged in the judgment, so as to affect the rights of the assignee or any other party. *Moorman v. Wood*, supra. Nor can the judgment debtor question the validity of the assignment, unless the assignment was taken for his benefit or paid for with funds advanced by him for that purpose. *Bender v. Matney*, 122 Mo. 244, 255, 26 S. W. 950.

[8] But appellant says the assignment cannot be regarded as valid, since it was not attested by the clerk. It seems that for some reason the clerk refused to attest the signature to the assignment, whereupon the parties thereto had it acknowledged before a notary, and that was attached to the record. Section 2156, R. S. 1909, provides that judgments of courts of records may be assigned in writing by the plaintiff, which assignment shall be on or attached to the judgment and attested by the clerk of the court, and, when so made and attested, shall vest the title to such judgment in the assignee. Whether the attestation of the clerk is mandatory or merely directory we need not attempt to say. For whether the assignment be sufficient to vest the absolute and perfect legal title to the judgment in O'Donnell, clearly the plaintiff could not, after judgment was rendered and the rights of his attorneys had intervened and attached to it, dismiss the cause of action which had become merged in the judgment, and thus compel the attorneys to begin over anew in their effort to enforce their lien. The assignment, even if not conforming to the requirements of a statutory assignment, nevertheless gives the assignee such rights as ought to entitle him to have the sufficiency of the judgment finally determined upon the appeal, especially where appellant joined in the submission thereof long after it now claims the cause of action was settled.

The motion to set aside the submission and

dismiss the case will therefore be overruled. It is so ordered.

All concur.

#### On Rehearing.

TRIMBLE, J. While going south on Grand avenue in Kansas City, Mo., riding in a one-horse open express wagon, plaintiff was thrown therefrom and severely injured by a south-bound street car overtaking and striking said wagon. He brought this suit for damages. Two specifications of negligence were alleged: First, that the operatives of the car ran it against the wagon, notwithstanding they saw, or by ordinary care could have seen, plaintiff on the track, in a position of peril and unconscious of the car's approach, in time, by the exercise of ordinary care, to have avoided injuring plaintiff, either by stopping said car, slackening its speed, or warning plaintiff of its approach, which said operatives negligently failed to do; second, that although said operatives were running a street car on a public highway, and knew, or by ordinary care could have known, of the presence of plaintiff and the wagon, and that said highway was constantly used by the public traveling thereon, yet they negligently failed to maintain a reasonable lookout for plaintiff and the general public, and, as a direct result of said negligence, ran the car against the wagon and injured plaintiff. The answer was a general denial. Upon a trial, plaintiff obtained a verdict and judgment and the defendant appealed.

Plaintiff was not driving, nor did he have any control over, the wagon. He had hired the owner thereof to haul him and his trunk to the Union Station. The driver and plaintiff, with his cousin, were seated with their faces in the direction the wagon was going. At a point about 50 feet south of Twentieth street, the space immediately in front of them was obstructed by an automobile becoming stalled in their path, and, in order to go around the automobile, the driver of the wagon drove upon the south-bound, or west, street car track, and, with the left wheels of the wagon slightly over the first rail of said track, proceeded southward thereon for about 100 feet, the horse moving in a walk. At this point a south-bound street car, going at the rate of 20 miles per hour, came up from behind, and, without warning or signal, struck the wagon and threw plaintiff out.

At the time the wagon started to go upon the track both the driver and plaintiff looked back, but saw no car approaching. They were at that moment prevented from seeing any further north than Nineteenth street (a little over a block away), by reason of the passing of a car from west to east on Nineteenth street across Grand avenue. It was after nightfall, being some time between 6:30 and 7:30 o'clock p. m. in February. The night was dry, but there was snow on the

ground. The street was well lighted by clusters of electric lights located at intervals of about 50 or 60 feet on both sides of the avenue, and by a large electric sign on a huge building near by. A moment before the collision the occupants of the wagon heard the rumble of the approaching car, but it was then too late to escape though an attempt was made to do so. The car pushed the wagon along the track for about 15 feet, and thereafter ran some 40 or 45 feet before it was stopped. The motorman testified that when the car struck the wagon the plaintiff fell out into the street; and the conductor says that after the collision he went to plaintiff, who was lying face downward upon the pavement. The conductor turned him over, and found he was unconscious, and with blood oozing from his left ear. He and the motorman carried plaintiff to the curb, and laid him down on the sidewalk. Plaintiff's evidence is that the wagon had a red light tied to its rear.

[9] The car was on its way to the barn at the close of its day's run; and the motorman admitted he was in a hurry to get there, and that he was going at least 20 miles per hour. He testified that owing to the location of the lights on the street at that time he could not see an object further than 75 feet away; that going at 20 miles per hour he could stop in 75 feet, but that this would depend on the condition of the rail, and that on this occasion the car was stopped in "about 75 feet." He said that when he first saw the wagon it was "about 75 feet" away, the wagon "quarterming to the southwest," the front (left) wheel about the middle of the track, and the horse just outside the outside rail; that is, the right-hand or west rail on the south-bound track. By his own testimony, therefore, upon its most favorable interpretation to him, he saw the wagon when it was 75 feet away, and, though he could stop in that distance, yet he did not prevent the collision. He also said the wagon was 200 feet south of Twentieth street which tends to show that the wagon traveled for more than 100 feet on the street car track. But, notwithstanding the motorman's evidence that he could see only 75 feet ahead of him, there was ample evidence tending to show that the wagon could have been seen from Nineteenth street. There was nothing to obstruct the vision that far back; and one of defendant's own witnesses, Arnold, who was in an automobile going south on Grand avenue the same way the car was going, says he saw the wagon when it was 150 feet away. Hence, according to defendant's testimony, the wagon could have been seen by the motorman for a distance of 75 feet before he did see it. For what Arnold saw could have been seen by the motorman. *Moore v. United Railways*, 185 Mo. App. 184, 170 S. W. 386, 388.

It will not do to say that during this first

75 feet the wagon was not on the track nor in danger, because all the evidence in the case is that the wagon at a point 50 feet south of Twentieth street turned upon the track, and went thereon for 100 feet before it was struck. During all this time and down to and including the moment the motorman finally saw the wagon, when it was only 75 feet away, it was in a perilous situation, not crossing the track, but proceeding along it with the left wheels in the middle of the track, and the horse just outside the rail. If the wagon was "quarterming to the southwest," as the motorman says it was when he first saw it, this merely shows that the wagon was leisurely proceeding to gradually get back into the path from which it had veered to get around the stalled automobile, and hence the motorman's testimony is not contradictory of, but is consistent with, the plaintiff's evidence. There is no testimony whatever anywhere in the case that the wagon was ever east of the track; that is, on the left side of the street and was crossing the track. Clearly, therefore, in view of the relative speeds at which the wagon and car were concededly going, the wagon was in a perilous situation before and at the moment the car was 150 feet away from the wagon when the motorman, even under defendant's evidence could have seen it had he looked. And that perilous situation continued until the wagon was struck. Thus it appears that the motorman was negligent for at least a distance of 75 feet before he reached a point 75 feet from the wagon, and that too without regard to any negligence in running a car 20 miles an hour down a much-traveled city thoroughfare, where he could only see 75 feet ahead of him, and where he would require 75 feet in which to stop. It was in evidence that after a person is seen on the track it requires a certain or appreciable length of time for the application of the stopping apparatus and for the exertion of its power. Consequently a traveler on the track, unaware of the car's approach, had no chance of escape even if the motorman did, after seeing him 75 feet away, endeavor to stop.

Plaintiff had an equal right with the defendant to use the street, and there is no charge of contributory negligence in the case. In other words, even under defendant's evidence the jury could well find that the motorman did not see the wagon until it was only 75 feet away, which did not afford sufficient time to save plaintiff from injury, and that the reason the motorman did not see the wagon sooner was because he failed to keep a reasonable lookout. Hence there was, in reality, no question of the motorman's negligence, nor could there be any issue in regard thereto save only with reference to the efforts he made to avoid the collision, after he did see the wagon, by slackening the speed of the car or by warning the plaintiff of his

approach. But it is manifest that, in view of his negligence up to the moment he actually saw the wagon on the track, his subsequent effort to avoid the collision by slackening the speed of the car could not neutralize or rectify such negligence unless by such subsequent effort he succeeded in avoiding the collision. This, of course, he did not do. There is no evidence anywhere in the case that the motorman thought, or had any reason to believe, the wagon would get out of danger before the car would reach it. So far as appearances went, and so far as the fact actually was, the occupants of the wagon were unconscious of the car's approach. Consequently, in view of the motorman's negligence up to the time he actually saw the wagon on the track, his alleged effort in slackening the car would not relieve defendant of liability nor destroy plaintiff's case. Even if warnings were given, as the motorman claims, yet if not given in time to enable the wagon to get out of danger, the plaintiff is entitled to recover; and, under such circumstances, no slackening of the car, short of one that would avoid the collision, could exonerate the defendant.

[10-12] With the case and the evidence as depicted in the foregoing, we are unable to see wherein the plaintiff's instructions 1 and 2 contain reversible error. Said instruction No. 1 told the jury that if plaintiff was going south on Grand avenue in a wagon on the track in a position of peril and unconscious thereof, and that if the motorman saw, or by ordinary care could have seen, plaintiff in a position of peril and unconscious of the car's approach, in time, by ordinary care, to have avoided the injury, "either by stopping said car or by slackening its speed or by warning plaintiff of its approach," and that the motorman negligently failed to do so, and as a direct result of such negligent failure said car ran against and injured plaintiff, then the verdict should be for plaintiff.

The criticisms of defendant are directed to the portion of said instruction inclosed in the above quotation marks. The first criticism is that plaintiff had no evidence to show the speed of the car was not slackened, while defendant's evidence showed that, in the attempt to stop, the car was slackened before it struck the wagon. Of course it was slackened in the attempt to stop, but was it slackened in time to avoid a collision, and did the motorman attempt to stop in time to enable the plaintiff to escape? The motorman says the moment he saw the wagon 75 feet away he rang his gong and applied the emergency brake. This shows that at the instant he first saw the wagon he realized plaintiff's danger and the necessity of stopping, and yet he did not succeed in stopping, nor was there time to do so after he actually saw the wagon. But this was, under defendant's own evidence, long after he could have seen

the wagon had he exercised ordinary care. It may be true that, after the motorman saw the wagon, no slackening of speed, short of actual stoppage, would avert the collision, but this does not show that, had he seen the wagon when he should have seen it, a slackening of speed then would not have averted or assisted in averting the injury. It is not seen, therefore, why the said instruction No. 1 should be held faulty because it included the element of slackening the speed. The instruction merely gave that as one of the ways of preventing the injury if the motorman had time, in the exercise of ordinary care, to do so. However, even if the instruction be faulty in this regard, we find that defendant in its instruction No. 1 also included the element of slackening the speed, so that the error, if there be any, was joined in by the defendant.

The next criticism is that plaintiff's evidence as to the failure to ring the gong or warn plaintiff was merely negative; i. e., that they (the occupants of the wagon) merely say they did not hear any gong, while defendant's evidence is positive that the bell was rung. We do not regard the plaintiff's evidence as purely negative. It is more than that the witnesses did not hear any gong. They testified positively that no warning was given. When the wagon had gone about half of the 100 feet or more it traveled on the track, a north-bound car passed on its track. No one testified that this north-bound car sounded its gong, or that the noise of said car prevented or in any way interfered with the men in the wagon hearing the gong of the south-bound car if it had been sounded. The fact that just before the wagon was struck the men heard the rumble of the approaching south-bound car and tried ineffectually to escape is some evidence that had the gong been rung they would have heard it, since they were not utterly oblivious to sound from that direction. The snow on the ground no doubt tended to deaden the ordinary noise of the street traffic, so that the sound of a gong sharply rung could have been more easily heard than otherwise. Under the circumstances we cannot say that plaintiff's evidence that no warnings were given is of such a purely negative character as to be of no probative force in the presence of the positive testimony of the motorman and one other of defendant's witnesses that they were given. It is true that sometimes positive evidence of witnesses, who concededly are in a position to know, to the effect that a warning was given, will prevail over evidence of witnesses, concededly not so well situated, or of little or no opportunity to know, that they did not hear any warning. The general rule is that—

"Where the witnesses are of equal credit, the positive evidence" that a warning was given is "entitled to more weight than that of witnesses who say they did not hear it. [Italics ours.]

Much depends upon the situation and position of the witnesses and the attention they were giving at the time." *Murray v. Missouri Pacific R. Co.*, 101 Mo. 236, 242, 13 S. W. 817, 819 (20 Am. St. Rep. 601).

In the case at bar the circumstances were such as to make it a question for the jury. *Dutcher v. Wabash Railroad Co.*, 241 Mo. 137, 145 S. W. 63; *Hanlon v. Missouri Pacific R. Co.*, 104 Mo. 381, 388, 16 S. W. 233; *State ex rel. v. Kansas City, etc., R. Co.*, 70 Mo. App. 634, 642.

[13] Plaintiff's instruction No. 2 told the jury that if they found defendant was operating a street car on the street in evidence, and that defendant knew, or by ordinary care could have known, of the presence of plaintiff and the wagon in which he was riding on said street, and that said highway was constantly used by the public traveling thereon, and that the motorman negligently failed to maintain a reasonable lookout for plaintiff and the general public, and that as a direct result of said negligent failure, if any, said car ran against the wagon and injured plaintiff, then the verdict should be for plaintiff. This instruction is under the second specification of negligence alleged in the petition, and is supported by the evidence as hereinabove set forth. As stated before, according to even the defendant's evidence, the motorman was running his car 20 miles per hour down a much-traveled city thoroughfare, at a place where he could only see 75 feet ahead of him, and where it took that distance for him to stop and longer if conditions were not right. Furthermore, the defendant's evidence showed that he could have seen the wagon twice that far away, and, according to the other evidence, much farther than that, and that during all this time the wagon was on the track, not crossing, but going along upon it. The jury could well say from all the evidence that the motorman did not see the wagon until there was not sufficient time to save plaintiff from injury, and that the failure of the motorman to see him sooner was due to his negligent failure to keep a reasonable lookout ahead.

[14] It is said the instruction is faulty because it assumes plaintiff was in a position of peril or was on the track at the time when a reasonable lookout, if maintained, would have been effective. But, as stated before, there was no dispute in the evidence over the fact that plaintiff was then on the track and had been for some time. No one says the wagon was elsewhere than on the track. Even the motorman says it was when he first saw it, and even if it was then going at an angle to the southwest that would eventually take it off the track it was not going to get off soon enough, and the motorman realized this, for he at once applied the emergency brake as soon as he saw the wagon. It is clear that the question of whether the wagon

was in danger or on the track was not in dispute at the trial. Hence the instruction was not erroneous on the ground complained of. *Davidson v. St. Louis Transit Co.*, 211 Mo. 320, 356, 358, 109 S. W. 583; *Fullerton v. Fordyce*, 121 Mo. 13, 25 S. W. 587, 42 Am. St. Rep. 516; *Dunavant v. Pemiscot Land & Cooperaage Co.*, 188 Mo. App. 83, 93, 173 S. W. 747; *Sotebler v. St. Louis Transit Co.*, 203 Mo. 702, 102 S. W. 651; *Barr v. Armstrong*, 56 Mo. 577, 589; *Gayle v. Missouri Car, etc., Co.*, 177 Mo. 427, 447, 76 S. W. 987; *Pope v. Kansas City Cable Ry. Co.*, 99 Mo. 400, 406, 12 S. W. 891.

[15, 16] There was no evidence that the wagon was ever on the east side of the street. Hence the instruction did not ignore any defense arising from defendant's evidence, nor did it broaden the issues. It is bottomed upon and closely follows the second ground alleged in the petition, and it submitted a good case of common-law negligence, and was sufficiently specific and definite. *Thompson v. Keyes-Morshall Bros. Livery Co.*, 214 Mo. 487, 493, 113 S. W. 1128; *Pope v. Kansas City Ry.*, supra. The instruction did not merely tell the jury that, if the failure to maintain a reasonable lookout directly resulted in plaintiff's injury, then the verdict should be for plaintiff. It went further, and required the jury to find that as a direct result of said negligent failure, if any, said car ran against said wagon and injured plaintiff, etc. The plaintiff was entitled to have his case submitted upon both charges of negligence. *Humbird v. Union Street Ry. Co.*, 110 Mo. 76, 19 S. W. 69. And this was proper notwithstanding there was a charge under the humanitarian doctrine in the petition. *Bruening v. Metropolitan St. Ry. Co.*, 180 Mo. App. 434, 168 S. W. 248.

The point that there was no evidence to support the charge of a failure to keep a reasonable lookout is untenable, as we have hereinbefore shown.

[17] In instruction No. 5 the jury were told that if the wagon was owned by the driver thereof, and that plaintiff employed the owner and exercised no control over the wagon, then the driver was not the servant of the plaintiff, and negligence, if any, on his part could not be imputed to plaintiff. This is complained of because it does not submit the question of whether plaintiff was in the exercise of ordinary care, or omits to submit the question of plaintiff's contributory negligence. There was no charge of contributory negligence pleaded, nor did any appear in plaintiff's evidence. Hence the omission to submit such issue was not error. *Benjamin v. Metropolitan St. Ry. Co.*, 245 Mo. 598, 614, 151 S. W. 91.

[18] There was no error in refusing to give defendant's instruction No. 4. Every proper element contained therein was covered by the nine instructions given for defendant.

The instruction, if given, would have told the jury, in effect, that the motorman was authorized to approach a wagon on a much-traveled street at the rate of 20 miles per hour without warning, having the right to presume that persons on the street would not go upon the track, or, if upon the same, that they would get off and avoid being struck.

[19] Instruction No. 12 sought to take from the jury the alleged failure to sound a warning on the ground that there was no evidence that such failure was the proximate cause of plaintiff's injury. But this view is untenable as we have heretofore shown.

[20, 21] The point that the court erred in admitting evidence that the plaintiff coughed up blood is without merit. The only objection made to such testimony was that the question was leading and suggestive, and this the court sustained. The petition pleaded, among others, an injury to the lungs, and that all of the injuries were permanent.

[22] If there was any error in the closing argument of plaintiff's counsel, the record discloses no exception saved thereto or to the court's failure to rule thereon. There was an exception saved to the action of the court in ruling on one objection to a statement made in the argument, but clearly that statement did not constitute reversible error.

[23] We cannot say the verdict, \$5,000, is excessive. Plaintiff has suffered much more than merely a fractured collar bone. The record discloses that his left shoulder and arm are permanently impaired, his lungs and left ear also permanently injured, so that from a strong vigorous man he has been reduced to that of one greatly hampered in his movements, unable to do an ordinary man's work, and coughing up blood at intervals. The injuries shown in the record appear to be too serious to justify us in reducing the amount recovered or in setting aside the verdict.

Being of opinion that we are without authority to disturb the judgment, it is accordingly affirmed.

The other Judges concur.

#### NOTE.

#### VALIDITY OF AGREEMENTS RELATING TO ACTIONS AND OTHER PROCEEDINGS IN GENERAL.

(U.S.Sup.1912) There is no implied agreement on the part of the principal in a bail bond in a criminal case to indemnify his surety, and an express agreement for such indemnity is illegal and void as against public policy.—(D. C. Va. 1908) *United States v. Greene*, 163 Fed. 442, order affirmed (1910) *Leary v. United States*, 184 Fed. 433, 107 C. C. A. 27, which is reversed 32 Sup. Ct. 599, 224 U. S. 567, 56 L. Ed. 889.

(U.S.C.C.Wash.1901) A contract between a county and a bidder for an issue of its bonds, by which the county agrees to sell the bonds to the bidder on condition that he will cause

a feigned suit to be brought and prosecuted to the supreme court of the state to determine the validity of the bonds prior to their issuance, the expense to be paid by the county, is void, as such condition precedent is contrary to public policy.—*Van Horn v. Kittitas County*, 112 Fed. 1.

(Cal.1913) An agreement to resist the probate of a will and procure it to be set aside, so as to cut off the interest of one who was not a party to the agreement, tends to thwart justice, and is void as against public policy.—*Gugolz v. Gehrkens*, 130 Pac. 8, 164 Cal. 596, 43 L. B. A. (N. S.) 575.

(Cal.App.1915) A contract between principal stockholder of a bank and a depositor, which binds the stockholder to pay depositor interest in event a judgment against depositor is affirmed, held not void as encouraging litigation.—*Cloyne v. Levy*, 148 Pac. 224, 26 Cal. App. 637.

(Idaho,1912) Though the doctrine of champerty and maintenance does not prevail the courts will not grant relief or enforce contracts which are contrary to good morals or sound public policy.—*Merchants' Protective Ass'n v. Jacobsen*, 127 Pac. 315, 22 Idaho, 636.

(Ill.App.1889) A contract by an employer, after the service of a writ of garnishment, to pay the wages of a servant in advance, in order to prevent the same from being reached under garnishment proceedings, is legal.—*Chicago & E. I. R. Co. v. Blagden*, 33 Ill. App. 254.

(Iowa,1902) In a foreclosure proceeding it was agreed that no execution should issue on the judgment of foreclosure for 10 months after the judgment was rendered, and the mortgagor assigned his interest in the rents and profits to plaintiff. Later the mortgagor's interest in the premises was sold under execution on a judgment junior to the mortgage. Held, that the action of the mortgagee's attorney in the foreclosure proceedings, in procuring the assignment of the judgment to be made, was not contrary to public policy.—*Miller v. Cousins*, 90 N. W. 814.

(Mass.1891) Plaintiff and others contested the probate of a codicil to a will, and findings of the lower court that the codicil was procured by the undue influence of defendant were set aside, and, when the case was called for a new trial, plaintiff, in consideration of defendant's agreement to pay him \$500, withdrew his opposition, and without knowledge of the agreement the court admitted the codicil to probate. The only other interested party was a weak-minded son of the testator, and there was no evidence of any connivance between plaintiff and defendant to defraud the testator's son, or that the latter's conduct was influenced by plaintiff's withdrawal. Held, the agreement was not void as against public policy because the court was not informed of it.—*Seaman v. Colley*, 59 N. E. 1017, 178 Mass. 478.

(Mich.1878) A plaintiff, pending suit, may purchase his peace or agree as to the disposition he will make of the judgment in case he recover one.—*Detroit Savings Bank v. Truesdail*, 38 Mich. 430.

(Minn.1899) A stipulation between a "guaranty insurance company," and the guarantied employé that a voucher or other evidence of payment by the company to the employer shall be conclusive evidence against the employé as

to the fact and extent of his liability to the company, is void, as being against public policy, in so far as it makes such voucher conclusive evidence.—*Fidelity & Casualty Co. of New York v. Crays*, 79 N. W. 531, 76 Minn. 450.

(Mo.1898) Where plaintiff and defendant, who were the only heirs at law of their deceased father, entered into a contract with each other, to which the devisee under the will of decedent was not a party, for the prosecution by defendant of a suit which he had instituted to set aside such will, to which proceeding both plaintiff and such devisee were necessary parties defendant, and also for the payment of a certain sum by defendant to plaintiff, out of defendant's share of the estate, if the will should be set aside, in consideration of which plaintiff was to pay the costs and attorneys' fees incurred in the prosecution of such proceeding, such contract, being not only a fraud on one of the parties to such suit, but an imposition on the court, and against public policy, could not be enforced.—*Ridenbaugh v. Young*, 46 S. W. 959, 145 Mo. 274.

(Neb.1898) A stipulation in the bond and a mortgage for payment by the mortgagor of "expenses incurred in procuring and continuing abstracts of title for the purposes of the foreclosure suit" is unenforceable as against public policy since the costs are confined to those allowed by statute.—*Northwestern Mut. Life Ins. Co. v. Butler*, 77 N. W. 667, 57 Neb. 198.

(N.Y.) A contract by one of the sureties on a bail bond to indemnify the other in case of default is not against public policy, the statutes authorizing bail by recognizance and by deposit of money by accused. 39 N. Y. Supp. 930, 16 Misc. Rep. 474, affirmed.—(1896) *Maloney v. Nelson*, 42 N. Y. Supp. 418, 12 App. Div. 545, judgment affirmed *Moloney v. Nelson* (1899) 53 N. E. 31, 158 N. Y. 351.

(N.Y.) An agreement by which a patentee is to furnish evidence for a third party in actions agreed to be brought against the assignees of the patentee to set aside his transfer of the patents to them is against public policy.—(1903) *Cowles v. Rochester Folding Box Co.*, 80 N. Y. Supp. 811, 81 App. Div. 414, affirmed (1904) 71 N. E. 468, 179 N. Y. 87.

(Ohio,1897) A contract by attorneys at law to render services to prevent the finding of an indictment against one accused or suspected of crime is void, without respect to the belief of such attorneys as to his guilt.—*Weber v. Shay*, 46 N. E. 377, 56 Ohio St. 116, 87 L. R. A. 230, 60 Am. St. Rep. 743.

(R.I.1901) Plaintiff alleged that he paid a sum of money to defendant to pay certain fines and costs, and to secure a settlement of certain criminal prosecutions, and that defendant falsely represented that the money was necessary to secure such settlements, and that he had secured them. The attorney general knew nothing of any effort to secure the settlements, and there was no evidence that the money was used to corruptly influence the attorney general. *Held*, that a nonsuit of plaintiff on the ground that a recovery was barred because the money was paid for an unlawful purpose was erroneous, since the attorney general has power to enter a nolle prosequi in criminal cases, and it was not unlawful to endeavor to secure a settlement.—*Rogers v. Hill*, 48 Atl. 670, 22 R. I. 496.

(Tex.Civ.App.1903) An agreement that, in consideration of the abandonment of a proceeding to perpetuate a witness' testimony, hearsay evidence thereof might be offered, was not invalid as contravening public policy.—*Thompson v. Ft. Worth & R. G. Ry. Co.*, 73 S. W. 29, 31 Tex. Civ. App. 583.

(Vt.1898) Where a note was executed solely for the purpose of establishing a false defense in a criminal prosecution, it cannot be enforced by the payee.—*Bates v. Cain's Estate*, 40 Atl. 36, 70 Vt. 144.

(Wis.1900) In a will contest between proponent and a part of the legatees who were also heirs at law of the deceased, a stipulation between the parties, in open court, that attorney's fees should be allowed in addition to statutory costs, did not entitle contestants to such fees, since such a stipulation was contrary to public policy and void. Judgment (1899) 80 N. W. 921, 104 Wis. 581, reversed.—*In re Stickney's Will*, 84 N. W. 23, 108 Wis. 99; *Fox v. Martin*, Id.

## DONNER v. WHITECOTTON. (No. 13021.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

### 1. COVENANTS §84 — BENEFICIAL OWNERSHIP OF LAND—EVIDENCE.

In an action to recover from a defendant not named in the deed damages for breach of a covenant of warranty, facts held sufficient to show that the grantor was not the beneficial owner of the land, and that the defendant was beneficial owner thereof, holding the record title in grantor's name.

### 2. PRINCIPAL AND AGENT §145(2)—UNDISCLOSED PRINCIPAL—LIABILITY.

Generally as to simple contracts, even such as the statute of frauds requires to be in writing, an undisclosed principal may be charged with liability on obligations made by the agent in his own name, but for his principal's benefit and by his authority.

### 3. BILLS AND NOTES §119—PRINCIPAL AND AGENT §145(2)—UNDISCLOSED PRINCIPAL.

The general rule as to liability of undisclosed principal does not apply to negotiable instruments; for one who takes a negotiable instrument contracts only with the parties who upon the face of the instrument are bound for its payment, and is presumed to look only to those parties, and not elsewhere.

### 4. PRINCIPAL AND AGENT §145(2)—UNDISCLOSED PRINCIPAL—CONTRACT UNDER SEAL.

At common law an undisclosed principal cannot be held liable upon a contract under seal executed by his agent.

### 5. PRINCIPAL AND AGENT §145(3)—UNDISCLOSED PRINCIPAL—WARRANTY BY AGENT.

At common law, under the rule that an undisclosed principal is not liable upon a sealed contract executed by the agent in his own name, such principal could not be held liable for breach of covenant of warranty contained in a deed executed by agent in his own name.

**6. PRINCIPAL AND AGENT ⇨145(3)—UNDISCLOSED PRINCIPAL—BREACH OF WARRANTY IN DEED.**

Even though the distinction between sealed and unsealed instruments be wholly abolished by Rev. St. 1909, § 2773, an action for breach of warranty cannot be maintained against an undisclosed principal, based solely on a deed covenant of warranty, since the principal does not appear on the face of the covenant as a party thereto, although a recovery may be had on the theory of his having obtained through his agent money to which he was not entitled and for which he gave nothing.

**7. COVENANTS ⇨130(7)—UNDISCLOSED PRINCIPAL—BREACH OF DEED COVENANT—DAMAGES.**

Where there was a breach of deed covenant, in an action therefor against an undisclosed principal, the measure of damages must be the extent to which the defendant was enriched at the expense of the purchaser, who bought from him through his agent.

**8. COVENANTS ⇨114(1)—UNDISCLOSED PRINCIPAL—COVENANT—PETITION—DAMAGES.**

Where there was a breach of deed covenant, a petition setting out such facts together with facts showing the defendant to have been an undisclosed principal in the sale, but nowhere alleging what plaintiff paid for the land, nor the value thereof, nor the value per acre of the land lost as compared with the rest, is insufficient for failure to set forth proper allegations as a foundation for application of the proper measure of damages.

**9. APPEAL AND ERROR ⇨1083(7)—HARMLESS ERROR—FINDING.**

In an action for breach of covenant, there was no error against the defendant in finding the value of the 10 acres lost to be the average value of all the land, since there was evidence that the 10 acres was bottom land and worth more per acre than the remainder.

**10. COVENANTS ⇨130(5)—ESTIMATE OF VALUE OF LAND LOST—AVERAGE ACRE VALUE.**

In an action for damages for breach of a deed covenant as to part of the land conveyed, in estimating the average value per acre, it was erroneous to add the \$3,500 deed of trust which plaintiff paid off to the \$7,000 agreed exchange valuation, when the property plaintiff deeded also had a \$3,500 mortgage against it.

Appeal from Circuit Court, Randolph County; A. H. Walker, Judge.

Action by Alva D. Donner against James H. Whitecotton. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Whitecotton & Wight, of Moberly, for appellant.

Ralph T. Finley, of St. Louis, for respondent.

TRIMBLE, J. In this action plaintiff, Donner, seeks to hold the defendant, James H. Whitecotton, liable for the breach of a

covenant of warranty contained in a deed to plaintiff from defendant's son, A. Tilden Whitecotton, but which the defendant did not sign, nor did his name appear therein in any manner. The theory is that the defendant can be held liable as an undisclosed principal, even though the warranting obligation is in a deed, because our statute has abolished seals, and thereby destroyed all distinctions between sealed and unsealed instruments.

The defendant, acting as attorney for a Mrs. Clara D. Winn, bid in for her at partition sale a certain Boone county farm supposed to contain 280 acres at the sum of \$4,600, and the sheriff executed a deed to her which was placed of record. Mrs. Winn was dissatisfied, claiming that defendant paid more than she had authorized him to bid for it. As a result of her dissatisfaction, it was agreed that she should convey the land to defendant's son, A. Tilden Whitecotton, who would give her a deed of trust thereon for \$3,500, she to receive in addition thereto the sum of \$1,100, which, with the deed of trust, would make up to her the \$4,600 she had been required to pay for the land. She executed a warranty deed to A. Tilden Whitecotton, he gave her a deed of trust thereon for \$3,500, and his father, the defendant, furnished the \$1,100 which was paid to Mrs. Winn.

Thereafter a trade was made whereby the plaintiff, Donner, exchanged property in Columbia for the farm, each property being valued, for the purposes of the trade, at \$7,000. There was an incumbrance of \$3,500 on each piece of property, and the arrangement was that each party should assume and agree to pay the incumbrance on the property he was to get; in other words, they exchanged debts also. This arrangement was carried out, and pursuant thereto A. Tilden Whitecotton executed a warranty deed to the plaintiff herein conveying the farm aforesaid, the latter assuming and agreeing to pay the \$3,500 deed of trust to Mrs. Winn with interest from January 1, 1912. Afterwards Donner conveyed the land by deed with the usual covenants of warranty to one Evans, who in turn likewise conveyed to one Rusk. Thereafter it was discovered that the title to, and the possession of, 10 acres of the land were, and for 40 years had been, in other parties, and consequently there was a breach of the covenant of warranty in each of the deeds above mentioned. Rusk thereupon sued Evans upon the latter's warranty. Evans notified Donner, and the latter notified the Whitecottons, to defend. Rusk recovered judgment against Evans for the breach of his covenant to warrant and defend the title, and Evans, after paying same, sued the plaintiff, Donner, and likewise recovered judgment against him; the total amount

which Donner was compelled to pay to discharge said judgment, with interest and costs, being \$633.04. It was to recover this amount that the present suit was brought, as hereinabove stated.

As originally brought, the suit was against A. Tilden Whitecotton and James H. Whitecotton, but later an amended petition was filed in which James H. Whitecotton was the sole defendant. The amended petition alleged that plaintiff bought the real estate in question, "which was then owned by said defendant, although the record title of said real estate was in one A. Tilden Whitecotton"; that said A. Tilden Whitecotton executed to plaintiff the deed to 230 acres of land (describing it) with the covenant to warrant and defend the title; that there was a breach of the covenant owing to the failure of title to 10 acres of the land whereby said 10 acres was lost to plaintiff.

The amended petition further alleged:

That "said A. Tilden Whitecotton was never the beneficial owner of any of the land described in said deed, but all of said land, except the part west of said creek, which was lost to plaintiff, was in truth and in fact the property of the defendant, James H. Whitecotton; that said James H. Whitecotton is the father of said A. Tilden Whitecotton, and the title of said land was placed by the defendant in the name of his son for convenience and for other reasons unknown to the plaintiff, and said James H. Whitecotton conducted the business concerning said land in the name of his said son, where the record title thereto was to be affected, although his said son had no real or beneficial interest therein; that said land was purchased by said James H. Whitecotton and paid for by him with his own means; and that said James H. Whitecotton in fact received the purchase price for the land described in said deed when the same was conveyed to the plaintiff by said A. Tilden Whitecotton; and that by reason of said facts and as the facts are the said James H. Whitecotton transacted the business concerning the record title to said land in the name of his said son as his agent, and the said A. Tilden Whitecotton was, in the execution of said deed, acting for his said father, the defendant herein. The plaintiff further states that, since said conveyance to the plaintiff by said A. Tilden Whitecotton, the plaintiff has learned for the first time that said A. Tilden Whitecotton is insolvent and has no property out of which a judgment for the damages and costs here could be made."

Said petition further set up the conveyance to Evans and from him to Rusk and the respective suits heretofore mentioned together with the judgment rendered in each and their payment as before stated.

The answer admitted the execution of the deed from A. Tilden Whitecotton to the plaintiff, Donner, but denied every other allegation.

The case was tried and submitted to the court; a jury apparently being tacitly waived by common consent. No request for or

waiver of a jury is mentioned in the record nor is any point made thereon; and we mention this merely to show how the case was tried. It is a suit at law tried before the court. Special findings of facts and declarations of law were given, and the court rendered judgment for \$613.25, said sum being made up of \$456.52, the value, as found by the court, of the 10 acres of land lost and the price paid therefor, and \$156.73 interest on said sum from March 1, 1912. The defendant appealed.

There is no question but that there was a failure of title as to the 10 acres whereby that amount of land was lost to plaintiff; nor is there any controversy over the various conveyances with covenants of warranty as heretofore stated, or over the various suits thereon and the payment of the respective judgments and costs thereof by the respective covenantors down to the deed involved herein.

[1] Some contention is made that the court was not justified in finding that the defendant, James H. Whitecotton, was the real owner of the land and the one for whom the conveyance to Donner was made; but we are wholly unwarranted in taking this view, since the record discloses ample evidence to support the trial court's finding:

That "A. Tilden Whitecotton was not the beneficial owner of said land or any part of the same, but that the defendant, James H. Whitecotton, was the real and beneficial owner thereof and held the record title to said land \* \* \* in the name of his said son, A. Tilden Whitecotton, for purposes of convenience; that said James H. Whitecotton paid all of the purchase money for said land when the same was deeded to his son, and received all of the proceeds of the sale, including property and money, when said land was conveyed to Alva D. Donner; that while holding the record title to said land, the said A. Tilden Whitecotton held the same for his said father, James H. Whitecotton, and acted as the agent of his said father in selling and conveying the same to the plaintiff as aforesaid; and that said James H. Whitecotton was the undisclosed principal of said A. Tilden Whitecotton at the time said land was conveyed to the plaintiff."

The court further found that—

"The plaintiff, Alva D. Donner, discovered that the said James H. Whitecotton was the real and beneficial owner of said land after the plaintiff had sold said land and conveyed the same to one I. V. Evans and said Evans had conveyed the same to one William H. Rusk."

It was in evidence that at the time of the conveyance of the farm to A. Tilden Whitecotton he was a young man attending the State University; that he had no property; that the title was put in the son's name for convenience; that defendant, James H. Whitecotton, always spoke of the farm as "my" farm, and, when certain buildings



thereon burned, he collected and kept the insurance.

The main question in the case is whether the defendant, James H. Whitecotton, can be held liable for the loss occurring by reason of the breach of a covenant of warranty in a deed he did not sign, on the ground that he was the undisclosed principal of the grantor, A. Tilden Whitecotton, who, in executing the deed, was acting for the defendant and with his authority.

[2, 3] With reference to simple contracts, even such as the statute of frauds requires to be in writing, the general rule is that an undisclosed principal may be charged with liability on obligations made by the agent in his own name, but for his principal's benefit and by his authority. *Weber v. Collins*, 139 Mo. 501, 508, 41 S. W. 249; *Meyers v. Kilgen*, 177 Mo. App. 724, 735, 160 S. W. 569; 2 Corp. Juris, 841; 21 R. C. L. 890. To this general rule there are certain exceptions, one of which is in the case of negotiable instruments (21 R. C. L. 891); the reason of such exception doubtless being that one who takes a negotiable instrument contracts only with the parties who upon the face of the instrument are bound for its payment, and is presumed to look only to those parties and not elsewhere (1 Am. & Eng. Ency. of Law [2d Ed.] 1141).

[4, 5] Notwithstanding the above general rule with reference to simple contracts, it is the well-established common-law doctrine that an action can be maintained upon a sealed contract only against those whose names appear therein; and hence the general rule is that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name. 2 Corp. Juris, 843; 21 R. C. L. 892. From this it necessarily followed that conveyances of real estate, being sealed instruments, came within the rule; and an undisclosed principal could not be held liable for the breach of a covenant of warranty contained in a deed executed by an agent in his own name.

[6] However, section 2773, R. S. 1909, provides that:

"The use of private seals in written contracts, conveyances of real estate, and all other instruments of writing heretofore required by law to be sealed (except the seals of corporations), is hereby abolished, but the addition of a private seal to any such instrument shall not in any manner affect its force, validity or character, or in any way change the construction thereof."

And the question is: What effect does this section have on the rule? Does this section destroy all distinction between sealed and simple contracts so as to allow an undisclosed principal to be held liable for the breach of warranty made by the agent in a deed executed in the latter's own name, or does it merely render a seal unnecessary to the deed's validity, leaving the status of the

deed, its construction, effect, and the rights and liabilities of the parties thereto, the same as before? In matters other than the question of liability herein considered, it has been held that the effect of this statute was to change common-law rules so that a deed or other sealed instrument could be dealt with and treated in the same manner as any other unsealed contract. *Bosley v. Bosley*, 85 Mo. App. 424, 428; *Edmunds v. Missouri Electric, etc., Co.*, 76 Mo. App. 610, 622; *Judd v. Walker*, 158 Mo. App. 156, 164, 138 S. W. 655.

In *Streeter, Jr., Co. v. Janu*, 90 Minn. 393, 96 N. W. 1128, a father sent his son to Dakota to buy land for him; he furnishing the money that was paid down thereon. The son, in his own name, entered into a contract under seal to purchase a large amount of land and to pay the unpaid portion of the purchase price in yearly installments. The son having refused to make these payments, suit was brought against the father on the ground that he was the real vendee, that the contract was actually made for him and in his behalf, and that of these facts that plaintiff was not informed until after the writing was executed. The court held that the statute abolishing seals abrogated the distinction between sealed and unsealed private contracts, and that all distinction between simple contracts and specialties, executed by private parties were discarded, and that therefore the father could be held liable as an undisclosed principal.

In *Efta v. Swanson*, 115 Minn. 373, 132 N. W. 335, the same court held that an undisclosed principal is bound by covenants of warranty in a deed made by his agent with authority. The decision was based upon the aforesaid ground that the statute abolishing seals had abrogated all distinction between sealed and unsealed private contracts, and the rule applicable to simple contracts as to the liability of a principal for authorized contracts in his agent's name applied as well to contracts under seal.

In *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907, the Supreme Court of Wisconsin held that an undisclosed principal could be held liable for the obligation of his agent in a written contract under seal, if the seal was not essential to its validity.

In *Stowell v. Eldred*, 39 Wis. 614, 626, it is held that an undisclosed principal could enforce the obligation of a contract made by his agent in the latter's name, even though the contract was under seal, provided the seal was not essential to the validity of the contract.

In *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913, the plaintiff, Mrs. Warren, had conveyed lands to Bowser and others, who, after giving notes to secure the unpaid purchase money, sold the land to one Rees, who assumed and agreed to pay

said notes. In purchasing said land and taking the deed to himself, Rees was in fact acting as the agent of Sanger and others, and, when he subsequently conveyed the land, Sanger and his associates received the proceeds. Mrs. Warren sued to recover the amount due on certain of the notes, and also to enforce her vendor's lien; and, in addition to a foreclosure, judgment was rendered, not only against Sanger and his associates for the balance due on her debt, but a judgment was also rendered against them in favor of Bowser and others for any moneys they might be compelled to pay on the judgment. The cause was submitted solely upon the second count, which sought to hold Sanger and his associates on the ground that they were the undisclosed principals of Rees; and the trial court charged the jury, in effect, that though on the face of the deed the land was conveyed to Rees and he assumed to pay the notes, still if he, in making the purchase, was in fact the agent of Sanger and others, they were liable thereon as undisclosed principals. The Supreme Court of Texas, however, refused to hold Sanger liable as an undisclosed principal, and ruled that the Texas statute dispensing with the necessity of private seals did not change the common-law rule as to the liability of an undisclosed principal for the obligations contained in a deed executed by the agent in his own name. The reasoning of the court was that the statute merely rendered it unnecessary to place a seal on a deed, but that, by the very language thereof, the statute did not undertake to give a deed executed without a seal any different status from what it would have had before the statute was passed if executed with a seal; that the common-law rules must still be resorted to in order "to determine the nature and extent of the estate conveyed by the deed as well as of the covenants therein contained, and who were bound or benefited thereby. It was not the intention of the statute to abolish them."

According to this, the rule that an undisclosed principal, when subsequently discovered, may be held liable upon a contract made with his agent, does not apply to a deed or conveyance of real estate whether the instrument is required to be sealed or not.

The case of *Jones v. Morris*, 61 Ala. 518, cited in the foregoing Texas case, dealt with the sufficiency of a deed executed by Jones' agents to pass the legal title and to estop Jones from recovering the land. And the court held that the statute abolishing seals did not change the common-law rule that a deed executed by an agent, to be valid and binding upon the principal, must with certainty appear to be the deed of the principal; the grant and the warranty must be his. The court further said that, while a seal was not now necessary to a conveyance, yet

a deed, though shorn of the dignity of a seal, retained all the operation and effect of a deed sealed at common law, its covenants being as comprehensive and its recitals as incapable of being disputed as if it were sealed with the greatest formality, and that the estoppel which at common law grew out of the covenants or recitals of a sealed instrument attach now to an unsealed conveyance of the legal estate in lands. This case, it will be noticed, involves something other and more than the mere question of the liability of a principal for an obligation contained in a deed executed by his agent in the latter's own name. The question there went to the sufficiency of the instrument to pass title, and it was held that, while there was "a larger legislative intention" in the statute than merely to dispense with a seal as a necessary element of a conveyance of the legal estate in lands, yet the statute did not aid the deed's insufficiency in other respects, and was not intended to be so broad in its scope as to blot out the common-law principles which give security to conveyances of real estate. We have no quarrel with the proposition that the statute should not be allowed to lessen or remove any of the safeguards or security thrown about titles to real estate; but the question is: Does the holding of an undisclosed principal liable for the obligation in a deed made in the principal's behalf, but by the agent in his own name, in any way lessen the security of land titles? It is hard to see how such a result would follow. And it would seem that the result reached in the Texas case could have been justified upon the ground that, as the plaintiff's claim therein had its origin and foundation in negotiable instruments, her right to hold the undisclosed principal of the agent who assumed the payment thereof could not rise higher than the source of her claim; for, had the maker of the notes been acting for another, Mrs. Warren could not have held Sanger as the undisclosed principal of such maker, since, as heretofore stated, negotiable instruments constitute an exception to the general rule as to the liability of an undisclosed principal.

The *Swanson* Case, above cited, is the only case which we have been able to find directly holding that an undisclosed principal is bound by the covenants of warranty in a deed made by his agent with authority. And with reference to the liabilities arising under a conveyance of real estate it is perhaps difficult to see why an undisclosed principal should not be held where the statute has abolished seals. While there were other differences than the mere presence of a seal between specialties and simple contracts as to the effect to be given the instruments themselves, the difference as to the liabilities arising from the obligations thereof arose largely out of the rigid technical common-law

rules pertaining to the use and effect of a seal. The presence of the seal seems to have been the distinguishing feature. Bishop on Contracts, §§ 110, 163; Story on Contracts, §§ 1 to 10. And when the seal is removed by statute, it is difficult to find any reason why the distinction between simple contracts and specialties is not also removed, in so far at least as the liability herein considered is concerned. But, however this may be, it would seem to be clear that, even if such distinction is wholly abolished, a suit for breach of warranty in a deed cannot be maintained against an undisclosed principal based solely on the covenant of warranty and nothing else, since the principal does not appear on the face of the covenant as a party to it. The suit is not strictly on the covenant for the breach thereof, but upon the facts of the entire transaction, including the fact of the covenant, its breach, and the loss occasioned thereby. The Swanson Case does not disclose the manner in which the suit was brought, nor the basis upon which it rested, but the implication is that it was brought on the facts of the transaction, especially as the measure of damages was held to be the consideration paid by the plaintiff for the land lost with interest thereon from the time of payment. The right of recovery in such case would therefore seem to be not strictly and solely on the breach of the covenant of warranty as such, but on the theory that the undisclosed principal, having obtained, through his agent, money to which he was not entitled and for which he gave nothing, should be required to repay same. In *Moore v. Granby, etc., Co.*, 80 Mo. 86, decided before the enactment of our statute abolishing seals, it was ruled that an undisclosed principal was liable upon the implied obligation growing out of the facts, even though the instrument which the agent executed was a contract under seal and in relation to the conveyance of real estate, but that such liability could not be enforced in a suit based solely on the contract itself. In like manner, it would seem that, even though our statute has now abolished seals and has destroyed the distinction between sealed and unsealed instruments, nevertheless the suit to recover from an undisclosed principal, loss arising on account of a breach of warranty in a deed should be based upon the facts of the case, and not strictly on the covenant itself. In such case the ground of recovery is really on the theory that the undisclosed principal has received something for which he gave nothing in return, and is under an implied obligation to repay the same.

[7] If this be the theory on which recovery is allowed, then the measure of damages must be the extent to which the undisclosed principal was enriched at the expense of the

purchaser who bought from him through his agent. This is exactly the measure of damages adopted in the Swanson Case and is the measure of damages which the trial court adopted in the case at bar. In other words, the undisclosed principal, in the case of failure of title in a warranty deed, is held liable, not on the theory that he is strictly a party to the covenant, but on the theory that he who has obtained the benefits of a transaction should restore to the purchaser that which he received in exchange for something he never sold nor had the right to sell. In this way the effect of the statute abolishing seals is not extended beyond the manifest purpose of the legislative authorities, nor, on the other hand, will one be permitted to unjustly enrich himself at the expense of another through having a conveyance executed by his agent in the latter's name.

[8] The fact that the suit is not based strictly and solely on the covenant in the deed itself is impliedly recognized in the petition filed by plaintiff, since it attempts to set out the facts of the entire transaction as a basis of his cause of action. But the trouble is the petition does not set out all of the facts so as to enable the court to render a judgment according to the measure of damages hereinabove referred to. It does set out the facts of the deed and its covenant together with the facts showing the defendant to be an undisclosed principal. But it nowhere alleges what the plaintiff paid for the land, nor the value thereof, nor the value per acre of the land lost compared with the rest of the land. All it alleges in reference to plaintiff's loss is the fact that a certain judgment for \$633.04 was rendered against him in a suit on the breach of his covenant with Rusk to warrant and defend the title. This, of course, included costs and expenses of attorneys in defending the title in addition to the value of the land lost, which was properly included therein, since the covenant to defend was one to which he was personally and strictly a party. But the trial court did not allow the expense of defending the title as a part of the recovery herein, but limited the plaintiff's recovery to the value of the land lost. This was done, though no allegation in reference thereto was contained in the petition. There was nothing in the petition on which the court could proceed to ascertain the value of the land lost and the amount by which the defendant was unjustly enriched at the expense of the plaintiff. In other words, the petition afforded no foundation for the ascertainment of the damages according to the measure the court applied. The court in its declaration of law found that "the measure of plaintiff's damages would be the purchase price paid for the land lost, with interest from the time of delivery of deed and possession, but, as no

price was fixed for the particular land lost, the court further finds that the measure of plaintiff's damages in such case should be such proportion of the whole consideration paid as the value of the 10 acres lost bears to the value of the whole." We think it was necessary for the petition to have contained the proper allegations as a foundation for the application of this measure.

[9] There was no error against the defendant in finding the value of the 10 acres lost to be of the average value of all the land, since there was evidence that the 10 acres was bottom land and worth more per acre than the rest.

[10] In arriving at the average price or value per acre the court added the \$3,500 deed of trust, which the plaintiff paid off, to the \$7,000, the agreed valuation placed on the properties exchanged, making the consideration paid for the farm \$10,500, and thus arrived at the price of \$45.852 per acre. But, since there was a deed of trust for \$3,500 on plaintiff's property which he traded for the farm, and which deed of trust he was relieved of paying, as it was assumed by the other party to the trade, the \$3,500 incumbrance on the farm which plaintiff paid off should not have been added to the \$7,000, but this last-named amount should be taken as the basis on which to figure the value or price per acre of the land. The judgment rendered is excessive by reason of the above-mentioned addition of the \$3,500 to the \$7,000 at which the properties were each valued.

The judgment is reversed, and the cause remanded.

All concur.

#### DAVIS et al. v. GEIGER. (No. 18010.)

(Kansas City Court of Appeals. Missouri. April 7, 1919.)

#### 1. BROKERS $\Leftrightarrow$ 41—COMMISSIONS—LIABILITY.

If plaintiff brokers were not agents of lessee, but were acting for defendant lessor, who had knowledge of and received benefits of services rendered in inducing lessee to lease property, defendant would be liable unless the dealings he had with plaintiffs and the services performed by the latter were not such as would lead a person of ordinary understanding under like circumstances to believe that plaintiffs were acting for defendant and expecting to be paid therefor.

#### 2. EVIDENCE $\Leftrightarrow$ 472(1)—CONCLUSIONS—ACTION FOR COMMISSION—CONCLUSION OF WITNESS.

In action by plaintiff brokers for commission, question asked by defendant of his bookkeeper and stenographer by whom she considered one of plaintiffs employed *held* clearly inadmissible, because calling for a conclusion upon a difficult matter which was the sole issue in the case.

#### 3. EVIDENCE $\Leftrightarrow$ 474½—NONEXPERT EVIDENCE—SUBJECTS.

Facts of common observation or concerning matters within the common experience and observation of men are in general the matters about which a nonexpert witness is allowed under proper conditions to give his opinion or conclusion.

#### 4. TRIAL $\Leftrightarrow$ 136(1)—MEASURING HUMAN CONDUCT—PROVINCE OF JURY.

It is particularly the jury's function to pass upon what would meet the requirements or satisfy the mind of that theoretical, reasonable, ordinary person which the law gives to the jury as a standard by which to measure human conduct.

#### 5. APPEAL AND ERROR $\Leftrightarrow$ 1050(1)—ERRONEOUS ADMISSION OF EVIDENCE—REVERSIBLE ERROR.

Where, in action for commission for procuring a tenant for defendant, defendant's counsel was permitted by the plaintiffs' counsel to ask a question calling for a conclusion on the sole issue in the case on terms suggested by plaintiffs that he would do likewise, *held*, case would not be reversed because plaintiffs in rebuttal were permitted to ask a question calling for the conclusion of another witness on the same subject.

#### 6. EVIDENCE $\Leftrightarrow$ 472(1)—CONCLUSIONS—MATTER IN ISSUE.

In suit for commission for procuring a tenant for defendant's property, the sole issue being whether plaintiffs were employed by defendant or the lessee, it was permissible to show that, when a discussion was had relative to the deal, one of the plaintiffs spoke in behalf of defendant, and question as to who argued on the side of the lessee was not subject to objection that it called for witness' conclusion as to whether said plaintiff was employed to act for defendant.

#### 7. BROKERS $\Leftrightarrow$ 40—COMMISSION—LIABILITY OF LESSOR.

If defendant either verbally agreed that plaintiffs should undertake to procure for him a tenant or consented that plaintiffs should endeavor to secure such tenant, and such tenant was procured, and a lease made, defendant would be liable.

#### 8. TRIAL $\Leftrightarrow$ 296(1)—ERRONEOUS INSTRUCTION—CURE BY OTHER INSTRUCTIONS.

No reversible error can be predicated on obscurity in meaning of first instruction given for plaintiffs where obscurity was removed by plaintiffs' second instruction, and instructions on the part of defendant, plaintiffs' first instruction not leaving out any necessary element of their cause of action, and not containing any positive misdirection.

Appeal from Circuit Court, Buchanan County; William H. Utz, Judge.  
"Not to be officially published."

Action by Frank Claude Davis and others against Jacob Geiger. Judgment for plaintiffs, and defendant appeals. Affirmed.

Robert A. Brown and Richard L. Douglas, both of St. Joseph, for appellant.

Culver & Phillip, of St. Joseph, for respondents.

TRIMBLE, J. This is a suit by a firm of real estate brokers in St. Joseph, Mo., to recover a commission alleged to be due for services in procuring a tenant to occupy certain real estate belonging to defendant.

The latter owned a quarter of a block of ground at the corner of Sixth and Francis streets in St. Joseph, which was practically unimproved; at least it had no rental buildings thereon in keeping at all with modern business requirements. The possibilities and features of this location as a good business corner were excellent, though undeveloped and not plainly apparent.

Defendant, a man of means, was willing to erect a large business building on the above tract provided a long-time lease thereon at a good rental could be obtained from a responsible tenant. Plaintiff brokers, knowing this, and having learned that a retail dry goods firm known as the Leader Dry Goods Company would shortly be required to select another location, conceived the idea of the defendant erecting a building on his above-named tract and getting the dry goods firm to lease it for a long term of years. According to plaintiffs' evidence they broached the subject to defendant, suggesting that there was an opportunity to get a good business concern on his corner provided it was handled right, and the tenants they had in mind could be induced to come to a new and untried corner; and, according to plaintiffs' evidence, defendant told plaintiffs, "That is all right; go right ahead and secure them if you can." Thereupon plaintiffs undertook the work of inducing the Leader Dry Goods Company to consider defendant's corner as a good location and to agree to lease such a building as defendant would build. The dry goods firm was not at first impressed with the desirability of the location, but after more than a year's work on the part of plaintiffs, and through their efforts, the dry goods company was induced to finally lease a building the defendant would erect. The negotiations carried on by plaintiffs back and forth between the defendant and the dry goods firm finally resulted in a written contract between said parties whereby defendant agreed to erect the building and the dry goods firm leased it for 15 years at an annual rental of \$28,500, with a renewal option for 10 years at an increased rate. The deal having been closed, and the lease executed and delivered, plaintiffs demanded of defendant their commission. Not being paid, they brought this suit. Upon a trial the jury returned a verdict for the full amount sued for, and, judgment being rendered thereon, the defendant appealed.

212 S.W.—25

The plaintiffs pleaded their alleged contract with defendant according to its legal effect; i. e., that the defendant promised and agreed to pay plaintiffs a reasonable sum for their services if such tenant was procured and the lease was consummated. The answer was a general denial.

There was no question but that plaintiffs' efforts were the procuring cause of the leasing of the building agreed to be erected by the defendant, nor is there any contention over the amount of the commissions charged; it being the usual percentage charged for such services. At the trial defendant contended, not only that he never employed or directed plaintiffs to act for him in the matter, but also that plaintiffs, in performing the services they rendered, were acting for and representing the Leader Dry Goods Company; that from all the facts and circumstances within his knowledge he was led to believe, and did believe, and so understood the fact to be, that plaintiffs were employed by the Lessee Dry Goods Company, and that they did not represent him in any of the negotiations. The plaintiffs testified that defendant expressly directed them to undertake the work of procuring for him a tenant for said real estate. In addition to this, the defendant was the owner of a large amount of real estate, a physician, and a man of affairs well versed in business methods and the way in which transactions in realty are carried on through real estate agents. He knew plaintiffs were engaged in the work of getting the deal consummated whereby he was to erect the building and the Dry Goods Company was to lease it, and that they were engaged in that matter for a long space of time, and he accepted the results of those services and received the benefit thereof. So that, as the case developed at the trial under the pleadings and evidence, the issue was whether the plaintiffs were in fact acting for the Dry Goods Company or whether they were acting for defendant either at his express direction or for and on his behalf and with the expectation of being paid therefor, with the knowledge and consent of defendant, who accepted the benefit of such services.

[1] There was no direct, express, or affirmative evidence that the plaintiffs represented or acted for the Dry Goods Company. The officers of the latter testified that said brokers did not represent it, and plaintiffs themselves testified they did not. Defendant's evidence in support of the claim that plaintiffs were in fact the Dry Goods Company's agents, or that defendant had no reasonable grounds to think that they were his agents, but was reasonably led to believe they were acting for the Dry Goods Company, consists of evidence as to plaintiffs' alleged words, acts, and conduct from the inception of the matter throughout the year or more of negotiations which were had before the deal in-

volving the agreement to erect and lease so large a building could be consummated. So that, even if we leave out of consideration plaintiffs' evidence as to defendant's express direction to act for him, still, if plaintiffs were not in fact agents for the Dry Goods Company, but were acting for defendant with the expectation of being paid therefor, he having knowledge of and receiving the benefits of such services, defendant would be liable, unless the dealings defendant had with plaintiffs and the services performed by the latter, were not such as would lead a person of ordinary understanding, under like circumstances, to think or believe that plaintiffs were acting for him and expecting to be paid therefor.

The errors complained of relate to only two matters, namely: (1) The admission of improper evidence in behalf of plaintiffs on rebuttal; and (2) the giving of plaintiffs' instruction No. 1.

The evidence which defendant complains of as having been erroneously admitted was that of Walter Boesch, the architect of the building, who was offered by plaintiffs in rebuttal.

The defendant, in addition to denying that he ever directed plaintiffs to act for him, testified that from all negotiations had between him and plaintiffs, and from all the facts and circumstances coming within his knowledge (theretofore stated by him in detail), he was led to believe, and did believe, from the very start and continuously thereafter, that plaintiffs were employed by and were representing the lessee or party seeking the location. Defendant then placed upon the stand defendant's bookkeeper and stenographer, a Miss Lewis, who claimed to have heard the first conversation between plaintiffs and defendant about the matter of a building and lease. She related the conversation as she claims to have heard it, and also stated that she was present and heard the further negotiations between them at various times, giving what was said, and that she wrote the correspondence in reference to the matter which was introduced in evidence. The defendant's counsel then asked the following question and the following took place:

"Mr. Brown: From the conversation you heard in the office there, and understanding the transaction as you did, by whom did you consider Mr. Davis was employed in this matter?"

"Mr. Culver: We object to that as a conclusion."

"The Court: The objection will be sustained. (To which ruling of the court the defendant excepted.)"

"Mr. Brown: I will put the question in this form: Judging from the conversations you have heard between Dr. Geiger and Mr. Claude Davis, and judging by Mr. Davis' conduct in the transaction, and the letters that you wrote to Mr. Davis, and his conduct in connection therewith,

whom did you understand that Mr. Davis represented in this case, the lessor or the lessee?"

"Mr. Culver: Now, we objected to that once, because we thought it was improper, but I am not going to object any more, but I want to give notice to Mr. Brown that we reserve the right to ask the same kind of question of other witnesses. We have no objection to it now that Mr. Brown is pursuing it after the court had ruled on it."

"Mr. Brown: Is the objection withdrawn?"

"Mr. Culver: We are not objecting to this question."

"Mr. Brown: Go ahead, then, and answer the question."

"A. Well, at first I didn't know whom he represented; I couldn't tell; I supposed he was representing the other party, and not Dr. Geiger; and who the other party was I didn't know for a long time."

"Q. Well, did you understand that he was representing Dr. Geiger or the lessee? A. Oh, the lessee."

The plaintiffs in rebuttal, as heretofore stated, placed Boesch on the stand. He testified that, upon being asked by defendant to give an estimate of the cost of the building, the defendant told him to "see Mr. Davis [one of plaintiffs]; he knows what they want," and that later, at his (witness') office, he discussed the matter of the character of the building with Mr. Davis and a Mr. Ellingwood, of the Dry Goods Company. The following then occurred:

"Q. Now, in that conversation, who talked on the part of the Leader Dry Goods Company?"

"Mr. Brown: That is objected to, your honor."

"Mr. Culver: That is proper, your honor. You remember what Mr. Brown went into here, and I objected once, and the court sustained it, and then Mr. Brown persisted in going into it, and now I want to go into the same conversation, as to whom he was actually representing."

"Mr. Brown: We object to it. I am objecting to any conversation unless Dr. Geiger was present."

Then took place some colloquy between court and counsel wherein the court was reminded of the fact that, "when Miss Lewis was on the witness stand, Mr. Brown asked her from what was said and done whom she thought Mr. Davis was representing, and we objected to it," and that after the objection was sustained the question was asked again, and that plaintiffs' counsel had said, "We don't object again, but we want to go into the same thing with other witnesses." Then occurred the following:

"Mr. Culver: Dr. Geiger said that he understood that Mr. Davis was representing the Leader, and now we are trying to meet that. We couldn't meet it before; there was no evidence of anything of that sort. Of course, I am going to ask the other question that we referred to, the same one that was asked Miss Lewis, but I hadn't gotten to that yet."

"The Court: Well, of course, the trouble was that Dr. Geiger and Mr. Davis both roamed all over everything, and nobody made any objec-

tion. In these other matters I am pretty near in the attitude where I have to let in pretty near everything you ask for now. Neither side objected to evidence that was clearly objectionable if anybody had wanted to object to it. Well, let him answer it."

The question was then read by the stenographer, as follows: "Now, in that conversation, who talked on the part of the Leader Dry Goods Company?"

"Mr. Brown: Now, that is objected to because it calls for a conclusion of the witness, and doesn't call for who acted or what was done, and for the further reason that it doesn't prove or tend to prove or disprove any fact in controversy in this case.

"The Court: Well, it is not as relevant as it might be possibly, and yet it might explain some of the other evidence that is already in here. (To which ruling of the court the defendant excepted.)

"Mr. Culver: Answer the question.

"A. Mr. Ellingwood represented the Leader Dry Goods Company.

"Q. Now, who, if any one, was representing Dr. Geiger in the transaction there? A. Mr. Davis and myself.

"Q. Were there any differences between you? A. Yes.

"Q. And a discussion took place there about it? A. There were some points that were not clear in this letter that they brought in there, and we tried to clear them up."

The witness Boeschen then testified that he saw and read a letter from defendant which had theretofore been introduced in evidence, and that he made the pencil interlineations therein which had been the subject of some inquiry in the preceding testimony, and then the following took place:

"Q. Now, from what you saw then, and all through this transaction, while you were acting as architect, from the time Mr. Davis and Dr. Geiger first spoke to you, who did you understand, from all those transactions, was representing Dr. Geiger in this matter?

"Mr. Brown: That is objected as their case in chief, and not proper rebuttal.

"The Court: That simply goes to contradict Dr. Geiger?

"Mr. Culver: That is all—and Miss Lewis.

"The Court: And also Miss Lewis gave an opinion on the same matter.

"Mr. Brown: It is not rebutting anything that Dr. Geiger said. It is giving the opinion of this man as to this case, and as a part of the case in chief. It is evidence in chief.

"The Court: The objection will be overruled. (To which ruling of the court the defendant excepted.)"

The question was then read by the stenographer, as follows: "Now, from what you saw then, and all through the transaction, while you were acting as architect, from the time Mr. Davis and Dr. Geiger first spoke to you, who did you understand, from all those transactions was representing Dr. Geiger in this matter? A. I got the impression that Mr. Davis was representing Dr. Geiger."

[2-4] Thereupon, on cross-examination, defendant's counsel drew from Boeschen an ad-

mission that his idea that Davis represented Geiger "was practically an assumption" on his part. But no motion to strike out his former evidence was made. The question asked by defendant of Miss Lewis, "By whom did you consider Mr. Davis was employed in this matter?" was clearly inadmissible, because it called for the conclusion or opinion of the witness. It is not within any of the exceptions to the general rule excluding opinion evidence. In the first place, the question was not as to a fact of common observation nor concerning a matter within the common experience and observation of men. Such, in general, are the matters about which a nonexpert witness is allowed, under proper conditions, to give his opinion or conclusion. 17 Cyc. 84-108; 2 Jones on Ev. §§ 360-387. But here the matter called for was an opinion on an involved and complex question of mixed law and fact, difficult often for one skilled in such matters to decide, and this alone made the witness' opinion inadmissible. 11 R. C. L. 566. Neither did the subject-matter of the inquiry relate to anything depending upon facts, perceived by the senses, which were so numerous and subtle as to make it difficult or impossible to adequately describe them, nor, as stated, was the conclusion "so simple and so well within the range of common experience that the witness can relate what he has seen more accurately, as well as more easily, by stating his conclusion than by attempting to detail the evidential facts." 11 R. C. L. 568. Opinions of witnesses are admissible when the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof, or if the witness has had the means of personal observation, and the facts and circumstances upon which he bases his conclusion are incapable of being detailed so intelligibly as to enable any one but the observer himself to form an intelligent conclusion from them. Eyerman v. Sheehan, 52 Mo. 221; State v. Patrick, 107 Mo. 147, 17 S. W. 686. But undoubtedly, after Miss Lewis had stated the facts, the jury was in possession of all the data she had on which to base a conclusion; indeed, they were far better qualified to form an opinion than she was; for they had the instructions of the court to guide them. For this reason her opinion on the difficult matter (which was the sole issue in the case) was wholly inadmissible, even though there was a question involved as to what a reasonable and ordinary person would be led to believe as to whom the brokers were representing and working for, and even though she first gave the facts on which her conclusion was based. If such evidence was incompetent, the giving of these facts did not make her testimony admissible. Merely because there was a question of an implied contract and the question whether a reasonable person under like

circumstances would think Davis Bros. were acting for the Dry Goods Company, and not for defendant, did not make Miss Lewis' opinion competent. As heretofore stated, the jury had all the data Miss Lewis had or could properly base her conclusion on, and hence the jury could decide better than she what a reasonable person should have thought. Indeed, it is peculiarly the jury's function to pass upon what would meet the requirements or satisfy the mind of that theoretical, reasonable, ordinary person which the law gives to the jury as a standard by which to measure human conduct. We have not been cited to a case upholding the admission of evidence of the impressions made on other persons, in cases of this character or similar thereto, though they are permissible in cases of slander and libel; for there the impression made on others is the wrong or damage done. In cases where the question is whether conduct was reasonably prudent or a place was reasonably safe, the opinions of witnesses are not admissible on that issue. *King v. Missouri Pacific*, 98 Mo. 235, 11 S. W. 568.

[5] Miss Lewis' evidence was objected to, and the objection was sustained; whereupon the same question was asked, but in a different form, viz.: "Whom did you understand that Mr. Davis represented in this case, the lessor or lessee?" This was asking her to draw from the facts she had testified to an inference which was the vital issue in the case, which the jury were empaneled to decide, and to decide which they were in a better position than she. Opposing counsel immediately served notice that, if this improper inquiry were going to be pursued notwithstanding the court's adverse ruling, he would offer countervailing evidence on the same line. The inquiry was persisted in, and an answer favorable to defendant was obtained. But, when plaintiffs offered such rebuttal evidence, defendant objected, and now relies upon the admission thereof as constituting reversible error. Both sides went into territory outside of the proper evidentiary limits. The jury heard the same on both sides, as well as the evidence that was properly admitted, and returned their verdict for plaintiffs. It would seem that, after having thus entered the forbidden territory (declared so by the court), upon the terms laid down by opposite counsel, and having lost on that venture, the loser ought not to afterwards complain, at least where it is clear (as it is from the record in this case) that the trial court was induced to rule as it did by the incursion into forbidden fields on the part of both sides. *Mason v. Fourteen Mining Co.*, 82 Mo. App. 367, 371.

[6] But there is another reason for not convicting the trial court of error on the point made, and that is this: The first question asked Boeschen, to which objection was made, related to but one occasion, the dis-

cussion had in the architect's office over some points relative to the deal and the building which were not clear and about which the parties were not agreed. The question was, "Now in that conversation who talked on the part of the Leader Dry Goods Company?" or, in other words, "Who argued on the side of the Dry Goods Company?" This was not asking who was authorized or employed to represent it, but who did in fact talk for it on that occasion. The witness replied that Mr. Ellingwood represented the Dry Goods Company. It would seem that this was no more of a conclusion than if one were asked who appeared for a certain litigant at an argument of his case. The witness was not asked whether Davis was empowered, employed, or authorized to act for Dr. Geiger, but only whether he did on that occasion represent him.

Again, the defendant's charge was that Davis Bros. acted for the Dry Goods Company, and it would seem that it would be permissible to show that on this occasion he spoke in behalf of Dr. Geiger, not that he was employed by Dr. Geiger, but that he merely did talk for him. This would also show a part of the services rendered by plaintiffs, and thus enable the jury, if they otherwise found that Dr. Geiger authorized them, to say what was the reasonable value of those services.

As to the other question, "Now from what you saw then, and all through the transaction, while you were acting as architect, from the time Mr. Davis and Dr. Geiger first spoke to you, who did you understand, from all those transactions, was representing Dr. Geiger in this matter?" there is this to be said: This was strictly the same matter about which Miss Lewis had been examined. But it will be noticed that here the objection was not on the ground that the question called for a conclusion. The question was "objected to as their case in chief, and not proper rebuttal." When the court suggested that it went to contradict Dr. Geiger, and also Miss Lewis gave an opinion on the same matter, counsel said:

"It is not rebutting anything that Dr. Geiger said. It is giving the opinion of this man as to this case, and as a part of the case in chief. It is evidence in chief."

The objection was overruled, and the witness said he got the impression that Davis was representing Geiger, which the witness afterwards on cross-examination said was "practically an assumption." The point that the architect, Boeschen, was not in possession of facts on which to base his impression, and did not state those facts, as in the case of Miss Lewis, ought not to be allowed to prevail now because the attention of the court was not called to this, nor was the objection to this question placed or made on any such ground, or anything similar there-



to. Consequently, even if, because of the question of an implied contract and of whether a reasonable person under like circumstances would have known plaintiffs were acting for defendant, it could be said that Miss Lewis' opinion was competent as showing the impression made on her mind, then likewise the evidence of the architect, Boeschen, was competent to show the impression made on his. The evidence, however, was not permissible on either side, but both sides went into it, and the court was induced by their action to allow them to do so. The jury heard all of the evidence offered on both sides, including that which was proper as well as improper. Both sides got the full benefit of what they chose to offer in that regard, and the jury decided in favor of plaintiffs. Under the circumstances, to reverse the judgment upon the point complained of would convict the trial court of error, not because error was committed against one party and over his protest, but because the court, influenced by the course of counsel on both sides, permitted them both to wander outside the proper fields of evidence. In other words, the case would be reversed and remanded for a new trial merely because of a mutual and technical violation of the rules of the game. We do not think this should be done.

Plaintiffs' instruction No. 1, of which defendant complains, is as follows:

"You are instructed that, if you believe from the evidence that the witness F. Claude Davis, as a member of the firm of Davis Bros., and the defendant Jacob Geiger, verbally agreed that the said Davis should undertake, or, if the defendant consented, that said Davis should endeavor to secure a tenant for defendant, who would enter into a lease with defendant for the occupancy of the ground owned by defendant and the building to be erected thereon at the southeast corner of Sixth and Francis streets in the city of St. Joseph, Mo., and mentioned in evidence, then such agreement in law constituted a contract of employment, and in such circumstances it was not necessary, in order to make the defendant liable to the plaintiffs, that the amount of compensation should have been mentioned or the amount agreed upon, and if you believe that the plaintiffs, acting through the witness F. Claude Davis, in pursuance to said understanding or consent, did secure the Sturgis, Ellingwood & Goerman Dry Goods Company, mentioned in evidence, as such tenant for the defendant, and that the said defendant executed the lease to the said Dry Goods Company introduced in evidence, then your verdict in this case will be for the plaintiffs for such sum as you may believe from the evidence is a reasonable compensation for the services, if any, performed by them for the defendant in said matter, not exceeding the sum of \$7,012.50."

Defendant's contention in reference to this instruction is that it told the jury that, if they believed from the evidence that plaintiffs had secured a tenant for the building with the knowledge and consent of defend-

ant, then the verdict should be for plaintiffs, and did not require the jury to find that plaintiffs were acting for the defendant, and not for the lessee, and in telling the jury that, if defendant merely consented to plaintiffs' securing a tenant, it should have told the jury under what circumstances such consent would render the defendant liable.

[7, 8] But the instruction does not say anything about securing a tenant for the building. It says, if the parties "verbally agreed that the said Davis should undertake, or if the defendant consented that said Davis should endeavor"—to do what? "To secure a tenant for defendant, who would enter into a lease with defendant," etc. It is conceded the defendant knew the plaintiffs were real estate brokers, and that he knew they were not "doing this [the work of securing a tenant] for pleasure or pastime." If, then he either verbally agreed that plaintiffs should undertake to procure for him a tenant who would enter into a lease with him, or if defendant consented that plaintiffs should endeavor to secure such a tenant for him, and such tenant was procured "for the defendant," and a lease was made and entered into, then defendant would be liable, since, as an experienced business man, he knew plaintiffs were in that business for pay and were not working for fun. We are unable to see how the jury could fail to understand, or would be likely to misunderstand, this instruction. If a man has a farm to sell and a broker gets his permission to secure a purchaser for him, can there be any doubt but that the broker is to act as the agent of the owner? Likewise, if the owner has realty to rent, and he consents that a broker may undertake to procure for him a tenant for such realty, does not this necessarily mean that the broker may act as the owner's agent in so doing? The jury could not misunderstand the matter; for plaintiffs' second instruction made this perfectly plain, because it specifically told the jury that, if they found there was no express agreement to employ plaintiffs, yet if they believed from the evidence that plaintiffs, acting through F. Claude Davis, "advised defendant that they would attempt to secure said tenant for him," and by their efforts did so, "and the defendant at the time plaintiffs were engaged in securing such tenant knew that plaintiffs, through said witness F. Claude Davis, were assuming to [act] and were in fact acting for defendant and expected said defendant to pay for their services, and that defendant, with knowledge thereof, accepted the benefit of said services and executed the lease," etc., then plaintiffs were entitled to recover. So that, even if plaintiffs' instruction No. 1 could be said to be obscure in its meaning, or was not as specific as it might have been (which we do not think), still the obscurity was removed by plaintiffs' second instruc-

tion, and the instructions on the part of the defendant (eight in number) iterated and reiterated in various ways the proposition that plaintiffs could not recover unless they were acting as agents for Gelger, either under an agreement of employment or under such circumstances as that Gelger knew, or as a reasonable man must have known, that plaintiffs were acting for him and as his agents with the expectation on their part of receiving pay from him. Under these circumstances, unless plaintiffs' instruction left out some necessary element of plaintiffs' cause of action or contained some positive misdirection, the obscurity, if any, in said instruction was made perfectly clear by defendant's instructions, and no reversible error can be predicated thereon. *Hughes v. Chicago & Alton R. Co.*, 127 Mo. 447, loc. cit. 452, 30 S. W. 127; *Sutter v. Metropolitan St. Ry. Co.*, 208 S. W. 851, 853, and cases cited.

The judgment is affirmed.  
All concur.

**ROBERTS et al. v. AMERICAN NAT. ASSUR. CO. (No. 13062.)**

(Kansas City Court of Appeals. Missouri.  
Jan. 27, 1919.)

**1. CORPORATIONS ⇨508(1)—ACTION—VENUE—SUIT ON POLICY.**

Under Rev. St. 1909, § 1754, the "venue" of action on a life policy was either in the county where the cause of action accrued or in any county where defendant insurer had an office or agent.

**2. INSURANCE ⇨618—ACTION ON LIFE INSURANCE POLICY—ACCRUAL OF CAUSE OF ACTION—VENUE.**

A cause of action on a life insurance policy, for the purpose of determining venue, accrues at the place where the insured dies.

**3. PLEADING ⇨104(1)—ANSWER—PLEA TO JURISDICTION.**

Where the fact that the cause of action on a life insurance policy did not accrue in the county of suit was not disclosed by the petition, and absence of jurisdiction on account of improper venue did not appear from or in the sheriff's return, the only way to question the court's lack of jurisdiction was by plea to the jurisdiction in the answer.

**4. ABATEMENT AND REVIVAL ⇨85—ANSWER—JOINING PLEA TO JURISDICTION AND PLEA TO MERITS.**

Since the Code contemplates a single answer containing all defenses, coupling of a plea to the jurisdiction, which must be raised by answer, with a plea to the merits, does not waive the matter of jurisdiction.

**5. APPEARANCE ⇨23—WAIVER OF LACK OF JURISDICTION—VENUE—TAKING DEPOSITIONS AND STIPULATING.**

In an action on a life policy, where defendant insurer properly coupled with a plea to the merits a plea of lack of jurisdiction based on improper venue, by serving notice to take, and taking, depositions, and stipulating as to the truth of certain facts, before the plea to the jurisdiction was filed, the insurer did not waive the lack of jurisdiction.

**6. APPEARANCE ⇨23—LACK OF JURISDICTION—VENUE—WAIVER.**

If defendant's complaint of lack of jurisdiction had been based on want of notice or defective or insufficient service, the taking of depositions and the signing of a stipulation as to facts conceded would have constituted a waiver of the defect.

**7. APPEARANCE ⇨9(1)—TEST OF.**

The test whether a defendant has made a general entry of appearance is whether he has become an actor in the cause.

Appeal from Circuit Court, Schuyler County; N. M. Pettingill, Judge.

Action by E. H. Roberts, administrator of the estate of Ralph G. Smith, and others against the American National Assurance Company. From judgment for plaintiffs, defendant appeals. Reversed.

Jones, Hocker, Sullivan & Angert and James C. Jones, Jr., all of St. Louis, and Campbell & Ellison, of Kirksville, for appellant.

Higbee & Mills, of Lancaster, for respondents.

**TRIMBLE, J.** This is an action upon a policy of insurance on the life of Ralph Goodrich Smith. The policy was issued under date of December 3, 1913, insured being then a resident of Adair county, Mo. By the terms of the insurance contract, defendant agreed that, upon the death of insured during the continuance of the policy, it would pay the sum of \$2,500 at its home office in St. Louis, Mo., to the administrators, executors, or assigns of the insured. To secure an indebtedness, Smith assigned the policy to one Foreman, who in turn assigned it to John C. Mills, who joins in the suit and consents that recovery may be had in the name of the administrator herein.

After the issuance and assignment of the policy, the insured removed to and resided in the town of Leaksville, state of North Carolina, where he died on July 18, 1915. Plaintiff, Roberts, was appointed administrator of his estate by the probate court of Schuyler county, Mo., on the — day of —, 1917, and thereafter, on September 4, 1917, this suit was instituted in the circuit court of said Schuyler county, returnable to the October, 1917, term, which began on the

15th of that month. The petition alleged the existence of the defendant as an insurance corporation organized under the laws of Missouri, the issuance of the policy, the death of insured on the date aforesaid, and the appointment of an administrator. Nothing was said in the petition as to the place of insured's death. Service was obtained on the defendant at its home office in the city of St. Louis, Mo., on September 5, 1917.

On the return day, October 15, 1917, the defendant filed its answer, which contained first a plea to the jurisdiction of the court over the cause and the person of defendant, with a prayer that defendant be dismissed with its costs, and next a plea to the merits of the cause based upon the charge that the policy was not in force at the time of Smith's death, because of his failure to pay a certain installment of premium when due.

As grounds for the plea to the jurisdiction, it was alleged therein that the defendant was a Missouri corporation having its chief office or place of business in the city of St. Louis; that it had no office nor agent in Schuyler county, Mo.; that the insured, Ralph Goodrich Smith, resided in Leaksville, N. C., and died there. Consequently, it was contended that under section 1754, R. S. 1909, which provides that, "Suits against corporations shall be commenced either in the county where the cause of action accrued, \* \* \* or in any county where such corporations shall have or usually keep an office or agent," etc., the court was without jurisdiction over the action or the person of defendant.

The cause was set for trial on the first day of the term to which it was returnable, to wit, October 15, 1917. When it was called, defendant asked, and the court granted, a trial, first, of the issues under the plea to the jurisdiction. Evidence on that was heard, and it was established beyond question that the defendant had no office nor agent in Schuyler county, that the insured was residing in Leaksville, N. C., and died there, and that service was made upon defendant at its home office in St. Louis.

In opposition to the plea, plaintiff showed that on September 22, 1917, the defendant gave notice to take, and on the 27th of September did take, depositions in St. Louis. These depositions related to matters concerning the merits of the issue, except the fact that the insured was living at Leaksville, N. C., and died there. Plaintiff also introduced a written stipulation between counsel for plaintiff and defendant, which was filed in court on said return day, October 15, 1917, wherein, "for the purposes of the trial" it was admitted that defendant executed the policy, that Smith prior to his death was practicing his profession of osteopathy at Leaksville, N. C., and died there on July 16, 1915; that his widow promptly notified the

defendant; and that it had denied liability on the ground that the policy was not in force at the time of his death. This stipulation seems to have been entered into October 1, 1917, but, as stated, was not filed in court until the return day, to wit, October 15, 1917, and after the plea to the jurisdiction was filed.

The court, after hearing the evidence pro and con on the plea to the jurisdiction, found "that before said plea was filed by the defendant, the defendant had entered its appearance in this action and waived all objections to the jurisdiction of this court." Thereupon the plea to the jurisdiction was overruled. To this defendant excepted, and then requested that the trial on the merits be laid over till later in the term, December 17th, to enable defendant to apply to the Supreme Court for a writ of prohibition. This was done, but the writ was refused. On December 17th, and at the same term, the case was called for trial on the merits, when the defendant renewed its objection to the jurisdiction of the court. This again was overruled, the defendant excepting.

The case was then tried on its merits before the court without a jury. The court, refusing all declarations of law, found for plaintiff, and rendered judgment on the policy for \$2,500. The defendant has appealed.

[1, 2] The venue, or the place where the law directs the suit to be instituted, was either in the county where the cause of action accrued or in any county where the defendant had an office or agent. Section 1754, R. S. 1909; *State ex rel. v. Gantt*, 274 Mo. 490, 208 S. W. 964. The cause of action on a life insurance policy accrues at the place where the insured dies. *Rippstein v. St. Louis Mutual Life Ins. Co.*, 57 Mo. 86; *Martin v. Mutual Life Ins. Co.*, 190 Mo. App. 703, 705, 707, 176 S. W. 266; *Bankers' Life Ass'n v. Shelton*, 84 Mo. App. 634. Consequently, Schuyler county was not the venue specified by the law as the proper place in which to bring the suit, since the cause of action did not accrue there, nor did the defendant have an office or agent there.

[3, 4] The fact that the cause of action did not accrue in Schuyler county was not disclosed by anything in the petition, nor did the absence of jurisdiction on account of improper venue appear there or in the sheriff's return. Hence the only way to question the court's lack of jurisdiction was by a plea to the jurisdiction in the answer. *Little v. Harrington*, 71 Mo. 390. Our Code contemplates but one answer, which must contain all the defenses, and therefore the coupling of a plea to the jurisdiction which must be raised by answer, with a plea to the merits, does not waive the matter of jurisdiction. *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267; *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481, 487, 83 S. W. 479; *Thomasson v. Mercantile*, etc.,

Ins. Co., 217 Mo. 485, 116 S. W. 1092; Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069; State ex rel. v. Vallins, 140 Mo. 523, 41 S. W. 887; State ex rel. v. Grimm, 239 Mo. 135, 143 S. W. 483; Barnett v. Colonial Hotel Building Co., 137 Mo. App. 636, 648, 119 S. W. 471; Jordan v. Chicago & Alton R. Co., 105 Mo. App. 446, 456, 79 S. W. 1155.

[5] But the trial court held, and plaintiff contends here, that because the defendant served notice to take, and did take, depositions, and entered into a stipulation as to the truth of certain facts, before the plea to the jurisdiction was filed, the lack of jurisdiction was waived.

But in determining whether such acts constitute a waiver of the lack of jurisdiction here complained of, several things are to be kept in mind. The lack of jurisdiction is based upon improper venue, and not upon improper or defective notice or summons, or the service thereof. The acts relied upon to constitute waiver were things done outside of court, and amounted to nothing more than a combined preparation of the proof or evidence needed by defendant in both trials, the one on the plea and the other on the merits. This preparation for trial was done before there was any opportunity to file a plea to the jurisdiction; and the objection to the jurisdiction was filed as soon as possible, since it was filed on the first day of court, the return day of the writ. The basis of the complained lack of jurisdiction was that the suit was not brought in the proper venue, the place designated by the statute. Such defense could only be raised by answer; the answer must contain all defenses; and the joining of a defense to the merits does not waive the defense of improper venue. If the joining of the two kinds of defenses in the same pleading is permitted, why is not a defendant to be permitted to make joint preparation to meet both issues? In this case, the plea was filed on the return day of the writ. That day was also the day on which the case was set for trial. Is the defendant to be compelled to forego its preparation for the trial on the merits in order that it will not waive its right to question the jurisdiction? It is not so compelled in the matter of its pleading. Why, then, is it compelled to forego preparation therefor lest it waive the jurisdictional plea? Of course, if defendant takes any step in court which involves, even by implication, a submission to, or an admission of, its power and authority to act in that case, and does this without first questioning the jurisdiction on account of improper venue, then the lack of jurisdiction on that account would doubtless be waived by such course. For instance, appearing in court and obtaining a continuance, or a change of venue, or procuring the court to do, or agreeing without objection that the

court shall do, something which could not be done unless there was jurisdiction over the person would no doubt waive the right to object to the case proceeding in that venue; the court otherwise having jurisdiction of the subject-matter. But where is there any step of that kind taken in court in this case? The defendant had to appear when summoned, since the improper venue had to be raised by answer and tried as an issue. The defendant did appear, and did make the objection at the first opportunity, and nothing was done which conceded the court's power regardless of the question of venue. All that the defendant did was in order that it might be prepared on both branches of its answer. Success on either branch depended upon proof, and that had to be adduced by defendant. The defendant could not be assured, in advance, of the result on either branch. The return day was also the day of trial. If separate trials of the two issues was in the discretion of the court (Clark v. St. Louis, etc., R. Co., 234 Mo. 396, 137 S. W. 583), yet, if the court exercised its discretion to grant a separate trial, the defendant could not be sure that a continuance would be granted to allow sufficient time to prepare for trial on the merits in case the trial on the jurisdictional feature resulted adversely. Hence it would seem the defendant had the same right to make a joint preparation of the proof needed at both trials as it did to file a pleading which joined those two defenses and created the necessity for two trials. In other words, the acts of the defendant, relied on to constitute waiver in this case, were not matters taking place in court, and in connection with the cause proper, but were matters outside of court, and merely collateral to the cause, and involved no more than a mere preparation of matter for use if it were needed. It implied no admission whatever that, regardless of the question of venue, the court was entitled to go on with the case.

[6] If the complaint of lack of jurisdiction had been based on want of notice or defective or insufficient service, then no doubt the taking of depositions and the signing of a stipulation as to facts conceded would constitute a waiver of that defect. Because, such acts would necessarily imply that defendant was admitting that it had notice of the suit, and regardless of whether it had been properly served or not, it was proceeding as if service was regular. In such a case, too, the objection on account of defective service would not go to the action itself, but only to a step required to be taken therein, namely, the serving of summons or notice. But in the case at bar the objection strikes at the action itself, which action appears all right on the face of things, and will be perfectly good if the defendant does not obey the summons and come into court prepared with all defenses which may be required. Hence its

preparation therefor ought not to deprive it of the right to object to the venue, when the objection is made at the first opportunity, and before the court is requested to do anything else in the case. In such circumstances, the defendant has done nothing which in any way implies or concedes that the court may proceed regardless of the venue.

It is true it is said in many cases that a defendant by issuing subpoenas, taking depositions, etc., "waives lack of jurisdiction," but it will be found that the cases were either prior to the holding in the case of *Little v. Harrington*, supra, announcing that a plea to the jurisdiction, permissible only by answer, is not waived by being joined with a plea to the merits, or were cases which did not consider or take note of the change in that regard made by our Code, or else were cases where joinder of pleas in the answer was not permissible. Cases involving appeals from a justice to the circuit court where jurisdiction is claimed to be lacking for want of notice of appeal, and cases where the want of jurisdiction is predicated upon defective or irregular service of summons, come under the last-named head. In cases of this character, lack of notice and defective or irregular service can be waived by such acts as are relied on herein. But in such cases and in other cases where the defect in jurisdiction appears on the face of the petition or in the return, the point cannot be raised by answer; and a defendant is not entitled to join such defense with a defense to the merits in one pleading, as he is in the case at bar.

[7] For this reason, we think that in a case like the one at bar, where the only way a defendant can raise the question of jurisdiction is by answer, and the law permits him to include therein such defense jointly with his defenses to the merits, and where he has raised that question as soon as he had opportunity, and asked the court to pass upon that question before asking for anything else or participating in any other step or action of the court as an actor therein, then he should not be deemed to have waived the jurisdictional defect of improper venue because he prepared for the trial of all questions raised in his answer. It is not every act of a defendant that will constitute a general entry of appearance in a cause. For a party to have impliedly bound himself to submission, he must have "asked or recovered some relief in the cause, or participated in some step taken therein." *Fulton v. Ramsey*, 67 W. Va. 321, 326, 68 S. E. 381, 383 (140 Am. St. Rep. 969). See, also, *Scott v. Hull*, 14 Ind. 136; *Bentz v. Eubanks*, 32 Kan. 321, 4 Pac. 269; *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460. The test is has he become an "actor in the cause." *Merchants', etc., Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L.

Ed. 488. While the rule announced in the foregoing decisions is not generally applicable in this state, still we think it is applicable to a case where the jurisdictional defense is allowed to be pleaded with the defense to the merits and what is done is only in preparation to meet the defenses raised by the answer, and no step in court has been taken before raising the plea.

Plaintiff urges that the cause of action did not arise until the appointment of the administrator, and that as the administrator was appointed in Schuyler county the cause of action accrued there, citing 1 Corp. Juris. 1145, and 1 Words and Phrases (2d Series) 56. We think, however, this relates rather to the time when the cause of action became enforceable rather than the place where it accrued. Under the decisions hereinbefore cited, a cause of action accrued to insured's estate at the place of his death, which became enforceable when an administrator was appointed.

Believing that the defendant should not be regarded as having waived the jurisdictional question by reason of the preparation of defenses which the law allows to be jointly pleaded, and which preparation involved no act necessarily inconsistent with its right to insist upon the objection to the venue, the judgment is reversed.

All concur.

HOAGLAND WAGON CO. v. LONDON GUARANTEE & ACCIDENT CO.  
(No. 13229.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

1. INSURANCE — 514 — EMPLOYER'S CASUALTY INSURANCE — PAYMENT OF "LOSS" — RIGHT TO RECOVER.

Where a company holding a policy indemnifying it against loss through damages for death of, or injuries to, a servant, after a servant was injured and recovered judgment, on the advice of the attorney for the indemnity insurer transferred its business and assets to one of its stockholders, but thereafter borrowed money to pay the servant's judgment, it sustained a "loss" within the meaning of its indemnity policy, whether it was solvent or insolvent, and could recover from the insurer, which cannot urge the payment was voluntary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loss.]

2. INSURANCE — 665(4) — CASUALTY INSURANCE — LOAN TO PAY JUDGMENT — SUFFICIENCY OF EVIDENCE.

Evidence held to show that money was actually loaned by a third person to a company, holder of an indemnity policy against loss through death of or injuries to its servant, which money was used by the company in pay-

ing an injured servant's judgment against it, so that it sustained a loss within the meaning of its indemnity policy rendering the insurer liable.

**3. INSURANCE — 514—CASUALTY INSURANCE—PAYMENT BY INSURED—GOOD FAITH.**

The matter of good faith of a company in paying the judgment of its injured servant, raised by the company's casualty insurer when sued for the loss, goes only to the question whether the judgment was actually paid by the company, or whether a form of payment was gone through amounting to a mere sham or colorable transaction and not actual payment.

**4. INSURANCE — 669(12)—CASUALTY INSURANCE—INSTRUCTION.**

In an action against a casualty insurer by a company which held a policy against loss from injuries to or death of a servant, instruction *held* proper as submitting the only issue of fact in the case, whether there had been a payment in good faith by the company of an injured servant's judgment against it.

**5. INSURANCE — 598 — INDEMNITY INSURANCE—LIABILITY FOR INTEREST.**

In view of the indemnity limits of its policy, indemnity insurer of company against loss through damages from death of, or injury to, a servant, *held* liable for interest on the amount of the original judgment in favor of the servant against the company, and, after demand on it for payment of the judgment, interest, and costs, for statutory interest of 6 per cent. on the whole sum due.

**6. TRIAL — 199—INSTRUCTIONS—QUESTIONS OF LAW.**

In suit by a company against its indemnity insurer for loss through damages from death of or injuries to a servant, instructions *held* properly refused as submitting questions of law.

**7. INSURANCE — 634(1)—INDEMNITY INSURANCE—PARTY IN INTEREST TO SUE.**

A company was the real party in interest to sue on its indemnity policy against loss through damages from death of or injuries to a servant, though the policy had been pledged to secure payment of a note given by the company for money borrowed to pay the servant's judgment; the written pledge not giving the lender any right to file suit against the indemnity insurer until the company failed to do so.

**8. INSURANCE — 602, 675—INDEMNITY INSURANCE—VEXATIOUS REFUSAL TO PAY—RIGHT TO RECOVER DAMAGES AND FEES.**

A company, which was the real party in interest to sue on its indemnity policy against loss through damages from death of or injuries to its servant, had a right to recover statutory damages and attorney's fees of the insurer for its vexatious refusal to pay, though the policy was pledged to secure a note given by the company for money borrowed to pay the injured servant's judgment against it.

**9. INSURANCE — 668(1)—INDEMNITY INSURANCE—VEXATIOUS REFUSAL TO PAY—QUESTION FOR JURY.**

Whether an indemnity insurer against loss through damages from death of, or injury to,

employees, had been guilty of vexatious refusal to pay a loss, *held* for the jury.

**Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.**

Suit by the Hoagland Wagon Company against the London Guarantee & Accident Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Battle McCordle, of Kansas City, for appellant.

Burke & Kimpton, of Kansas City, for respondent.

**BLAND, J.** This is a suit upon an employer's liability policy of insurance. Plaintiff recovered a verdict and judgment, and defendant has appealed. The policy indemnified plaintiff against loss from liability that might be imposed by law upon it for damages on account of death or bodily injuries suffered as the result of accident occurring to employees of the plaintiff, not to exceed \$5,000 for death or injury to one or \$10,000 to more than one. At the time the policy was issued, plaintiff was engaged in the manufacture and repair of wagons in Kansas City, Mo. While the policy was in force and on June 28, 1914, one Harry Lindelof, an employee of the defendant, was injured and filed suit against this plaintiff on the 18th day of August, of that year, to recover damages in the sum of \$10,000 for such injuries. Defendant was notified of the accident and suit and after investigation undertook the defense of the action. On June 17, 1915, judgment was rendered in the circuit court in favor of Lindelof in the sum of \$5,000. The case was appealed to this court by the defendant, without any supersedeas bond being given, and on May 22, 1916, the judgment was affirmed.

After the affirmance of the judgment, plaintiff attempted to get defendant to satisfy the judgment; but defendant refused to do so, and, finally, plaintiff borrowed the money with which to pay the judgment, costs, and interest, which it paid. After making repeated demands upon defendant to reimburse it for the outlay and upon the refusal of defendant to do so, plaintiff brought this suit, which resulted in a verdict and judgment for plaintiff in the sum of \$8,966.79, being the amount of the Lindelof judgment, costs and interest thereon, and attorney's fees, and penalties for vexatious refusal to pay. The judgment included \$500 penalties and \$500 attorney's fees.

As matters of defense to this action, defendant set up in its answer an admission of the execution of the policy and a denial of each and every other allegation in the petition, and by way of special defense pleaded that paragraph 2 of the policy pro-

vided that defendant should indemnify plaintiff against "loss" from liability imposed by law upon plaintiff for damages, and that clause H, section 8, provided that no action should be brought against defendant to recover for any loss or expense under the policy unless it be brought by the assured "for loss or expense actually sustained and paid in money by assured." The answer further alleged that plaintiff had not actually sustained any such loss or expense; that it had not paid in money any such loss or expense; that, if there was any settlement between plaintiff and Lindelof, the same was made voluntarily by plaintiff, and of its own accord, and no loss or expense was actually sustained; that at the time of the alleged payment of the Lindelof judgment plaintiff was insolvent and had discontinued business; that its charter had been revoked by the state; that it had conveyed all of its property to trustees for the benefit of creditors and had no intention of resuming business, and judgment could not be collected against plaintiff; that under the provisions of the policy it was the duty of plaintiff not to incur voluntarily and unnecessarily any loss; that, if any settlement by plaintiff was made, it was not a bona fide one but was a pretended one; and that it was made for the purpose of defrauding the defendant. The reply was a general denial.

The facts in reference to the settlement and payment of the judgment show that John Hoagland was a wagon maker and had followed his trade in Kansas City for about 33 years. In the year 1909 he incorporated his business with a capital stock of \$4,000, the stockholders being himself and his three sons. In January, 1914, this policy was issued. On December 14, 1914, a few months after the Lindelof suit was brought and before its trial, plaintiff made an assignment for the benefit of creditors, owing at the time about \$4,500 and having assets of \$3,000. The company thereafter settled up the matter by paying its debts in full. This left remaining only the obligation of the Lindelof claim. Defendant must have known of the financial condition of plaintiff, for the reason that an appeal of the Lindelof case was taken without giving a supersedeas bond, yet defendant continued in charge of the defense.

On April 17, 1915, after the Lindelof suit was brought but before its trial, the "physical" assets of the property were sold, but the good will and name were not included in the sale. On May 26, 1915, Joseph L. Hoagland, one of plaintiff's stockholders and directors, on the letter head of plaintiff, sent out circular letters to 250 customers of plaintiff stating that the Schaeffer Wagon Company had not, as it had claimed, purchased the stock and business of the Hoag-

land Wagon Company, but that the Hoagland Wagon Company "is still in existence"; "we have not sold the shares or good will of the business"; "neither did we agree to allow them to use our name in connection with their business." However, we did sell all our equipment and material. The letter further stated that the company was equipped with new machinery and a new stock of material and that after June 7th it would be ready to carry on the business as usual. The letter was signed by Joseph L. Hoagland. On July 8, 1915, three weeks after Lindelof recovered judgment in the circuit court, plaintiff held a directors' meeting, at which all of the stockholders were present and resolved that the remaining assets and the good will of the company be turned over to Joseph L. Hoagland, and that the business of the company be carried on by Joseph L. Hoagland in his name, and that he adjust all claims against the corporation "he thinks proper." Neither plaintiff nor Joseph L. Hoagland had an attorney, but Joseph L. Hoagland sought legal advice from Mr. Barry, an attorney representing this defendant. Barry advised him, about the time the company was taken over by the latter, to use his (Joseph L. Hoagland's) individual name in conducting the business. In accordance with this resolution of plaintiff, the remaining property of every description was turned over to Joseph L. Hoagland, one of the stockholders. This property consisted of the good will, the name, and about \$400 in book accounts. At the time of the turning over of the remaining assets of the company to Joseph L. Hoagland, the stockholders consisted of John Hoagland and his two sons, F. J. and Joseph L. Hoagland, and at that time all but two shares of the stock which were retained, one each by John Hoagland and F. J. Hoagland, were turned over to Joseph L. Hoagland. Since that time the plaintiff has held all regular and special corporation meetings. After the company's business was run in the name of Joseph L. Hoagland, the latter paid off its indebtedness except the Lindelof judgment, and ran a thriving business.

There was evidence that the charter of the corporation was allowed to lapse through an oversight in failing to make reports to the secretary of state, but that it had been renewed; the forfeiture having been set aside. Since the turning over of the remaining assets to Joseph L. Hoagland, the company (unless Joseph L. Hoagland's business was its business) ceased to have a place of business and had transacted no business except the holding of corporation meetings and had no plans for the resumption of business at the time this suit was tried, but the company had not given up the idea of resuming business at that time. On the contrary, the Hoaglands intended to turn back the busi-

ness to the Hoagland Wagon Company, this plaintiff, as soon as the Wade note that it owed was paid off. The Wade note was given by plaintiff in borrowing the money to pay off the Lindelof judgment; the inference being that plaintiff expected to pay off the note from the proceeds of this insurance policy. The evidence shows that the business would have been turned back to plaintiff company even before the Wade loan was made, had it not been for the Lindelof judgment hanging over the company. After the business was turned over and conducted in the name of Joseph L. Hoagland, Lindelof had an execution issued on his judgment and garnished various creditors of Joseph L. Hoagland. On June 19, 1916, Barry wrote Joseph L. Hoagland a letter acknowledging receipt of the latter's letter inclosing copy of summons of garnishee, and saying that he wished to advise that the defendant's attorneys would give this matter attention, and that Hoagland need not pay any further attention to the matter, and that if anything came up defendant's attorneys would take the matter up with him. The letter further stated that the summons was an attempt on the part of Lindelof's attorneys to find out whether Joseph L. Hoagland had any property of the Hoagland Wagon Company in his possession. Barry states:

"That, of course, you have not but before filing an answer we will consult with each of you."

The letter finally concludes by the further statement that this defendant would see that Joseph L. Hoagland was not further troubled about the matter, and, if anything further transpired, that said Hoagland was to consult one of defendant's attorneys. Barry had some of the garnishments released. All of these facts are undisputed.

About this time Mr. Kimpton, a lawyer in Kansas City, came down to Hoagland's office and asked regarding the Lindelof judgment, stating that he desired to get information for some hardware firm, retailers' association, or credit association; that he represented some firm back east that wanted to know something of Hoagland's credit standing, and it was in this way that Hoagland met Kimpton.

On July 8, 1916, plaintiff held a directors' meeting. This meeting was had "on account of difficulties which had arisen in the matter of Harry Lindelof and on account of trouble caused by legal proceedings in the matter." At that meeting plaintiff resolved that steps be taken to get the necessary money to pay the Lindelof judgment, and that legal advice be obtained to take action to compel the defendant to repay the Hoagland Wagon Company the amount to be paid out by it in settlement of such judgment. Thereafter

plaintiff employed Kimpton to assist them in carrying out these purposes.

A witness testified that these garnishments paralyzed the Hoagland credit and was embarrassing to the business in many ways. Lindelof's attorney was threatening to bring receivership proceedings against Joseph L. Hoagland on the theory that the Hoagland Wagon Company was not defunct, but was carrying on its business through Joseph L. Hoagland. Kimpton testified that he regarded Joseph L. Hoagland's business as nothing more than the business of the Hoagland Wagon Company, and, if Lindelof's attorneys took the threatened action, it might be successfully prosecuted and Joseph L. Hoagland ruined. Kimpton pressed the matter of paying the judgment with the defendant, but nothing was done by it toward adjusting the judgment. Thereupon Kimpton, being given authority by the Hoaglands, arranged with a client of his, one George L. Wade, for the latter to loan to plaintiff the amount necessary to pay off the Lindelof judgment, interest and costs; plaintiff to give to Wade as security for the loan the policy now sued upon. This arrangement was made with Wade, and he loaned plaintiff the sum of \$5,660, and the Lindelof judgment, interest and costs, was paid. Kimpton advised Wade that the policy was good security for the loan. Kimpton testified that he thought the policy was good security for the loan and that in his opinion the Hoagland Wagon Company, a corporation, and Joseph L. Hoagland, an individual, were one and the same, and that Joseph L. Hoagland had a prosperous business. Kimpton told Wade of the circumstances surrounding the situation. Joseph L. Hoagland had borrowed money from the bank to use in his business. Wade had been Kimpton's client for seven or eight years.

Wade was the owner and operator of eight or more railway sleeping cars with cooking outfits, and he had been in that business for two or three years before he loaned the money to plaintiff. Wade did not testify; he was evidently not in the city, as he could not be found by subpoena server. But Kimpton said that he had handled loans for Wade; that the total amount of loans he had made for Wade was about \$25,000 or \$30,000; and that the largest single loan was for \$8,500. Wade's banker stated that he would loan Wade money at any time and had loaned him money. The matter of the loan between plaintiff and Wade was made through Kimpton. There was a conference between Joseph L. Hoagland and Wade of about 30 minutes, but the witness testifying to the same could not remember what was said. At the time Joseph Hoagland, on behalf of the plaintiff, executed a note signed Hoagland Wagon Company by Joseph Hoagland, for \$5,660, payable to George L. Wade, the latter gave a check to Hoagland, payable



to the Hoagland Wagon Company, for that amount on the Traders' National Bank of Kansas City, and Kimpton, as attorney for plaintiff, cashed the check and paid the money to the clerk of the circuit court of Jackson county, and the amount of the Lindelof judgment with interest and costs was satisfied. This whole proceeding was authorized or at least ratified by plaintiff at a directors' meeting.

[1] It is contended by the defendant: That the policy was one of indemnity, and, if any money was actually paid by Wade to plaintiff and it was afterwards paid into court in satisfaction of the judgment, it was "a voluntary payment not made to prevent loss or seizure of property under execution, but collusively made by virtue of an understanding between the wagon company, the assured, and the attorney of Lindelof, by which the money should be borrowed not to avert loss" (as defendant says plaintiff was insolvent and out of business), "but to bring on an alleged loss so that ground might be laid for a suit to compel" defendant to pay the loss. That payment of the judgment under the circumstances was a fraudulent creation or acceleration of a loss by the plaintiff. That it was the duty of the plaintiff to act in good faith toward the defendant, and not to do or suffer to be done any act which could expose it to jeopardy or willful loss. That the loss was willfully occasioned, and for these reasons the defendant was discharged. We think there is no merit in this contention. The payment was not voluntary, but was made under the duty imposed by law upon the plaintiff to either settle the judgment, or, if it could not be settled, to pay it as directed by this court, whether it was solvent or insolvent. *Mining Co. v. Casualty Co.*, 162 Mo. App. 178, loc. cit. 185, 190, 144 S. W. 883.

It is with very poor grace that defendant urges that plaintiff should not have paid this judgment. A court of last resort had adjudged the judgment to be a just one and that it should be paid. Instead of permitting plaintiff to pay the judgment, defendant used all the means at its command to prevent its payment, evidently knowing that it would be the final loser. Defendant not only refused to pay or to refund to plaintiff the amount of the judgment, but even before it was rendered advised plaintiff to circumvent its payment by fraudulently running the business in the name of one of its stockholders, Joseph L. Hoagland. Not only this, but, after the business was placed in the name of Joseph L. Hoagland and the suit had come to trial resulting in a judgment, defendant offered legal aid to plaintiff to defeat the execution issued on the judgment. Defendant now claims it never became liable to pay the Lindelof judgment, and thus places itself in the position of advising and as-

sisting plaintiff and Joseph L. Hoagland, to whom it owed no responsibility whatsoever, to fraudulently attempt to defeat a judgment of a court of last resort. Unless the mandates of our courts are to be flagrantly disobeyed and laughed at and the administration of the law defeated, such a practice must be disapproved. Plaintiff in its brief touches on this subject but gingerly, and we would have no hesitancy in including plaintiff in the disapprobation if it were not for the fact that it was perhaps only partially to blame and that only at the start of the transactions, but afterwards, as the jury has found, made a praiseworthy effort to right its wrongs and borrow the money with which to comply with the mandate of the court and pay off the judgment. We say it may be that plaintiff was only partially to blame in taking the method it did to defeat the collection of the judgment, because it was without the advice of its own legal counsel, but depended upon that of defendant's, which made the conduct of defendant much more culpable. The evidence far from shows that plaintiff was out of business when it paid off this judgment, and the only reason that there is any dispute about it at all is that defendant, if it did not instigate the scheme to defeat the collection of the judgment, aided and abetted such a plan by advising plaintiff to turn its business and assets over to one of its stockholders.

[2] It is further contended by defendant that no money was actually loaned by Wade to the plaintiff; that the transactions had in reference to the alleged loan were merely colorable; that Wade did not have the money to lend; "and that it challenges credence that a mere stranger would have loaned without security the sum of \$5,660 to an insolvent corporation, whose capital stock was only \$4,000." There was no substantial evidence that Wade did not have the money to lend. It is true that he had a mortgage on his residence, and defendant introduced evidence tending to show that his personal property tax return in 1917 showed a valuation of \$2,650, in 1916 a valuation of \$2,450, and a very little of the property listed in those returns consisted of cash. There was evidence that Wade was engaged in a substantial business and that he loaned thousands of dollars. People of money often have mortgages on their property, and, unfortunately, it is a common occurrence for persons to greatly undervalue their personal property when making tax returns. Wade made the loan on the recommendation of his attorney who had loaned large sums of money for him previously. The attorney thought this policy was good security, and that Joseph L. Hoagland had a prosperous business, and that the business he carried on was that of the plaintiff. It may be assumed that Wade acted upon the advice of his attorney. While

the capital stock of the plaintiff was only \$4,000, it was that same amount when defendant issued this policy and insured plaintiff for the maximum sum of ten thousand dollars. It is not unbelievable that a corporation may borrow money in excess of its capital stock. While it might be contended by way of argument that the circumstances surrounding the manner in which the money was borrowed and the judgment paid off was only consistent with some prearranged plan to discharge the judgment through subterfuge and not by actual payment of money and thus avoid the terms of the policy, yet there is evidence from which the jury could say that the transaction was had in good faith.

[3] The argument is made that the Lindelof judgment was paid off by plaintiff in order to save Joseph L. Hoagland, a stranger to this contract of insurance, from embarrassment of garnishments, and therefore the same was not paid in "good faith." It matters not what may have been the motive actuating plaintiff in paying off this judgment. One of the Hoaglands testified that his family had been in business for a great many years and that it always paid its debts and did pay this judgment to save its good name. The matter of good faith goes only to the question as to whether the judgment was actually paid, or whether a form of payment was gone through that amounted to a mere sham or colorable transaction and not actual payment. *Stenbom v. Brown-Corliss Engine Co.*, 187 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956; *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 132 Pac. 398; *Davies v. Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A. 1916D, 395, 398; *Rodgers v. Pacific Coast Casualty Co.*, 33 Cal. App. 70, 164 Pac. 1115; *Kennedy v. Fidelity and Casualty Co.*, 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673.

[4] Defendant complains of the giving by the court of plaintiff's instructions which told the jury that—

"Plaintiff had the right in good faith to pay the Lindelof judgment mentioned in evidence, and if you believe and find from the evidence that on July 20, 1917, the plaintiff in good faith actually paid into court in satisfaction of said judgment the sum of \$5,675.45 in money and that demand was made upon the defendant therefor, then you should return a verdict in favor of the plaintiff for said amount, together with interest thereon, at 6 per cent. per annum from the date of such demand to the present time."

It is contended that this instruction did not require the jury to find any of the facts on which recovery by plaintiff depended; that the instruction does not require the jury to find from the evidence that there had

been a compliance with the terms of the policy. The only issue of fact in the case was whether or not the money was actually and not merely formally paid by plaintiff to satisfy the Lindelof judgment. As we have before stated, plaintiff did not wrongfully accelerate the loss or make the payment voluntarily, but that it was plaintiff's duty, after the affirmance of the judgment by this court, to pay or settle it whether plaintiff was solvent or insolvent. All this, of course, is true as a matter of law and should not have been submitted to the jury. The instruction therefore submitted the only issue of fact in the case; that is, whether there had been a payment in good faith of the judgment.

[5] It is further contended that interest on the amount of the original judgment cannot be recovered for any time prior to the filing of this suit. This contention is ruled against defendant. Section 2 of the policy provides:

"The indemnity limits shall be \* \* \* (5) All interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the company's liability as herein expressed."

In other words, the defendant agreed to be liable for interest on not to exceed \$5,000 of any judgment recovered against plaintiff by one of its employes. The judgment recovered by Lindelof was for \$5,000. Defendant owed plaintiff the amount of this judgment, interest thereon, and costs (see, also, *Century Realty Co. v. Ins. Co.*, 179 Mo. App. 123, 161 S. W. 624), and, after demand for the whole was made upon defendant by plaintiff, defendant thereafter became liable for the statutory interest of 6 per cent. on the whole sum due from the date of the demand.

[6] The court properly refused defendant's instruction No. 2. This instruction is not easy to understand, but it apparently sought to submit to the jury the two questions, intermingled: Whether the judgment in good faith was paid, and whether it was proper for plaintiff to pay it under the circumstances. The latter question was one of law as already stated. Instructions Nos. 3 and 4 sought to submit to the jury the question of plaintiff's motive in paying off the judgment, and for that reason they were properly refused. Instruction No. 5 sought to submit a question of law to the jury, that is, whether plaintiff was insolvent and compelled to pay the judgment in view of that fact. It was properly refused.

[7] Defendant urges that the action was not brought in the name of the real party in interest. The policy was pledged to secure the payment of the note. It was provided in the written agreement by which the pledge was made that plaintiff should file and prosecute this suit and not until plaintiff failed to do so would Wade have any right so to do.

Under the terms of the agreement, Wade did not have a right to bring this suit. The policy belonged to the plaintiff and remained its property until default was made under the terms of its agreement with Wade. At least until there had been a default in the payment of the note plaintiff had a right to prosecute the suit. *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586; *Key ex rel. v. Ins. Co.*, 101 Mo. App. 844, 74 S. W. 162.

[8] Defendant urges that this suit is prosecuted for the benefit of Wade, and therefore no damages for vexatious refusal to pay or for attorney's fees could be awarded. We have already stated that plaintiff had an interest in the controversy and had a right to bring this action, and we have no doubt that it had a right to recover statutory damages and attorney's fees.

[9] There was sufficient evidence to go to the jury on the question of whether the refusal to pay was vexatious. The evidence in this case shows that from the very beginning the defendant was attempting to avoid paying the Lindelof judgment. It gave no supersedeas bond when it appealed that judgment to this court. It went to the extent of advising the Hoaglands to carry on the business of the wagon company in the individual name of Joseph L. Hoagland, even before the judgment was rendered, in order to defeat its collection, and it offered to help and actually assisted Joseph L. Hoagland in attempting to defeat the garnishments run by this plaintiff on Hoagland's creditors. If defendant did not actually concoct a scheme whereby the business of plaintiff was turned over to Joseph L. Hoagland to defeat Lindelof in the collection of his judgment, it aided and abetted the scheme to frustrate the collection of that judgment declared to be justly rendered by a court of last resort. This conduct on defendant's part amounted to an effort to defeat the ends of justice. As already stated, plaintiff's conduct would have been just as reprehensible as that of defendant had plaintiff not desisted in its efforts and finally did the praiseworthy thing in making arrangements to pay and actually paying his judgment (at least the jury so found). Plaintiff was placed in this embarrassing position, at least in part, by defendant's advice and refusal to pay off the judgment. Although we are not wholly exonerating plaintiff for what it did, however, when plaintiff paid off the judgment this defendant should have reimbursed it at once, if the transaction was a real and not a sham one. The only real issue in the case was whether or not the judgment was actually paid. Defendant had ample opportunity to investigate and find out whether this was true or not, and at the trial introduced no evidence except the mortgage and tax returns of George L. Wade, which were

of little probative force. We think there was sufficient evidence from which the jury could say that the refusal to pay was vexatious.

The judgment is affirmed.

All concur.

# GREEN v. STROTHER. (No. 13175.)

(Kansas City Court of Appeals. Missouri.  
Feb. 17, 1919.)

## 1. PROCESS $\Leftrightarrow$ 166—SERVICE—NAMES.

A name is a mere means of identity, and if one served with process in the wrong name desired to take advantage of the situation, he must appear and raise the question in the court where suit is brought before judgment is rendered, and, unless he does so, his right to object for misnomer is waived.

## 2. COURTS $\Leftrightarrow$ 200 $\frac{1}{4}$ —PROBATE COURTS—JURISDICTION.

While the probate court, under the Constitution and statutes, has no equity jurisdiction, yet, as Rev. St. 1909, § 4056, confers jurisdiction on the probate court over all matters pertaining to probate business, that tribunal has jurisdiction in matters pertaining to probate business, where the issue can be settled at law and is simple, and in such a case the probate court may even invoke equitable principles.

## 3. COURTS $\Leftrightarrow$ 200 $\frac{1}{4}$ —PROBATE COURTS—JURISDICTION.

A proceeding to classify judgment against an estate, where judgment was actually rendered against deceased during his lifetime under a wrong name, or an alias name, is not one involving a complicated matter or a proceeding in equity, and the probate court has jurisdiction to determine the matter.

## 4. COURTS $\Leftrightarrow$ 200 $\frac{1}{4}$ —PROBATE COURTS—JURISDICTION—CLASSIFYING JUDGMENTS.

Rev. St. 1909, § 197, providing that judgment may be obtained against an estate in some court of record in the ordinary course of proceeding, and may thereafter be established in the probate court against the estate, does not prevent a judgment creditor from proceeding directly in the probate court to have allowed and classified against an estate a judgment obtained against deceased under wrong name; the statute not limiting the powers of the probate court, but merely giving a party option to proceed first in the court of record.

## 5. EXECUTORS AND ADMINISTRATORS $\Leftrightarrow$ 262—CLASSIFICATION OF JUDGMENT—NATURE OF PROCEEDING.

A proceeding in the probate court to classify judgment against the estate of a decedent is not a mere ministerial or clerical act, and may involve a trial of fact, as where a judgment is against the deceased in the wrong name.

## 6. EXECUTORS AND ADMINISTRATORS $\Leftrightarrow$ 262—PROBATE COURTS—PROCEEDING.

Under Rev. St. 1909, §§ 197 and 206, it is unnecessary in a proceeding before the court of probate to obtain the allowance and classifica-

tion against an estate of a judgment rendered against the deceased in a wrong name to file any formal pleadings.

**7. COURTS §200½—JURISDICTION—PROBATE COURT—CORRECTING MISNOMER IN PROCESS.**

As the verdict, under Rev. St. 1909, § 2119, cures the defect of misnomer, a judgment rendered against deceased, who was served in a wrong name, may be allowed and classified by the probate court, though under sections 1848, 1851, 2119, and 2120, the circuit court alone could correct the misnomer, so that the judgment would import notice to persons buying real estate from the judgment debtor.

**8. PROCESS §147, 148—SERVICE—PAROL EVIDENCE.**

It is proper to permit the introduction of parol evidence to identify the particular individual upon whom a writ was served, though the name of the individual served and the name in the writ are not idem sonans, and to do so does not tend to contradict or impeach the return of the officer serving the writ.

**9. PROCESS §149—SERVICE—EVIDENCE.**

In proceeding in the probate court to have allowed and classified against an estate a judgment rendered against the deceased in a wrong name, evidence *held* to establish that deceased was the person served, although he was served under a wrong name.

**10. APPEAL AND ERROR §231(3)—OBJECTION IN LOWER COURT—EVIDENCE.**

Statements, "I object to that," "I move that be stricken out," are no objections at all, and are insufficient to preserve for review the propriety of the admission of evidence.

**11. APPEAL AND ERROR §231(5)—OBJECTIONS IN LOWER COURT—SUFFICIENCY.**

A general objection as incompetent, irrelevant, and immaterial to evidence which was most relevant and material is insufficient to present for review on appeal the objection that the evidence was hearsay.

**12. EXECUTORS AND ADMINISTRATORS §262—PROCEEDINGS TO CLASSIFY JUDGMENT—SCOPE OF RELIEF.**

Where a judgment was rendered against deceased in a wrong name, the probate court, in proceeding to have the same allowed and classified against the estate, cannot render a money judgment against the estate, and a judgment for a fixed amount is void.

Trimble, J., dissenting.

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Petition by Mamie Green against Samuel B. Strother, administrator of the estate of William Floyd Skinner, deceased, for the allowance and classification of the judgment against the estate of the decedent. From a judgment of the probate court for the administrator, petitioner appealed, and from a judgment of the circuit court against him, the administrator appeals. Reversed and remanded.

Calvin & Rea and Watson, Gage & Watson, all of Kansas City, for appellant.

John O. Nipp, of Kansas City, for respondent.

**BLAND, J.** On April 30, 1913, plaintiff brought suit in the circuit court of Jackson county, Mo., against one described as *John Skinner*. Summons was issued directing the sheriff of said county to summon *John Skinner*. Service was duly had by a deputy sheriff, his return reciting that he had executed the writ in said county by delivering a copy of said writ and the petition in said cause to the "within-named defendant, John Skinner."

The petition in that case alleged that plaintiff received personal injury by reason of the negligence of the defendant in permitting a sidewalk to become out of repair in front of his premises located at 1123 Oak street, in Kansas City, Mo., and that by reason of said defective sidewalk plaintiff, while walking over the same, was caused to fall, to her injury, and asked judgment in the sum of \$5,000. Defendant made default, and on March 18, 1914, the court rendered judgment in favor of plaintiff and against defendant, "*John Skinner*," in the sum of \$1,000.

Some time prior to the 20th day of May, 1915, *William Floyd Skinner* died, and an administrator of his estate was appointed by the probate court of Jackson county, Mo. The inventory of the estate showed that at the time of his death deceased was the owner of said property located at 1123 Oak street. In May, 1915, plaintiff presented to the probate court of Jackson county a transcript of said judgment in her favor and against *John Skinner*, seeking to have the same classified as a judgment against the estate of *William Floyd Skinner*. No pleadings were filed in the probate court except said transcript of the judgment. The record shows that all parties appeared before the probate court, tried out the matter of classifying the judgment, and that the court refused to allow and classify the same.

Thereafter plaintiff appealed to the circuit court of Jackson county, Mo., where the case was tried by that court without the aid of a jury. No declaration of law or finding of fact was requested except one by the defendant to the effect that said judgment was not entitled to allowance or classification as a claim or judgment against the estate of *William Floyd Skinner*, which was refused by the court, and the court thereupon rendered judgment in favor of plaintiff and against the estate. After taking the proper steps, defendant has brought the case here.

In the court below plaintiff introduced evidence tending to prove that *John Skinner* and *William Floyd Skinner* were one and the same person, and that the suit of Mamie Green v. *John Skinner* was instituted and the

summons served upon *William Floyd Skinner*, although he was designated in the petition and summons as *John Skinner*.

[1] Defendant insists that his demurrer to the evidence should have been sustained, and in this connection states:

"The probate court is a court of limited jurisdiction, and has no jurisdiction which permits the classification of judgments rendered by other courts of record which require amendment and were not rendered by those courts in the ordinary course of proceedings."

We have no doubt but that the probate court had jurisdiction to classify this judgment against the estate of *William Floyd Skinner*, providing it was established that *John Skinner* and *William Floyd Skinner* were one and the same person. Whether there was evidence to show such fact will be hereinafter discussed, and we will assume, for the purpose of disposing of this point, that there was such evidence. It is stated in *Parry v. Woodson*, 33 Mo. 347, loc. cit. 348, (84 Am. Dec. 51):

"A name is a means of identity; but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued, but the person to whom it is applied. Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fail to appear, or, appearing, fail to object that he is sued by the wrong name, and judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name. The use of the right name is every way preferable, since without it as a means of identification the evidence of the identity of the person sued may in process of time become lost; and hence the propriety of the amendment in this case; but so long as the defendant can be identified as the one against whom the judgment was rendered, he is as much bound by the judgment, and those claiming under the judgment are as much entitled to its benefits, to all intents and purposes, as if the defendant had been sued by his right name."

If one served with process in a wrong name desires to take advantage of the situation, he must appear and raise the question in the court where the suit is brought before judgment is rendered against him. Unless he does so, his right to object to his being sued in a wrong name is waived. *Parry v. Woodson*, supra; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451.

[2, 3] The functions that the probate court may perform are conferred by the Constitution and statutes, and consequently, as the Constitution and statutes give no equity jurisdiction to the probate court, it may not proceed in equity cases. However, the statute (section 4056, R. S. 1909) confers jurisdiction upon the probate court "over all matters pertaining to probate business," and therefore it is held that the probate court has

jurisdiction in matters pertaining to probate business where the issue can be settled at law and involves a simple matter, and that the probate court may even invoke equity principles in disposing of such business. *Leitman's Estate v. Leitman*, 149 Mo. 112, loc. cit. 117, 50 S. W. 307, 73 Am. St. Rep. 874; *Gentry v. Gentry*, 122 Mo. 202, loc. cit. 222, 26 S. W. 1090; *Green v. Tittman*, 124 Mo. 372, loc. cit. 379, 27 S. W. 391; *State ex rel. v. Bird*, 253 Mo. 569, 162 S. W. 119, Ann. Cas. 1915C, 353. The proceeding to classify a judgment against an estate, whether that judgment was actually rendered against the deceased during his lifetime under a wrong name or an alias name, is not one involving a complicated matter or a proceeding in equity, and we think there is no doubt but that the probate court has jurisdiction to determine the matter.

[4] Section 197, R. S. 1909, provides that a judgment may be obtained against an estate in "some court of record, in the ordinary course of proceeding," and may thereafter be established in the probate court against such estate. Defendant says that the judgment in the case at bar, being obtained against the deceased in his wrong or alias name, was not "in the ordinary course of proceeding." This clause in the statute has no reference whatever to a judgment procured as was this one. The statute simply provides that the claimant may elect to first go into a court of record and establish his claim against the estate there by the same kind of proceeding that he would pursue if the deceased had not died, but was sued while living. This is the meaning of the quoted language of the statute.

[5] It is defendant's contention that the classification of a judgment was more or less ministerial on the part of the probate court, and that a proceeding to classify a judgment in that court does not contemplate a trial of fact such as is involved in a proceeding to show whether the party against whom and in whose name the judgment was actually rendered is the same as that of the deceased. There is no merit in this contention. The action of the probate court in classifying a judgment may involve a trial of fact, and it is not a mere ministerial, clerical, or non-descript act. *McFaul v. Haley*, 166 Mo. 56, loc. cit. 68, 65 S. W. 995. Of course, when a judgment is presented for allowance or classification, the probate court cannot go into the merits of the original cause of action upon which it was founded. It is held in *McFaul v. Haley*, supra, that whatever legal defense the law permits in a suit at law in the circuit court on the judgment an executor or administrator may make in the probate court when the judgment is presented for classification. It would be the duty of the probate court to satisfy itself in any case that a judgment presented to it for classification against an estate was actually rendered against the deceased in his lifetime. If a

judgment against John Smith were presented to the probate court to be classified against the estate of John Smith, it would be necessary for the court to determine whether the two John Smiths were one and the same person, and this although, where there is an identity of name, identity of person is presumed. This presumption being rebuttable, if the administrator or executor desired to contest the matter as to the identity of the two John Smiths, he would have a right to do so, and we do not think that any one would question the jurisdiction of the probate court to try such an issue. We see no substantial difference between a situation of that kind and the one in the case at bar, although the names "John Skinner" and "William Floyd Skinner" are not idem sonans. The proceeding in the probate court to establish whether John Skinner and William Floyd Skinner are identical would not be substantially different from a proceeding to determine whether John Smith against whom a judgment was rendered was the same as John Smith, the deceased, against whose estate a judgment was sought to be classified. The only difference in the two proceedings would be possibly the matter of the burden of proof.

[6] There was no necessity for any formal pleadings to be filed by plaintiff in the probate court alleging that William Floyd Skinner was known as John Skinner and that the John Skinner sued in the circuit court was the same person as William Floyd Skinner, the deceased. Section 206, R. S. 1909, provides that the probate court "shall hear and determine all demands in a summary way without the form of pleading." Section 197, R. S. 1909, provides that "any person having a demand against an estate may establish the same by the judgment or decree of some court of record, in the ordinary course of proceeding, and exhibit a copy of such judgment or decree, and shall also exhibit copies of all judgments or decrees rendered in the lifetime of the deceased to the probate court." By reason of these sections it is not necessary to have any formal pleadings either in the probate or circuit court on appeal. *Wencker, Adm'r, v. Thompson's Adm'r*, 96 Mo. App. 59, 69 S. W. 743; *McFaul v. Haley*, supra, 166 Mo. loc. cit. 68, 65 S. W. 995; *Kessler v. Claves*, 147 Mo. App. 88, loc. cit. 102, 125 S. W. 799.

[7] Defendant makes the point that the only court in which the judgment could have been corrected was the circuit court, citing sections 1848, 1851, 2119, and 2120, R. S. 1909, which confer power on the courts to correct the name of a party either before or after judgment. Defendant says that he is unable to find a case in this state "holding that a probate court could correct and amend a judgment rendered in another court." From this it is evident that defendant misconceives the purpose of this proceeding. No such thing is sought to be done. The mat-

ter attempted to be accomplished in this case is not to correct a judgment, but to classify one that was really and in fact rendered against William Floyd Skinner, although in the name of John Skinner, against the estate of William Floyd Skinner. While plaintiff could have corrected the judgment in the circuit court by the proceeding provided by the sections of the statute last mentioned, he was not required to do so in order to have a valid judgment against William Floyd Skinner or his estate. Said sections of the statute were enacted to alleviate the rigor of the common law which invalidated judgments for or against persons suing or sued in the wrong name and are for the benefit of the party holding a judgment against such persons suing or being sued. Ordinarily it is to the advantage of the party holding such a judgment to have it corrected in the court in which it was rendered; for, unless the party sues or is sued in a name that is idem sonans with his right name, and practically the same name, the record of the judgment would not import notice to persons buying real estate owned by the judgment debtor, whereas, if the judgment is in the right name of the party, or one idem sonans and practically the same name, it would import notice and constitute a lien upon such real estate. *Green v. Meyers*, 98 Mo. App. 438, 72 S. W. 128. But, as before stated, it is not necessary to have such a judgment corrected in the court in which it is rendered or any other court. The verdict cured the mistake in name; the statute (section 2119, R. S. 1909), treating the proper amendment as having been made. *Kronski v. Mo. Pac. Ry. Co.*, 77 Mo. 362, loc. cit. 370. So it was not necessary in order to cure the matter that any amendment of the judgment be made.

[8, 9] Defendant makes the point that there is no competent and credible evidence to show that John Skinner who was served by the deputy sheriff was, as a matter of fact, William Floyd Skinner, the deceased. In *Reid, Murdock & Co. v. Mercurio*, 91 Mo. App. 673, it is held that it is proper to permit the introduction of parol evidence to identify the particular individual upon whom the writ was served, even though the two names are not idem sonans, and that to do so in no way tends to contradict or impeach the return of the officer. The same is held in *Lafayette Ins. Co. v. French*, supra, 18 How. loc. cit. 409, 15 L. Ed. 451, and in *Carmichael v. Vandebur & Hopkins*, 50 Iowa, 651. In order to show that John Skinner, the party named in the summons, and the deceased, William Floyd Skinner, were one and the same person, plaintiff introduced a photograph which was identified by the witness Barker as that of the person called John, Floyd, Henry, or William Skinner, who lived at 1123 Oak street, in Kansas City, Mo. This property was owned by the deceased. The deputy sheriff who served the summons identified this picture as

being a likeness of the person upon whom he served the writ. When the deputy sheriff served the writ he first went to the place named in the summons, 1123 Oak street, and, not finding the defendant there, he went to Dick's saloon at Twelfth and Locust streets. At the latter place he asked the bartender, "Who is John Skinner?" and the bartender pointed out John Skinner, and the sheriff served him in the saloon. The sheriff asked the party served if his name was John Skinner, and he replied that it was, but that he had gone sometimes by the names of John, William, and Floyd Skinner. At the time John Skinner was served he told the sheriff, "If it wasn't for the niggers taking up the boards, there wouldn't have been any damage suit." At another time the same deputy served a notice of garnishment on John Skinner and found him living at that time with some negroes, about four doors from 1123 Oak street. The deputy sheriff was evidently incensed with counsel for the defendant, or entertained some unfriendly feeling toward him, for on the cross-examination he answered the attorney in a very impolite manner with an effort at sarcasm. At one place in his testimony he said that John Skinner did not live at 1123 Oak street, and at another place he intimated that he, John Skinner, might live at 1123 McGee street, that John Skinner had a wife living there, but that he had two wives, and his wife at 1123 Oak street would not let him live there. From the testimony of the deputy sheriff we conclude that he was making a very poor effort at sarcasm, and we take it that he did not know in fact where John Skinner lived. Defendant insists that by reason of the conduct and testimony of the deputy sheriff on the witness stand his credibility as a witness was destroyed. The court, sitting as a jury, was the sole judge of the credibility of the witnesses.

The witness Barker testified that he was at Dick's saloon at Twelfth and Locust streets at the time John Skinner was served, and that the deputy sheriff served the man who lived at 1123 Oak street, known to the witness as John, Floyd, Henry, and William Skinner. This witness afterwards identified the picture in evidence as that of John, Floyd, Henry, and William Skinner who lived at 1123 Oak street as that of a man whom he saw dead at an undertaking establishment afterwards. The witness Francis stated that he knew one who went by the name of Frank, John, Floyd, and Bill Skinner, and who at one time lived on Oak street; that the photograph testified to by the deputy sheriff as being a likeness of the man whom he served as John Skinner was that of the person whom the witness knew as Frank, John, Floyd, and Bill Skinner, who lived on Oak street.

No evidence was introduced by the defendant to show that the John Skinner who was served by the deputy sheriff was not the

same person as William Floyd Skinner, the deceased, or that William Floyd Skinner did not also go under the name of John Skinner during his lifetime. In fact, defendant introduced no evidence whatever. We think that under this testimony there was sufficient evidence from which the court could find that John Skinner who was served by the sheriff was the same person as William Floyd Skinner, the deceased. Plaintiff, having shown these facts, made out a prima facie case, and it was then incumbent upon the defendant to show that John Skinner who was served was not William Floyd Skinner, the deceased.

[10, 11] Defendant complains that the court permitted the introduction of hearsay testimony in order to show, at least in part, the identity of John Skinner and William Floyd Skinner. We have examined the objections made at the trial court, and find that the matter was not presented to the trial court, but that it is raised for the first time in this court. The objections to the testimony were that the evidence was "incompetent, irrelevant, and immaterial;" "I object to that;" "I move that be stricken out." The last two objections were no objections at all. *Breen v. United Railways Co.* (Sup.) 204 S. W. 521, and cases therein cited. The objection "incompetent, irrelevant, and immaterial" was not sufficient to raise the question that the evidence objected to was hearsay. As was stated in *Sexton v. Lockwood*, 207 S. W. 856, decided by this court, but not yet officially reported:

"Ordinarily the objection that evidence is 'irrelevant and immaterial' does not constitute any objection, since it does not furnish any basis or ground of objection; but this is so in those instances where the objection does not give the court any reason for exclusion, and it is not clear whether the testimony is relevant or material."

The evidence now objected to as being hearsay was very material to the issues in the case; it went to the question as to whether John Skinner and William Floyd Skinner were one and the same person. Therefore we must hold that the objection made in the trial court was not sufficient to raise the point now made.

[12] While the point is not raised in the briefs, we find upon an examination of the record that the judgment in this case is absolutely void. The judgment recites that the court "finds the issues for the plaintiff and against the defendant and assesses plaintiff's damages at the sum of \$1,220," and that "plaintiff have and recover of and from the said defendant the said sum of \$1,220," and "it is further ordered by the court that this judgment be certified" to the probate court for classification against the estate of William Floyd Skinner.

Under the pleadings the only judgment that

the court could render in favor of plaintiff was one ordering the classification of the judgment filed in the probate court, and the court had no jurisdiction whatever under the pleadings to render an entirely new judgment and order it classified. *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 21 L. R. A. (N. S.) 481, 127 Am. St. Rep. 674; *Wilson v. Darrow*, 223 Mo. 520, loc. cit. 531, 122 S. W. 1077; *Chandler v. Railroad*, 251 Mo. 592, loc. cit. 599, 158 S. W. 35. The judgment now rendered should not be a judgment in favor of the plaintiff and against the defendant for so much money. The judgment should not be that plaintiff have and recover a sum of money or any sum, but that the judgment standing in the name of John Skinner was and is in fact a judgment against William Floyd Skinner, and that, as he is now dead and his estate is being administered, the judgment so standing in the name of John Skinner, being still unpaid, is entitled to be classified as a demand against the estate of William Floyd Skinner, deceased, and the probate court should be directed to so classify it. In this way only can the judgment respond to the relief the plaintiff is seeking to obtain. Any other judgment is outside of the purview of the proceeding and will leave two judgments still standing on the records, one against John Skinner and another against the estate of William Floyd Skinner. There was no error in the trial of the case, but, as the judgment is void, the case must be remanded.

The judgment is reversed, and the cause remanded.

ELLISON, P. J., concurs.

TRIMBLE, J. (dissenting). It may be that the probate court has jurisdiction to take the affirmative step or action plaintiff asked to be taken herein; and yet it is difficult for me to escape the conviction that, as to the estate and those interested therein, the matter sought to be adjudicated is, in effect, a reformation of the judgment in the circuit court so as to make it a judgment against William Floyd Skinner instead of what it purports to be, a judgment against John Skinner. This is, in reality, what is sought to be done, no matter what we call it nor the terms we may use in describing it. And this affirmative step must first be taken; for without it there is no authority for classifying a judgment against John Skinner as a demand against the estate of William Floyd Skinner, deceased. And I very gravely question the wisdom or the validity of the course whereby a judgment appearing upon the records of the circuit court as against one man can in another and a different court, the court of probate, be declared to be, in fact and in reality, a judgment against another man who is now dead. It would seem that the court where the judg-

ment was rendered should be the forum wherein to establish the fact that the judgment stands in the wrong name and is in reality a judgment against a man of another name. In this way we can avoid the situation where one court, the circuit court, has on its records a judgment against one man which the probate court says is a judgment against another man. Practically and in effect this is what is done no matter if we do attempt to get around it by saying that it is the same man, but only different names. The two may not be the same; the presumption is they are not; and, even if they are the same, it would seem that the proper court to adjudicate and establish that fact is the court in which the judgment was rendered.

**STROTHER v. ATCHISON, T. & S. F. RY. CO. (No. 13138.)**

(Kansas City Court of Appeals. Missouri. May 5, 1919.)

**1. CARRIERS ⇐203—CARRIAGE OF LIVE STOCK—LAW GOVERNING.**

A case involving a live stock shipping contract executed and fully performed wholly in a particular state is governed and controlled by the laws and decisions of such state.

**2. TRIAL ⇐156(2)—DEMURRER TO EVIDENCE—CONSIDERATION OF EVIDENCE.**

In determining whether defendant's demurrer to evidence should have been sustained, the court can consider only evidence which can be regarded as properly bearing on the issue raised by the petition.

**3. CARRIERS ⇐228(3) — CARRIAGE OF LIVE STOCK — FAILURE TO TRANSPORT EXPEDITIOUSLY—ISSUE.**

In action against carrier of stallion for failure to transport as expeditiously as required by statute after accepting for transportation, inquiry must be confined to ascertaining whether there was a failure to obey the statute after acceptance of the shipment, and the court can consider only evidence in relation to the movement of the shipment from and after it was accepted.

**4. CARRIERS ⇐219(2) — CARRIAGE OF LIVE STOCK—ACCEPTANCE OF SHIPMENT.**

Acceptance of a stallion for shipment by defendant railroad sued for failure to transport expeditiously after acceptance did not arise merely from the fact that another connecting railroad set the shipper's car on the transfer track connecting the two roads, where it was snowing at the time so as to tie up traffic.

**5. CARRIERS ⇐228(5) — CARRIAGE OF LIVE STOCK — DELAY IN TRANSPORTATION — SUFFICIENCY OF EVIDENCE.**

In action against railroad for having failed to transport a stallion as required by a Kansas



statute which called for a speed of 15 miles an hour exclusive of particular stops and causes mentioned, evidence held to justify finding that transportation was not effected as expeditiously as required, and that, after acceptance of stallion for shipment, the railroad was not prevented from transporting expeditiously by unavoidable accidents or snow conditions.

6. CARRIERS ⇐228(5) — CARRIAGE OF LIVE STOCK—DELAY AS CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain finding that delay and slowness of transportation after stallion was accepted for shipment caused and enabled a slight cold it contracted to develop into pneumonia which caused its death.

7. CARRIERS ⇐228(5) — CARRIAGE OF LIVE STOCK — CAUSE OF DEATH — BURDEN OF PROOF—EVIDENCE.

In an action against a railroad for death of a stallion caused by failure to transport as expeditiously as required by a Kansas statute, slight evidence is sufficient to maintain the shipper's burden of proof as to the cause of death to make a case for the jury.

8. CARRIERS ⇐218(1) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY.

In view of General Statutes of Kansas 1915, § 8435, under the order of May 1, 1901, of the Board of Railroad Commissioners of Kansas, where the intrastate shipper of a stallion in Kansas declared a valuation, and so obtained a lower rate, provision in shipping contract limiting liability to amount of declared valuation was valid, and shipper cannot recover in excess of the amount.

9. TRIAL ⇐251(2)—INSTRUCTIONS—ISSUES.

Where shipper of stallion suing for his death caused by failure to transport as expeditiously as required by statute by his instructions not only broadened issues, but abandoned cause of action for failure to transport as expeditiously as required and substituted a cause of action based on railroad's common-law duty to transport without delay and within a reasonable time, there was error.

10. CARRIERS ⇐230(10)—CARRIAGE OF LIVE STOCK — REDUCED RATE — PRESUMPTION OF KNOWLEDGE.

In action by intrastate shipper of a stallion in Kansas, under the declared valuation on which the rate was based, an instruction was erroneous which submitted to the jury the question of whether the shipper knowingly accepted the reduced rate based on the declared value; the shipper's knowledge of the lawful rate being conclusively presumed by Kansas law, which controlled.

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by John Strother against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

Thomas R. Morrow, George J. Mersereau, John H. Lathrop, and J. D. M. Hamilton, all of Kansas City, for appellant.

Beardsley & Beardsley, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff, in the state of Kansas, shipped a stallion over defendant's railroad from Abilene to Kiowa. During the transportation the stallion contracted pneumonia and died shortly after reaching destination. This suit was brought in Jackson county, Mo., to recover damages on account of his loss. A verdict of \$1,600 in plaintiff's favor was returned, upon which judgment was rendered, and defendant appealed to this court. The case was transferred to the Supreme Court on the ground that constitutional questions were involved. It was held, however, that they were not timely raised, and the case was returned to us. *Strother v. Atchison, etc., R. Co.*, 274 Mo. 272, 203 S. W. 207.

The petition pleaded sections 7116 and 7117 of the General Statutes of Kansas 1909, and the cause of action is bottomed upon a violation of said statutes. The first section provides that those operating railroads as common carriers shall transport all live stock received for transportation within the state without delay, and shall transport the same at a rate of speed not less than an average of 15 miles an hour for the entire distance over which said shipment is transported by rail within the state, unless prevented by unavoidable accidents. The second section provides that any common carrier which fails or refuses to transport such live stock at a rate of not less than 15 miles an hour shall be liable for all damages sustained by any person on that account and for all other damages which are the proximate result of such failure; other statutory and common-law remedies in addition to the remedy provided in said statute being preserved to the shipper.

The petition alleged that in the shipment of said stallion the defendant failed to comply with the provisions of said statutes, in that it failed to transport said stallion from the point of origin to destination at a rate of speed not less than an average of 15 miles an hour for the entire distance between said points; that said failure was not due to unavoidable accident; that the actual time consumed in moving said shipment from Abilene to Kiowa was unreasonably long; that the said stallion was in perfect health and condition at the time of its delivery to the defendant at Abilene, but because of the unreasonable length of time thereafter taken by the defendant to move it to Kiowa, said stallion contracted pneumonia, and died soon after reaching there; that the death of said stallion "was directly due to the carelessness and negligence of the defendant, its officers

and agents, in failing to move said car from Abilene, Kan., to Kiowa, Kan., within the time prescribed by the statutes hereinbefore pleaded."

In addition to a general denial, the defendant pleaded that, at the time the stallion was alleged to have been offered for transportation from Abilene to Kiowa, the defendant could not accept it for shipment by reason of the fact that it was impossible for defendant to move any of its freight trains from Abilene during the time beginning with the 2d day of March and continuing until the 4th day of March, 1912, on account of an unusual and unprecedented snow blockade existing during that time upon its line of railroad; that defendant was in no way responsible for said conditions, and on account of the unprecedented snow blockade, and for no other reason, the defendant refused to accept said stallion for transportation until March 4, 1912; that, although all possible diligence was exercised, defendant could not get its line from Abilene to Kiowa open for traffic until the 4th of March, 1912, and that as soon as the line was open it did accept and transport said stallion from Abilene to Kiowa; that, if there was any delay in transportation after said stallion had been accepted for transportation, it was due entirely to the unprecedented conditions caused by the snow blockade which existed prior to the acceptance of said shipment, and the consequences thereof were not entirely removed at the time the shipment was received.

The answer then set up certain provisions in the shipping contract whereby it was asserted that the value of the stallion was fixed at and limited to the sum of \$100, whereby the lowest rate applicable to the transportation of said stallion was obtained, and also pleaded certain Kansas statutes, certain orders of the Kansas Public Utilities Commission, and decisions of the Supreme Court of Kansas, under and by virtue of which it was asserted that the limited valuation of \$100 placed on said stallion in said shipping contract was legal, valid, and binding upon plaintiff, and that defendant in no event could be held liable for damages in excess of said valuation.

Plaintiff in reply pleaded certain statutes of Kansas and also decisions of the Supreme Court of that state construing the Kansas statutes, under which the provision in the bill of lading which is claimed to limit the liability of defendant was asserted to be of no binding force or effect.

[1] As the shipping contract was executed and fully performed wholly in the state of Kansas, the case is governed and controlled by the laws and decisions of that state. *Yost v. Union Pacific R. Co.*, 245 Mo. 219, 149 S. W. 577; *Newlin v. St. Louis, etc., R. Co.*, 222 Mo. 375, 121 S. W. 125; *Liebing v. Mutual Life Ins. Co.*, 207 S. W. 230.

Plaintiff purchased the stallion at Beloit, Kan., and shipped it from there to Abilene over the Union Pacific Railroad on a contract for that portion of the journey only; the agreement of the Union Pacific being to deliver the car containing the horse to the defendant at Abilene for carriage by the latter from Abilene to Kiowa. The horse was shipped from Beloit on March 1, 1912, and arrived at Abilene (the plaintiff accompanying the shipment) somewhere between midnight and 2 o'clock in the morning of Saturday March 2, 1912. The car containing the horse and his feed was set by the Union Pacific Railway Company on the transfer track connecting the two roads at that point. The defendant's station at Abilene was a day station; there being no night trains operated over its lines at that point. The business hours of the station were from 7 a. m. to 6 p. m. The transfer track was about three-fourths of a mile west of the Santa Fé station, and was used for the purpose of transferring freight, when in carload lots, from the Union Pacific to the Santa Fé, and vice versa. It was the only track over which cars could be delivered from one railroad to the other.

Upon reaching Abilene, the car was set by the Union Pacific on this transfer track, and the plaintiff, after looking after and caring for the comfort of his horse, went to a hotel and retired. According to plaintiff's testimony, some snow had fallen at Beloit prior to the day he started which had melted to some extent; and, although no snow fell the day he left Beloit, yet during the trip from Beloit to Abilene it began snowing, and was snowing hard when he arrived at the latter place. By the time he reached there the snow was from 4 to 5 feet deep where it had drifted. Four or 5 inches of snow had fallen that night. It did not stop snowing until Saturday night, and the entire fall of snow was about 8 or 10 inches. During this time it was cold and growing colder; the temperature falling to about zero.

On Saturday morning, March 2d, the plaintiff went to the Santa Fé station between 7 and 8 o'clock to arrange for the transportation of the horse from Abilene to Kiowa. He says the assistant agent told him the Santa Fé was blockaded by snow, and that for this reason the Santa Fé could not accept the horse for transportation; that about this time the agent came in, and he wired to the superintendent for advice as to whether the horse could be accepted; that soon thereafter plaintiff was told that they were instructed not to accept the horse. Thereupon plaintiff says he went to the Union Pacific agent and asked to have the car placed at the unloading platform so he could take the horse out of the car and care for him. The Union Pacific agent, having no engines, told him they would be unable to do so, but, at plaintiff's request, telephoned the Santa Fé agent to inquire

whether that road would be able to place the car at their unloading station. Plaintiff himself went back to the Santa Fé agent and made the same request, but was told that they would be unable to do so until an engine came in, as they had none at Abilene. About 6 o'clock Saturday evening a Santa Fé train from Salina, on a short branch line running west from Abilene, came in, and the engine thereof was hooked on to the car containing plaintiff's horse and pulled over on to the Santa Fé house track about 75 yards from the depot, but not up to the unloading platform. The plaintiff says he requested the crew to put the car at the unloading platform, but they refused; that he then requested the station agent to have the car placed at the unloading platform, and the latter promised that the next engine that came in he would have that done. Defendant's evidence is that the request on Saturday was to put the car containing the horse on the house track, and that the request to have the car set at the unloading platform was not made till Sunday afternoon, and that this was the time when the agent promised that as soon as another engine came in he would have the car set at the unloading platform.

The horse remained in the car on the house track Saturday night and all day Sunday. About 7 or 8 o'clock a snow engine (i. e. an engine with snowplow and shovellers to clear the snow) came in, and the car containing plaintiff's horse was placed at the unloading platform. But plaintiff says it was then so dark, and on account of the ice and snow it was too dangerous to attempt to unload the horse, especially as a two-foot connection would have had to be made and used between the car and the platform. So the horse was left in the car that night.

On Monday morning, March 4th, plaintiff says he went to the station intending to unload the horse, but did not do so because the agent told him they would be able to handle the shipment on that day; that there would be "no use unloading the horse, for I could get out that morning."

The shipping contract was dated March 4th, and plaintiff testified it was issued to him about 9 or 10 o'clock Monday morning. The car containing the horse did not leave Abilene until 3 o'clock that afternoon, but plaintiff says it was "picked up by the first train that went through in the direction I was going with the horse."

The transportation of the horse from Abilene to Kiowa was by local freights. The train that carried the horse from Abilene took it to Strong City, a distance of 63 miles, the terminus of that train's run. According to plaintiff's evidence, it arrived there at 9 o'clock Monday evening, March 4th. The car remained there until 8:30 Tuesday morning, a period of 11½ hours, during which time other trains passed through Strong City, be-

ing through freights which stopped at Kiowa; and plaintiff endeavored to have his car taken on by some of them, but his request was refused on the ground that the trains were too heavily loaded, and plaintiff would have to await his turn. At 8:30 Tuesday morning, the horse left Strong City, and at 5 o'clock in the afternoon of that day reached Mulvane, a distance of 96 miles. Here the car waited until 8:30 that evening, and during the wait several trains passed through in the direction plaintiff was going. One of these came in about an hour after plaintiff's horse reached Mulvane, and plaintiff asked why he could not have his horse taken by that train, but the agent at Mulvane told him that a local would soon be along and take him. At 8:30 Tuesday evening the local took plaintiff's car and carried it to Wellington, a distance of 18 miles, arriving there some time that evening. Plaintiff does not say what time it arrived but does say there was a delay there of some 6 or 7 hours. Here the plaintiff again asked to be taken on by some through freights that passed and which would stop at Kiowa, but was told he would be held for the local freight, as they had plenty without his car. Defendant's witness De Witt, the conductor, says they got to Wellington at 11:20 Tuesday evening. The horse left Wellington at 3 o'clock Wednesday morning and reached Kiowa about 9 o'clock a. m. of the same day.

Plaintiff noticed that the horse was taking a slight cold while waiting at Abilene. He observed that he was getting worse at Mulvane. At Wellington he called attention to the fact that the horse was sick, and when Kiowa was reached the horse was in a very critical condition. A veterinary was called immediately, and everything possible was done for him, but he died in a few days. There was evidence that he died of pneumonia as a result of the long time on the trip and the exposure. He was in perfect health when shipped from Beloit and when he arrived at Abilene. The evidence is that he was catching cold at Abilene, but this was not regarded apprehensively, as a horse almost invariably catches a slight cold when shipped in the winter time.

[2-4] The first question to be disposed of is whether or not defendant's demurrer to the evidence should have been sustained. In passing on this question, only that evidence can be considered which can be regarded as properly bearing upon the issue raised by the petition. That issue is whether, after the stallion was accepted for transportation, it was transported without delay and at a rate of not less than an average speed of 15 miles per hour for the entire distance between Abilene and Kiowa, which was 229 miles; for, although there is an allegation in the petition that the stallion, after being shipped over the Union Pacific from Beloit to Abilene, was, on the morning of March 2, 1912,

immediately tendered and delivered to defendant's agent to be forwarded to Kiowa, and that defendant failed and neglected to move the car containing said stallion out of Abilene, but held the same from 10 o'clock in the morning of March 2, 1912, until the afternoon of March 4, 1912, and plaintiff was compelled during said time to allow said stallion to remain in said car because defendant failed, neglected, and refused to place said car where the horse might be unloaded and cared for, yet there is no allegation that any damage accrued either by reason of failure to receive the horse promptly or by reason of defendant's refusal to place the car where the stallion could be unloaded. Hence neither of these two matters can be considered in determining the question of whether plaintiff made a case for the jury. As the case is based solely upon failure to transport as expeditiously as the statute requires after the stallion was accepted for transportation, whenever that was, the inquiry must be confined to ascertaining whether there was a failure to obey the statute after the acceptance of the shipment. Acceptance of the stallion for shipment did not arise merely from the fact that the Union Pacific railroad set plaintiff's car on the transfer track connecting the two roads at Abilene. *Gray v. Wabash R. Co.*, 119 Mo. App. 144, 95 S. W. 983. A snowstorm of such violence and extent that it ties up the traffic on a carrier's line is a valid reason for refusing to accept freight. *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 504, 93 Am. Dec. 315. On the other hand, we do not wish to be understood as holding that acceptance could not possibly be said to have arisen until receipt of the stallion was acknowledged by the issuance of a bill of lading. The evidence is that at least in the latter part of Saturday and throughout Sunday plaintiff was told a train might come along almost any time, and on this account plaintiff urges that, as the horse was in the car on defendant's track ready to go forward, there was an acceptance the same as if the agent had directed a shipper to bring his live stock to the pens for loading, in which case the carrier would be liable for failure to begin the transportation within a reasonable time thereafter regardless of conditions existing at the time such direction was given. But the situation is not at all parallel to the one to which it has been likened. The evidence on both sides shows that as soon as the plaintiff, on the morning of March 2d, tendered the horse for shipment, the agent refused to accept it, and gave his reasons for so doing. When the Union Pacific sent over the bill of lading it had, the defendant refused to accept it, and returned it to the Union Pacific. A telegram was sent to the superintendent asking whether the horse should be accepted, and the superintendent replied

that the shipment could not be handled that day and probably not the next day. Plaintiff was advised that instructions were not to receive the horse, and the shipment was refused. Under such circumstances, if defendant was unable, on account of the snow, to get a train through to carry plaintiff's horse, defendant is not liable, under the statute sued on, for the delay which lasted until the road was cleared and a train could be gotten through. Whatever duty defendant may have owed plaintiff with reference to helping plaintiff protect said horse or to enable plaintiff to unload and protect it during the wait at Abilene for the road to be cleared, and whatever liability defendant may have incurred in violating any such duty, is not involved herein, since the petition does not rest the claim for damages on any such ground. Plaintiff contends that there is evidence tending to show that the snow was not so great as to prevent defendant from getting its trains through Abilene sooner than it did. But this is not tenable. Plaintiff's own admission as to the snow at Abilene outweighs any deduction to be drawn from statements scattered here and there throughout weather notations made at other places on defendant's line, the distance of which from Abilene is not shown; nor did such notations state the condition of the tracks or the possibility of moving trains. While plaintiff did say "other trains" went through Abilene on Saturday and Sunday, he did not say what kind of trains these were, and defendant's evidence showed that these were "snow" trains; i. e., engines equipped with a snowplow with one or two cars carrying shovelers to dig out the snow. A passenger train and perhaps a mixed freight and passenger train came through, but they were not on the line plaintiff was going to travel, but on a short branch line that was not blockaded, nor were they going in the right direction as were the other lines. Defendant's evidence as to this was wholly uncontradicted, and so also was its evidence as to the snowdrifts, the necessity of running snowplows, and using men to dig the cuts out, and the inability to move trains on the line in question during the time, all of which was corroborated by records made at the time. All of this, combined with plaintiff's own evidence as to the snow and its extent as hereinabove set forth, shows unquestionably that a train could not have been gotten through Abilene sooner than the one that did come through at 3 o'clock Monday afternoon, which plaintiff himself says was the first one to come through going in his direction. We are therefore of the opinion that, in determining whether there was a violation of the statute sued on, we can only consider the evidence in relation to the movement of the shipment from and after the stallion was accepted for shipment.

But, after the train started from Abilene, the evidence must be regarded as showing that the line was open for traffic, and that the conditions on account of snow no longer hindered or impeded the movement of trains. Hence, if the statute as to transporting the animal at a rate of speed of "not less than an average of 15 miles an hour for the entire distance over which said shipment is transported" was violated after the stallion was accepted, then a case was made for the jury.

[5] We have not been cited to any decision wherein the above-mentioned statute has been construed or its meaning elucidated, but, as the statute contains a provision to the effect that the time consumed by stops for loading, or stops for watering and feeding occasioned by the requirements of law, or the order of the shipper, shall not be considered a part of the time in which shipments are required to be made, we understand that all other delays not occasioned by unavoidable accidents are included in the time in which the shipment must be carried to its destination, and that the statute means that, when live stock is accepted for transportation by rail from one point to another in the state of Kansas, the whole time consumed in such transportation, exclusive of the particular stops and causes mentioned, must not exceed one hour for every 15 miles of distance to be traveled. On this view of the statute there was evidence from which a jury could find that the statute was violated. The distance between the two points of Abilene and Kiowa was 229 miles; the time consumed—i. e. between 3 p. m. Monday and 9 a. m. Wednesday—was 42 hours. The distance from Abilene to Strong City was 63 miles, which, according to plaintiff's evidence, was traveled in  $5\frac{1}{2}$  hours, or a little less than 6 miles per hour. At Strong City the car, according to plaintiff, was "delayed"  $11\frac{1}{2}$  hours. From Strong City to Mulvane was 96 miles, accomplished in  $9\frac{1}{2}$  hours, or a little less than 10 miles per hour. Defendant's evidence shows that "a number of stops" were made between Abilene and Strong City, but does not state what those stops were for; that time was consumed "in various delays" between Strong City and Mulvane, but does not otherwise characterize or explain them. The run from Mulvane to Wellington, a distance of 18 miles, was accomplished in 2 hours and 50 minutes, or at a rate of not quite 7 miles per hour. Defendant's evidence is that about an hour was consumed "in various delays" between these points, but makes no explanation. At Wellington plaintiff says there was a delay of some 6 or 7 hours. Plaintiff testified that no accidents occurred to the car or train or any other train during the entire time of the transportation, nor did he make any stops to feed and water between Abilene and

Strong City, nor were any such stops made between Strong City and Kiowa. Under all of the evidence we think there was sufficient testimony from which the jury could find that the transportation was not effected as expeditiously as required by the statute, and that, after the shipment was accepted, the defendant was not prevented from so doing by unavoidable accidents or snow conditions.

[6, 7] Nor are we able to say there was no evidence from which the jury could find that the injury to the horse—the fatal illness of pneumonia—did not arise as a result of the delay in transportation of the horse after it was accepted. While the evidence on this feature is not as strong as it might be, we are of the opinion there was sufficient evidence from which the jury could find that the delay and slowness of the transportation after the horse was accepted caused and enabled the slight cold it contracted to develop into the dread disease that caused its death. Slight evidence is sufficient to maintain plaintiff's burden of proof so as to make a case for the jury. *Libby v. St. Louis, etc., R. Co.*, 137 Mo. App. 276, 117 S. W. 659; *Foust v. Lee*, 138 Mo. App. 722, 119 S. W. 505; *Botts v. St. Louis, etc., R. Co.*, 191 Mo. App. 676, 177 S. W. 746; *Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151; *Greening v. Chicago, etc., R. Co.*, 183 S. W. 1121.

We are therefore of the opinion that, upon the cause of action for failure to transport at the statutory rate of speed, the plaintiff made a case for the jury, and that defendant is not entitled to a reversal outright.

[8] The question then arises: What is the extent of defendant's liability? The shipment being an intrastate, Kansas, shipment, the laws and decisions of the state of Kansas are controlling and must be followed. The declared value in the shipping contract was \$100 (and plaintiff's attention was called to this fact), and the contract contained alternative rates whereby on a valuation of \$100 the freight rate was 76 cents per hundred; while, if the valuation was over \$100 and less than \$800, the rate was increased by an additional charge of 10 per cent., and upon a valuation in excess of \$800 an additional charge of 150 per cent. of the first or lowest rate was charged. These alternative rates were authorized and fixed under the laws of Kansas and the tariffs filed with the Public Utilities Commission of that state. The shipping contract provided that in case of loss the recovery could not exceed the declared value.

Prior to the enactment of section 7216, General Statutes of Kansas 1909, now section 8435, General Statutes of Kansas 1915 (which forbade a common carrier to limit its liability as a carrier "except as otherwise provided by regulation or order of the board"), the law of Kansas clearly permitted a com-

mon carrier to limit its liability under a contract fairly entered into between shipper and carrier in consideration of a lower rate. *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Pac. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107; *Kallman v. United States Express Co.*, 3 Kan. 205. Upon the passage of said section 7218, such limitation could only be done when authorized by the Board of Railroad Commissioners, now succeeded by the Utilities Commission. *St. Louis, etc., R. Co. v. Sherlock*, 59 Kan. 23, 51 Pac. 899. Following this decision the Board of Railroad Commissioners made an order (May 1, 1901) permitting carriers (except express companies) to so limit their liability in the manner hereinabove indicated. We need not go to the trouble of comparing section 1, c. 240, of the Session Laws of Kansas 1911 with the Carnack Amendment (Act June 29, 1906, c. 3591, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and of calling attention to the similarity of the two laws, nor of discussing the similarity of purpose in the two pieces of legislation, namely, the prevention of discrimination between shippers and the securing of uniformity of rates and liability of carriers for the same services performed; nor need we discuss the necessity of giving such Kansas laws the same construction as that placed by the federal courts on the Interstate Commerce Act. The liability of the defendant in this case being governed by the laws and rules of decision in force in the state of Kansas, we have only to follow them upon the question involved. We therefore rule that, upon the cause of action pleaded, plaintiff having obtained a lower rate by placing a declared valuation of \$100 on the horse in question, the provision for the limitation of the carrier's liability to that amount in the shipping contract is valid, and his recovery cannot exceed that amount. *Kennedy v. Atchison, etc., R. Co.*, 179 Pac. 314. This case was decided by the Supreme Court of Kansas January 11, 1919, and a rehearing was denied March 8th last. It follows, therefore, that plaintiff's recovery upon the cause of action pleaded in the petition cannot exceed the sum of \$100, the declared valuation upon which the lowest rate was based and obtained. This error could be cured by remanding the case, with directions to enter judgment for that amount if the case had been properly tried and submitted.

[8] But notwithstanding the fact that, as heretofore stated, the negligence causing the

injury was limited in the petition solely to the failure to transport as expeditiously as the statute requires, plaintiff, in his instruction No. 1 (which covered the case and directed a verdict), broadened the issues and submitted the case to the jury on the question of the duty of the defendant to accept the car on March 2d, when first presented to it; and if that was not established, then the question of the defendant's duty to switch the car to the unloading platform, and finally on the question of whether the defendant, after the issuance and delivery of the bill of lading on March 4th, carelessly and negligently failed to transport said stallion to Kiowa "without delay and within a reasonable time." Not only, therefore, did the instruction broaden the issues, but the cause of action for failure to obey the statute and transport at an average rate of 15 miles per hour was abandoned, and in place thereof a cause of action based on the carrier's common-law duty to transport without delay and within a reasonable time was substituted. This was clearly erroneous. *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Black v. Metropolitan Street Ry. Co.*, 217 Mo. 672, 117 S. W. 1142; *Huff v. St. Louis, etc., R. Co.*, 222 Mo. 286, 121 S. W. 120.

[10] Since the case must be reversed and remanded for a new trial, we think it well to say that instruction No. 2 is also erroneous in submitting to the jury the question of whether the plaintiff "knowingly" accepted the reduced rate based on the declared value. Under the federal decisions based upon a similar law, the construction of which is followed by the Kansas courts, the shipper's knowledge of the lawful rate is conclusively presumed. *Kansas Southern Ry. Co. v. Carr*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; *Louisville & Nashville R. Co. v. Maxwell*, 237 U. S. 94, 98, 35 Sup. Ct. 494, 50 L. Ed. 853, L. R. A. 1915E, 665; *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 166, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Cau v. Texas & Pacific R. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053. There was no evidence of any advantage being taken of the shipper nor the practice of any deceit upon him in this regard. Indeed, the evidence is that the shipper's attention was called to the valuation placed on the horse, and that he agreed thereto.

We need not notice further alleged errors. The case is reversed, and the cause remanded.

All concur.

## FOEGE v. WOESTENDIEK. (No. 15489.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted April 9, 1919. Opinion Filed May 6, 1919. Rehearing Denied May 22, 1919.)

## 1. APPEAL AND ERROR ¶171(1) — THEORY OF CASE BELOW.

A theory not embodied in the pleadings or advanced at trial cannot be considered by the Court of Appeals.

## 2. APPEAL AND ERROR ¶242(5)—OBJECTION TO EVIDENCE—FAILURE TO RULE—DEPOSITION.

Testimony should not be taken subject to objection, and no ruling afterwards made thereon; but the rule has no application to testimony by deposition, the whole of which is incorporated in the abstract, and is before the Court of Appeals reviewing the case, a suit in equity.

## 3. WITNESSES ¶48(5), 845(1) — CONVICTION OF FELONY.

Under Rev. St. 1909, § 6888, that a witness has been convicted of felony goes, not to his competency, but to his credibility.

## 4. APPEAL AND ERROR ¶172(3) — QUESTION REVIEWABLE—THEORY OF CASE BELOW.

In suit by the first lender on property, through a fraudulent agent, who failed to record the deed of trust, and subsequently procured another loan, against the holder of the same deed of trust transferred by the agent as security to the second lender, it not having been urged before the trial court that it should make an order or decree touching the difference between plaintiff's notes and the funds held by defendant, the matter is not open to review by the Court of Appeals.

## 5. BROKERS ¶106—GOOD FAITH OF BROKER—SUFFICIENCY OF EVIDENCE.

Evidence held to warrant finding that plaintiff's financial and realty agent induced her to make a loan on a deed of trust executed by a realty and investment company in fact owned and managed by the agent.

## 6. MORTGAGES ¶235—SUCCESSIVE NOTES SECURED BY DEED OF TRUST—PRIORITY.

Where lender on security of deed of trust, she having purchased from her agent a note for principal and notes for interest secured by such deed, was the owner of the note first negotiated, another principal note and interest notes being subsequently negotiated by plaintiff's fraudulent agent to a second lender on the security, plaintiff's note will be considered the real note, entitled to priority, as to the security of the deed of trust, over those held by the second lender, though plaintiff's note, by the fraud of the agent, was never recorded.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Suit by Johanna Foegen against Herman Woestendiek and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

Eugene D. Ruth, Jr., and James T. Roberts, both of St. Louis, for appellant.

John C. Robertson, of St. Louis, for respondent.

## Statement.

REYNOLDS, P. J. On the 18th day of May, 1915, plaintiff filed her petition in which she named as defendants "the unknown holders of deed of trust recorded in book 2585, page 230, Alfred H. Murphy and Jessie Morris Realty & Investment Company, a corporation, and R. A. Bullock, Trustee." Afterwards an amended petition was filed by plaintiff, in which she named appellant, Herman Woestendiek, as defendant, together with Alfred H. Murphy, the Jessie Morris Realty & Investment Company, and R. A. Bullock, Trustee.

The amended petition alleges, in substance, that on December 10th, 1912, the Jessie Morris Realty & Investment Company, defendant, made and executed a principal note for \$4,500 due 3 years after date, and six semi-annual interest notes for \$135 each and also then made a deed of trust on property described, to secure the same; that a credit of \$1,000 was indorsed on the principal note and \$30 on each interest note, and on December 11th, 1918, for value received, A. H. Frederick, who was then the legal owner of said notes, transferred and assigned them, together with the deed of trust, to the plaintiff for value; that four of the interest notes have been paid, and the principal note and two of the interest notes remain unpaid. Further, that defendant Woestendiek claims and pretends to own the above described notes and the deed of trust securing the same. Averring that she is the real owner of the unpaid notes secured by the deed of trust, plaintiff prays that the court so decree, and also prays for a decree directing defendant Woestendiek to deliver said deed of trust to her, that defendant Murphy, now owner of the property, bought by him subject to the deed of trust, be ordered to pay the note to her, and for general relief.

The Jessie Morris Realty & Investment Company filed its answer, admitting its incorporation and denied generally the allegations of the petition.

The cause was dismissed as to the "unknown holders" of the deed of trust attacked.

The answer of defendant Woestendiek, after a general denial, sets up as new matter that he, Woestendiek, holds the genuine notes and the genuine deed of trust, which he had bought before maturity from the Edward K. Love Real Estate Company and for which he

paid \$4,500. That defendant further sets up that the money advanced by the Love Company was expended in the erection of the building. To this a general denial by way of reply was filed.

Defendant Murphy made no answer and no order or judgment as to him was entered, he being treated as an unnecessary party.

Plaintiff testified, in substance, that she had known Mr. Frederick for a number of years; that he had made a loan of \$3,500 for her on certain property on Newstead Avenue, in the city of St. Louis, which she called the "Gossel loan"; that early in December, 1912, about the 6th or 7th, Frederick called her up and told her that the parties wanted to pay this Gossel loan and asked her to bring down her papers. She took these papers to Mr. Frederick's office and left them and afterwards went down there and Frederick told her that the loan had been paid and he (Frederick) had the proceeds of the loan. Plaintiff further testified that she told Mr. Frederick that she did not want the \$3,500 to lay idle and would like a new investment as soon as possible; that Frederick told her that he did not have any deeds of trust for \$3,500 at hand that he could give her, and suggested that she come back in a few days; that she returned to Frederick's office on December 10th, 1912, and Mr. Frederick then told her that the Jessie Morris Realty & Investment Company was intending to put up some flats on a lot on Eads Avenue and that he thought it was a good loan for her. She further testified that Frederick told her that while the note was for \$4,500, he would indorse a credit of \$1,000 on it so as to reduce it to \$3,500, the amount she had to loan, and this was accordingly done then and there. She testified that Frederick further stated that the company, meaning the Jessie Morris Realty & Investment Company, would put up the additional \$1,000, as they were going to build the flats. She further testified that Mr. Fernich, who was the vice-president of the company, and the architect, showed her the blueprints of the proposed improvement and described to her fully what the Jessie Morris Realty & Investment Company intended to do touching this improvement of that property; that the notes were brought out and Mr. Frederick thereupon indorsed the credit of \$1,000 on the principal note, reducing it to \$3,500, and a credit of \$30 on each of the interest notes, reducing them to \$105; that he showed her the deed of trust, which she read, and thereupon took the principal note reduced to \$3,500 and the six interest notes reduced to \$105 each from Frederick, in payment of the amount due her from Frederick on account of his collection of the Gossel loan of \$3,500. Plaintiff further testified that when she took the notes, she left the deed of trust with Mr. Frederick for the purpose of having him record it for her; that

she returned some time later and got a certificate of title to the property and that Frederick gave her the recorder's receipt card, showing that the deed of trust had been filed for record, and that later on, some time in January, 1913, she went to Mr. Frederick's office and he gave her the deed of trust. This deed of trust was offered in evidence by plaintiff and is *ipsissima verba* the same as the deed of trust held and claimed by defendant Woestendiek. Each of these deeds of trust appear to have been executed by the Jessie Morris Realty & Investment Company; each is dated December 10th, 1912; each is given to R. A. Bullock, trustee for W. E. Dearth; each describes the same property and each appears to be given to secure a principal note for \$4,500, due in three years after date, and six interest notes, each for the sum of \$135, being for interest on the principal note.

Plaintiff testified that she drew \$75 on account of the Gossel loan, on December 10th, from Frederick, and exhibited a receipt from him of that date. She also produced a number of receipts showing that she had received money from time to time from A. H. Frederick, which had been charged to her on Frederick's books. Plaintiff's receipts showed that she had been paid by Frederick \$745. There had been, as it appears, \$5 paid on the unpaid interest note, making it \$100. Plaintiff testified that she got these advances from time to time from Frederick and when they amounted to the sum of an interest note, she would deliver the interest note to him; that she had all of her dealings with Frederick and that the interest notes were never paid her by anyone except A. H. Frederick.

Plaintiff further testified that she took her notes and the deed of trust and put them in her box where she kept her papers at home, and that she made no further inquiry touching these papers, except to collect the interest from Frederick, until there was an expose in the newspapers of Frederick's transactions, and that she thereupon made inquiry and found that the deed of trust which she had on the property and which had secured her notes, as a matter of fact, never had been recorded.

Plaintiff also testified that she knew that this was a building loan and knew that the buildings were being erected by the Jessie Morris Realty & Investment Company, who owned the property, as the certificate of title showed the title to that property at the time to be in the Jessie Morris Realty & Investment Company.

Walter Niehaus testified that he was bookkeeper and cashier for Frederick; that the office of the Jessie Morris Realty Company was that of Frederick; that he (witness) was secretary of that company, holding one share of stock to act as secretary; did not know "offhand" who owned the stock of the



company but knew that Frederick owned the greater portion of it.

William E. Dearth testified that he had formerly been with Frederick; that the Jessie Morris Realty & Investment Company was a company of Frederick's. Witness was salesman for Frederick and sometimes party to deeds of trust; his name was used in the notes plaintiff held and was put there at Frederick's request, and he (witness) indorsed them; does not remember who he turned them over to; evidently put them on Frederick's desk or took them to Frederick's bookkeeper; was a "straw man" to carry the title.

Morris Fermich testified that he was vice-president of the Jessie Morris Realty & Investment Company; that Frederick was president and Walter Niehaus secretary of that company; that its name was partly taken from his name; that he recalled Mrs. Foegel coming there and that he showed her the blueprints and explained to her the nature and character of the improvements that the Jessie Morris Realty & Investment Company intended to put upon that property.

The deposition of A. H. Frederick was taken on behalf of plaintiff. He deposed that he had sold plaintiff a deed of trust on some property on Eads Avenue for \$3,500, the deed of trust originally securing a note for \$4,500 and interest notes for \$135 each; that the principal note was credited as of date December 10th with \$1,000; that he had delivered these notes to Mrs. Foegel about the time they were dated; that the books of the Frederick Real Estate Company and of the Jessie Morris Realty & Investment Company were kept together, and the transactions which he carried on were conducted through the same set of books; had delivered to plaintiff a card showing a record of the deed of trust and had also delivered to her a certificate of title. The credit he spoke of had been made by his bookkeeper at his direction; no money was actually paid; he simply reduced the amount of the note from \$4,500 to \$3,500 by having this credit entered. The deed of trust which he finally gave plaintiff was not the original deed of trust; the recorder's certificate on it was forged.

On cross-examination Frederick deposed that he did not remember just when he had sold the \$4,500 note secured by this deed of trust to the Edward K. Love Realty Company; did not remember just when Love had paid him the money for the note; his best recollection was that Love had paid him the money in a lump sum along in May, June or July after the buildings were completed or about completed, that is the \$4,500 for the note secured by the deed of trust which he turned over to Love; if his books showed that he got that money in March or April, then he was wrong as to his recollection of it having taken place in the summer. Asked to state whether he

had disposed of the deed of trust to Mrs. Foegel first or to the Edward K. Love Realty Company, he answered that his recollection was that he did not get anything from Love until after he had made the loan to plaintiff.

It is to be said of Frederick's deposition that it is very unsatisfactory and vague as to dates and details of the transaction, at the time he not having access to his books and the deposition having been taken June 24th, 1915, in the Penitentiary.

This was substantially the evidence for plaintiff.

Defendant's evidence disclosed that the "Gossel loan," referred to by Mrs. Foegel, was paid by the check of the Rosenbaum-Hauschulte Real Estate Company and was for \$3,629.83, and was made to the order of A. H. Frederick and deposited by him to his personal account in the National Bank of Commerce in St. Louis. Defendant offered in evidence a transcript of Frederick's account with the National Bank of Commerce in St. Louis, covering the time from December 1st, 1912, to September 1st, 1913, being the entire period covered by the transactions involving the erection of the buildings on the property on Eads Avenue. An abstract of this account shows that on the 9th day of December, 1912, Frederick deposited \$3,704.88, and that his bank balance at the close of that day was \$5,656.42; that on January 23rd, 1913, and before any work whatever had been done toward the erection of the improvements on the Eads Avenue property, Frederick's account at the National Bank of Commerce had shrunk to \$555.69.

There was also testimony to the effect that the Jessie Morris Realty & Investment Company had acquired the property on Eads Avenue by deed in November, 1912.

Edward K. Love testified that he conducted the negotiations for his company with the Jessie Morris Real Estate & Investment Company, represented by Frederick; that a principal note for \$4,500 and six interest notes for \$135 each, together with the deed of trust, were brought over to his office by Frederick about the 10th or 11th of December, 1912, and that Frederick wanted an advance thereon; that when Frederick first commenced the negotiations for the loan in December, he (Love) pasted one of their stickers on the notes and deed of trust, over the name of A. H. Frederick, and that when Frederick came back later he (Love) told him that he could not advance any money until something had been done in the way of improvements there; that Frederick expressed some displeasure owing to the fact that the Edward K. Love Company had pasted a sticker with their name on the notes and deed of trust and thereupon took them away. This was apparently in December, 1912.

Mr. Love further testified that Frederick

came back about January 21st, 1913, and showed that work had been undertaken, and that thereupon he agreed to make the loan and gave the Jessie Morris Realty Company a check of the Edward K. Love Real Estate Company for \$2,250, being one-half of the amount they were to advance on account of the building loan; that he watched the improvements from time to time as the work progressed and that some time later and on July 12th, 1913, he gave the Jessie Morris Realty Company a check of the Edward K. Love Real Estate Company for \$2,160, being the balance due on said building loan, less the usual commissions. Mr. Love also testified that he went out several times a week during the time the buildings were in the process of construction and saw what was going on, and that Frederick, when he got the last check, brought him receipted bills for approximately \$3,000, showing what he had paid for labor and material used in the construction of the buildings, and exhibited to him other receipts showing payment in full for all of the work done for the Jessie Morris Realty Company.

Defendant Woestendiek testified that he bought the notes and deed of trust from Mr. Love some time in September, 1913, and that he paid for such notes the face value thereof, with accrued interest, amounting in all to \$4,576.50, and this was done on the 22nd of September, 1913. Defendant also offered in evidence a deed from the Jessie Morris Realty & Investment Company to Louis Hudson, dated April 4th, 1914, conveying the property on Eads Avenue, together with other property; showing also that the property was sold subject to a deed of trust for \$4,500, which was the deed of trust in controversy here.

It was not disputed that the Jessie Morris Realty & Investment Company had executed the deed of trust produced by plaintiff and that it had also executed the deed of trust held by defendant and offered in evidence, as well as the two sets of notes. It also appeared that the deed of trust ultimately delivered by Frederick to plaintiff was a duplicate of the original and that the certificate of record thereon was a forgery, the genuine deed of trust being delivered to defendant Woestendiek.

The evidence of the building commissioners showed that they could not find anything prior to February 17th, 1913, showing that they had had a report that any work had been done on 2905-7 Eads Avenue, and the last report, when they marked the building as completed, was August 4th, 1913.

While the finding of fact has no binding effect in a suit in equity, we may use it and it is informative as a statement of the evidence. It corresponds closely to our own view of the evidence. The decree, which was

entered, follows that and finds, first, that plaintiff is the owner of the debt secured by the deed of trust described in the petition and recorded, and that that deed of trust secured the notes offered in evidence by plaintiff. Second, that this deed of trust was delivered to plaintiff on December 10th, 1912, and has been her property ever since that time but is now in the possession of defendant Herman Woestendiek. Third, that the notes offered in evidence by defendant Herman Woestendiek and described in his answer are not the notes secured by the deed of trust, although of the same description as plaintiff's notes. The court accordingly entered a decree, in substance, that defendant Woestendiek deliver and surrender the deed of trust described to the clerk of the court within five days from date, and that the clerk deliver it to plaintiff, and that the security for the deed of trust, of date December 10th, 1912, be applied to the payment of the balance due on the principal note for \$4,500, after application of credit for \$1,000, reducing it to \$3,500, and to the payment of the unpaid semiannual interest note held by plaintiff, all executed by the Jessie Morris Realty & Investment Company and described. It is further ordered, adjudged and decreed that defendant Woestendiek be perpetually enjoined and restrained from enforcing or attempting to enforce the power of sale in the deed of trust, and that the trustee Bullock be enjoined and restrained from enforcing or attempting to enforce the power of sale contained in the deed of trust at the direction of Woestendiek, or of any person holding the notes now in possession of Woestendiek, and the defendants Woestendiek and Bullock be further restrained from applying or attempting to apply the security of the deed of trust to the payment of any set of notes corresponding in description to those set out in the deed of trust other than the set of notes held by plaintiff, and that Woestendiek and Bullock be perpetually enjoined from in any manner interfering with the plaintiff in the enforcement of the power of sale contained in the deed of trust, or in the application of the security of the deed of trust to the payment of the notes held by plaintiff. Costs were adjudged against plaintiff.

The defendant Woestendiek filed a motion for a new trial as well as one in arrest and saving exception to the overruling of these motions, has duly appealed.

#### Opinion.

It is claimed by learned counsel for appellant that the respondent took the notes and deed of trust with full knowledge of all the facts in the case, and that on her own showing, she acquired her securities as the

result of a fraudulent transaction. If this proposition is true, it would follow that plaintiff could not recover, but on a very careful consideration of the testimony we find nothing whatever to justify the conclusion reached by learned counsel for appellant. So far as the testimony shows, the respondent was an innocent and injured party, acting in entire good faith and without any suspicion, much less knowledge, of any fraud in it until long after she had made the loan, and until after the exposure of the transactions of Frederick in other matters, when she became suspicious as to whether she might not be a victim, and commenced the investigation which resulted in her discovering the fraud that had been perpetrated on her, when she promptly instituted this action.

It is further urged by those learned counsel that plaintiff does not come into court with clean hands, but was a party to the fraudulent transaction. We are at a loss to understand how appellant can take any such position in the face of the evidence in the case. As said above, plaintiff was an innocent and the injured party and her hands clean from any fraud.

[1] It is further urged that inasmuch as the answer alleges, and the court found, that the money advanced by the Edward K. Love Realty Company was a building loan, made on the faith of the notes and deed of trust actually executed by the Jessie Morris Company, and the money was actually expended in erecting improvements on the land covered by the deed of trust, that he who expects equity must do equity, and that the court should have ordered an accounting and have allowed defendant Woestendiek the difference between the value of the vacant ground and the value of the improvements. We find no such theory in the pleadings or advanced at the trial. We cannot consider it here. *Riggs v. Price*, not yet officially reported but see (Sup.) 210 S. W. 420.

[2, 3] It is further urged by those counsel that the court took the deposition of Frederick offered by plaintiff "subject to objection" and never ruled on the objection, and that this testimony was inadmissible and the action of the trial court, taking it "subject to objection," is reversible error. It is true that it is the general rule that testimony should not be taken subject to objection and no ruling afterwards made thereon, but that rule does not apply here. The whole of Frederick's deposition is incorporated in the abstract and is before us, so that, irrespective of the action of the learned trial court on it, that is as to whether he accepted it and finally held it admissible, or excluded it, it is in the record, subject to our examination in this, a suit in equity, and entitled to such consideration as we may conclude to give it, having in view the conviction of

Frederick for a felony, which fact is conceded, and which goes under the provision of section 6888, Revised Statutes 1906, not to his competency as a witness but as to the credibility of his testimony.

[4] The fifth and final point suggested by learned counsel for appellant is that the court having jurisdiction over the parties should have made an order or decree touching the \$1,000, being the difference between plaintiff's notes and the funds held by defendant Woestendiek. We are unable to agree to this proposition. That was not a matter brought before the trial court. Nor do we here hold that Woestendiek is by this decree shut off from any legal remedy on the notes he bought. That we do not here pass on.

[5] Further attacking the finding of the trial court, it is urged that there was no evidence justifying the court in finding that A. H. Frederick and the Jessie Morris Realty & Investment Company were one and the same. There was evidence from one of the parties, as secretary, that he held one share of stock and did not know who owned the others but this witness, as well as two others, testified distinctly that the Jessie Morris Realty & Investment Company in point of fact was A. H. Frederick. The facts in evidence were sufficient to warrant this. A. H. Frederick kept but one set of books and those books contained not only his individual transactions and his transactions as a real estate agent but the transactions of the Jessie Morris Realty & Investment Company. This was sufficient to warrant the finding that Frederick and the Investment Company were one and the same.

[6] The principle upon which this case was undoubtedly determined by the learned trial court is very thoroughly considered by our Supreme Court in the case of *Southern Commercial Savings Bank v. Slattery's Adm'r*, 166 Mo. 620, 66 S. W. 1066. We think the principle decided and announced in that case not only applicable, but controlling here. The same doctrine had been long before then announced by our Supreme Court in *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73. In that case it was held that one purchasing a note secured by a mortgage takes the latter as an incident to the note; and where the note is transferred before becoming due, the purchaser takes it with all the presumptions in his favor of want of notice on his part of any secret claims or trusts attached to the notes in favor of third persons, and the mortgage passes on the same footing as the note; that where one purchases a note in good faith, and before due, he cannot be affected by any subsequent notice of claims of third persons on the note. In line with the above cases there have been many decisions by our appellate courts. As one cov-

ering the matter very clearly and very applicable here, see *Casner v. Schwartz*, 198 Mo. App. 236, 201 S. W. 592, where it is held that when notes are fraudulently executed in triplicate with a deed of trust securing payment of the note, the one first negotiated will be considered the real note, entitled to priority in the lien of the deed of trust. A multitude of authorities are cited by the learned judge in that case and without repeating them here we refer to his decision.

It is true that Mr. Love and his clerk, Mr. Dudley, in rather vague testimony undertook to place the inception of the transaction between them and Frederick in November or December, 1912, but when their evidence is tested, even in itself and in the light of the time that they made the first payment on this note and took over the loan, it is very clear that Mr. Love, through whom de-

fendant Woestendiek became owner of these notes, had not seriously entertained the proposition of Mr. Frederick to let him have money on the notes and deed of trust until in January, 1913. The first money that he paid on them was paid on January 21st, 1913, the final payment not having been made until July of that year. So that, in point of time, plaintiff here was the owner of the note first negotiated and that note and its interest notes will be considered the real notes and entitled to priority over the notes held by Woestendiek. So the learned circuit court held.

Our conclusion is, that the judgment of the circuit court is for the right party, is supported by sufficient evidence and should be sustained.

That judgment is accordingly affirmed.

ALLEN and BECKER, JJ., concur.

## PONDER v. STATE.

(Supreme Court of Tennessee. May 27, 1919.)

1. ANIMALS  $\S$ 4—STATUTES  $\S$ 93(3)—CLASSIFICATION OF COUNTIES — REGISTERING DOGS.

Priv. Laws 1917, c. 648, § 1, declaring a public nuisance the running at large of dogs not registered, in counties having a population between 29,946 and 29,975, according to the 1910 federal census, is not unconstitutional as partial; counties being properly subjected to the population classification basis.

2. CONSTITUTIONAL LAW  $\S$ 237—DISCRIMINATION—REGISTERING DOGS.

The requirement of Priv. Laws 1917, c. 648, that dogs be registered and wear collars bearing tags for identification is reasonable, and the enactment that dogs not so identified are a public nuisance when found running at large, while dogs so identified are permitted to run at large, is not an arbitrary and unreasonable discrimination.

3. STATUTES  $\S$ 121(1)—TITLE — PROVISIONS GERMANE TO GENERAL SUBJECT—REGISTRATION OF DOGS—DISPOSITION OF FEES.

Priv. Laws 1917, c. 648, entitled "An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this state and to provide penalties for violations of this act," is not unconstitutional as being broader than its title, in that section 8 thereof, providing that balance of registration fees, if any, shall be credited to a "Dog and Stock" fund, is not germane to its general subject; the tax being but an incident to the object expressed.

4. EMINENT DOMAIN  $\S$ 2(2)—LICENSES  $\S$ 7 (2)—TAXATION  $\S$ 42(1)—TAKING PROPERTY WITHOUT JUST COMPENSATION — EQUALITY OF TAXATION.

Priv. Laws 1917, c. 648, as to registering dogs, does not violate Const. art. 1, § 21, in that it takes property without just compensation being made therefor, nor article 2, § 28, providing that no one species of taxable property shall be taxed higher than any other species of property of the same value.

5. ANIMALS  $\S$ 4—DOGS — REGISTRATION — PENALTY.

Under Priv. Laws 1917, c. 648, requiring registration of dogs, it is no defense to an indictment for keeping and permitting a dog to run at large in September without first having been registered, which is a misdemeanor under section 6, that the tax is not delinquent under section 12 until October 1st, since the latter section requires registration by July 1st.

Error to Circuit Court, Obion County; Joseph E. Jones, Judge.

Jim Ponder was prosecuted for keeping a tag without reporting it for registration,

and, judgment being entered against him, he appeals and assigns errors. Affirmed.

Pierce & Fry, of Union City, for plaintiff in error.

The Attorney General, for the State.

HALL, J. The defendant below, Jim Ponder, was indicted in the circuit court of Obion county at its September term, 1917, for keeping a dog three months of age or over without having reported it for registration as required by chapter 648 of the Private Acts of 1917.

A motion was made to quash the indictment upon several grounds, all of which were overruled. Thereupon the defendant was tried without a jury, and a fine of \$10 was assessed against him, and he was taxed with the costs of the cause. His motions for a new trial and in arrest of judgment having been severally overruled and judgment entered against him, he has appealed to this court, and has assigned errors.

It is conceded that the evidence was sufficient to support the judgment of the trial court, and the questions raised upon this appeal are all based upon the alleged unconstitutionality of chapter 648 of the Private Acts of 1917, under which the defendant was indicted, and upon the alleged insufficiency of the indictment. These questions were presented by the motion to quash the indictment.

Chapter 648 of the Private Acts of 1917 applies to counties having a population of not less than 29,946 nor more than 29,975, according to the federal census of the year 1910, or any subsequent federal census. Obion county was given a population of 29,946 by the federal census of 1910, and therefore falls within the application of said act. The title of said act is as follows:

"An act to be entitled 'An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this state, and to provide penalties for violations to this act.'"

Section 1 of the act provides that the running at large of dogs not registered as otherwise provided in the act is declared to be a public nuisance, and requires that the owners of dogs three months of age or over shall report the same for registration annually to the circuit court clerk.

Sections 2 and 3 of the act direct the circuit court clerk with respect of the registration.

Section 4 provides for the method of registration, and provides that every person registering a dog shall be furnished with a leather collar, to which must be attached a tag showing the registered number of the

dog, which collar and tag must be kept on the dog continuously.

Section 5 provides that for the registry of each dog and the furnishing of the collar and tag a fee of \$1.50 must be collected by the circuit court clerk.

Section 6, the penal section, upon which the indictment is based, is as follows:

"Any person owning or keeping a dog three months old or over, and failing to report the same, for registration, or permitting such to run at large without being registered, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars nor more than twenty-five dollars for each dog kept and not reported, or permitted to run at large without being registered, and shall pay all costs."

Section 7 gives the grand jury inquisitorial powers over violations of said act.

Section 8 provides for the keeping of an account of the registry fees collected, and for the payment of the administration of the act, and then provides that—

"The balance, if any remaining shall be credited to an account to be opened and kept by the clerk to be known as the 'dog and stock' fund and shall be paid out as the law in such cases may provide, and all such disbursements be reported to said court and sworn to by the clerk."

Other provisions of this section are immaterial.

Section 9 provides for the annual registration of each dog.

Section 10 provides that county tax assessor shall annually make a list of all dogs found in the county, for which he is to receive a fee of five cents for each dog listed and reported to the clerk.

Section 11 provides that a certified copy of the list of all delinquent owners of dogs who have failed to register their dogs shall be furnished to the grand jury at any term of court, and further provides that the certified list shall constitute prima facie evidence of the nonregistration of dogs, upon which the grand jury is authorized to return an indictment, as provided by sections 6 and 7.

Section 12 provides that the registration must be made or renewed during the month of July of each year, and further provides that the registration "shall become delinquent from and after the 1st day of October of each year."

Section 13 provides that nothing in the act shall exempt the owner of any dog from liability for any damage caused by it.

Section 14 provides that the statute shall apply to counties having a population of not less than 29,946 nor more than 29,975, according to the federal census of the year 1910 or any subsequent federal census.

This court, in the case of *State v. Erwin*, 139 Tenn. 341, 200 S. W. 973, passed upon the constitutionality of a statute similar to

the one now involved. The title of the act involved in that case was almost identical with the title of the act involved in the instant case, the only exception being that the act in the *Erwin* Case affected only female dogs. The title of the act in the *Erwin* Case was as follows:

"An act to regulate the keeping of female dogs, by requiring them to be registered, and to declare the running at large of unregistered female dogs a public nuisance." Laws 1907, c. 32.

The material points of difference between the statute involved in the *Erwin* Case and the statute involved in the instant case are as follows:

(1) The statute involved in the *Erwin* Case applied to the state at large, while the statute involved in the case at bar applies only to certain counties; (2) the statute involved in the *Erwin* Case applied only to female dogs, while the statute involved in the case at bar applies alike to all dogs; (3) the registration fee provided for in the statute involved in the *Erwin* Case was \$3, while the registration fee prescribed by the statute under consideration is only \$1.50; (4) the registration provided for in the statute involved in the *Erwin* Case was not to be renewed, while the statute under consideration provides for an annual registration; (5) the balance remaining from the proceeds of the registration required by the statute involved in the *Erwin* Case, after paying all expenses incident to the administration of the statute, was required to be paid into the common school fund, while the balance of such fund, under the statute involved here, is required to be paid into a "dog and stock" fund, the disposition of which is provided for in another statute (chapter 647 of the Private Acts of 1917, applying to the same counties).

In the *Erwin* Case this court held that while dogs are property, as repeatedly held in the earlier cases cited by the court in that case, they are property of such a character that the Legislature, in the exercise of the police power of the state, has seen fit to regulate the keeping of them so as to protect the safety of the people and property from their offensive and destructive propensities; that while the registration of dogs and attaching collars to them with tags, for which the owner is made to pay a tax, will not change their inherently bad qualities, the registration and payment of the tax "will probably reduce their number and cause the owners of them to use greater care to see that they do not harm the persons or property of others."

It was further held in the *Erwin* Case that the requirement of the payment of the registration fee was not arbitrary class legislation. It was further held that the object of the statute was the regulation of

dogs, and that the tax was only an incident to the object expressed, and was not put into the statute primarily for the purpose of raising revenue.

We think the same general rules of construction and principles enunciated in the Erwin Case apply, in the main, to the questions presented by the assignments of error in the case under consideration.

[1] The defendant insists that section 1 of the statute under consideration, declaring that the running at large of dogs not registered is a public nuisance, in certain counties of the state, is an arbitrary discrimination against the citizens of the counties affected, and is therefore unconstitutional and void.

This very question was settled against the contention of the defendant in the cases of *Thomas v. State*, 136 Tenn. 47, 188 S. W. 617, and *Sullivan v. State*, 136 Tenn. 194, 188 S. W. 1153. In those cases, and in the earlier cases cited by the court in them, statutes were involved making it unlawful for owners of live stock in certain counties to permit their stock to run at large, the provisions of said statutes being intended for the protection of other citizens who might have growing crops subject to damage by live stock. It was expressly ruled in those cases that such statutes were not partial class legislation in violation of the Constitution, since the counties were properly subjected to the population and classification basis.

[2] It is next insisted by the defendant that the registering of the dog does not make it any less a public nuisance, and that it is an unreasonable and arbitrary enactment to provide that a dog not registered is a public nuisance; that the absence of the collar, which is provided for a registered dog, being no ground for declaring such a dog a nuisance.

The court, in the Erwin Case, *supra*, used this language:

"Of course, the registration of dogs and attaching to them collars with tags, for which the owner is made to pay a tax, will not change their inherently bad qualities; but it will probably reduce their number and cause the owners of them to use greater care to see that they do not harm the persons or property of others."

We think the registering of the dog and requiring him to wear a collar, which bears a tag containing a number by which the name of the owner can be ascertained on reference to the books in the office of the circuit court clerk, is a reasonable distinguishing mark, and the enactment that dogs not so identified are a public nuisance, when found running at large, while the dog so identified is permitted to run at large, is not an arbitrary and unreasonable discrimination. The

state, in the exercise of its police power through the Legislature, has full power to provide that a dog may not be allowed to run at large unless he bears such mark of identification. Such requirement will enable the owner of sheep or other property damaged by such dog, if the dog should be killed or captured, to discover the owner of the dog, who may be held liable for damages for the injury done by him. Also, as held in the Erwin Case, the requirement of a small registration fee will tend to reduce the number of worthless dogs.

The holding of the court in the Erwin Case is a sufficient answer to defendant's further contention that it is unreasonable to require all dogs to be registered, including those which are too small and weak to kill a sheep. While the principal object of the act it may be conceded is to protect sheep and hogs, the act is not limited to that purpose.

[3] It is next insisted that the act in question is broader than its title, because of the provision of section 8, which provides that the balance of the proceeds of the registration fees, "if any remaining, shall be credited to an account to be opened and kept by the clerk to be known as the 'dog and stock' fund, and shall be paid out as the law in such cases may provide." It is insisted that this provision of the act is not germane to the general subject of the act which is expressed in the title "to regulate the keeping of dogs by requiring them to be registered," etc.

In the Erwin Case the title of the act went no further than the title of the act in the present case. In that act it was provided that the balance of the proceeds of registration fees, if any balance should remain after paying all the expenses incident to the administration of the act, should go to, the "common school fund." This court held that the tax was only an incident to the object expressed, and was not much more than enough to cover the cost of its execution. The tax provided by the statute involved in that case was twice as great as the tax provided by the statute under consideration. We are therefore of the opinion that the provision for the disposition of whatever balance of the fund that might remain, after the payment of the expenses provided for in same, is germane to the general subject of the act, which is the requirement of registration. It certainly is not such a distinct and severable subject, the introduction of which would render the act invalid.

[4] It is next insisted that the court erred in overruling the motion to quash the indictment, because said act violates article 1, section 21, of the Constitution of the state, in that it takes property without just compensation being made therefor; and that it also violates article 2, section 28, of said

Constitution, which provides that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.

These questions were ruled adversely to defendant's contention in the case of *State v. Erwin*, supra, the court holding that the statute involved in that case, which, in principle, is the same as the statute involved in the case under consideration, did not have for its primary object the raising of revenue, but was a police regulation, its object being to regulate dogs; that the tax was only an incident to the object expressed, and was not much more than enough to cover the cost of its execution.

[5] The next and last insistence of the defendant is that the trial judge erred in overruling the twelfth ground of defendant's motion to quash the indictment, which was as follows:

"Because the said statute shows upon its face that the parties failing to pay the dog tax are not delinquent until the 1st day of October, 1917. Hence no indictment can be predicated upon said statute until said time."

The twelfth section of the act provides as follows:

"All dogs shall be registered or registration renewed in the month of July of each year from and after the date of the passage of this act, and shall become delinquent from and after the 1st day of October of each year."

It is a sufficient answer to this last contention of the defendant to say that he was not indicted, and is not being prosecuted for his failure to pay a registration fee; but he is charged with owning and keeping and permitting to run at large a dog, which should have been registered, but which was not registered. It is provided in section 12 of the act that all such dogs must be registered during the month of July. The indictment returned against the defendant charged him with keeping and permitting a dog to run at large in September, 1917, without first having been registered, which is a misdemeanor under section 6 of said act.

It results that we find no error in the judgment of the court below, and it is affirmed, with costs.



## KRYPTON COAL CO. v. EVERSOLE et al.

(Court of Appeals of Kentucky. June 3, 1919.)

JUDGMENT  $\Leftrightarrow$  443(3)—VACATION IN EQUITY—  
CAUSE—STATUTE.

Petition alleging that plaintiff herein, as transferee of a coal-mining lease, was sued, with others, by defendants herein, to cancel lease, etc., that on the fraudulent representation of defendants herein that, if plaintiff would not answer or appear and would allow judgment to be taken, defendants would execute a new lease, plaintiff in reliance allowed a default judgment, though having a good defense, and that defendants refused to execute a lease, stated a cause of action to vacate the judgment for fraud, within Civ. Code Prac. § 518, subsec. 4.

## Appeal from Circuit Court, Perry County.

Action by the Krypton Coal Company against Clark Eversole and others to vacate a judgment rendered in an action by defendants, as plaintiffs, against plaintiff herein and others, as defendants. Demurrer to petition sustained, and petition dismissed, and plaintiff appeals. Reversed and remanded.

Miller & Craft, of Hazard, for appellant.

John B. Eversole, of Hazard, for appellees.

CLAY, C. This is an independent action by the Krypton Coal Company against Clark Eversole, Serena Eversole, G. C. Lewis and Bertie Lewis to vacate a judgment rendered in an action wherein the defendants were plaintiffs and the Krypton Coal Company and others were defendants, on the ground that the judgment was obtained by fraud. A demurrer was sustained to the petition, and the petition dismissed. Plaintiff appeals.

The allegations of the petition are in brief as follows: Clark Eversole, Serena Eversole, G. C. Lewis, and Bertie Lewis were the owners of a boundary of land in Perry county. On October 5, 1913, they leased the lands, for mining and other purposes, to W. H. Soper, who transferred the lease to the East Kentucky Mining Company, which in turn transferred it to the Krypton Coal Company. The lessee was to pay a royalty of 8½ cents per ton, was to mine sufficient coal to insure the lessors an income of not less than \$50 per month, and was to begin the operation as soon as possible after the execution of the lease. Subsequently the lessors brought suit against Soper, the East Kentucky Mining Company, and the Krypton Coal Company to cancel the lease because of a breach of its terms, to recover royalties in the sum of \$610.35, and asked that they be adjudged a lien on the property for that sum, and that the property be sold. The defendants were summoned, and the East Kentucky Mining Company filed a demurrer to the petition, which was overruled. Before

judgment was rendered, Clark Eversole, representing himself and the other plaintiffs in that action, came to the president of the Krypton Coal Company and told him that if that company would file no answer in said action, and would not appear therein, but would allow judgment to be taken, the plaintiffs in that action would execute and deliver to the Krypton Coal Company a new lease upon the premises, containing the same terms and conditions as the former lease. Relying upon these statements, the Krypton Coal Company made no defense and allowed judgment to be rendered by default. Thereafter the property was sold, and purchased by the plaintiffs in that action, and plaintiffs refused to execute a new lease to the Krypton Coal Company. At the time said judgment was rendered the Krypton Coal Company did not owe the plaintiffs in that action any sum whatever, and the terms of the lease had not been violated, and, had it not been for the representations of Eversole, the Krypton Coal Company would have appeared in the action and would have established these facts. The promises made by the plaintiffs in that action were made by and through Eversole, for the fraudulent purpose of causing the Krypton Coal Company not to appear and make defence, and at a time when the plaintiffs in that action had no intention of carrying out the promises.

Our Code provides that the court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it for fraud practiced by the successful party in obtaining the judgment. Civil Code, § 518, subsec. 4. The only question to be determined, therefore, is whether the facts relied on are sufficient to show fraud. In support of the judgment below, it is argued that the Krypton Coal Company was in court, that it knew the relief sought, and also knew that judgment would be rendered if no defense was made. Hence it is insisted that that company was not deceived in any respect, but that the case is one where, according to the petition, the plaintiffs in the original action merely refused to comply with their contract to make a new lease. This contention, however, overlooks entirely the fact that the Krypton Coal Company had a good defense, and that it was induced not to make defense, but to let judgment go, by the fraudulent promise that a new lease would be executed to it. It is not, therefore, a case of mere breach of contract, but a case where a party was lulled into inaction and induced to forego its rights by an agreement that was never intended to be carried out. If this was not fraud practiced by the successful party in obtaining the judgment, we are unable to characterize the transaction. It follows that the demurrer to the petition should have been overruled.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

## CAUDIL et al. v. WAGONER.

(Court of Appeals of Kentucky. May 23, 1919.)

1. CURTESY  $\S$ 12(1)—RIGHT OF LIFE TENANT TO MINING ROYALTIES.

Where coal mines were opened and operated during the lifetime of and under lease from a wife, the owner, her husband after her death as life tenant by curtesy by law was entitled to the whole of the royalties due from the operation.

2. REMAINDERS  $\S$ 14—TENANT BY CURTESY—PURCHASE FROM REMAINDERMEN.

Where children of a wife, who owned and leased coal lands, inherited their interest with the burden impressed on the land that the surviving husband as life tenant by curtesy was entitled to the royalties or rentals from the coal lease, a mining company by its purchase from the remaindermen took no greater interest than was owned by them, and its rights are subject to the life tenant husband's.

3. MINES AND MINERALS  $\S$ 79(1)—RIGHT TO RECOVER ROYALTIES—PAYMENT OF RENTAL.

The fact that a coal mining company pays to a husband, life tenant by curtesy of his wife's coal lands leased by her to another company, which sold to the first, a stipulated annual rent for use of certain buildings on the land, and for the right to haul over it coal from other lands, does not preclude the life tenant husband from recovering from the company his part of the royalties due from the operation of mines on the land.

## Appeal from Circuit Court, Pike County.

Action by Tobias Wagoner against J. D. Caudil and others. From judgment for plaintiff, defendants appeal. Affirmed.

Stratton & Stephenson, of Pikeville, for appellants Caudil and Mullins.

Oline & Steele, of Pikeville, for appellant Mossy Bottom Mining Co.

Roscoe Vanover, of Pikeville, for appellee.

CLARKE, J. The question presented by this appeal is whether appellee Tobias Wagoner, life tenant by curtesy of  $22\frac{1}{2}$  acres of land, is entitled as adjudged to one-third of the royalties due on the coal mined therefrom, by appellant Mossy Bottom Mining Company.

The land was leased by appellee and his wife, Caroline M. Wagoner, who owned the land, to the Wagoner Coal Company, and the mines were opened and worked for a time during her lifetime by that company under its lease. After the death of Caroline M. Wagoner, and while the mines upon the land were being operated by the Wagoner Coal Company under its lease, a controversy arose between the life tenant, Tobias Wagoner, and his children, who inherited the remainder interest in the land from their moth-

er, as to whom the royalties were due under the lease; and, in a suit which grew out of that controversy, an agreed judgment was entered adjudging to the life tenant one-third of the royalties and to the remaindermen the remaining two-thirds thereof.

Thereafter the Wagoner Coal Company, having encountered financial trouble, ceased its mining operations, and in the settlement of its affairs its lease was sold to the appellant Mossy Bottom Mining Company, which, however, seems to have abandoned its lease, when it subsequently purchased an undivided four-fifths interest in the land from the remaindermen, and thereafter resumed operation of the mines theretofore opened upon the land, and it now denies that the life tenant is entitled to any royalties from the operation of the mines, and complains of a judgment in his favor for one-third thereof, but admits liability to an infant remainderman whose undivided one-fifth interest it has not acquired, for a proportional part of a reasonable royalty upon coal mined, conceded to be ten cents per ton, and a judgment was entered in favor of this remainderman upon that basis, of which no complaint is made.

[1-3] Since the very same mines that are now being operated were opened and operated during the lifetime and under lease from Caroline M. Wagoner, there is no doubt, under the authorities, that the life tenant by curtesy was by law entitled to the whole of the royalties due from such operation. See 9 R. C. L. 579; James H. Seager, Guardian, v. Gertrude C. McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; Deffenbaugh v. Hess, 225 Pa. 638, 74 Atl. 608, 36 L. R. A. (N. S.) 1099 and notes. So except for the judgment in the litigation between appellee the life tenant and his children, the remaindermen, which fixed their respective interests in these royalties, appellee would clearly have been entitled to the whole of same; but, recognizing the binding effect of that judgment, he is in this action claiming, and was awarded by the judgment herein, but one-third thereof. Since the land had been thoroughly impressed as mineral lands and the mines in question had been opened and operated by the owner in her lifetime, which under the authorities above cited fixed upon her surviving husband entitled to curtesy the right to the royalties or rentals therefrom, it is quite clear that the remaindermen inherited their interests in the land with this burden thoroughly impressed upon it, and that the Mossy Bottom Mining Company by its purchase from these remaindermen took no greater interest in the land than that owned by them, and its rights in the land, just as were their rights, are subject to the life tenant's rights therein, and it is only because of

the compromise judgment between its grantors and the life tenant that it is entitled, to any part of royalties due from the operation of the mines during the life tenant's occupancy. Nor does the fact that the Mossy Bottom Mining Company is paying to the life tenant a stipulated annual rental for the use of certain buildings upon the land, and for the right to haul over this land coal it mines from other land acquired from other resources, preclude the appellee from recovering his part of the royalties due from the operation of the mines on this land, since it is clear that these payments are not made nor intended by either party as a settlement or waiver of royalties on coal mined from the land, but are for rights to use the surface recognized and contracted for by the parties as additional to the right to operate the mines thereon.

Wherefore the judgment is affirmed.

PHELPS et al. v. STONER'S ADM'R et al.  
(Court of Appeals of Kentucky. May 30, 1919.)

1. WILLS §476—RULES OF CONSTRUCTION.

In arriving at testator's intention, all parts of the will and codicils thereto must be looked to.

2. WILLS §439—CONSTRUCTION—INTENTION.

The intention of a testator must be applied, provided it does not conflict with any established public policy, or is not otherwise prohibited by law.

3. WILLS §439—CONSTRUCTION.

The rule that the intention of a testator must be given effect is an absolute one, and imposes upon the courts an imperative duty.

4. WILLS §449—CONSTRUCTION—PRESUMPTIONS—INTESTACY.

It will be presumed that a testator intends to dispose of his entire property, and not merely to change, from that provided by law in case of intestacy, the devolution of a small portion of it.

5. WILLS §614(5)—CONSTRUCTION—LIFE ESTATE.

A will giving property to a certain person, and a codicil in which testator attempted to dispose of the entire property left to such person after her death, *held* to create only life estate in the person to whom the property was first given.

6. WILLS §616(1)—LIFE ESTATE—POWER OF DISPOSITION.

Where a life estate only is given, with power of disposition, a limitation over in a will will be upheld.

7. WILLS §616(9)—CONSTRUCTION—LIFE ESTATE.

A codicil, providing that a certain person could keep a farm during his life if he desired,

"and leave it so some of my family can own it," *held* not to revoke a clause in the will to the effect that the farm should be sold preferably to one of the family, but only to postpone the sale until the person who was allowed to keep it should withdraw his desire to further occupy, or should die.

8. WILLS §535—EXCLUSION OF HEIRS.

A clause in a will, "It is my desire that F. shall never have a dollar of my estate," cannot deprive F. of his inheritance, unless in addition there is a disposition made of the property by the will, or one provided for therein.

Appeal from Circuit Court, Montgomery County.

Suit by Mary F. Stoner's Administrator and others against Frank Phelps and others. Judgment for plaintiffs, and defendants appeal. *Affirmed*.

E. C. O'Rear and J. C. Jones, both of Frankfort, and R. G. Kern, of Mt. Sterling, for appellants.

Chas. D. Grubbs and Robert H. Winn, both of Mt. Sterling, for appellees.

THOMAS, J. This suit was filed by the administrator with the will annexed of Mary F. Stoner and certain devisees, for the purpose of obtaining a judicial construction of the will of the testatrix. Some of the devisees who did not join as plaintiffs were made defendants, as were also the appellants, Frank Phelps, Hugh Atkinson, and Mary Lou Atkinson, all of whom are heirs at law of the testatrix, but were not devised anything by her will or any of the codicils attached thereto. The court by its judgment construed the will and codicils so as to dispose of all of the property of the testatrix, and in a manner which deprived appellants of all interest therein, and, complaining of that judgment, they prosecute this appeal.

The will and codicils were written by the testatrix, and, as she says, "without consulting any one." The will, which is dated May 20, 1901, contains 16 clauses, and there are three codicils, the first of which is dated March 20, 1906; the second is not dated, and the third bears date of August 14, 1906. The first eight clauses of the will have nothing to do with this controversy. Specific devise and bequests are made in them, none of which is called in question. The ninth clause reads:

"After these bequests are complied with, and my debts paid, the remainder of my estate I want equally divided between my brothers and sisters, namely: Lucy Atkinson, Sally Berry, Amanda Clay, Margaret Burgin, William T. and John S. Phelps."

Immediately following, in the tenth clause, the testatrix says:

"The part of my estate bequeathed to my sister, Margaret Burgin, I want to be used for her comfort while she lives, and at her death what is left of it, to be equally divided between my sisters Sally Berry and Amanda Clay and my brother, William T. Phelps."

She made other limiting provisions in subsequent clauses of the original will with reference to the interests devised to her sisters Amanda Clay and Sally Reppart, and in the first codicil, with reference to the part of her estate devised to her sister Lucy Atkinson, she says:

"At my sister Lucy Atkinson's death, I want her daughter, Mary Lou, to have 1,200 dollars of her estate, and the balance to be equally divided between the following named nieces and nephews, Sally, Margaret and Ann Clay; and William P. Oldham."

Further along in that codicil it is provided that:

"If my brother, William T. Phelps and sister, Sally Berry, desire it, I want them to keep the farm and everything on it their lifetime. I bequeath it to them for that period, by requesting them to look after my sister, Amanda Clay, and her unmarried daughters. I leave everything in their hands, knowing they will decide everything with judgment and wisdom. I now revoke the gift of four hundred dollars bequeathed to my nephew Frank Phelps, and bequeath the same to my nephew, William P. Oldham. It is my desire that Frank Phelps shall never have a dollar of my estate."

The second codicil has no bearing upon any questions involved, and the third and last codicil is in these words:

"I have made these changes without consulting any one. I want them strictly carried out, without any opposition. If my brother, William T. Phelps, desires it I want him to keep the farm, his and my sister Sally Berry's lifetime, and leave it so some of my family can own it. I have every confidence in him and know he will do what is just and right. I now set my name to this. This August 14th, 1906. Mary F. Stoner."

The original will named the two brothers, William T. and John S. Phelps, as executors, but before the death of the testatrix John S. Phelps died, and in the first codicil the coexecutor first named, William T. Phelps, is made sole executor. The fourteenth clause of the original will provides that:

"If any of my family want the farm on which I live, I want my executors after consultation with my sisters to fix a price on it, and sell and convey to the purchaser. If none of the family want it, I direct my executors to sell it, either publicly or privately, as they think best, and I hereby give them full power to convey it to the purchaser."

The chief points of controversy, and the storm center around which the legal battle revolves, grows out of the effect of the attempt in the first codicil to limit the estate

given Lucy Atkinson by the ninth clause of the will, and the construction to be given the last codicil of date August 14, 1906. Appellants contend that by the last codicil the testatrix intended to and did revoke in its entirety the disposition made of her property in clause 9 of the will, and gave therein to her brother W. T. Phelps, as his sole interest in her farm, an estate for and during his lifetime and that of his sister Sally Berry; that it revoked the life estate in the farm previously given to Sally Berry by the first codicil, and, in addition, that W. T. Phelps in that codicil was given the power to dispose of the farm or "leave it" to some member of the testatrix's family; and that, since W. T. Phelps died after the death of the testatrix without making disposition of the farm, it passed as undivided property, and that appellants are entitled to their distributive share therein. The appellants Hugh and Mary Lou Atkinson further contend that if they should be mistaken as to the effect of the last codicil revoking the ninth clause of the will, then the attempted limitation in the first codicil of the share which Lucy Atkinson took under the ninth clause of the will is null and void, and that, being the sole heirs of John W. Atkinson, a deceased son of Lucy Atkinson (the devisee) also deceased, they are entitled by inheritance to one-half of the interest devised to Lucy Atkinson in clause 9 of the will. The judgment disallowed all of the contentions made by appellants, and we are called upon to determine whether that judgment is correct.

Before adverting to a consideration of the questions involved and the application of well-known rules for the construction of wills, we deem it necessary to make a brief statement of the surroundings of the testatrix. The farm, which is practically all of the residue of the estate covered by clause 9 of the will, and which is the only property mentioned in the last codicil, was one upon which the testatrix resided, and it contained 371 acres. She was a widow without children, as was also her sister Sally Berry; her brother William T. Phelps was a bachelor, and he and Sally Berry had for a long time resided with the testatrix upon her farm. They were very much attached to one another, as appears to have been true as between the testatrix and her other brothers and sisters. The will breathes throughout a fair and equitable desire on the part of the testatrix to deal justly with her living brothers and sisters and the children of those who were deceased. It also appears from express terms in the will that the testatrix had great confidence in her two brothers, William T. and John S. Phelps, and in her sister Sally Berry. It further appears that it was the desire of the testatrix that when the farm should be sold for

final distribution some member of her family should be given preference as purchaser, provided any of them desired it, at the price to be agreed upon by the devisees. It is equally apparent that, inasmuch as the brother W. T. Phelps and the sister Sally Berry were both old and childless, the testatrix wished that they should continue to occupy as their home throughout their lives, if they so desired, the one in which they had long resided with her. With these preliminary statements, we will as briefly as possible undertake to determine the true construction of the portions of the will and codicils in controversy.

[1, 2] Perhaps there is no rule of law more firmly established than the one requiring courts in construing wills, as well as other writings, to first determine the intention of the testator, or the one who executed the writing, and to give and apply that construction which accords with and carries out that intention; and, in arriving at such intention, all parts of the will and codicil or codicils must be looked to. In the recent case of *Dickson v. Dickson*, 180 Ky. 423, 202 S. W. 891, L. R. A. 1918F, 765, in stating the duty of the court in such cases, it was said:

"Many rules prevail \* \* \* as aids to assist courts in construing" wills. "Chief among them, and indeed the one which surrenders to no other, is that the intention of the testator as gathered from the four corners of his will shall prevail."

In the case of *Peynado's Devisees v. Peynado's Ex'r*, 82 Ky. 5, in stating this governing rule of construction, this court said:

"But when the language, whatever may be its purity or defects, expresses the intention of the testator in making a lawful disposition of his property, that intention will be the polestar to guide the court in interpreting the meaning of his words and construing the composition of his testament."

Many other cases, both foreign and domestic, might be referred to, but it would render this opinion too long to do so, and we will content ourselves with citing only the following from this court: *Citizens' Trust Co. v. Fidelity Trust Co.*, 136 Ky. 540, 124 S. W. 824; *Whitaker v. Whitaker*, 166 Ky. 632, 179 S. W. 584; *Compton v. Moore*, 167 Ky. 657, 181 S. W. 360; *O'Rear v. Bogle*, 157 Ky. 666, 163 S. W. 1107; *Patrick v. Patrick*, 135 Ky. 307, 122 S. W. 159; and *Trustees Presbyterian Church of Somerset v. Mize*, 181 Ky. 567, 205 S. W. 674. In all the cases it is held, and in all the text-books it is stated, that whenever the intention of the testator can be gathered from the language employed as contained within the four corners of the entire will and in all of its codicils, such intention must be applied, provided it does not conflict with any established public policy or is not otherwise prohibited by law. That codicils may be looked to in connection with the wills to which they

are attached (in applying this rule) is equally well established, since they are parts of the will itself, and must be construed as if the whole constituted one instrument. 40 Cyc. 1421; *Beall v. Cunningham*, 3 B. Mon. 390, 39 Am. Dec. 469.

[3, 4] The rule just discussed is an absolute one, and it imposes upon the courts an imperative duty; i. e., to give that construction to the will which will carry out the intention of the testator as shown by a consideration of the whole of it. A rule of presumption useful for the purpose of assisting the courts in determining the testator's intention is that it will not be presumed that a testator intended to die intestate as to any of his property. In other words, that it will be presumed that when a testator attempts to formulate and execute his will, which is a most solemn and important act, he intends to dispose of his entire property, and not merely to change (from that provided by law in case of intestacy) the devolution of a small portion of it. Cases from this court applying that rule are *Dickson v. Dickson*, supra; *Newcomb v. Fidelity Trust Co.*, 108 S. W. 911, 33 Ky. Law Rep. 41; *Thomas's Ex'r v. Thomas's Gdn.*, 110 S. W. 863, 33 Ky. Law Rep. 700; *Howard v. Cole*, 124 Ky. 812, 100 S. W. 225, 30 Ky. Law Rep. 1027; and many others to which reference might be made. Guided by these two leading rules, we are convinced that there is no serious difficulty in ascertaining what the testator meant and intended by the clauses of the will and the codicils involved.

[5] Reading the ninth clause of the will in connection with the one in the first codicil limiting the estate of Lucy Atkinson, it is perfectly manifest that the intention of the testatrix was to limit the interest of Mrs. Atkinson to that of only a life estate. While it is not expressly stated, in either the will or the codicil containing the clause of limitation, that the estate is only for the life of Mrs. Atkinson, by implication such was the intention of the testatrix. The codicil does not attempt to dispose of any part of Mrs. Atkinson's portion given to her under the ninth clause "which may be left" at her death, but it attempts to and does dispose of all of it after her death, clearly showing that it was the intention of the testatrix that Mrs. Atkinson should enjoy it only during her life. The limitation would scarcely have been more definite or any clearer if it had been expressly stated that Mrs. Atkinson took only a "life interest."

Upon this point it is urged that the attempted limitation in the codicil is inconsistent with the absolute estate given to Mrs. Atkinson in the ninth clause of the will, and that under the doctrine of the cases of *Clay v. Chenault*, 108 Ky. 77, 55 S. W. 729, 21 Ky. Law Rep. 1485, *Dulaney v. Dulaney*, 79 S. W. 195, 25 Ky. Law Rep. 1659, *Becker et al. v. Roth et al.*, 132 Ky.

429, 115 S. W. 761, *Nelson v. Nelson*, 140 Ky. 410, 131 S. W. 187, *Ball v. Hancock*, 82 Ky. 107, *Mitchell v. Campbell*, 94 Ky. 347, 22 S. W. 549, 15 Ky. Law Rep. 163, *Pedigo's Ex'r v. Botts*, 89 S. W. 164, 28 Ky. Law Rep. 196, *Commonwealth v. Stoll's Adm'r*, 132 Ky. 234, 114 S. W. 279, 116 S. W. 687 (on petition for rehearing), *Trustees Presbyterian Church of Somerset v. Mize*, supra, and others which could be cited, it is void, and that under the ninth clause of the will Mrs. Atkinson took an absolute estate in the portion of the property therein devised to her, unaffected by the limitation attempted to be imposed in the first codicil. This would, no doubt, be true if the terms of the will creating the estate in Mrs. Atkinson were similar to those involved in the cases referred to. But to our minds they are entirely dissimilar. In each of these cases the wills involved, or the portions of them affecting the interests under consideration, conferred upon the devisee an absolute estate, with full and unlimited power of disposition, and the right to exercise such acts with reference to the property and of control and dominion over it as could be done only by an owner in fee simple. The attempted limitation in these cases which the court denied effect purported to operate only upon whatever portion of the property devised, if any, which the devisee might not himself dispose of. There was no attempt in any of the limiting clauses of the wills involved to curtail or restrict in any manner the right and power of the devisee to make such disposition of the property as he saw proper, and the court construed such provisions to manifest an intent on the part of the testator to create in the devisee an absolute estate; that it was not the intention of the testator to create any less than an absolute estate by attempting to dispose of any portion of the property undisposed of by the devisee. Thus in the *Chenault Case* the testator provided in a codicil to his will, in which he had given an absolute estate to his son with "the right, privilege and power to \* \* \* convey his part of said land, and make the purchaser a good title thereto"; that if any of the proceeds arising from the sale should at the time of the death of the son without children be invested in other lands, then such lands should revert back to the estate of the testator; and it was held that such attempted limitation was inconsistent with the fee, and was therefore void.

In the *Dulaney Case*, after having given the devisee an absolute estate, the will said:

"If any one of my children should die and leave property belonging to me, one-half they can will to whom they please, if they have no legal heirs; the other one-half is to go to my living heirs."

It was held that the attempted limitation was void because it purported to operate

only upon property which the devisee might leave undisposed of at his death.

[6] The same distinction is recognized in the other cases referred to, it being stated in the latest one, *Trustees Presbyterian Church of Somerset v. Mize*, thus:

"That where property is devised to one absolutely, with the power of unlimited disposition of the property, and by an afterclause of a will it is attempted to devise over an undisposed of remainder of the property, the limitation over is void."

All the cases held that where a life estate only is given, with power of disposition, the limitation over will be upheld.

In the case before us the testatrix did not, either expressly or impliedly, confine the operation of the limitation in the first codicil of her will to any remainder of the property which might be left at the death of Mrs. Atkinson, or to any portion of it which she might not dispose of. On the contrary, the limitation expressly disposes of the entire property after the death of Mrs. Atkinson. Such limitations have universally been upheld by this court upon the ground that to do otherwise would violate the plain and manifest intention of the testator. It results, therefore, that the portion of the judgment now under review cannot, and will not, be disturbed.

This brings us to the second contention as to the effect of the last codicil, which attempts to deal only with the home farm of the testatrix, containing 371 acres, and which constituted the great bulk of her property. By the fourteenth clause of the will it was provided how that farm could be sold, but in the previous tenth clause William T. Phelps was given the privilege, if he desired it, to run and operate the farm for five years. At the time of the writing of the first codicil, five years after the date of the will, one of the brothers had died. This fact no doubt induced the testatrix to provide in the first codicil that her brother William T. Phelps, and her sister Sally Berry, if they desired it, might keep the farm and everything on it their lifetime, conditioned that they look after the sister of the testatrix, Amanda Clay, and her unmarried daughters. This was perhaps superinduced by the thought that the brother and sister, to whom the privilege of occupying the farm for their lifetime was given, were getting old, would soon die, and that the sale provided for by the fourteenth clause of the will would be postponed for only a short while, even if the right to occupy for life were exercised by the brother and sister. The same might be said with reference to the right of occupancy for life by W. T. Phelps under the last codicil. Under it he could keep the farm during his and his sister Sally Berry's lifetime if he desired. If he did not desire to exer-

cise that privilege, he was not compelled to do so, nor would there be any life estate or life right of occupancy in him if he saw proper to surrender it before his death. During the occupancy, however, the sale provided for would be postponed; or, if made, would be subject to his right. Clearly it was the intention of the testatrix by this codicil to provide in unmistakable terms a home for her brother and sister so long as they desired to occupy it. This, to our minds, is perfectly manifest unless (as is contended) the clause, "and leave it so some of my family can own it," found in the last codicil, was intended to and did create in W. T. Phelps the power to dispose of the farm. If the clause did not create such a power, then the codicil did no more than to make the foregoing provisions for the brother, and possibly to defer the sale of the farm which the fourteenth clause of the will directed.

This brings us to a consideration of the effect to be given to the clause in question. If, as contended by appellants, its effect is to create such a power of disposition in W. T. Phelps, we would have to conclude that the testatrix intended thereby to revoke the ninth clause of her will and leave the disposal of her property to such member or members of her family as her brother saw fit to bestow it. If the power was not exercised (and it was not), then there would be an intestacy as to the bulk of testatrix's property, which, under the rule, *supra*, we are not to presume she intended. But may the clause, literally construed, be given the effect contended for? It will be observed that it does not provide for W. T. Phelps' leaving the property to some member of her family, but only "so some member of my family can own it." One of the definitions given to the word "so" in Webster's New International Dictionary is:

"In this or that condition or state; as has been stated or suggested; as indicated or as implied, or as supposed to be known."

The same authority defines the word "leave" as:

"To withdraw one's self from; to go away from; to depart from, as to leave the house."

[7, 8] In the instant case the testatrix knew that her brother and sister might not desire to keep it or live upon the farm during their lives, and when they ceased using it they would "leave" or "depart from" it, at which time the privilege which she had given them in her will would be exhausted and the farm would then be left "so" (in the condition or state) some of my family can own it." But own it how? Clearly by purchasing it in the manner provided by the fourteenth clause of the will, which they could not do unless the farm was left by W. T. Phelps intact and

as a part of the estate of the testatrix, for the farm could not be so purchased unless it was left (so) "in that condition or state." We think it was the intention of the testatrix, by the execution of the codicil in question, to postpone the sale of the farm, as provided for in the fourteenth clause of her will, to such a time as her brother W. T. Phelps, as her executor, saw proper to make it, when he would withdraw his desire to further occupy; but, if he did not do so in his lifetime, that it would then be left in condition so that some member of her family could own it by exercising their preferred right to purchase it, given by the fourteenth clause of the will; and that she did not use the word "leave" in the clause of the last codicil in a testamentary sense, so as to vest in her brother the power to dispose of the farm. This construction also carries out the expressed intention of the testatrix when she said in the first codicil to her will that, "It is my desire that Frank Phelps shall never have a dollar of my estate," which intention would be defeated as to all property undisposed of by the will and codicil, since an heir cannot be deprived of his inheritance by such expressions of exclusion alone. There must in addition, be a disposition made of the property by the will, or one provided for therein. *Phillips v. Phillips*, 93 Ky. 498, 20 S. W. 541, 14 Ky. Law Rep. 493; *Clarkson v. Clarkson*, 8 Bush, 658; *Todd v. Gentry*, 109 Ky. 704, 60 S. W. 639, 22 Ky. Law Rep. 1319; *Walters v. Neafus*, 136 Ky. 756, 125 S. W. 167; *McIlvalne v. Robson*, 161 Ky. 616, 171 S. W. 413.

The conclusion reached renders it unnecessary to consider the effect of the failure of W. T. Phelps to exercise the power (if he were given it).

Neither are we called upon to pass upon the validity of the sale of the farm which the administrator with the will annexed and Mrs. Berry made after the death of W. T. Phelps, or whether the exercise of the power of sale was properly or improperly made, since this is not a suit calling in question the acts of the administrator in the discharge of his trust, but it is only for the construction of the will of Mrs. Stoner. For the same reason we cannot consider the silence of the judgment with reference to the interest which W. T. Phelps (who died childless and testate) is devised in clause 10 of the will, wherein the estate of Mrs. Burgin is limited to her for life. This is not a suit to settle the estate of W. T. Phelps; and, when the time is ripe for the disposition of his interest under the limiting clause, appellants may then be heard upon the point argued, but not raised, by the pleadings.

The judgment being in accord with the views herein expressed, it is affirmed.

# **HUGHES v. CLEVELAND JEWISH ORPHAN ASYLUM.**

(Court of Appeals of Kentucky. May 30, 1919.)

## **1. WILLS §492—CONSTRUCTION—ASCERTAINMENT OF BENEFICIARY.**

In construing will to ascertain intended beneficiary, testator's intention will control.

## **2. WILLS §493—CONSTRUCTION—DESIGNATION OF BENEFICIARY.**

If language employed to designate beneficiary is sufficient to enable court, from face of will, or in view of the circumstances, to ascertain who was intended, the devise will not fail, and the one so ascertained to be the intended devisee will take the property.

## **3. WILLS §515—CONSTRUCTION—DESIGNATION OF BENEFICIARY.**

A devise to the "Cleveland Orphan Asylum of Cleveland, Ohio, an orphan asylum for Jewish orphans," was a devise to the Cleveland Jewish Orphan Asylum, where such orphanage was the only Jewish orphan asylum in Cleveland, which fact was known to testator, who at time of making will did not know exact name thereof.

Appeal from Circuit Court, Jessamine County.

Suit by the Cleveland Jewish Orphan Asylum against J. W. Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

William J. Baxter, of Nicholasville, for appellant.

Miller & Miller and H. E. Ross, all of Lexington, for appellee.

THOMAS, J. Simon Goetz died on March 30, 1916, a resident of Nicholasville, Jessamine county, Ky. He left a will containing three clauses, the first of which directed the payment of his just debts and funeral expenses. The third clause nominated his executor, and the second clause is in this language:

"All the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath to the Cleveland Orphan Asylum of Cleveland, Ohio, an orphan asylum for Jewish orphans."

The will was duly probated, and the nominated executor qualified.

Composing a part of the property of which the testator died the owner was a parcel of land in the town of Nicholasville, and the appellee (plaintiff below), the "Cleveland Jewish Orphan Asylum," which is a charitable institution duly incorporated under the laws of the state of Ohio and located in the city of Cleveland in that state, claiming to be the beneficiary in clause 2 of the testator's will, entered into a contract with appellant (de-

fendant below) to sell to him the parcel of land referred to. In obedience to the terms of the contract, it executed, acknowledged, and tendered to him a deed; but he declined to accept it or to pay the agreed consideration, and refused to comply with any part of the contract upon the ground that the language employed to describe the beneficiary in the will was not sufficient to designate or include the plaintiff, and that it neither had nor could convey to him a perfect title.

To enforce the contract and compel defendant to accept the deed and comply therewith, plaintiff filed this suit, and in the petition, after alleging the execution of the will and filing a copy of it, it averred that the testator intended to designate it as his beneficiary in clause 2 of his will.

The answer put in issue the allegations of the petition, and, after submission and the hearing of proof, judgment was rendered enforcing the contract, and from that judgment defendant prosecutes this appeal.

It was shown by depositions filed in the case that plaintiff is a charitable corporation located in Cleveland, Ohio, and engaged in looking after and taking care of Jewish orphans, and that it is the only institution of that kind in that city or in the state of Ohio, since the Secretary of State testified that no other similar institution had been incorporated therein. It is furthermore shown that the testator knew such facts, and that at the time and upon the occasion of the drafting of his will he did not know the exact corporate name of his intended beneficiary, and that he directed the draughtsman to write it the "Cleveland Orphan Asylum of Cleveland, Ohio, an orphan asylum for Jewish orphans," and said at the time that the last phrase, "an orphan asylum for Jewish orphans," would be sufficient to designate the institution which he had in mind as his intended beneficiary.

[1, 2] In construing wills, the cardinal rule, as held by this and all other courts, is to ascertain the intention of the testator and to so construe the will as to carry out that intention, provided it does not conflict with any positive rule of law or of public policy. This rule applies to the ascertainment of the intended beneficiary of the testator, as well as to the character of estate which he takes, and to other clauses intended to express the testator's purpose. The rule is general that the law will not allow a devise to fail because the testator did not with exact precision describe or name his intended beneficiary. If the language which he employs to designate his beneficiary is sufficient to enable the court from the face of the will, or in view of the circumstances, to determine who was intended, the devise will not fail, and the one so ascertained to be the intended devisee will take the property. This rule



of law as applied generally to devisees was presented and elaborately discussed in the case of *Elchhorn v. Morat*, 175 Ky. 80, 193 S. W. 1013, where many cases from this and other courts bearing upon the question are referred to. After acknowledging the existence of the rule and its applicability to cases where the facts permit it, we said:

"It [the rule] does no violence to the rule against the substitution of a devisee when none is mentioned, nor does it tend to manifest an intention which the testatrix had entirely omitted."

In 40 Cyc. p. 1447, the general rule as applied to all devisees alike is thus stated:

"A mere mistake in the name or description of a legatee or devisee will not render the legacy or devise void if the person intended by the testator can be clearly ascertained and distinguished from every other person, even from the will itself or from extrinsic evidence. And this rule applies to a devise or bequest to a corporation, association or society, as well as to an individual."

[3] Dealing with the exact question presented by the case now under consideration, it is said on page 1469 of the same volume:

"A devise or bequest to a charitable object or purpose is valid, although the beneficiary organization is not named or is misnamed, if the object intended can be ascertained with reasonable certainty from the language of the will and the surrounding circumstances, as where the devise or bequest is to a corporation, or association, having a certain described charitable purpose; but it cannot be taken by an object different from that described. A devise or bequest will be valid when made to a charitable society described with substantial correctness."

In the note to the last statement in the text are cases cited from many of the courts of the different states, there being no dissent from the rule as stated.

In the case of *Women's Foreign Missionary Society of the Methodist Episcopal Church v. Mitchell*, 98 Md. 190, 48 Atl. 737, 53 L. R. A. 711, the testator devised property to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church of the United States of America," in trust to be used for the education of six girls to enable them to become Bible readers in India. There was no such organization as that named in the will, but the Women's Foreign Missionary Society of the Methodist Episcopal Church did have charge of that character of charitable work in India, a fact which the evidence showed was known to the

testator. It was held in that case that the Women's Foreign Missionary Society of the Methodist Episcopal Church was the institution intended by the testator to take the property and discharge the trust imposed.

In the case of *McLeod v. Jones*, 159 N. C. 74, 74 S. E. 733, it was held that the declarations of the testator are admissible, especially where made at the time the will was executed, for the purpose of showing the society intended, in an ambiguous bequest to a "Missionary Society."

In the case of *Trustees of Catholic Church v. Offutt*, 6 B. Mon. 535, the will involved made devises to the Catholic Church, the Baptist Church, the Presbyterian Church, and the Methodist Episcopal Church. It did not appear what particular congregation of these denominations was intended as the devisee; but the court held that, under the circumstances as developed by the proof (which is saying that extrinsic evidence may be resorted to in such cases), the testator meant the congregations of those churches located at Taylorsville, where the testator resided.

In the still later case from this court of *Cromle's Heirs v. Louisville Orphans' Home Society & C.*, 3 Bush, 385, it was held in substance that a bequest to the Presbyterian Orphan Asylum of Louisville, when there was no such society by that name in existence, passed to the Louisville Orphans' Home Society; it being the only incorporated society of the kind in Louisville under the charge of the Presbyterian Church, which latter society had been patronized by the testator in his lifetime, but he made a mistake in designating its name in his will. That case is thoroughly considered and the opinion deals exhaustively with the question.

It will be noted that the rule under consideration does not go to the extent of substituting one beneficiary for another under the guise of carrying out a supposed intention of the testator, which intention he had in no wise expressed. Nor does the rule permit the creation of a devisee when none at all is mentioned in the will, upon the theory that the testator had intended to name one, but by mistake or oversight had failed to do so. The only office of the rule is to ascertain that object of the testator's bounty which he intended to designate, but by some mistake had failed to accurately do so.

In the light of the authorities referred to, and the well-settled rules which they announce, we have no hesitancy in holding that the judgment appealed from is correct, and it is affirmed.

**GRAVITT v. COMMONWEALTH.**

(Court of Appeals of Kentucky. May 27, 1919.)

**1. INDICTMENT AND INFORMATION §110(3), 119—ABDUCTION—STATUTORY LANGUAGE—SURPLUSAGE.**

The crime denounced by Ky. St. § 1158, prohibiting the taking or detaining of a woman against her will, being statutory, it is sufficient if the indictment, following the language of the statute, charges that accused unlawfully committed the acts constituting the crime, the word "feloniously" not being required, and, if such word be included, it is mere surplusage.

**2. CRIMINAL LAW §369(2), 673(5), 678(1, 4)—INDICTMENT CHARGING DISTINCT OFFENSES—ELECTION—EVIDENCE OF OTHER OFFENSES.**

Where an indictment for unlawfully detaining a woman was based on two distinct offenses, the state should be required to elect, but, after electing the one upon which it would rely, evidence as to the other can only be considered as corroborating the proof of defendant's guilt of the offense for which he is being tried, and the court must so admonish the jury.

**3. CRIMINAL LAW §1038(1)—APPEAL—INSTRUCTION—OBJECTION AND REQUEST.**

Where an indictment for unlawfully detaining a woman was based upon two distinct offenses, and the state elected to proceed as to one offense, defendant could not complain of the court's failure to instruct the jury to disregard evidence as to the other offense in the absence of objection at the time or of a request to instruct.

**4. ABDUCTION §9—EVIDENCE—COMPLAINT BY PROSECUTRIX.**

The rule permitting proof of complaint directly made by the victim of a rape without detailing the occurrence does not authorize proof to be made that a victim of an unlawful detention has made complaint of it.

**5. CRIMINAL LAW §695(6)—EXCLUSION OF EVIDENCE—SUFFICIENCY OF GENERAL OBJECTION.**

Where a witness in a criminal prosecution has given evidence the greater part of which is competent, the entire testimony of such witness will not be excluded in the absence of an objection designating that part of the evidence which is incompetent.

**6. ABDUCTION §15—QUESTION FOR JURY—CREDIBILITY OF PROSECUTRIX.**

In a prosecution for unlawfully detaining a woman, where the evidence of the prosecutrix, if true, clearly demonstrated the guilt of the accused, a peremptory instruction for defendant was properly overruled; the credibility of prosecutrix being for the jury.

**7. ABDUCTION §16—INSTRUCTIONS.**

In a prosecution for unlawfully detaining a woman, instruction requiring the jury to believe that accused's acts in detaining the woman were done feloniously and defining the term "feloniously" was not error, where the meaning given the word "feloniously" described sub-

stantially the intent which must have actuated accused to make him guilty.

**8. CRIMINAL LAW §450—OPINION EVIDENCE—FACTS OF CASE.**

The opinion of a witness in a criminal prosecution as to the facts of the case is not competent for any purpose.

**9. CRIMINAL LAW §939(1)—NEW TRIAL—DILIGENCE.**

A new trial will not be granted to give a litigant an opportunity to use witnesses of whose existence he knew, as well as the facts they would prove, and whom he had negligently failed to offer upon the trial.

**10. CRIMINAL LAW §942(1, 2)—NEW TRIAL—IMPEACHMENT OF WITNESSES.**

A new trial will not be granted to allow a litigant to impeach witnesses who have testified upon the trial by proofs touching their character for truth or by showing contradictions.

**11. CRIMINAL LAW §945(1)—NEW TRIAL—EFFECT OF NEWLY DISCOVERED EVIDENCE.**

A new trial will not be granted on account of newly discovered evidence unless the proposed new evidence is important and reasonably calculated to have a decisive influence upon another trial.

**12. CRIMINAL LAW §941(1)—NEW TRIAL—CUMULATIVE EVIDENCE.**

A new trial will not be granted on account of new evidence which is merely cumulative.

**13. RAPE §40(1)—EVIDENCE—COMPETENCY.**

In prosecution for rape, it is competent for defendant to prove specific acts of a lewd and lascivious character by the prosecutrix with third parties occurring shortly before the alleged rape as evidence for the consideration of the jury in determining whether prosecutrix consented to the intercourse with defendant.

**14. CRIMINAL LAW §940—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

In a prosecution under Ky. St. § 1158, denouncing the detention of a woman against her will for the purpose of sexual intercourse, a new trial will be granted on the ground of newly discovered evidence showing acts of a lewd and lascivious character on the part of prosecutrix with others shortly before the commission of the alleged offense.

**Appeal from Circuit Court, Graves County.**

Ira Gravitt was convicted of a violation of Ky. St. § 1158, and, a new trial being denied, he appeals. Reversed and remanded.

Webb & Weaks and B. C. Seay, both of Mayfield, and Samuel H. Crossland, of Paducah, for appellant.

Chas. H. Morris, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

**HURT, J.** The appellant, Ira Gravitt, was tried and convicted, and sentenced to im-

prisonment for four years, upon an indictment charging him with a violation of section 1158, Ky. Stats. His motion for a new trial being overruled, he has appealed, and insists that the trial court erred to the prejudice of his substantial rights by: (1) Overruling a demurrer to the indictment; (2) admitting incompetent evidence against him; (3) misinstructing the jury and failing to properly instruct the jury; (4) overruling his motion for a new trial. These alleged errors will be considered in their order.

[1] (a) The complaint made against the indictment is that it charges that the accused did, "with force and arms, unlawfully, willfully, and feloniously take and detain Vera Franklin against her will with the intention to have carnal knowledge of her \* \* \* himself," the said Vera Franklin being a female, and not the wife of the accused. It is contended that the use of the word "feloniously" in describing the intention of the accused renders the indictment fatally defective. The crime which the indictment accused the appellant of is a statutory one, and is described by the statute, and usually an indictment for a statutory offense which follows the language of the statute is sufficient, and such is the case with reference to the crime denounced by section 1158, supra, and as the statute which creates the crime does not require its felonious violation to make an offender guilty of the crime, it is sufficient to charge in an indictment that the accused unlawfully committed the acts which constitute guilt of the crime, and in this it is different from a common-law felony. *Higgins v. Com.*, 94 Ky. 54, 21 S. W. 231, 14 Ky. Law Rep. 729; *Kaelin v. Com.*, 84 Ky. 354, 1 S. W. 594, 8 Ky. Law Rep. 293; *Cundiff v. Com.*, 86 Ky. 196, 5 S. W. 486, 9 Ky. Law Rep. 537. The use of the word "feloniously" in the indictment in the instant case, however, did not in any respect impair it or change its meaning, and was, at most, mere surplusage.

(b) A consideration of the errors complained of in the admission of the evidence against the accused will make necessary a short statement of the facts as presented by the evidence. The accused and Vera Franklin were cousins, and the homes of their parents were within about one-half mile of each other, and situated by the side of a road. Chance Handley, a half-brother of Vera Franklin, and his wife, Ina Handley, who was also a cousin, as well as a cousin of the accused, resided in a house beside the same road, and between the Franklin and Gravitt houses, and in sight of each. Vera Franklin and the accused were frequently together at their respective places of residence and elsewhere, and, according to her testimony, the accused was at the house of her father on the 22d day of May, 1918, and in the afternoon she left her home to go to the house of Cora Fields, a sister of the accused, to procure

Mrs. Fields to make her a dress. The appellant accompanied her, and when they came to the house of Chance Handley there was no one at home, and she entered the house for the purpose of leaving certain letters for her sister-in-law, thinking that the accused would proceed on his way, but when she had gotten in the house she heard a step upon the porch, and then the accused entered the house, and, seizing her, threw her forcibly upon a bed, and attempted to have intercourse with her. She said to him that some one was coming, when he sprang up and started to run, and she did also, but when they came to the door, and he saw that no one was approaching, he again seized her and threw her upon the floor, and was attempting to accomplish his purpose, when Chance Handley came near the house with a wagon, and the accused desisted and ran out of the house. Handley proceeded with the wagon to the house of the father of the accused, and she went along behind the wagon to the house, where Ina Handley was visiting at the time. Vera returned with Ina Handley to her home, and remained there overnight. Chance Handley went away to be gone until a late hour of the night, and Ina called to the accused to come and stay with her and Vera until her husband returned, which he did. On the following day, about 1 o'clock p. m., Vera was again at the home of the accused, and accompanied his father and brother in a wagon to the home of Mrs. Fields, who resided upon a farm belonging to the elder Gravitt, to have her make a dress for her. While there, the accused came in a buggy and took Treva Fields, a young lady who was there, into the buggy, when Vera, although her dress had not yet been completed, got into the buggy with them, and they proceeded to the home of the Fields girl, which was a mile away, and then Vera and the accused proceeded in the buggy to his home, where they remained for a time. The Handleys were then at their home, but left very soon, and after they left their home Vera started apparently to go to her home, but, according to her statement, when she arrived opposite the Handley home, the accused had followed her, and called to her and requested her to go into the Handley house and get a razor for him, and she agreed to do so if he would remain out in the road, but, when she had been in the house for a few moments, he came to the back door and called to her to let him in, saying that he did not want her, but wanted the razor. She opened the back door, and he came in, and immediately seized her, and, throwing her upon a bed, attempted to have intercourse with her. She resisted all she could, and after a time he desisted in his efforts and went away, and she then proceeded to her home. She testified that the assaults by the accused were against her will, while he testified that upon each occasion they went into the Handley house by agree-

ment and for the purpose of engaging in sexual intercourse, and that his attempts to do so were with her consent, and that the failure to accomplish their purpose was not because of any objection upon her part.

It will be observed from the foregoing that, according to the evidence for the prosecution, the accused was guilty of two distinct offenses, for either of which he might be convicted under the indictment, and the evidence of his guilt of each was permitted to be introduced, and his guilt under the indictment was submitted to the jury upon the evidences of both offenses, and it would be impossible to tell which crime the jury found him guilty of, or some of the jurors might have believed him to be guilty of one of them, and their fellows may have believed him to be guilty of the other. An indictment for the crime of detaining a woman against her will, etc., can contain only one offense of that dignity, but, under our system of criminal pleading, an indictment for this offense may be so drawn that an accused may be tried upon it for any offense committed previous to the finding of the indictment upon the person named as the victim in the indictment. Where an accused is put upon trial under an indictment, and the evidence tends to prove the accused to be guilty of more than one offense of the kind which is charged in the indictment, the attorney for the commonwealth should be required by the court to elect upon which one of the offenses he will rely for conviction, and the jury should be confined by the instructions to his conviction or acquittal of the particular offense which the state has elected to rely upon for his conviction.

[2] A defendant cannot be required to undergo a trial for two crimes of the character denounced in the indictment at the same time and under the same indictment, as the indictment does not contain but one offense. The attorney for the commonwealth in the instant case was entitled to introduce evidence as to each of the offenses, but, after having elected the one he would rely upon for conviction, the evidence of the other could only be considered as corroborating the proof of the defendant's guilt of the one for which he was being tried, and the court should have so admonished the jury when the evidence was heard. *Smith v. Com.*, 109 Ky. 685, 60 S. W. 531, 22 Ky. Law Rep. 1349; *Newsom v. Com.*, 145 Ky. 627, 140 S. W. 1042; *McCreary v. Com.*, 163 Ky. 206, 173 S. W. 351.

[3] The commonwealth's attorney introduced, first, the evidence of appellant's guilt of the offense alleged to have been committed by him on the 23d day of May, and, in the absence of a formal election, it would be considered that he had elected to rely for conviction upon the offense committed upon that day, but, when the evidence touching the offense committed upon the 22d day of May was offered, the appellant made no objection to its introduction unaccompanied by an ad-

monition, nor requested the court to admonish or instruct the jury as to the purpose for which it should consider it, and is now precluded from complaining that the court did not instruct the jury in regard to it. *Day v. Com.*, 173 Ky. 269, 191 S. W. 105; *Renaker v. Com.*, 172 Ky. 714, 189 S. W. 928; *Bennett v. Com.*, 175 Ky. 540, 194 S. W. 797.

[4, 5] Ina Handley was permitted to testify without objection that on the days following the days upon which appellant is accused of committing each of the offenses for which he was tried Vera Franklin informed her of the assaults which appellant had made upon her. This evidence was merely hearsay, and not competent. The rule which permits to be proved the complaint directly made by the victim of a rape, but without the details of the occurrence, has not been extended so as to permit proof to be made that a victim of an unlawful detention has made complaint of it. *Douglas v. Com.*, 68 S. W. 1107, 24 Ky. Law Rep. 562. At the close of the evidence of Ina Handley, the appellant moved the court to exclude her entire evidence, which the court properly overruled, as the greater portion of her evidence was competent, and the appellant did not point out or designate the evidence above mentioned as incompetent. *Ellis v. Com.*, 146 Ky. 715, 143 S. W. 425.

[6] (c) The appellant's motion to instruct the jury to peremptorily find him not guilty was properly overruled. The witness Vera Franklin testified to an abundance of facts clearly demonstrating the guilt of the accused if her statements were true, and while she was contradicted by the appellant and others, and certain circumstances tended to weaken the strength of her testimony, her credibility was a question for the jury, and not the court. *Graham v. Com.*, 174 Ky. 645, 192 S. W. 683; *Ockerman v. Com.*, 176 Ky. 753, 197 S. W. 385; *Bingham v. Com.*, 183 Ky. 688, 210 S. W. 459.

[7] (d) The instructions given the jury required it to believe that the alleged acts of the appellant in detaining the woman were done "feloniously," and then another instruction was given defining the term "feloniously." This, in our opinion, was not prejudicial to the substantial rights of the appellant, and a reversal would not be granted upon that account, as the meaning given to the word "feloniously" described substantially the intent with which the appellant must have been actuated to be guilty of the crime charged, but upon another trial it will be better to instruct in the language of the statute, within the averments of the indictment which are necessary to constitute the crime, and the definition of "felonious" may then be eliminated as well as that term. It was the duty of the court, however, to instruct as to the entire law of the case, and, when evidence was introduced tending to show the commission of two offenses applicable to the indictment, the jury should have been confined by

the instructions to finding him guilty or not guilty of one of the offenses, instead of submitting it for decision as to both offenses.

[8-12] (e) With his motion and in support of one of the grounds for a new trial the appellant filed his own affidavit and those of Belle Stephens, Bud Hill, Chancy Gravitt, Oval Lancaster, Treva Davis, Ross Gravitt, Lila Hill, and Essie Brown. These affidavits purported to contain newly discovered evidence of which the appellant did not know at the time of the trial, and could not with reasonable diligence have discovered and offered at the trial. The appellant so deposes, and the newly discovered witnesses likewise depose. Much of what is proposed to be proven by these witnesses would not justify the granting of a new trial. Certain of these witnesses propose to testify to facts which they say transpired in the presence of appellant, and he was obliged all the time to have known of the statements they would make. Certain others propose to testify as to declarations of the witness Ina Handley and in contradiction of the testimony given by her upon the trial and to opinions which they say she had expressed touching the transaction out of which the charge in the indictment grew.

Of course, her opinion as to the facts in the case would not be competent for any purpose. A new trial should not be granted to give a litigant an opportunity to use upon the new trial witnesses of whose existence he knew as well as the facts they would prove, and whom he had negligently failed to offer upon the trial; nor, as a rule, will a new trial be granted to allow a litigant to impeach witnesses who have testified upon the trial either by proofs touching their characters for truth or by contradictions, nor should a new trial be granted on account of newly discovered evidence, unless the proposed new evidence is important and reasonably calculated to have a decisive influence upon another trial. *Gee v. Com.*, 178 Ky. 606, 199 S. W. 1051; *Crouch v. Com.*, 172 Ky. 471, 189 S. W. 698; *Price v. Thompson*, 84 Ky. 219, 1 S. W. 408, 8 Ky. Law Rep. 201; *Chambers v. Chambers*, 2 A. K. Marsh. 348; *Ellis v. Com.*, *supra*; *Ripperdam v. Scott*, 1 A. K. Marsh. 151; *Hays v. Com.*, 140 Ky. 184, 130 S. W. 987. Nor, as a rule, will a new trial be granted on account of new evidence which is merely cumulative. There is, however, in the newly discovered evidence in this case certain alleged facts which are competent evidence for the accused, and which cannot be strictly classed as being cumula-

tive, and which appear reasonably calculated to have an influence upon a verdict. The accused may be convicted upon the testimony of the prosecutrix alone. The essential element of guilt of a crime of the character charged is that the taking and detention is against the will of the woman. If not against her will, the crime is not committed. The issue upon the trial of this case was whether or not the prosecutrix consented to the acts of the appellant. She testified that the acts of appellant were against her will, and that she did not consent. The appellant testified that she did consent, and that his conduct was not against her will. There was no other person present, and there is no circumstance proven in the nature of appearances at the place of commission which can shed light upon the nature of the transaction. Several of the new witnesses propose to testify to acts of a lascivious character on the part of the prosecutrix with men other than the appellant shortly before the alleged crimes were committed by appellant.

[13, 14] In prosecutions for rape it is competent for the defendant to prove specific acts of a lewd and lascivious character by the prosecutrix with third parties occurring shortly before the alleged rape, as evidence for the consideration of the jury in determining whether the prosecutrix consented to the intercourse with the defendant. *Brown v. Com.*, 102 Ky. 227, 43 S. W. 214, 19 Ky. Law Rep. 1174; *Stewart v. Com.*, 141 Ky. 522, 133 S. W. 202. The consent or want of consent on the part of the woman plays as important a part in a prosecution for unlawfully detaining a woman, as in a prosecution for rape. In fact, the former offense is a degree of the latter. *Reed v. Com.*, 76 S. W. 838, 25 Ky. Law Rep. 1029. The acts of a lewd and lascivious character on the part of Vera Franklin with other men, proposed to be proved by the newly discovered evidence, shortly before the commission of the alleged crime by appellant, will be competent evidence upon another trial. These acts, too remote or too insignificant to have a tendency to lead the guarded discretion of a reasonable man to believe that she consented to the acts of appellant, should be rejected by the trial judge in the exercise of his discretion.

The failure to grant a new trial, we think, was error, under all the circumstances of the trial.

The judgment is therefore reversed, and cause remanded for a new trial and for proceedings not inconsistent with this opinion.

**COMMONWEALTH v. METCALFE.**

(Court of Appeals of Kentucky. June 3, 1919.)

**1. CRIMINAL LAW §1059(1)—APPEAL—NEW TRIAL—EXCEPTION.**

On appeal by the commonwealth under Cr. Code Prac. §§ 335, 337, from an order granting a new trial to one convicted of grand larceny, only the correctness of the granting of the new trial can be considered, where there was no exception saved to that decision.

**2. CRIMINAL LAW §1134(4)—APPEAL—NEW TRIAL.**

Since the amendment of 1910 (Acts 1910, c. 92) to Cr. Code Prac. § 281, the decision of the court denying or granting a new trial is subject to exception and to review upon appeal.

**3. CRIMINAL LAW §1024(7)—NEW TRIAL—APPEAL BY COMMONWEALTH.**

Under Cr. Code Prac. § 281, as amended in 1910 (Laws 1910, c. 92), the commonwealth may appeal from an order granting a new trial to one convicted of felony.

**4. LARCENY §8(4), 10, 16, 17—LOST PROPERTY.**

Lost property may be the subject of larceny, although it must be taken from the possession of some one, and there must be an asportation or carrying away so as to oust the constructive possession of the owner, at least for a distinct time, but one who takes lost property into his possession does not commit larceny unless he takes it with the intention to appropriate to his own use and permanently deprive the owner.

**5. LARCENY §16, 17—LOST PROPERTY—ASPORTATION.**

To make the necessary asportation to constitute larceny of lost property, there must be a severance of the property from the possession of the owner for a distinct time, and any removal of the property from the place it was found with a felonious intention is a sufficient asportation; yet the finder of lost property is not guilty of larceny when he takes possession and converts it to his own use, where he has no clue to the ownership, although he will be guilty if he has a clue and the taking is felonious.

**6. LARCENY §68(1)—OFFENSE—EVIDENCE.**

In a prosecution for larceny of a lost \$20 bill, the question of the sufficiency of the evidence to support the conviction *held* for the jury.

**7. LARCENY §44—EVIDENCE—KNOWLEDGE.**

In a prosecution for larceny of a lost \$20 bill, the fact that defendant, who knew of the loss by the prosecuting witness, learned after the finding that another had found a \$20 bill, is not competent as shedding any light on his motives at the time he found and took possession of the same, but does shed light upon his failure thereafter to return the money or tell the prosecuting witness about finding it.

**8. CRIMINAL LAW §1156(2)—APPEAL—DISCRETION—NEW TRIAL.**

Where a lower court grants a new trial on the ground of the insufficiency of the evidence

to sustain conviction, the appellate court is not justified in reversing the decision unless an abuse of discretion appears.

**9. CRIMINAL LAW §1156(1)—APPEAL—GRANTING NEW TRIAL.**

A decision of the trial judge granting a new trial, a matter within his discretion, is viewed less critically and more effect is given to it than a decision denying a new trial; for the grant of a new trial places the parties in a position they originally occupied, while a denial of a new trial concludes their rights.

Appeal from Circuit Court, Letcher County.

Fred Metcalfe was convicted of grand larceny, and from an order granting a new trial, the Commonwealth appeals. Order affirmed.

Chas. H. Morris, Atty. Gen., and R. Monroe Fields, Commonwealth's Atty., of Whitesburg, for the Commonwealth.

D. D. Fields and W. I. Day, both of Whitesburg, and T. B. McGregor, of Frankfort, for appellee.

**HURT, J.** [1] This is an appeal by the attorney for the commonwealth of Kentucky from a decision of the circuit court granting a new trial to the appellee, Fred Metcalfe, who was convicted of the crime of grand larceny. The attorney for the commonwealth has brought the case here by appeal, as provided by sections 335 and 337 of the Criminal Code, insisting that it is important to the correct and uniform administration of the criminal law that this court should determine certain questions which arose in the trial, and to reverse the decision which granted a new trial. The only exception saved by the commonwealth's attorney was to the decision granting the new trial, and hence the correctness of that decision will only be considered. *Commonwealth v. Brand*, 166 Ky. 753, 179 S. W. 844. The grounds upon which the new trial was granted were as follows: (1) The instructions were incorrect, and the ones given did not embrace the entire law applicable to the case; (2) the verdict was contrary to the law and the evidence; (3) the evidence was insufficient to sustain the verdict. To determine these questions, a statement of the substance of the testimony will be necessary.

The appellee, Fred Metcalfe, was an employé of a telephone company, and in charge of the room wherein a telephone exchange was maintained in the town of Whitesburg. On Friday Fess Whittaker was in the exchange, and there he and the appellee each indulged in a social dram of spirits, as many other good and worthy people have been wont to do in times now in the glimmering past. On the evening of the same

day, and after nightfall, Whittaker, accompanied by two other men, repaired to the "exchange" for the purpose of slaking their thirst with something stronger than the limpid waters of the Cumberland, and, after arriving, each took a dram. One of the party bought a certain article, the character of which the evidence does not disclose, from the appellee, and requested Whittaker for a loan of 50 cents with which to pay appellee for the article. Whittaker had in the watch pocket of his pantaloons two pieces of currency, one a \$2 bill and the other a \$20 bill. Shortly previous to that time he had rolled the two bills together and put them in the pocket. He took out of his pocket and reached to his friend the \$2 bill, who presented it to appellee, and the latter returned to him the sum of \$1.50, which Whittaker received. Whittaker and his companions, then departed from the "exchange," and he repaired to his home near by, and proposed to give the \$20 bill to his wife, when he discovered that it was no longer in his pocket, where he had placed it. In company with one of his companions, he immediately returned to the "exchange," and, making a statement in regard to the loss of the bill, made inquiry of appellee, as to his knowledge of it. Appellee replied that he had not seen it, and then, providing a light, he assisted Whittaker and his friend to search the floor of the room, and then they descended the stairway and made search of it and the route over which Whittaker had traveled in going to his home. The search, however, was fruitless, and they did not find the money. On the following morning the appellee made inquiry of Whittaker, as well as of the man who accompanied him, if they had found the money, and, being informed by them that they had not found it, he stated to each of them that he had made another search on that morning. On the following Sunday morning Whittaker was relating the circumstances of the loss of the money, and that he had dreamed that he saw it hanging between wires, when Cain Polly informed him that he was in the "exchange" on the day before, and that appellee raised the lid to the telephone switchboard box, and he saw a bill of money rolled up and placed between the wires, and appellee said that he intended to buy two quarts of whisky with it for use at Christmas. Whittaker secured the services of the sheriff, and together they went to the "exchange" on Sunday, but appellee was absent at Sunday school, and the door to the room was fastened. They unlocked it, and, making a search, found a \$20 bill similar in appearance to the one lost rolled up and sticking between the wires under the lid of the switchboard box. The money which was lost was the property of Whittaker, and its appropriation by any one

was without his consent. Appellee was directly arrested upon the charge of stealing the money, and, when informed by the sheriff of the finding of the money, said that he did not deny that he placed the money in the box. He also stated to the county judge, when carried before him, that on the morning after Whittaker and the two men who accompanied him were in the "exchange" he found a \$20 bill on the floor, and intended to give it to Whittaker but was called out on the telephone line and forgot to do so.

[2, 3] The appellee testified in accordance with the foregoing in regard to Whittaker being in the office and the changing of the \$2 bill, the return of Whittaker in search of the \$20 bill, and the search made for it; that he inquired of Whittaker if he had found the bill on Saturday morning, but this was previous to his finding it; that afterward, in clearing up the trash, he found the bill and placed it in the box between the wires; that he showed the bill to Polly on Saturday and stated that he could buy a gallon of whisky with it, but that it was not his property; that he was required to go out on one of the telephone lines shortly thereafter, to make repairs, and did not see Whittaker after finding the money, and as he left the office Hilliard Brown told him that he had found a \$20 bill, and he concluded not to give to Whittaker the bill found by him until he should be satisfied that it was the one lost by Whittaker. He said that, in addition to saying to the sheriff that he did not deny placing the money in the box, he said to him that he did deny that he knew who was the owner of it. Hilliard Brown deposed that he did find a \$20 bill, but that he did not remember of having told appellee about it, and the sheriff deposed that appellee did not deny to him that he knew to whom the money belonged. Neither Whittaker nor either of the parties in the office at the time he is supposed to have lost the bill saw anything of a \$20 bill at the time. Since the amendment of 1910 (Laws 1910, c. 92) to section 281, Criminal Code, it has become well settled that the decision of a court denying or granting a new trial is subject to exception and to review upon appeal, and the right of appeal from such a decision may be exercised by the commonwealth as well as by the defendant. *Wilson v. Com.*, 140 Ky. 341, 132 S. W. 557, 35 L. R. A. (N. S.) 227; *Tucker v. Com.*, 145 Ky. 89, 140 S. W. 73; *Com. v. Harris*, 147 Ky. 702, 145 S. W. 387.

[4-7] It is now generally, if not universally, held that lost property may be the subject of larceny. To constitute a larceny of lost property, it is essential that it be taken from the possession of some one, either the owner or some one having possession for the owner. It must also be taken against the consent of the possessor so as to amount to a

trespass upon the possession either in fact or in contemplation of law. Where one has inadvertently or carelessly lost personal property, it remains in the constructive possession of the owner. The owner does not lose his constructive possession of it unless he casts it away with the purpose to abandon it, in which state of case he loses both the possession and the title. The finder of personal property which has been inadvertently or negligently lost, and who takes it into his possession, thereby severs the possession of the owner, but the finder does not commit larceny in so doing, unless he takes it with the intention to appropriate it to his own use and to permanently deprive the owner of his property and use of it. If he takes it with such intention, he thereby commits the trespass necessary to constitute larceny, which he does not commit if he takes it with the intention of returning it to the owner, if he knows him, or, if he does not know the owner, to whoever the owner may be. As in larceny of any other property, the finder of lost property, before he becomes guilty of larceny, must make an asportation of the property or carrying away, in the familiar term of the law, so as to oust the constructive possession of the owner at least for a distinct time. To make the necessary asportation to constitute a larceny, there must be a severance of the property from the possession of the owner for a distinct, appreciable time, however short, and any removal of the entire property from the place where it was found, with a felonious intention, is a sufficient asportation to make out the crime of larceny, although the removal may be only from the place where the property is found to another place in the same room. 17 R. C. L. 19, 20; 1 Roberson's Criminal Law, § 413; 2 Russell on Crimes, 152; 3 Greenleaf's Evidence, 154; 15 Cyc. 22; Adams v. Com., 153 Ky. 88, 154 S. W. 381, 44 L. R. A. (N. S.) 637. The finder of lost property which has been abandoned becomes the owner of the property. The finder of lost property, where there is no clue to the ownership, although inadvertently or negligently lost, becomes the owner of the property where the owner is never discovered and fails to assert his ownership, and hence a finder of lost property is not guilty of larceny when he takes possession and converts to his use property the owner of whom he does not know, and where he has no clue to the ownership, but, if the finder has a clue to the ownership of the property, the taking will be larceny if feloniously done. 17 R. C. L. 38; 25 Cyc. 37; Hester v. Com., 29 S. W. 875, 16 Ky. Law Rep. 783. A clue to the ownership is the existence of such facts and circumstances at the time of the finding as constitutes reasonable grounds for believing that the owner will be discovered and will reclaim his property; as,

when one finds lost property in a shop or store, he must reasonably expect that the owner, having discovered his loss, will return and claim the property. Hence, under the facts proven and admitted by the appellee in this case, he was guilty of larceny if, at the time he found the money and took it into his possession and placed it between the wires in the box, he knew who was the owner of it, or had reasonable grounds for believing that the owner of it would be discovered and would claim the money, and, further, if he took and removed it with the intention to appropriate it to his own use and to permanently deprive the owner of it.

The only issues as to the facts in the case are whether the appellee when he took the money into his possession and removed it from the place of its finding, knew who was the owner of it, or, if he did not know who the owner was, did he have reasonable grounds for believing that the owner would be discovered and the money claimed, and, if so, whether he took the money with the intention of returning it to the owner, or did he take it with the felonious intention to convert it to his own use and benefit and to permanently deprive the owner of it? These are facts which must be determined from all the circumstances relevant to the transaction. The fact that he received notice from Whittaker in a short time of the loss of the money; the search made without finding it in the room; the declaration to Whittaker on the following morning that he had made another search without finding it; his admission that he did find it; his statements to Polly; his meeting with Whittaker on the following evening and failing to notify him that the bill had been found by him; his proximity to the place of Whittaker's residence when he did find it without notice to Whittaker; the length of time the bill was retained by him; his declarations to the sheriff and the county judge, and the reasons given by him for his conduct—are all circumstances and facts which the jury may consider, as well as any other relevant facts. The information received by him from Brown that the latter had found a \$20 bill is not competent as shedding any light upon his motives at the time he found and took possession of the money, as he had then done so, but it is competent as shedding light upon his failure thereafter to return the money to Whittaker or to tell him about finding it. Under these facts the question of the intention of the appellee when taking and carrying away the money is peculiarly one for the jury. Com. v. Williamson, 96 Ky. 1, 27 S. W. 812, 16 Ky. Law Rep. 197, 49 Am. St. Rep. 285; Blackburn v. Com., 89 S. W. 160, 28 Ky. Law Rep. 96.

[8, 9] As the action will again have to be tried, we forbear expressing any opinion as



to the weight or convincing quality of the evidence, but suffice it to say that it was such as required a submission of the case to the jury, and, as it appears upon the record, a verdict of guilty does not seem to be flagrantly against the evidence, or that the evidence is palpably insufficient to support such a verdict. If the circuit court, however, granted the new trial on account of the insufficiency of the evidence in the opinion of the judge to sustain the verdict, this court is not justified in reversing the decision, unless it appeared that the circuit court abused its discretion in granting the new trial. A decision by the trial judge granting a new trial is viewed less critically and more effect is given to it than a decision denying a new trial. The reason of this is that a new trial places the parties where they were before, while a decision denying a new trial concludes their rights, and hence a broad discretion is necessarily vested in the trial judge, who sees the witnesses, and knows of the degree of intelligence they have and their apparent candor, and must necessarily see and know much of a trial, which a record in writing will not impart to us, and therefore, unless it appears that the trial judge abused his discretion in granting a new trial his decision to that effect will not be disturbed. *Com. v. Harris*, 147 Ky. 702, 145 S. W. 387; *Wilhelm v. Louisville Ry. Co.*, 147 Ky. 196, 143 S. W. 1013; *Miller v. Ashcraft*, 98 Ky. 314, 32 S. W. 1085, 17 Ky. Law Rep. 894; *Brown v. L. & N. R. R.*, 144 Ky. 546, 139 S. W. 782.

The instructions, while substantially embodying the law of the case to the extent that they were not, upon the facts, prejudicial to the substantial rights of either of the parties, were not altogether in accordance with the law of the case as heretofore stated, and upon another trial, if the facts are substantially the same, the following instructions should be given in lieu of those given upon the former trial:

(1) The jury is instructed that, if it believes from the evidence beyond a reasonable doubt that in Letcher county, and before the finding of the indictment, the witness Fess Whittaker did then and there lose a bill of the currency of the United States and of the denomination and value of \$20, and the same mentioned in the evidence and of which the said Whittaker was the owner, and that he lost custody of it involuntarily and without intention to abandon it, and the defendant found the bill, and then and there knew who was the owner of it, or, not knowing who was the owner of it, had reasonable grounds for believing that the owner of it would be discovered and would claim the bill, and did then and there feloniously and against the consent of said Whittaker, and with the intention of appropriating the bill to his own use and benefit, and to permanently deprive the owner of the use and benefit of same, take it into his possession and removed it into another

place, it, the jury, will find the defendant guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for a period of not less than one year nor more than five years, in its discretion, controlled by the evidence.

(2) Although the jury may believe from the evidence beyond a reasonable doubt that the defendant found the bill mentioned in the evidence and took same into his possession and removed it to another place, and then and there knew who was the owner of the bill, or had reasonable grounds to believe that the owner of the bill would be discovered and would claim the bill, yet, if it believes from the evidence that the defendant did not intend to convert it to his own use and benefit and to permanently deprive the owner of its use and benefit, but intended at the time to return it to Whittaker or to its owner when discovered, or if the jury believes from the evidence that at the time the defendant took the bill into his possession and removed it, if he did so, that he did not know who the owner of it was, and did not have reasonable grounds for believing that the owner of it would be discovered, it, the jury, should find the defendant not guilty.

(3) If the jury has a reasonable doubt of the defendant having been proven to be guilty, as set out in instruction No. 1, it will find him not guilty.

It is therefore ordered that the order granting a new trial be affirmed, but the opinion is ordered to be certified to the trial court, as the law of the case.

DE WITT et al. v. COMMONWEALTH et al.

(Court of Appeals of Kentucky. May 27, 1919.)

1. TAXATION ~~§896~~—TRANSFER TAX—PERSONAL PROPERTY—JURISDICTION OF COURT.

Before amendment of 1914 (Laws 1914, c. 56), neither the county nor circuit courts had jurisdiction, under Laws 1906, c. 22, art. 19, now Ky. St. § 4281m, or other statutes, to ascertain the value of personal property of a nonresident upon which Ky. St. § 4281a, imposed an inheritance tax, where the deceased had no real property in the state.

2. TAXATION ~~§867(1)~~ — TRANSFER TAX — NONRESIDENCE—PERSONAL PROPERTY.

Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposed an inheritance tax upon personal property of a nonresident having a legal situs in the state, although he had no real property in the state.

3. TAXATION ~~§859(1)~~ — TRANSFER TAX — PERSONAL PROPERTY — NONRESIDENT — VALIDITY OF STATUTE.

Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposing an inheritance tax upon personal property of a nonresident having a legal situs in the state, where the nonresident had no real property in the state, was valid.

#### 4. TAXATION ⚡893 — INHERITANCE TAX — VALUATION.

In the matter of an inheritance tax, the valuation can be made and the tax paid at any time prior to the distribution of an estate.

#### 5. TAXATION ⚡859(7) — TRANSFER TAX — PERSONAL PROPERTY—NONRESIDENT.

Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposing an inheritance tax on personal property of a nonresident not having a legal situs in the state, although the nonresident owned no real property in the state, was not rendered inoperative by reason of the failure of section 4281m, or other statutes, to provide a remedy for compelling the payment of the tax, and where a nonresident died before the passage of the act of 1914 (Laws 1914, c. 56), which provided a remedy and tribunal to enforce valuation and payment of the tax, the commonwealth can proceed under the latter statute to value the property and collect the tax at any time before distribution; although it results in giving the act a retroactive effect.

Appeal from Circuit Court, Jefferson County; Chancery Branch, First Division.

Proceeding by William G. De Witt and others, as executors of the will of George G. De Witt, deceased, against the Commonwealth of Kentucky and the Sheriff of Jefferson County. There was a judgment for defendants, and the plaintiffs pray an appeal. Appeal granted, and judgment affirmed.

Humphrey, Middleton & Humphrey, of Louisville, for appellants.

A. Scott Bullitt and James Hemphill, both of Louisville, for appellees.

SETTLE, J. The question presented for decision in this case is whether there should be paid to the commonwealth of Kentucky by the executors of the will of George G. De Witt, deceased, an inheritance tax on the value of certain, as yet undistributed, personal property, having a legal situs in this state and which was devised by his will to certain collateral kindred. George G. De Witt died testate January 12, 1912, in the city and state of New York, leaving an estate of more than \$1,500,000 in value. The will, which disposed of the entire estate, was duly admitted to probate by an order of the probate court of the county and state of the testator's residence at the time of his death, and was immediately followed by the qualification in the same court of the three executors appointed by the will.

The property upon which is claimed the inheritance tax here involved consists of 230 shares of the capital stock of the Southern Pacific Railroad Company, a Kentucky corporation. As the corporation, if the commonwealth was entitled to the inheritance tax, would have made itself amenable to a statu-

tory penalty, by transferring the stock on its books at the request of the executors without requiring the payment of the tax, it refused to make the transfer requested by them, and the executors instituted this proceeding in the Jefferson county court against the commonwealth of Kentucky and sheriff of Jefferson county to have determined the question of the right of the state to the inheritance tax claimed, which right was sustained by the county court, and from its judgment, so declaring, the executors took an appeal to the Jefferson circuit court, chancery branch, First division, with like result. From the latter judgment they have moved for and prayed an appeal in this court.

There is no issue between the parties as to the amount of inheritance tax that should be paid by the executors of De Witt's will, if any is collectable. It appears from the report of the tax appraiser filed in the county court, the correctness of which is not questioned, that the stock in the Kentucky corporation disposed of by the will to the six collateral legatees named therein, after making the pro rata legal deductions and exemptions allowed by the tax statute as to each legatee, has a net value subject to the inheritance tax of \$9,716.75, which at 5 per cent. will make the tax \$485.84, and for this amount the commonwealth recovered judgment both in the county and circuit courts.

It is, however, earnestly contended by appellants that there was no inheritance tax due the commonwealth from the estate of the testator, De Witt, under the law at the time of the latter's death; that although the statute known as the act of 1906 (Laws 1906, c. 22, art. 19) was in force at the time of his death, and it did by its terms impose an inheritance tax on the succession to property such as is here involved, as the act failed to provide adequate means or procedure for enforcing its collection, such failure rendered the statute inoperative; and further that although the act of 1906, as amended by that of 1914 (Laws 1914, c. 56), remedied the defects in procedure in the former act by providing adequate means of enforcing the payment of the inheritance tax, as the act of 1914 was passed after the death of the testator, its provisions cannot be invoked to compel of his estate the payment of the inheritance tax claimed by the commonwealth, and to do so would give the act a retrospective effect, which cannot properly be done.

The act of 1906 contained in Ky. Stata. § 4281a, which was in force when George G. De Witt died, in part provides:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the

time of death, which property, or any part thereof, shall be within this state, \* \* \* shall be and is subject to a tax of five dollars on every one hundred dollars of cash value of said property."

Section 4281m of the same statute in part provides:

"The county court in the county in which is situated the real property of the decedent who was not a resident of the state \* \* \* shall have jurisdiction to hear or determine."

[1] It will be observed that, although section 4281a imposes the inheritance tax, the jurisdiction to ascertain the value of the property involved, fix the amount, and enforce the collection of the inheritance tax, was conferred on the county court by section 4281m of the act of 1906, which jurisdiction attached, and could only be exercised by that court in a county in which was situated real property of the decedent not a resident of the state. As the act of 1906, including the section, supra, was in effect when De Witt, a nonresident, died, and there was then no real property in this state of which he died the owner, no county court of the state, down to the passage of the act of 1914, had jurisdiction to enforce the collection of an inheritance tax against or out of any personal property left by him having a situs in this state. It is likewise true that the circuit courts were as much without jurisdiction as were the county courts prior to the act of 1914. The section in question was construed by us in the cases of *Comlth. v. Cumberland T. & T. Co.*, 146 Ky. 142, 142 S. W. 392; *Comlth. v. Stumpf's Adm'r*, 146 Ky. 132, 142 S. W. 393; *Comlth. v. Southern Pacific Ry. Co.*, 150 Ky. 97, 149 S. W. 1105—in each of which it was held that the county court was without jurisdiction to assess or compel the payment of an inheritance tax on the estate of a nonresident decedent where no real property was owned by such decedent in the state. In neither of these cases was it declared, nor could it properly have been held, that section 4281a of the act of 1906 was rendered inoperative by reason of the failure of section 4281m to provide a remedy for compelling the payment of such inheritance taxes as might be imposed by its provisions.

[2, 3] In our view of this case, section 4281a of the Act of 1906, in force at the time of De Witt's death, by its terms imposed the inheritance tax the commonwealth is here seeking to collect; and, while its right to the tax arises out of the situs in this state of the property belonging to the estate of the deceased nonresident and the amount of the tax must be determined by the value of the property, after all is said its valuation and other steps preliminary to its collection is but a method of ascertaining the amount of

the tax, which is not a tax on or against the property as such, but a tax on the transmission of or succession to property, or the right or privilege of taking it by will or descent, which it is the policy of practically all the states of this country to exact. The authorities supporting this proposition are so numerous that citation of only a few of them will be necessary. *Booth's Ex'r v. Comlth.*, etc., 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N. S.) 592; *Leavell v. Arnold*, 131 Ky. 426, 115 S. W. 232; *Magoun v. Ill. Trust & Savings Co.*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569; *Garth v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653. Obviously, if De Witt had left real estate in Kentucky, though of trifling value, under the act of 1906 the same, together with the railroad stock, could have been assessed for the purpose of realizing this tax by the county court of the county containing the real estate. So there can be no doubt of the validity of the statute, or of the validity of its imposition of the tax.

As the act of 1906 imposed the inheritance tax in question and failed to provide adequate means for arriving at the value of the property out of which it is to be paid or of enforcing its payment, the question next to be determined is: What effect should be given the amendment of 1914, enacted two years after De Witt's death? Can it be regarded as so remedying the defects of procedure in the former act as to make its provisions applicable in enforcing the collection of this tax? The act of 1914 is as follows:

"The county court in which is situated property of any nature or kind of a decedent who was not a resident of the state, or in which the will of said decedent might be probated, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this chapter, and the first acquiring jurisdiction, shall retain the same, to the exclusion of every other."

[4, 5] The fact must not be ignored that in the matter of an inheritance tax the valuation can be made and the tax paid at any time prior to the distribution of the estate (*Comlth. v. Cambron's Ex'rs*, 158 Ky. 577, 165 S. W. 979), and it is admitted that the De Witt estate, or the particular stock out of which the tax here must be paid, had not been distributed before the passage of the act of 1914 and has not yet been distributed. So the office of the act of 1914 is to provide the method of arriving at the value of the property out of which the tax must be paid and a tribunal with jurisdiction to enforce such valuation and the payment of the tax which had previously been imposed by an existing statute, and so long as the estate re-

mains unsettled the Legislature could or may by a proper enactment cure any defects in the law by which the tax was imposed or a lien created for same, though it will result in giving the act a retroactive effect. This conclusion is supported by the following authorities: *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92; *Montgomery v. Gilbertson*, 134 Iowa, 291, 111 N. W. 964, 10 L. R. A. (N. S.) 986.

In *Ross on Inheritance Taxation*, § 36, it is on this subject said:

"The rights and obligations of all parties in regard to the payment of an inheritance tax is ordinarily determinable as of the time of the death of the decedent. It is at that time that the title to the property passes to the heirs, devisees, and legatees and that the right of the public to the tax accrued, although actual enjoyment is postponed by the delays incident to the administration of the estate. The occasion for the tax being the devolution of property, it should usually attach to such interest only as arises by reason of a death subsequent to the passage of the act imposing the tax. The statute is not given a retrospective operation, so as to raise estates of persons who have died before its enactment, unless its terms clearly demand such an interpretation. But the method of procedure for the ascertainment and determination of the tax is controlled by the statute in force at the time of the institution of the proceedings, although the tax itself and the rights of the parties are controlled by an earlier statute." *Estate of Davis*, 149 N. Y. 539, 44 N. E. 185; *Estate of Sloane*, 154 N. Y. 109, 47 N. E. 978; *Cohen v. Brewster*, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215; *Barclay's Trustee v. Comlth.*, 156 Ky. 456, 161 S. W. 510, 51 L. R. A. (N. S.) 232.

We do not regard the cases *In re Estate of Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, and *Estate of Pettit*, 65 App. Div. 30, 72 N. Y. Supp. 469, upon both of which counsel for appellants strongly rely, as controlling in the instant case. In the first case it appears that the property involved had been removed from the state prior to the institution of the proceedings to tax the succession; and in the second case the court seemed to have wholly failed to discriminate between a general property tax and a tax on the succession to property, and also, without cause, to have assumed that the amendatory act sought to be applied in that case, by reason of its alleged retroactive effect, was rendered unconstitutional. We think these cases so in conflict with the great weight of authority that we are unwilling to declare them the law in this state.

In our view of the case, so long as the stock sought to be charged with the payment of this inheritance tax remains in this state undistributed, it is liable for such tax; hence, though the appeal prayed is granted, the judgment of the circuit court is affirmed.

## ALEXANDER v. LEWIS.

(Court of Appeals of Kentucky. June 10, 1919.)

### 1. PARTNERSHIP —53—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to settle an alleged partnership and to recover one-half of the profits, the chancellor's finding that no partnership existed held warranted by the evidence.

### 2. APPEAL AND ERROR —1009(3)—REVIEW—FINDING OF CHANCELLOR.

The appellate court will not disturb the finding of a chancellor upon question of fact, where the evidence is conflicting and on a consideration of the whole case the mind is left in such doubt that it cannot be said with reasonable certainty that the chancellor erred.

Appeal from Circuit Court, Carter County.

Action by R. H. Alexander against Robert F. Lewis. From a judgment for defendant, plaintiff appeals. Affirmed.

Strother & Hamilton, of Louisville, and Theobald & Theobald, of Grayson, for appellant.

John M. Waugh, of Ashland, for appellee.

CLAY, C. Claiming that he and the defendant, Robert F. Lewis, were partners in the purchase and sale of tobacco, plaintiff, R. H. Alexander brought this suit to settle the partnership and to recover one-half of the profits. The master commissioner, to whom the case was referred, to hear proof and determine whether there was a partnership, and to settle the partnership, if one existed, reported that there was a partnership and that the profits amounted to \$2,051.88. On exceptions to this report, the chancellor decided that there was no partnership, sustained the exception, and dismissed the petition. Plaintiff appeals.

Plaintiff testified in substance as follows: He was the president and manager of the Tenth Street Tobacco Warehouse Company in Louisville. He first became acquainted with the defendant in the month of October, 1916. During that month he had some correspondence with the defendant about acting as agent for the Tenth Street Tobacco Warehouse Company, and possibly buying a few crops. Some time later, the defendant called to see him and they talked further about the matter; the defendant stating that he wanted to buy a few crops, if he could buy them right. About November 4th he called defendant over the telephone and asked him how he was getting along. Defendant replied that he had bought one or two crops, and he asked defendant if he could buy any more tobacco. Defendant said that he thought he could. He then asked defendant if he could buy it at the right price. Defendant said he could.

He then asked defendant if he wanted to go into partnership with him and buy some tobacco; that he had a man there that he would send up to go with him; that the man was a good judge of tobacco, and would be a great help to him in making the purchase. Defendant said he would be glad to have him. He had reference to Mr. Harpring. He then explained to Harpring about the conversation and directed him to go to Grayson, Ky., and assist the defendant in buying some tobacco. Harpring went the next day. Under this arrangement, defendant and Harpring bought over 100,000 pounds of tobacco. A large portion of the tobacco was sold to Gorin Bros., and some of it was sold at the Tenth Street Tobacco Warehouse. Under the contract the tobacco was to be shipped there, and the company was to receive a commission for handling the tobacco. While he did not tell defendant that he was to furnish the money, that was the natural conclusion. The money was borrowed from the Tenth Street Tobacco Warehouse Company. The contract of sale to Gorin Bros. was made in the name of Alexander & Lewis. All the time the business was talked of by him and Lewis as a partnership. There was also a sale of 57,000 pounds of tobacco to Haley & Shelburne at Lexington. Harpring had a great deal of correspondence with defendant, and in that correspondence Harpring represented plaintiff. Under the agreement between him and defendant, defendant was to receive the tobacco, pay for it, have it prized, and deliver it at the depot at his place, while plaintiff was to pay for the tobacco and pay for the sale of it. The accounts with the Tenth Street Tobacco Warehouse Company were kept in the name of R. F. Lewis & Co. The drafts, given in payment for the tobacco, were charged to the account, and the account was credited by the sales made. The amount expended in the purchase of tobacco was \$13,105.28. On cross-examination witness stated that the Tenth Street Tobacco Warehouse was a commission house and collected commissions on the tobacco. Defendant was not present when the contract with Gorin Bros. was signed, but defendant afterward approved the sale. Nothing was said between him and defendant as to how the profits or losses, if any, were to be divided. It was the custom, however, when one party furnished the money and attended to the sale of the tobacco, and the other party attended to the buying, to divide the profits and losses equally between them.

R. A. Harpring was present on November 4th, when plaintiff called up the defendant. Plaintiff asked defendant if he wanted a partner in the purchase of tobacco. Plaintiff told defendant he would send him up there, and witness went there at the direction of plaintiff. He made three trips up there, and assisted defendant in buying several crops. Defendant stated to him that he

and Alexander were partners in the purchase of the tobacco. He told defendant that he thought he could get a certain price for the tobacco, at the same time saying, "I will see Mr. Alexander, and if it is satisfactory to him, and satisfactory to you, we can sell it." Defendant said, "Well, go ahead, and if you can, sell it for us." Thereupon he returned to Louisville and the tobacco was sold to the Gorin Bros. He wrote defendant about it, and defendant wrote back that he was well satisfied. Afterwards a crop was sold to Haley & Shelburne. Before the sale was made, defendant mentioned to plaintiff the price that he thought he could get for the tobacco, and plaintiff said that it was agreeable to him to sell it. In all these transactions he represented Mr. Alexander. He wrote several letters to defendant, and received several letters in reply. On cross-examination, witness stated that defendant told him that Mr. Alexander was to have half of the profits. At that time he was solicitor for the Tenth Street Warehouse. A. E. Mitchell, the secretary and treasurer of the Tenth Street Tobacco Warehouse Company, testified that the accounts of the Tenth Street Tobacco Warehouse Company were kept in the name of R. F. Lewis & Co. He also exhibited a large number of drafts drawn by defendant in the name of R. F. Lewis & Co.

The defendant, R. F. Lewis, testified that he had been in the tobacco business for about two years and was also assistant postmaster. He had known plaintiff for about ten months. Never at any time was he in partnership with plaintiff. His contract with plaintiff was that plaintiff was to furnish the money to buy the tobacco and get his commission out of it. That was all the contract they had. He was to pay 6 per cent. for the money. The Tenth Street Tobacco Warehouse Company did not furnish all the money to buy the tobacco. He himself furnished about \$4,000. The reason the account was kept in the name of R. F. Lewis & Co. was that he had other accounts in the bank and did not want to get them mixed up. The tobacco which he purchased was shipped to the Tobacco Warehouse Company. The shipments sold elsewhere were made by the direction and with the consent of plaintiff. The shipment to Gorin Bros. was sold through the Warehouse Company. The only shipment that was not thus sold was to Haley & Shelburne, and this sale was made with the consent of Mr. Alexander. Harpring came to Carter county as a representative of the Tenth Street Tobacco Warehouse. When Alexander called him over the 'phone, he had a hard time understanding him. He finally understood that Alexander wanted to send somebody up to help him out, as he was tied up in the post office. He told Alexander, that that plan would suit him very well. Not at that time or at any other time, did he state to Alexander that they were partners.

Harpring wrote him a letter, in which he said, "I have sold your tobacco." He never saw the contract between Alexander & Lewis and Gorin Bros. He never had any agreement with Alexander, by which the latter was to have half the profits. He told Alexander that, if he had to have a partner, he would not engage in the business.

In rebuttal plaintiff denied that defendant had stated to him that he would keep the accounts in the name of R. F. Lewis & Co., so that they would not get mixed up, Harpring went as a representative of the plaintiff, and not as a representative of the Warehouse Company. Harpring testified that, upon his arrival at Grayson, defendant stated that he fully understood defendant and plaintiff were partners. At the time he was representing Alexander, he was being paid by the month by the Tenth Street Tobacco Warehouse Company. Mrs. L. S. Gatewood stated that she was present when Mr. Alexander called defendant, and heard Mr. Alexander say, "Do you want a partner?" She also heard him say, "I have a good man to send up and will send him tomorrow." He then turned to Harpring and asked him if he would go. Harpring said, "I will."

Several letters from defendant to plaintiff and Harpring were introduced, and in these letters defendant referred to purchases "I have made," and in some instances to purchases "We have made." In several of them defendant spoke of the prices at which the tobacco was purchased and asked Harpring to keep him advised as to market prices, as he didn't want to take any chances.

The circumstances relied on to show a partnership are defendant's statements to Harpring that he understood that he and plaintiff were partners; that the purchases were made, the drafts drawn, and the accounts kept in the name of R. F. Lewis & Co.; that portions of the tobacco were not shipped to the Warehouse Company, but were sold to Haley & Shelburne and to Gorin Bros.; that Harpring and plaintiff made the sale to Gorin Bros., which they would not have done unless plaintiff had been a partner with defendant, and that defendant expressed his satisfaction with the sale upon being apprised of the terms thereof; that in speaking of some of the purchases he used the pronoun "we"; that plaintiff became responsible to the Warehouse Company for the money, which he would not have done, had there been no partnership.

On the other hand, plaintiff, when he called defendant over the phone and asked him if he wanted to go in partnership with plaintiff in the purchase of tobacco, did not state what defendant's answer was. Plaintiff did not then agree to furnish the money. Nothing was said about profits and losses, and none of the terms of the alleged partner-

ship were discussed. A portion of the money used in the purchase of the tobacco was advanced by defendant himself, and the other portion was loaned by the Warehouse Company, and interest charged therefor. In none of the numerous letters introduced was the word "partnership" used. Defendant explained that the Gorin purchase was afterwards sold through the warehouse, that the sale to Haley & Shelburne was made with plaintiff's consent, and that the accounts were kept in the name of R. F. Lewis & Co., so as not to conflict with other accounts kept in his own name. Harpring came as a representative of the Warehouse Company, and was paid by that company, and sent to Grayson to assist defendant, because defendant could not devote all of his time to the work.

[1, 2] While it may be true that plaintiff believed that he had entered into a partnership with defendant, the evidence is by no means clear that the defendant understood that this was the case, or that there was ever a meeting of their minds on the question. It is our rule not to disturb the finding of the chancellor upon a question of fact, where the evidence is conflicting, and on a consideration of the whole case the mind is left in such doubt that we cannot say with reasonable certainty that the chancellor erred in his conclusion, and this rule is peculiarly applicable to the facts of this case. *Hayes v. Hayes' Ex'r*, 181 Ky. 589, 205 S. W. 596.

Judgment affirmed.

#### PREWITT v. WILBORN et al.

(Court of Appeals of Kentucky. March 28, 1919. Rehearing Denied, June 20, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1032(1)—PRESUMPTIONS FAVORING JUDGMENT.

Before a judgment should be reversed, an error prejudicial to the rights of appellant should affirmatively appear from the record.

#### 2. APPEAL AND ERROR $\S$ 901—BURDEN TO SHOW ERROR—OMITTED PORTION OF RECORD.

Appellant, if he would secure reversal, must exhibit in the Court of Appeals a record showing affirmatively that the decision appealed from is erroneous, after indulging presumption, which follows a showing on the record presented, that a portion of the record of the case has been omitted.

#### 3. APPEAL AND ERROR $\S$ 907(1)—PRESUMPTION FAVORING COURT BELOW—OMISSION OF PART OF RECORD.

Where transcript as made shows that a portion of the record of the case is omitted, which must have been considered by the court in reaching a decision, it must be presumed that omitted portion justified the decision.

**4. APPEAL AND ERROR §907(1)—PRESUMPTION FAVORING COURT BELOW—OMISSION OF PART OF RECORD.**

Presumption on appeal that omitted portion of record was considered by trial court, and justified his decision, does not arise from omission of parts of record which were not considered by trial court, could not have influenced its decision, and which, if present, would not have been necessary to be considered to determine correctness of decision.

**5. APPEAL AND ERROR §907(1)—PRESUMPTION FAVORING COURT BELOW—OMISSION OF PART OF RECORD—REVERSAL.**

Even if absence of part of record on appeal appears from record as presented, if record affirmatively shows that decision below was erroneous, it will be reversed.

**6. APPEAL AND ERROR §518(5)—RECORD — RECORDS IN PRIOR CASE—INTRODUCTION IN EVIDENCE.**

In action at law, the pleadings stating the issues and showing the records of a prior action, such records could have been used as evidence only, and by such use alone could have become part of the record in the action.

**7. APPEAL AND ERROR §518(5)—WRITINGS FILED AS EXHIBITS—STATUTE.**

Under Civ. Code Prac. § 128, subsecs. 1-3, in an action at law, writings filed as exhibits, and which a party intends to rely upon as evidence, do not become part of record, unless it shows they were used, or offered to be used, on trial, or unless they were filed with and relied on as foundation of cause of action.

**8. APPEAL AND ERROR §907(1)—PRESUMPTION FAVORING COURT BELOW — OMISSION OF PART OF RECORD.**

Where record fails to show that anything omitted from transcript, or bill of exceptions, was considered by trial court, or before it to be considered, Court of Appeals will not presume judgment to be correct, because certain orders in the case, or the records of prior suits pleaded, but not introduced in evidence, are omitted from the transcript.

**9. TRESPASS §19(1) — RECOVERY ON STRENGTH OF TITLE.**

In action wherein defendants came to occupy position of plaintiff in action for trespass on realty, and plaintiff came to occupy position of defendants, title of defendants, as well as their possession and right to possession, being put in issue, they were under necessity to recover on strength and validity of their own title, and not because of any want of title in plaintiff.

**10. JUDGMENT §713(1)—RES JUDICATA.**

A final judgment rendered on the merits, by a court having jurisdiction of the subject-matter and parties, is conclusive on the rights of the parties and their privies in another suit on the points and matters in issue on the first suit.

**11. JUDGMENT §713(2) — RES JUDICATA — MATTERS LITIGATED OR THAT MIGHT HAVE BEEN LITIGATED.**

In second suit between same parties on same cause of action, judgment in former suit is complete bar, not only as to everything used

in former action to sustain or defeat demand, but everything which parties could have used properly; but where second suit is between same parties or their privies upon different cause of action, judgment in former action is an estoppel only to a relitigation of questions actually litigated or determined in first action.

**12. JUDGMENT §736—RES JUDICATA—REFORMATION OF DEED — TRESPASS — RIGHT TO PROPERTY.**

Judgment in action for reformation of deed on ground of mistake, the real question decided being whether mistake had occurred, was not res judicata in an action for trespass on lands, involving issue as to title not adjudicated in first suit, since same evidence would not sustain or defeat action in both cases.

**13. DEEDS §138—"EXCEPTION."**

An "exception" in a deed, as distinguished from a reservation, is some part of the boundary described in the deed to which the grantor retains title, not conveying it by the deed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exception.]

**14. DEEDS §139—EXCEPTION — CERTAINTY IN DESCRIPTION.**

The certainty necessary in a description of lands excepted in a deed, to make the exception valid, is the same certainty necessary to make the conveyance of lands by the deed valid.

**15. DEEDS §88(1)—CERTAINTY OF DESCRIPTION.**

To make a conveyance of lands by deed valid, deed must describe them so certainly that property can be located, and in this sense that is certain and locatable which can be made certain and locatable.

**16. DEEDS §111 — AMBIGUITY IN DESCRIPTION OR EXCEPTION—INTENTION OF PARTIES AND CIRCUMSTANCES.**

If there is ambiguity in description of property intended to be conveyed or excepted from conveyance, its identity may be gathered from intention of parties and accompanying circumstances; but intention must be gathered from deed itself.

**17. EVIDENCE §460(7)—EXCEPTION—IDENTIFICATION OF PROPERTY.**

Parol evidence may be resorted to, to designate property contained in exception from deed, where terms of exception so identify property that parol proof can be applied to language and make it certain.

**18. VENDOR AND PURCHASER §230(1)—EXCEPTION—KNOWLEDGE OF GRANTEEES.**

Where language of exception in deed gave notice to grantees of fact there was land within description of boundary in their deed which had been disposed of to another, and with small diligence grantees could have definitely ascertained its location, if not already known to them, grantees could not accept deed without being chargeable with notice.

**19. EVIDENCE §460(5)—PAROL—EXCEPTION IN DEED.**

In action involving title to land, where question of whether lands affected by exception in

deed involved could be located, so as to make property referred to a matter of reasonable certainty, was dependent on the evidence, the trial court erred in rejecting proof of the contents and execution of a writing between a party in the chain of title and his grantee.

**20. DEPOSITIONS §79—OF DECEDENTS—FILING BEFORE TRIAL.**

In action involving title to lands, where depositions of party in chain of title and his grantee were given in action to which defendant and privies of plaintiff were parties, as both deponents were dead, such part of their depositions should have been permitted to be read as tended to prove execution and contents of writing between them, and location of lands, embraced by exception in controversy in present suit, to which writing referred, also any other portions of the depositions containing competent evidence on the issues, if the depositions were filed in action before trial.

**21. APPEAL AND ERROR §854(2)—REVIEW—WRONG REASON—JUSTIFIABLE JUDGMENT.**

Judgment of trial court, based by it on an erroneous reason, will not be reversed, if justifiable for any other reason.

**22. JUDGMENT §743(2) — RES JUDICATA — DUTY TO SET UP ALL CLAIMS TO LAND.**

In action involving title to land, it was duty of a party to bring forward all titles and claims to titles he possessed, and he could not rest his action on one claim of title alone, and, being defeated on that, put forward another claim, and thus require court to adjudicate his rights piecemeal.

**23. JUDGMENT §739—RES JUDICATA—SUBSEQUENTLY ACQUIRED TITLE.**

Plaintiff's claim of title, acquired since rendition of a former judgment, would not be barred by such former judgment.

**24. JUDGMENT §684—RES JUDICATA—ACTION AGAINST TENANTS—EFFECT ON LESSORS.**

Judgment in action against tenants, to which lessors were not parties on record, was not binding on lessors, if adverse to them, unless they assisted or directed defense, which they could have lawfully done for their tenants.

**25. JUDGMENT §666 — RES JUDICATA—MUTUALITY OF ESTOPPEL.**

A former judgment, which is not binding on defendants, is not a bar to the assertion of any right by plaintiff.

**26. JUDGMENT §951(1) — RES JUDICATA—MUTUALITY OF ESTOPPEL — BURDEN OF PROOF.**

In an action involving title to land, the burden is on defendants to show they participated in the defense of a prior action for their tenants, so that the former judgment is a bar to the assertion of any right by plaintiff, in that it is binding on defendants.

**27. JUDGMENT §958(2) — RES JUDICATA — MUTUALITY OF ESTOPPEL — PARTICIPATION IN ACTION—QUESTION FOR JURY.**

In an action involving title to land, whether defendants participated in the defense of a

prior action for their tenants held a question of fact for the jury.

**28. ADVERSE POSSESSION §115(1) — CONFLICTING EVIDENCE—QUESTION FOR JURY.**

In action involving title to land, where there was some slight evidence in support of defendants' claim of adverse possession, but there was other evidence contradictory of it, question was for jury.

**29. ESTOPPEL §32(1)—BY DEED—EXCEPTED LANDS.**

Acceptance of a deed by plaintiff does not estop him from asserting title to the lands excepted from its operation, if he had title to such lands otherwise.

**30. EVIDENCE §353(4)—ADMISSION—DEED.**

In an action involving title to land, a deed accepted by plaintiff is competent evidence against him, if, under the other facts of the case, it would tend to prove an admission on his part of the existence of any fact adverse to his claim of title.

**Appeal from Circuit Court, Wolfe County.**

Action by Clifton Prewitt, Sr., against John Wilborn and others. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded for a new trial.

Edward C. O'Rear, of Frankfort, S. Monroe Nickell, of Hazard, and H. R. Prewitt, of Mt. Sterling, for appellant.

Kelly Kash, of Irvine, and Robert H. Winn, of Mt. Sterling, for appellees.

**HURT, J.** The judgment appealed from was rendered at the June term, 1916, of the circuit court, and the record was thereafter filed in this court, and, after the order of submission in this court had been set aside on two occasions, was finally submitted on May 10, 1918. A motion was made by the appellees to strike the bill of exceptions from the record, and this motion was ordered to be passed and to be heard upon the final submission. The grounds of the motion to strike the bill, under the circumstances shown by the record, are deemed insufficient, and the motion was therefore overruled.

(b) This action was instituted by the appellant, Clifton Prewitt, and others, whom we will call the plaintiffs, against the appellees, whom we will call the defendants, on February 29, 1892, and hence it is a veteran. The answer was filed in August, 1892. It appears, from *Goff v. Wilburn*, 24 S. W. 871, 15 Ky. Law Rep. 614, decided January 23, 1894, that, a demurrer having been filed to the answer, it was carried back to the petition and sustained, and the petition dismissed, and from the judgment an appeal was prayed to this court, which resulted in the opinion *supra*, which reversed the judgment below, and after the cause was remanded to the trial court, on the 28th day of January,



1897, an amended answer and counterclaim was filed. On April 29, 1897, an amended petition was filed. January 21, 1898, a reply was filed. March 4, 1898, a rejoinder was filed. In 1903 the court dismissed the action, as it appears, for a want of prosecution. A suit was filed under section 518, Civil Code, for a new trial, which was dismissed, and the plaintiffs again appealed to this court, and secured a reversal of the judgment by the opinion of this court in *Goff v. Wilburn*, 79 S. W. 232, 25 Ky. Law Rep. 1963, on the 9th day of March, 1904. The cause was remanded for a new trial, and on September 21, 1904, the defendants filed a second amended answer and counterclaim. On May 5, 1905, an amended reply was filed by plaintiffs. A trial was had March 5, 1915, which resulted in a judgment for defendants. A new trial was granted to the plaintiffs by the trial court on December 29, 1915. On May 30, 1916, an amended reply was filed, and on the same day the defendants filed a rejoinder, and the pleadings were then completed by an agreement upon the record that all affirmative allegations in all the pleadings be considered as controverted of record. The pleadings were thus completed 24 years after the litigation began.

During the period of the pendency of the action it has suffered casualties, and the clerk inserted a memorandum in his transcript to the effect that the record books containing the orders made during the progress of the action up to May 29, 1913, were burned when the courthouse in Wolfe county was destroyed by fire on that date, and had never been supplied, and hence were not copied in to the transcript. On July 26, 1915, the court, apparently upon its own motion, appointed a commissioner to supply the missing records, and, the commissioner never having reported, on the 7th day of March, 1916, the plaintiffs entered a motion to extend the time for the commissioner to hear proof and supply the lost records; but this motion never seems to have been acted upon by the court, and the commissioner never did report. On May 31, 1916, an order by agreement of the parties, was made, which recited that the parties then had present in court the original records in the cases of *J. M. Bacon et al. v. Wash Miller et al.* and *Wash Miller et al. v. E. C. Chenault et al.*, which were the records of the Powell common pleas court, and that same could be used by either party, on the trial of this case, as if they were certified copies of the records of those cases, and that for the purposes of a trial of this case they should be treated as if filed in this case. No part of the record of the case of *J. M. Bacon et al. v. Wash Miller et al.*, is copied into the transcript or bill of exceptions, except a deposition of S. F. J. Trabue, which was offered to be read, but excluded by the court.

[1-5] The appellees now insist that the

judgment ought to be affirmed, because the appellant has not brought to this court the entire record of the case, inasmuch as he has not brought the orders in the case, which were burned, nor all of the records of the case of *J. M. Bacon et al. v. Wash Miller et al.* It is a well-settled rule that, before a judgment should be reversed, an error prejudicial to the rights of the appellee should affirmatively appear from the record, and the necessary result of this rule is that every presumption is indulged in favor of the correctness of the judgment appealed from. *Dixon v. Melton*, 137 Ky. 689, 126 S. W. 858, Ann. Cas. 1912A, 457; *Huffaker v. National Bank*, 13 Bush, 644. Hence an appellant, if he would secure a reversal here, must exhibit a sufficiency of the record as will show affirmatively that the decision appealed from is erroneous, after indulging the presumption, which follows a showing, upon the record presented, that a portion of the record of the case had been omitted. Where the transcript as made shows that a portion of the record of the case is omitted, which must have been before and considered by the court in arriving at the decision, it will necessarily be presumed that the omitted portion justified the decision, as where a judgment overruling a demurrer to a pleading is appealed from, and the record shows that an amendment to the pleading had been filed before the decision, and the amendment is omitted from the transcript, it will be presumed on appeal that the amendment cured the defect; or if an appeal is from a decision on a question of fact, and the record shows that the evidence or a portion of it has been omitted, it will be presumed that the omitted portion sustained the judgment; or if an appeal is prosecuted because of the failure to give an offered instruction, and the instructions given are omitted from the record, on appeal it will be presumed that whatever was correct in the rejected instruction, was embodied in the instructions which were given; or if all the instructions are omitted, the presumption will be that the instructions were correct; or if certain ones are omitted, the same presumption will be indulged in their favor; or if the pleadings are omitted, the presumption will be indulged that they were sufficient to justify and sustain the judgment; or if the evidence is omitted, and a peremptory instruction was given, it will be presumed that the peremptory was proper.

There have been many cases determined by this court, wherein the presumption of the soundness of the judgments of the trial court was indulged, and dealing with many different situations, wherein the presumption has arisen, as will appear from the following cases, which are only a few of those in which the principle has been declared and adhered to, but they illustrate its reason and extent: *Huffaker v. National Bank*, supra; *Bowman*

v. Holloway, 14 Bush, 426; Bean v. Meguiar, 96 Ky. 553, 29 S. W. 306, 16 Ky. Law Rep. 715; McNew v. Williams, 36 S. W. 687, 18 Ky. Law Rep. 364; Braswell v. Hurley, 149 Ky. 205, 148 S. W. 32; Heard v. Cherry, 150 Ky. 319, 150 S. W. 361; Trosper Coal Co. v. Tway Mining Co., 183 Ky. 354, 209 S. W. 58; Mayo v. Emery, 103 Ky. 637, 45 S. W. 1048, 20 Ky. Law Rep. 638; Com. v. Keger, 1 Duv. 240; Jones' Adm'r v. Jones, 60 S. W. 488, 22 Ky. Law Rep. 1280; Dixon v. Wood, 64 S. W. 724, 23 Ky. Law Rep. 1004; Brashears v. Frazier, 43 S. W. 244, 19 Ky. Law Rep. 1259; Rudd v. Monarch, 32 S. W. 1083, 17 Ky. Law Rep. 893; Farmers' Bank v. Farmers' Bank, 147 Ky. 766, 145 S. W. 746; Wickliffe v. Farmers' Bank, 142 Ky. 35, 133 S. W. 966; Moore v. Bishop, 49 S. W. 967, 20 Ky. Law Rep. 1622; Maize v. Bradley, 64 S. W. 655, 23 Ky. Law Rep. 993; Miles v. Miles, 103 Ky. 496, 45 S. W. 506, 20 Ky. Law Rep. 182; Johnson v. Postal Telegraph & Cable Co., 50 S. W. 1, 20 Ky. Law Rep. 1821; Kugler v. Rouss, 64 S. W. 625, 23 Ky. Law Rep. 979; Davis v. Bailey, 53 S. W. 81, 21 Ky. Law Rep. 839. The presumption, however, does not arise from the omission of parts of the record, which were not considered by the court upon the trial, and could not have influenced the decision, and which, if present in the record here, would not be necessary to be considered, to determine the correctness of the decision. Further, even if absence of certain portions of the record here appears from the record, yet, if the record filed here affirmatively shows that the decision below is erroneous, it will be reversed. McMillan v. Stephens, 49 S. W. 778, 20 Ky. Law Rep. 1528.

It seems that the pleadings and everything necessary to be considered by the court, and in fact everything that was considered upon the trial, are embodied in the transcript and bill of exceptions. A portion of the pleadings was filed before the destruction of the courthouse and a portion of them has been filed since. Two trials have been had since the burning of the courthouse. Into the first of these the appellees entered without objection, and into the latter, as the result of which the judgment appealed from was rendered, each of the parties entered without objection, and with full knowledge of the absence of the records which were burned. The appellees never sought to have the burned records supplied, and the efforts of appellant in that direction ended with a motion for further time for the commissioner to act, made more than a year before the trial and never pressed to a decision by the court. It does not appear, from the record here, nor from any source, that the records of the orders in the case, previous to the burning, could have in any way influenced the decision in the case, or could have been considered, as they were not in existence at the time of the trial, and the bill

of exceptions falls to show that any reference was made to any of these orders, by either party or the court, during the trial.

[8, 7] This being an action at law, and the pleadings, which are all in the transcript, state the issues, and show the records of the action of J. M. Bacon et al. v. Wash Miller et al. could have been used as evidence only, and by such use was the only way in which it could become a part of the record. Either party was free to use it as evidence, if competent; but if neither party introduced it as evidence, nor offered to do so, it was not considered by the court, and could not be a part of the record of this case. The bill of exceptions shows that neither party used or offered to use it as evidence, nor for any purpose, except the appellant offered to read the deposition of Trabue, which was a part of the record of that case, and upon objection by appellees it was rejected as evidence. The deposition is copied into the bill of exceptions, with the objection and the ruling of the court thereon. In an action at law, writings filed as exhibits, and which a party intends to rely upon as evidence, do not become a part of the record, unless the record shows that they were used or offered to be used upon the trial, or unless they were filed with and relied upon as the foundation of a party's cause of action. Section 128, subssecs. 1, 2, 3, Civil Code.

[8] The allegations in the answer, that appellees had sued appellants and recovered a judgment for timber trees, cut upon the lands in 1892, and that in that action the title to the lands had been adjudicated in favor of appellees, were denied by the reply, and no evidence was offered touching such suit, if there was any such, and hence the record of that case did not become a part of the record of this. The record failing to show that anything omitted from the transcript or bill of exceptions was considered by the court upon the trial of the action, or was before the court to be considered, the contention that this court should presume the judgment to be correct, because the orders in the case previous to 1913, or the records of the suits referred to, are omitted from the transcript, is without merit.

(c) The plaintiffs in the action, at the first, were M. O. Goff, James Goff, Elisha Goff, Caswell Prewitt, Washington Miller, and the appellant, Clifton Prewitt. The defendants were John Wilborn, Elkanah Spencer, Dillard Hall, James Brooks, — Brooks, D. W. Chenault, Bettie Chenault, and Joel Chenault. Since the institution of the action, all of the plaintiffs have either died or transferred their interests in the lands in controversy, except appellant, Clifton Prewitt, and the action has not been revived in the name of the deceased plaintiffs. Of the defendants, D. W. Chenault and Bettie Chenault claimed ownership of the lands in con-

The plaintiffs replied, denying the owner-

[illegible]

In 1786 the commonwealth of Virginia granted to Terrason & Bros. a patent for 20,000 acres of land, which embraced the lands in dispute, and all the lands in the above diagram. Thereafter, in 1819, the lands patented to Terrason & Bros. were sold to satisfy the taxes due thereon, and were purchased by Jas. Haggins, and in 1849 or 1850 were conveyed to the heirs of Haggins by the register of the land office. At the time of the sale for taxes, they were assessed for taxation in the name of one who was described in the proceedings as a successor of Terrason & Bros. Previous to 1850, one James Townsend was residing at the place which is indicated upon the diagram as "James Townsend's House." He does not appear to have had any title or color of title to the lands, but claimed dominion over 6,919 acres, which is represented upon the diagram by the lines indicated by the figures 1, 2, 3, 4, 5, 6, 7, and 8. During his lifetime, which ended in 1862, he had a small improvement and inclosure around his house, and certain of his heirs lived at the same place, and at other places within the 6,919-acre boundary, until 1887 or 1888, and the appellant claims title by conveyances from certain of the heirs of James Townsend, and also by conveyances from Trabue, attorney in fact for the Haggins heirs.

About 1884 or 1885 Elizabeth Maxwell set up a claim to 2,008 acres within the boundaries of the James Townsend tract. Upon what she based her claim to all of the 2,008 acres does not appear, but she claims to have acquired a claim to all or a part of it from one Wells for a consideration of \$5. Upon what Wells based his claim does not appear. Presumably Wells and Maxwell were mere "squatters." The boundary to which Mrs. Maxwell asserted claim is described by the lines represented by the letters A, B, C, D, E, F, G, H, I, K, J, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, and a. About 1875 the Spencer house was erected and occupied for a short time, by one Townsend, who seems to have been a mere intruder, and after he abandoned the house Spencer took possession of it and occupied it until his death, and after him his wife and certain members of his family occupied it until the time of the bringing of this suit. About 75 acres around the Spencer house were inclosed, and shortly after he began to occupy the house he seems to have become a tenant of D. W. and Bettie Chenault; but upon what ground the Chenaults based their claim to the land does not appear. Charles occupied the house described on the diagram as "Charles House," as a tenant of Wells and Mrs. Maxwell, for several years before the institution of this suit.

The timber trees, the cutting of which is complained of, were situated between the lines described by the letters A to F and A to E. The line A to E is said to be a due

north line, while the one A to F is N. 9° W. and about 625 poles in length. The boundary of land which the appellees claim to own is described by the lines A to F, F to E, E to G, G to H, and H to A, while it seems that the appellant claims to be a joint owner with others of the entire James Townsend tract. At the trial, after the evidence had been closed, the court, being of the opinion that the judgment in the case of Washington Miller et al. v. E. C. Chenault et al., tried and decided in the Powell common pleas court, determined the question of the ownership of the title to the lands from which the timber trees were cut, as between the appellees and appellant and the persons who claimed to be joint owners with appellant, and in favor of appellees, and that appellant was now estopped by the judgment to deny the title of appellees, directed the jury peremptorily to find a verdict for appellees, which it did, and a judgment was rendered accordingly, and from the judgment this appeal is now prosecuted.

1. After this lengthy statement of the history and facts of the case, which seems to be necessary to render the opinion intelligible, we will consider the question of the propriety of the peremptory instruction given by the court, and objected to at the time by appellant, and this will involve a history of the case of Washington Miller et al. v. E. C. Chenault et al., upon the judgment in which the court based its ruling that the title to the land in controversy was res judicata.

On the 18th day of September, 1888, Trabue, as attorney in fact for the Haggins heirs, entered into a contract, which was reduced to writing, with Elizabeth Maxwell. The contract was subscribed by both Trabue and Maxwell. This writing recited that—

"Whereas, Elizabeth Maxwell claimed the possession and has her tenants in possession of 2,008 acres of land, situated on the South fork of Red river; and whereas, S. F. J. Trabue is the agent and attorney in fact of the heirs of said Bacon and Mrs. Barclay, heirs of James Haggins, deceased, who represent the 20,000-acre survey of Bartholomew Terrason, successor to Terrason & Bros., which survey includes the lands surveyed by Mrs. Maxwell, containing 2,008 acres, aforesaid: Now, it is agreed, between the said Elizabeth Maxwell and the said Trabue, agent aforesaid, that he (Trabue) will invest the said Maxwell with the title of his principals by a deed of conveyance, whereupon the said Maxwell is by a like deed to convey to said Trabue one-fourth interest in said land, and also one-fourth interest to the clients of said Trabue. The said Trabue is to warrant and defend the title to one-fourth of said land, and his clients the other one-fourth, and Mrs. Maxwell is to make similar conveyance."

Thereafter, on July 16, 1891, the heirs of Jas. Haggins, by Trabue, attorney in fact, executed a deed to D. W. and Elizabeth Chenault, the consideration of which was expressed to be:

"The settlement of all controversy and claims between the parties hereto as to the land herein conveyed, and in further consideration of one dollar, in hand paid, and for assistance and services by the second party in settlement of the claims of the parties of the first part to their lands in the Terrason Bros. patent."

The land conveyed by the deed was described as the land shown upon the diagram as included by the lines A to F, F to E, E to G, G to H, and H to A, and further described it as the land to which the grantees had asserted title and possession in the suit in the Madison common pleas court, styled *Blackwell v. Washington Miller et al.*, and succeeded against the claims of all parties thereto. Then followed certain exceptions in the deed to the conveyance of the body of land described and conveyed as follows:

"There is excepted out of this conveyance 75 acres, including the inclosure occupied by Jackson Adams, and the boundary, or any part lying within the boundary here conveyed, heretofore deeded by the party of the first part to William Townsend, or E. Maxwell, or sold to her."

On the 1st day of October, 1891, the Haggins heirs, by Trabue, attorney in fact, and Trabue, in his own right, executed a deed to Washington Miller, trustee, by which they conveyed to him a body of the lands within the Townsend tract, and also an undivided one-half interest in the Maxwell tract, or the boundary described by the lines designated by the letters A, B, C, D, E, F, a, b, c, d, e, f, g, h, i, j, k, l, m, n, o. Just who were the cestui que trustants in the deed to Miller as trustee does not definitely appear. Thereafter, on November 7, 1891, Washington Miller, Trabue, the Haggins heirs, and Elizabeth Maxwell instituted the suit in equity in the Powell court of common pleas against Elizabeth Chenault and D. W. Chenault. The plaintiffs alleged that the Haggins heirs had been the owners of the Townsend tract of land, and had entered into the contract above stated with Mrs. Maxwell touching the 2,008 acres, and that she was in possession of same, and that, in executing the deed to the Chenaults, by Trabue, for the Haggins heirs, it was intended to convey to the Chenaults the boundary of land described by the lines A to B, B to C, C to D, D to E, E to F, and F to A, but excepting that portion which lies to the westward of the line A, B, C, D, E, and in fact it was intended to except from the conveyance the tract of land held by Mrs. Maxwell, and that they had not in fact sold or deeded to Mrs. Maxwell any land at all, and that such expression in the deed was a mistake, and that it was intended to except the land concerning which the contract with Mrs. Maxwell existed, and the only relief sought by the petition was a cancellation of the deed made to the Chenaults, and a conveyance to be made to them excepting the

lands contracted to Mrs. Maxwell. The answer made by the Chenaults denied that there was any mistake made by the Haggins heirs in the execution of the deed, or that it was acknowledged by mistake, or that it was drafted otherwise than intended by the parties, and further denied that the Haggins heirs were ever the owners of the lands conveyed to defendants; that defendants were the owners of same by adverse possession for the statutory period, and the deed to them was only a conveyance of the claim which the Haggins heirs made to the lands for a sufficient consideration. The reply of plaintiffs traversed the allegations of the answer. The court rendered a judgment, dismissing the petition, and denying the relief sought, and in the judgment the only issue decided, and the reason for the decision, was expressed as follows:

"The court is of the opinion that the deed, sought by plaintiffs to be reformed, embraces all that the parties contemplated, and nothing was left out of it by mistake."

It will be observed that the only question, which the court was asked to decide by the prayer of the petition or the answer, was whether the deed had been executed by any mistake, and whether it contained terms in accordance with the intentions of the parties, and that was the only issue determined by the court, by the express words of the judgment. Mrs. Maxwell asked the court to quiet her title to an undivided one-half of the boundary of land alleged to be in her possession in the prayer to her separate reply; but the court ignored the request, presumably upon the ground that the deed excepted her interest, whether the whole or an undivided interest, in the boundary of land claimed by her from its operation. Neither was any question made or decided touching the validity of the exception contained in the deed.

[10-12] The doctrine of *res judicata* is that a final judgment rendered upon the merits of the case, by a court having jurisdiction of the subject-matter and the parties, is conclusive of the rights of the parties and their privies in another suit on the points and matters in issue in the first suit. A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties upon the same cause of action and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but everything which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estop-

pel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision, and is not conclusive as to matters not decided, and the decision of which were not essential to the decision in the first suit, although issues may have been made in reference to them.

In the instant case, conceding that appellant was a party to the action of Washington Miller et al. v. E. C. Chenault et al., or a privy in estate to a party to that action, which he appears to have been, the cause of action was a different one in this action to the one involved in that. In that the cause of action was to secure a reformation of a deed upon the ground of mistake, and whether the mistake had occurred was the only question decided by the court; while in this case the cause of action is trespass upon the lands, which involves an issue as to the title to the lands, which was not adjudicated in the first suit. The accepted rule in determining whether two suits are upon the same cause of action is whether the same evidence will sustain or defeat the action in both cases. It is evident that a recovery could not be had, in the action of Washington Miller et al. v. E. C. Chenault et al., except by evidence showing that the deed to the Chenaults by Trabue was made by mistake, nor could such action be defeated except by evidence controverting the fact of any mistake. Evidence as to the ownership of the lands by the Chenaults, by adversary possession, or the possession of the land by Mrs. Maxwell, or her ownership of same, would not be relevant to the issue in that case, upon which the action was decided, although an issue was made in the pleadings as to the title to the lands, but it was not material, and hence was not adjudicated.

In this action, none of the evidence relating to the right of a reformation of the deed could be relevant. The judgment in the Powell county case being confined solely to the decision as to whether the execution of the deed arose from a mistake, and that being the only thing adjudicated in the case, the court did not necessarily or impliedly determine any question relating to the ownership of the land, in arriving at the decision it did make. Hence, the instant action being upon a different cause from the other, and the title to the land not being adjudicated in the other, and the court not having impliedly determined the ownership of the land, in arriving at its judgment, and no fact therein constituting a bar unless adjudicated, the judgment therein did not estop the appellant to deny appellee's ownership of the lands in this action, and the court was in error in giving that effect to it. 15 R. C. L. 964, 978; Jefferson v. National Bank, 144 Ky. 67, 138

S. W. 308; 1 Freeman on Judgments (4th Ed.) § 282; 2 Black on Judgments, § 787; 23 Cyc. 1196, 1216, 1217, 1218; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Thompson v. Bushnell (C. C.) 80 Fed. 332.

[13-17] It is, however, insisted that as a matter of law the exception, in the deed of the lands within the boundary conveyed to the grantees, of the boundary heretofore deeded or sold to E. Maxwell, is so indefinite and uncertain that the exception is void, and the entire boundary passed under the deed to the grantees. An exception in a deed, as distinguished from a reservation, is some part of the boundary described in the deed which the grantor retains title to and does not convey by the deed. Hicks v. Phillips, 146 Ky. 305, 142 S. W. 394, 47 L. R. A. (N. S.) 878. Hence the deed, after the judgment in the Powell court of common pleas, having been left to be construed according to its terms as made by the parties, the deed did not convey to the Chenaults such a part of the boundary, or such interest in the boundary, described in the deed to them as had theretofore been deeded or sold to Mrs. Maxwell. The certainty necessary in a description of the lands excepted in a deed, to make the exception valid, is the same certainty as is necessary to make a conveyance of lands in the deed valid. The certainty there required is that the description given of the lands in the deed is such that the property can be located, and that is held to be certain which can be made certain. If there is ambiguity in the description of the property intended to be conveyed or excepted from the conveyance, the identity of the property may be gathered from the intention of the parties and the accompanying circumstances, which surround and are connected with the parties and the property at the time; but the intention of the parties must be gathered from the deed itself. Parol evidence may be resorted to to designate the property contained in an exception, where the terms of the exception so identify it that parol proof can be applied to the language of the exception, and thus make it certain.

[18-20] It is clear from the deed that the grantors did not intend to convey, nor the grantees to receive under the conveyance, any part of the boundary described in the deed which had theretofore been deeded or sold to Mrs. Maxwell. The parol proof heard and rejected makes certain the lands to which the exception was intended to apply. Several years before the deed was executed, Mrs. Maxwell had caused the boundary of 2,008 acres to be surveyed and marked, and was holding it in her actual possession by her tenants. The writing entered into between her and Trabue was a sale to her of an undivided one-half of that boundary for a sufficient consideration, as expressed in the writing. The language of the exception

in the deed gave notice to the grantees of the fact that there was land, within the description of the boundary in their deed, which had been disposed of to Mrs. Maxwell, and with a small degree of diligence its location could be definitely ascertained, if not already known by them. The grantees could not accept the deed without that knowledge. The following decisions illustrate and uphold the views above expressed, touching the certainty of description of property requisite in deeds to make the conveyance valid, and no greater degree is required in the description covered by the exception: *Bates v. Harris*, 144 Ky. 399, 138 S. W. 276, 36 L. R. A. (N. S.) 154; *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114; *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1085, 14 Ky. Law. Rep. 732; *Tyler v. Onzts*, 98 Ky. 331, 20 S. W. 256, 14 Ky. Law. Rep. 321; *Posey v. Kimsy*, 146 Ky. 205, 142 S. W. 703; *Hall v. Cotton*, 167 Ky. 467, 180 S. W. 779, L. R. A. 1916C, 1124; *Campbell v. Preece*, 138 Ky. 572, 118 S. W. 373; *Price v. Hays*, 144 Ky. 535, 139 S. W. 810; *Hyden v. Perkins*, 119 Ky. 188, 83 S. W. 128, 26 Ky. Law Rep. 1099; *Moayon v. Moayon*, 114 Ky. 855, 72 S. W. 83, 24 Ky. Law Rep. 1641, 60 L. R. A. 415, 102 Am. St. Rep. 303; *Ellis v. Deadman's Heirs*, 4 Bibb, 466; *Perry v. Wilson*, 133 Ky. 155, 208 S. W. 776; *Matherley v. Wright*, 171 Ky. 264, 188 S. W. 385.

Hence, inasmuch as the judgment of the Powell common pleas court makes the meaning of the deed from the Haggins heirs, by Trabue, to the Chenaults, a subject *res judicata*, and confines its meaning to its exact terms, the deed conveyed to the Chenaults the title of the Haggins heirs to the boundary of land embraced by the lines A to H, H to G, G to F, and F to A, except to any land within such boundary which was then occupied by Jackson Adams, and to such lands, or to such interests in the lands, as had theretofore been deeded or sold by the Haggins heirs to Wm. Townsend or to Elizabeth Maxwell. The evidence tends to prove that an undivided one-half of the boundary described by the lines A to B, B to C, C to D, D to F, and F to A, had theretofore been sold to Maxwell by Trabue for the Haggins heirs, and the question of whether the lands affected by the exception can be located, so as to make the property referred to a matter of reasonable certainty, is dependent upon the evidence. Hence the court was in error in rejecting proof of the contents and execution of the writing between Trabue and Mrs. Maxwell, and as the depositions of Trabue and Mrs. Maxwell were given in an action to which the defendants and the privies of appellant were parties, and as both are now dead, such part of their depositions should have been permitted to be read as tended to prove the execution and contents of the writing between them and the location of the

lands embraced by the exception to which the writing referred, and any other portion of the depositions which contains competent evidence upon the issues between the present parties, provided the depositions were filed in this action before the trial. *Kerr v. Gibson*, 8 Bush, 129; *Oliver v. Louisville & Nashville R. R. Co.*, 32 S. W. 759, 17 Ky. Law Rep. 840.

[21-23] 2. While the court rested its decision in directing the verdict for appellee solely upon the supposed effect of the judgment of *Miller et al. v. Chenault et al.* in the Powell common pleas court, if the action of the court for any other reason could be justified, the judgment would not be reversed, and hence it becomes necessary to advert to the other evidence heard for the appellees upon the trial. It was shown that in the action of *Blackwell v. Miller et al.*, decided in the Madison common pleas court on October 23, 1889, the appellant was one of the plaintiffs in that action. The action was for a division of the lands, which had been claimed by James Townsend in his lifetime, between Blackwell, Wm. B. Townsend, and Miller, and appellant joined Blackwell and Townsend as plaintiff, asserting interest in the lands, praying for the same relief as the other plaintiffs. The action was not only for a division, but, so far as it was an action against Wilborn and others, was to recover possession of certain portions of the lands, which it was alleged that Wilborn and others held unlawfully in their possession. The plaintiffs alleged that they were the owners of the lands, and therefore entitled to recover the possession from Wilborn et al. Wilborn and certain others, by their answer, denied the ownership or the right to the possession of that portion of the land which is included by the lines on the diagram as follows: A to H, H to G, G to E, and E to A. The line upon the western side of the boundary claimed by them was described as running from the standing rock north to a point not definitely stated, and N. 9° W. is the boundary now claimed by appellees. Wilborn and his cotenants claimed the possession, and the right to the possession of the land as the tenants of the Chenaults, who, they alleged, were the owners of the boundary described in their answer by adversary possession for the statutory period. To enable plaintiffs to recover in that action, it was necessary for them to show a superior title to the lands, and thus the title of the plaintiffs was put directly in issue, and as between them and Wilborn et al. there was necessarily no other issue except the title of the plaintiffs.

The trial resulted in a verdict and judgment for defendants, and does not appear, from anything appearing upon the record, to have been determined from anything, except upon the merits of the action. It seems that this judgment would be a bar to the appel-

lant claiming anything in the lands which were in controversy in that action, on account of any title which he may have had at the time of the judgment, if the appellees were parties to that action upon the record or participated in the defense. It was his duty to have brought forward all the titles and claims to titles that he then had, and he could not rest his action upon one claim of title alone, when he had others, and, being defeated upon the claim of title put forward, he could not cut and come again, and require the courts to adjudicate his rights by piecemeal. The evidence, however, shows that he is relying upon a claim of title acquired since the rendition of the judgment in the case of *Blackwell et al. v. Miller et al.*, and such title, if any he has, would not be barred by the judgment in that case. 23 Cyc. 1331.

[24-27] The evidence heard did not distinctly show that the trespasses complained of in this action were committed upon the portion of the lands which were involved in the action of *Blackwell et al. v. Miller et al.*, and, if not within the boundary involved in that action, the title to the lands upon which the trespasses were committed was not adjudicated adversely to appellant in that action. The appellees *Chenault* were not parties upon the record in that action, and the judgment would not be binding upon them if it had been adverse to their tenants, unless they had assisted or directed the defense, which they might have lawfully done for their tenants. If they are not bound by the judgment, it would not be a bar to the assertion of any right by appellant, as the bar of the judgment should be a mutuality. 23 Cyc. 1238; *Bridges v. McAlister*, 106 Ky. 791; *Chiles v. Conley*, 2 Dana, 21; *Schmidt v. L. C. & L. Ry. Co.*, 99 Ky. 143; *Herman*, §§ 150-152; *Valentine v. Mahoney*, 37 Cal. 389. The evidence does not show that the *Chenaults* were parties upon the record in the suit of *Blackwell et al. v. Miller et al.*; and while there were some statements and admissions in pleadings and deeds from which it might be inferred that they participated in the defense of the action for their tenants, the burden of showing they participated is upon them, and such of the inferences which may be drawn, as above stated, as are competent evidence between the parties to this action, are not altogether uncontradicted by other circumstances and inferences, and the question of the participation of the *Chenaults* in the defense of the action is a question of fact to be determined by the jury under proper instructions.

[28] 3. The evidence offered by appellees in support of their title to the land by adverse possession would not justify a directed verdict in their favor, because, while there was some slight evidence in support of their claim of adverse possession, there was other evidence contradictory of it, which made a question for the jury.

[29, 30] 4. It is urged that the directed verdict was justified because of the deed executed by *Trabue* for himself and the *Hagins* heirs to appellant and others in 1898, as it expressly excepts from the operation of the conveyance the boundary of land upon which the trespasses are alleged to have been committed, and we are further urged to adjudge in advance the effect to be given to the deed. It is clear that, if appellant has no title to the land, except what he may have acquired from this deed, he has no title at all; but it is equally clear that the acceptance of this deed does not estop him from asserting title to the lands excepted from its operation, if he had title to such lands otherwise. There was evidence which tended to prove that appellant had title to and undivided interest in the lands from sources other than this deed, and the appellees cannot succeed without showing title to the lands, although appellant should appear to have none. The deed of 1898 does not show any title in the appellees. The deed of 1898 having been accepted by appellant, it is competent evidence in this action against him, if, under the other facts of the case, it would tend to prove an admission on his part of the existence of any fact adverse to his claim of title. The potency and effect of the deed, as evidence in the action, is dependent upon the other facts and circumstances which may appear in the evidence, and we can only assume that the trial court, upon another trial, will give to it its proper effect, if any it will have, as the facts of the case may require; but we determine nothing further than that, upon the present record, the appearance of this deed in evidence did not authorize the directed verdict required by the court, neither did the court base its action upon the existence of this deed. When reference is made, as above, to the lands upon which the trespasses are alleged to have been committed, that portion of the lands conveyed by *Trabue* to the *Chenaults* which is embraced in the *Maxwell tract* is meant.

The judgment is therefore reversed, and cause remanded for a new trial, and for proceedings not inconsistent with this opinion.

<sup>1</sup> 51 S. W. 603, 21 Ky. Law Rep. 428, 45 L. R. A. 800, 90 Am. St. Rep. 267.

<sup>2</sup> 35 S. W. 125, 38 S. W. 168, 18 Ky. Law Rep. 65.



## MILLER et al. v. POWERS et al.

(Court of Appeals of Kentucky. May 27, 1919.)

1. ADVERSE POSSESSION §100(1) — DEEDS  
§76—VOID DEEDS—COLLATERAL ATTACK.

A deed void ab initio conveys no title whatever on the grantee, and, in a suit where one relies upon it, may be used only to show extent of possession, if adverse possession is relied upon.

## 2. TAXATION §734(1)—VOID TAX DEEDS—COLLATERAL ATTACK.

A tax deed does not confer title on the grantee, if the proceedings by the sheriff, clerk of the county court, or the purchaser which lead up to the deed were irregular and essential steps were omitted, and it may be attacked at any time on the ground that it is void.

## 3. TAXATION §624—TAX SALE—VALIDITY—EXHAUSTING PERSONAL PROPERTY.

The filing of an affidavit in the office of the county clerk showing that persons from whom taxes were due had no personal property out of which taxes could have been made is an essential step in proceeding to sell land for taxes.

## 4. TAXATION §750—TAX DEEDS—VALIDITY—NOTICE BY PURCHASER.

Notice required by Ky. St. §§ 4153, 4156, must be given by a purchaser of land at a tax sale to the owner in order to entitle him to deed after expiration of redemption period, and where such notice is not given, sale is invalid, and sheriff's deed does not confer title.

## 5. TAXATION §658(2)—TAX SALE—VALIDITY—NOTICE.

The mailing by the sheriff to a taxpayer of a post card 15 days before sale giving notice of time and place of sale of land for taxes is an essential step, which, if omitted, renders sale as well as tax deed ineffectual, except to impress property sold with a lien for amount of taxes, interest, penalty, and cost in favor of purchaser.

## 6. TENANCY IN COMMON §15(6)—ADVERSE POSSESSION.

One joint tenant cannot acquire title by adverse possession against his cotenants by mere possession, no matter how long continued, for he has a right to occupy the premises.

## 7. TENANCY IN COMMON §15(10)—ADVERSE POSSESSION—PRESUMPTIONS.

Possession of premises by tenant in common is presumed amicable, and not hostile to his cotenants.

## 8. TENANCY IN COMMON §15(7, 8)—ADVERSE POSSESSION—NOTICE.

The statute of limitations will not begin to run in favor of a cotenant in possession of land until notice of his adverse possession is brought home to his co-owners by acts of such notoriety and conspicuousness as would be calculated to put ordinarily prudent persons on notice of his adverse holding.

## 9. TENANCY IN COMMON §15(10) — JOINT TENANTS—BURDEN OF PROOF.

The burden is upon a joint tenant claiming adversely to his co-owners to show a disseizin and notice to his co-owners of his hostile possession.

## 10. TENANCY IN COMMON §37—RENTS AND PROFITS—ACCOUNTING.

One joint tenant is entitled to an accounting for rents and royalties arising from oil produced and marketed from the premises by his co-owners.

## 11. PARTITION §85—ALLOWANCE FOR IMPROVEMENTS — RENTS AND PROFITS — ACCOUNTING.

Where joint owners sue for partition and an accounting of rents and royalties arising from oil produced and marketed from the premises, the land being ordered sold, the fair value of necessary and proper permanent and lasting improvements placed on lands by defendants to develop it for minerals must be ascertained and allowed to those making outlay from funds arising from royalties of the whole property.

## Appeal from Circuit Court, Wayne County.

Action by Belle Miller and others against M. W. Powers and others. Judgment for named defendant, and plaintiffs appeal. Reversed.

Henry O. Gilha, of Williamsburg, and O. B. Bertram, of Monticello, for appellants.

Duncan & Bell, of Monticello, for appellees.

**SAMPSON, J.** This action, by Belle Miller and others, claiming to be the owners, as heirs of W. P. Goodin, of a two-fifths undivided interest in a 50-acre tract of land on little South fork of Cumberland river, was instituted in the Wayne circuit court in August, 1914, against M. W. Powers and others for a sale of said land and a division of the proceeds as well as an accounting for rents and profits among the joint owners, as their interests appear, on the averments that the lands are not susceptible of division in kind, and that each interest will be worth less than \$100. All parties to the action claim the land under W. P. Goodin, who died intestate as to this tract in 1864. He left surviving seven children, two of whom shortly thereafter died intestate and childless. Each of the five remaining children was entitled to a one-fifth interest in the 50-acre tract of land in controversy, Elizabeth Campbell, a daughter, occupied the lands as a home for many years and up to about 1903, when the house was destroyed by fire, and Mrs. Campbell moved elsewhere. Appellants insist that Mrs. Campbell, a joint tenant, was occupying, holding, and claiming said land for herself and her brothers and sisters, but appellees assert that she was claiming it in severalty

adversely to her cotenants, and that her claim and possession amounted to a disseizin which vested title in her by adverse possession many years before the commencement of this action. While Mrs. Campbell was residing upon the land it was assessed for taxation in the name of the Goodin heirs for the years 1893 and 1894, and, these taxes being unpaid, the sheriff sold the 50-acre tract of land in January, 1895, to satisfy the taxes, 75 cents, and cost, \$2.92, at which tax sale J. M. Dodson became the purchaser. Dodson afterwards transferred his bid and purchase to Emily Bell, a daughter of Mrs. Campbell, and granddaughter of W. P. Goodin. In June, 1898, the sheriff executed, acknowledged, and delivered to Emily Bell a deed for this tract of land. At this time Mrs. Campbell resided upon the land, holding and claiming it either in severalty or for herself and the other heirs of Goodin. None of the other Goodin heirs lived in Wayne county at that time, but some of them lived in Whitley county, Ky., and others in different states. After the house was burned and Mrs. Campbell moved from the land, Emily Bell, claiming under the tax deed, in February, 1904, sold and conveyed said land to Joseph Troxell, and Troxell immediately moved upon the place, took possession, cleared some land, put out an orchard and built a new house. In 1905, Troxell sold the land to appellee Powers, and Powers leased the land for several succeeding years to Troxell, and Troxell continued to live there until 1910. Thereafter Powers let the land to other tenants, and was in the actual possession thereof at the institution of this action in 1914.

The answer of appellees contained a traverse, and in a second paragraph asserted title in appellee Powers under the tax deed of January, 1895. The third paragraph presented the 15-year statute of limitations as a bar to appellants' right of recovery. The fourth paragraph avers that more than 5 years had elapsed since the taxes on the lands became in arrears, and that more than 5 years had elapsed since the execution and delivery of the sheriff's deed on the 20th of July, 1898, and the filing of plaintiff's petition, and reliance is had upon the 5-year statute of limitation as a bar to plaintiffs' right to recover. By the fifth paragraph of the answer appellees alleged that Elizabeth Campbell, one of the Goodin heirs, conveyed her interest in the lands in controversy to M. W. Powers before the commencement of this action, and that she had by adverse possession for 15 years acquired title to the whole tract, and this was offered as a bar to plaintiffs' proceeding.

By reply the appellants admitted that the lands in controversy descended from W. P. Goodin, and that the same had been assessed for taxation for the years 1903 and 1904 in the name of his heirs, and that the taxes on

said property for said years was 75 cents, and that the property was sold for taxes by the sheriff in January, 1905, and that Dodson became the purchaser at the tax sale, but they averred that at the time the property was sold for taxes Elizabeth Campbell, who is one of the children and heirs at law of Goodin, resided upon said land, and that the sheriff knew this fact at the time and before he sold said land, and that certain others heirs of Goodin resided in Whitley county, Ky., at the time and long before said sale, and this fact was known to the sheriff, and that the sheriff knew the post office address of these and various other heirs and owners of the land in controversy, but that the sheriff did not give to either of said claimants, or any one, notice of the sale of said land, as required by the statutes; that the taxes and cost on said land for the years 1893 and 1894 amounted to \$2.92, but that the sheriff did not within 30 days, or at all, give to said Dodson, or any one for him, a certificate of purchase describing the lands and stating the time of sale and the price at which said land sold, and that said Dodson nor any one claiming under him, ever at any time or at all gave appellants, or either of them, or any one under or through whom they, or either of them, claim, written notice of Dodson's purchase as provided by the statute. They also denied that Dodson transferred his bid to Emily Bell. The plea of limitation offered by the defendants was traversed.

Evidence was taken in support of the issues, and, the case being submitted, the trial court dismissed appellants' petition and adjudged Powers the exclusive owner of the land, and appellant Miller and others prosecute this appeal.

Each party recognizes W. P. Goodin as the common source of title. Appellee Powers claims title under Goodin in two ways: (1) By tax deed; (2) by adverse possession. The appellants claim title as the heirs at law of Goodin, and it is conceded that the title to the tract of land in controversy was at one time in appellants and their cotenants. Appellants contend that the tax deed under which appellee Powers claims is and was void for the following reasons:

"(1) The making and filing in the county clerk's office by the sheriff of an affidavit in writing, showing the persons from whom taxes are due have no personal property out of which said taxes can be made. The sale was void unless this affidavit was made and filed.

"(2) Where the sale is made for more than the true amount of the taxes, penalty, and costs due.

"(3) The giving of the notice required by sections 4153 and 4156, by the purchaser to the landowners.

"(4) The failure of the sheriff to present receipt to and demand payment of taxes from taxpayer before levy or sale.

"(5) The failure of the sheriff to mail to the

taxpayers a postal card 15 days before sale giving notice of time and place of sale."

They rest their right to prevail over the tax deed under which Powers claims on the broad proposition that the failure of the sheriff who made the sale and the purchaser at the sale to comply with each and all essential steps prescribed by law renders the sale void, and they cite *Jones v. Miracle*, 93 Ky. 639, 21 S. W. 241, 14 Ky. Law Rep. 639, *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647, 11 Ky. Law Rep. 647, and *Durrett v. Stewart*, 88 Ky. 665, 11 S. W. 773, 11 Ky. Law Rep. 172, in support of their contention. They say that Powers' claim of adverse possession is wholly without merit, because not sustained by the evidence, in that Mrs. Campbell, a joint tenant, did not hold or claim the land adversely to her joint owners, but only for herself and them together, and that Powers and those under whom he claims have only had actual possession of the land since 1904, practically 10 years before the commencement of this action, and therefore not sufficient to bar appellants' right of recovery.

The chief contention of appellees is that a tax deed is prima facie evidence of title in the grantee, and can only be successfully attacked by the former owner by showing fraud or mistake or a failure to comply with the statutory requirements in the making of such sale and deed, and this can only be done within 5 years from the discovery of such mistake or fraud, and in no event more than 10 years from the commission thereof, and since appellee Powers has held and claimed the land under his tax title of record for more than 10 years next before the institution of this action, appellants' right was barred and tolled. Appellees insist that a deed cannot be attacked for fraud or mistake after the lapse of 10 years, and that a tax deed is no exception.

[1] 1. A deed void ab initio confers no title whatever upon the grantee, and, in a suit where one relies upon it, may be used for the purpose only of showing extent of possession, if adverse possession is relied upon.

[2] A tax deed does not confer title on the grantee if the proceedings by the sheriff, clerk of the county court, and purchaser which led up to the deed were irregular, and essential steps were omitted. Such deed may be attacked at any time because it is void. This may be done by the owner affirmatively pleading the essential steps omitted, and, if such allegation is sustained by the evidence, judgment should go awarding the land to the original owner subject to a lien of the grantee in the tax deed for the amount of the taxes, interest, penalties, and cost, paid by him.

[3-6] In the case under consideration no affidavit in writing was filed in the office of the clerk of the Wayne county court show-

ing that the heirs of W. P. Goodlin from whom the taxes were due had no personal property for the years 1898 and 1894 out of which the taxes could have been made. Such affidavit was held to be an essential step in a tax proceeding in *Leszinsky v. Le Grand*, 119 Ky. 313, 83 S. W. 1038, 26 Ky. Law Rep. 1235. In the case of *Crab Orchard Banking Co. v. Saunders*, 174 Ky. 68, 191 S. W. 652, and in *Morse v. Duryea*, 174 Ky. 247, 192 S. W. 477, it is held that the notice required by sections 4153 and 4156, Kentucky Statutes, must be given by the purchaser of land at the tax sale to the owner in order to entitle the purchaser to deed after the expiration of the redemption period, and where such notice is not given within the time, the sale is invalid, and the sheriff's deed does not confer title. So also is the failure of the sheriff to mail to the taxpayer a post card 15 days before sale giving notice of the time and place of the sale for taxes due upon real property an essential step which, if omitted, renders the sale as well as the tax deed ineffectual except to impress the property sold with a lien for the amount of the taxes, interest, penalties, and cost in favor of the purchaser.

Each of the foregoing essential steps were omitted in the proceeding leading up to the tax deed. There appears to have been other irregularities in the sale and conveyance, but either one of those referred to is sufficient to support appellants' contention that the tax deed under which appellee Powers claims is invalid and does not confer title, but only a lien for the amount of taxes, interest, penalties, and cost provided by the statutes.

[7-9] 2. Elizabeth Campbell resided upon the land in question for some 20 or 30 years, but during all that time she was a cotenant with appellants and others, and, so far as the evidence discloses, Elizabeth Campbell did not claim the land adversely to her cotenants, though she did claim it as a home, and had the right to occupy it as such. It is a well-established rule that one joint tenant cannot acquire title by adverse possession against his cotenants by mere possession, no matter how long continued, for he has a right to occupy the premises, and his occupancy thereof is not to be presumed to be hostile, but is presumed to be amicable and in harmony with his legal rights. In fact, the statute of limitations will not begin to run in favor of the cotenant in possession until notice of his adverse holding is brought home to his co-owners. While this may be accomplished by acts of such notoriety and conspicuousness as would be calculated to put ordinarily prudent persons upon notice of his adverse holding, the burden is upon the claimant to show such a disseizin and notice. The evidence tends to show that Mrs. Campbell claimed her undivided interest in the land in controversy which was a

part of her father's estate. As she continued to live upon, hold, and claim the land for herself and joint tenants until 1904, the statutory period of 15 years had not elapsed at the commencement of this action in 1914. In the absence of a contrary showing, the presumption is that a joint tenant is holding the common property for the joint use and benefit of himself and cotenants. May v. C. & O., 184 Ky. 493, 212 S. W. 131.

[10] The trial court should have adjudged the plaintiffs below, appellants here, the owners of and entitled to a two-fifths undivided interest in the lands in controversy, and directed a sale of the entire property subject to the oil lease and a division of the proceeds according to the rights of the joint tenants. Appellants were also entitled to an accounting for the rents and royalties arising from the oil produced and marketed from the premises.

[11] Wherefore the judgment is reversed, with directions to enter a judgment in favor of appellants for a two-fifths undivided interest of the lands in controversy, direct a sale thereof subject to the lease and a division of the proceeds as the interests of the parties may appear, refer the matter to the master to ascertain and report the amount and value of the oil produced and marketed from the premises, and require appellees, Powers and others, to account to appellants for the reasonable royalties of two-fifths thereof, by such orders as may be proper and equitable. The fair value of the necessary and proper permanent and lasting improvements placed on the lands to develop it for mineral by appellees must be ascertained and allowed to those making the outlay from the funds arising from royalties of the whole property. The court will make such further orders as appear necessary to carry out its judgment when conformed to this opinion.

Judgment reversed.

#### WARREN OIL & GAS CO. v. GARDNER et al.

(Court of Appeals of Kentucky. May 27, 1919.)

#### 1. EVIDENCE $\Leftrightarrow$ 65 — PARTNERSHIP $\Leftrightarrow$ 64 — FICTITIOUS NAMES—REQUIREMENT OF RECORDING—PURCHASE AND SALE OF LEASE—TITLE OF BUYER OF LEASE.

A corporation, obtaining a transfer of an oil and gas lease on land in A. county from a partnership, was chargeable with knowledge that such firm was a partnership and was operating under a fictitious name, and must be presumed familiar with Ky. St. § 190b, requiring a registration of members of such a partnership in such county, to render the partnership's contracts enforceable, and had constructive

notice of the partnership from the records of W. county where recorded, and from the records of A. county where the lease was obtained, that such certificate of fictitious name was not there recorded, and obtained no better title to the lease than the partnership had.

#### 2. PARTNERSHIP $\Leftrightarrow$ 64—FICTITIOUS NAMES—REGISTRATION—CONTRACTS VOIDABLE.

Where a partnership, acting under a fictitious name, was not registered in the county as required by Ky. St. § 190b, neither the partnership nor its assigns could enforce as lessee an oil lease on land therein, although the contract was valid and enforceable as to lessor who was not in fault; the contract being voidable but not void.

#### 3. PARTNERSHIP $\Leftrightarrow$ 64—FICTITIOUS NAMES—REGISTRATION WITHIN COUNTY OTHER THAN WHERE PARTNERS RESIDE.

It is not enough that the partnership certificate of fictitious name required by Ky. St. § 190b, is filed with the clerk of the county where the partnership is formed and where the partners reside, but it must be filed in such county or counties in which such persons conduct or transact or intend to conduct or transact such business.

#### Appeal from Circuit Court, Allen County.

Suit by W. T. Gardner and another against the Kentucky-Indiana-Tennessee Oil & Gas Company, a partnership, to cancel an oil and gas lease, in which the Warren Oil & Gas Company were denied the right to intervene, and such company appeals. Judgment affirmed.

W. B. Gaines and Sims, Rodes & Sims, all of Bowling Green, for appellant.

Noel F. Harper, of Scottsville, for appellee.

SAMPSON, J. A partnership was formed in 1917, by J. Dan Stark and Scott Isabel, both of Bowling Green, Warren county, Ky., under the firm name of Kentucky-Indiana-Tennessee Oil & Gas Company, for the purpose of engaging in the business of buying and selling oil and gas leases, and they filed in the office of the clerk of the Warren county court the certificate required by section 190b, Kentucky Statutes, regarding the employment of a fictitious name in business in this state. After transacting some business in Warren county, the partnership, through Stark, went into Allen county and acquired two oil and gas leases from landowners, one being the lease in controversy, executed by W. T. Gardner and wife to the Kentucky-Indiana-Tennessee Oil & Gas Company, and bearing date October 31, 1917, consideration \$25, and reservation of royalties to continue for a term of three years. Stark issued and delivered to Gardner a check on a Bowling Green bank for \$25 in payment of the bonus on the lease, but this check was returned unpaid through some mistake of the bank, whereupon Stark tendered Gardner \$25 in

cash, which Gardner refused, and instituted this action in the Allen circuit court to have the lease contract adjudged null and void, canceled and held for naught on the grounds: (1) That it was executed without consideration; (2) fraud and misrepresentation on the part of the grantee and its agents in obtaining the lease; (3) the lease contract was void because the partnership Kentucky-Indiana-Tennessee Oil & Gas Company had not complied with section 199b, Kentucky Statutes, by filing the required certificate in the office of the clerk of the Allen county court, and was not authorized to do business in said county. Process was first issued only to Warren county for defendants, and when returned executed was quashed on motion of defendants. In the meantime summons was issued to Allen county and executed upon Stark and Isabel in that county the requisite time before the convening of the April term, 1918, of the Allen circuit court, and on the fifth day of that term of court, the defendants having failed to answer or make defense, the cause was submitted, and on the sixth day of the term, which was the 20th day of April, judgment was entered adjudging the lease null and void for the reasons set out in the petition, and in accordance with the prayer thereof. Within a very few days thereafter and at the same term of court, defendants moved to set aside the submission and judgment for two reasons: (1) Because a motion was pending to quash process; (2) the lease had been transferred to the Warren Oil & Gas Company. The first ground was without merit, because the motion to quash had been disposed of several days before. The second ground presents a more serious question. A one-half undivided interest in the lease had been transferred by the partnership to the Warren Oil & Gas Company some ten days before the commencement of this action, but not recorded until some months later. Each of these grounds were set forth both in the motion of defendants and in the petition to be made party, answer, and counterclaim of Warren Oil & Gas Company, which was offered by it at the same time the motion was entered, asking the judgment to be set aside. By the petition, answer, and counterclaim of the Warren Oil & Gas Company, it is admitted that the certificate required by section 199b, Kentucky Statutes, was not filed by the Kentucky-Indiana-Tennessee Oil & Gas Company in the office of the clerk of the Allen county court, but it is alleged:

"That it did not intend and has not transacted any business in Allen county, except to take the lease in controversy and one other lease, intending before they should do any further business in Allen county to file said statement, but having parted with all interest in said lease on November 13, 1917, two weeks after acquiring same, they did not file said statement in Allen county."

This pleading also contained a traverse of certain averments of the petition, and affirmatively alleged that the Warren Oil & Gas Company was at all times a duly incorporated company. The court declined to file the petition to be made party of the Warren Oil & Gas Company; and the special demurrer and motion of the defendants Stark and Isabel were likewise rejected; but all these pleadings were made part of the record. The motion to set aside the judgment was overruled, to which exception was saved, and the Warren Oil & Gas Company appeals.

The grounds argued for reversal of the judgment are: (1) The court erred in rejecting the petition to be made party offered by appellant, Warren Oil & Gas Company, because that company, being the owner of a one-half undivided interest in the lease in controversy with title of record before the issuance of summons to Allen county, was entitled to be heard before the lease was canceled. (2) A partnership operating under a fictitious name which has filed the required certificate in the county in which it is formed, and where the partners reside, may do business in another county without filing such certificate there, and the trial court committed prejudicial error in holding otherwise.

[1] 1. The Warren Oil & Gas Company is in exactly the same position with reference to the lease that the partnership Kentucky-Indiana-Tennessee Oil & Gas Company occupied, for it acquired its interest in the lease from the partnership and was charged with knowledge that the concern was a partnership and was operating under a fictitious name. It is also presumed to be and to have been acquainted with the requirements of section 199b, Kentucky Statutes, and with the law that a failure of a partnership to comply with its provisions would render its contracts unenforceable. The records of the clerk's office of the Warren county court gave it constructive notice of the partnership, and the records of Allen county, the county where the leased lands lay and the lease was executed, revealed the fact that the necessary certificate had not been filed. Most of these facts are admitted by the answer, and we do not think the answer, when considered as a whole, states an affirmative defense. This being true, it was not error for the trial court to decline to allow the pleading to be filed, and to set aside the judgment. The rule is that one who asks such relief must present a defense which, if true, will prevail, and until such pleading is presented the court would not be justified in granting a rehearing, or in setting aside a submission and judgment.

[2] 2. The statute requiring the filing of a certificate by one or more persons desiring to do business under an assumed name is as follows:

"No person or persons shall hereafter carry on or conduct or transact business in this state under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct or transact or intend to conduct or transact such business, a certificate setting forth the name under which said business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the post office address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct, said business."

This court has repeatedly held that a failure to comply with this and similar statutes renders the contracts of the one under such duty unenforceable as to it.

In one case a partnership, operating under the fictitious name "Big Four Auto Company," sued to recover on two notes for \$284, executed to it in the course of its business, and it was held that, as the partnership had failed to comply with section 199b, its contract was unenforceable, and it was denied a recovery. *Hunter v. Big Four Auto Company*, 162 Ky. 778, 173 S. W. 120, L. R. A. 1915D, 987.

A foreign corporation failing to comply with section 571, Kentucky Statutes, requiring the filing of a statement with the Secretary of State, giving the name of an agent upon whom process may be served, cannot maintain an action to recover on its contracts made in this state. *Fruin-Colnon Constructing Co. v. Chatterton*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857; *Oliver Company v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915C, 565; *Bondurant v. Dahnke-Walker Company*, 175 Ky. 774, 195 S. W. 139; *Hayes v. West Virginia Oil & Gas & By-Products Co.*, 183 Ky. 624, 210 S. W. 174.

The section under consideration has been considered and construed in the following cases: *Somerset Stave & Lumber Co. v. Brown*, 173 Ky. 194, 190 S. W. 680; *Commonwealth v. Ritchey et al.*, 171 Ky. 330, 188 S. W. 397, L. R. A. 1917B, 697; *Commonwealth v. Bassett*, 171 Ky. 385, 188 S. W. 459; *First National Bank of Central City v. Utterback*, 177 Ky. 76, 197 S. W. 534, L. R. A. 1918B, 838; *Commonwealth v. Siler et al.*, 176 Ky. 802, 197 S. W. 453.

But this case is the reverse of those cited, for here it is the person who contracted with the partnership operating under the fictitious name that is seeking to void the contract. If it were the partnership here attempting to enforce the contract, we would only follow the above cases and hold it without power to maintain its action on the contract; that the contract was, as to the partnership, unenforceable. But here the parties are transposed. Such contracts are not void, but only voidable at the option of the party not in default. As to the party in fault, the contract is unenforceable, but enforceable by the party not in fault, and he may have specific performance or cancellation at his option if he present a state of case warranting such relief. It follows therefore that the lease contract was unenforceable as to the Kentucky-Indiana-Tennessee Oil & Gas Company, and its assigns, but valid and enforceable as to appellee Gardner who was not in fault. In other words, the contract was voidable but not void.

[3] It is not enough that the certificate required by section 199b, Kentucky Statutes, is filed in the office of the clerk of the county where the partnership is formed, and where the partners reside, but it must be filed with such "county or counties in which such person or persons conduct or transact, or intend to conduct or transact such business," and the partnership doing business under a fictitious name is without power to enforce its contract made in a county in which it has failed to comply with the statute. The object of the statute is to enable the public, as well as those who deal with the concern, to ascertain definitely who is the real person or persons behind the business in case litigation arises. The statute is a part of the public policy of the state and was intended to protect and safeguard the rights of citizens. If, however, the statute required the certificate to be filed only in the county of the residence of the partners, it would serve little or no purpose in many cases, and could be employed so as to hide rather than disclose the facts.

We conclude therefore that the petition to be made party, answer, and counterclaim did not present a defense, and the trial court very properly declined to allow it to be filed and to set aside the judgment. It therefore becomes unnecessary to consider the other contentions made.

Judgment affirmed.

## BAILEY et al. v. WADDY et al.

(Court of Appeals of Kentucky. May 30,  
1919.)1. WILLS  $\S$  55(1)—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show mental incapacity on part of the testator.

2. WILLS  $\S$  155(1)—"UNDUE INFLUENCE"—WHAT CONSTITUTES.

Undue influence is that which obtains dominion over mind of the testator and destroys free agency on his part.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. WILLS  $\S$  163(1)—UNDUE INFLUENCE—PRESUMPTIONS.

Undue influence on the testator cannot be presumed.

4. WILLS  $\S$  166(7)—UNDUE INFLUENCE—EVIDENCE.

That there was opportunity to influence testator is insufficient to sustain a charge of undue influence.

5. WITNESSES  $\S$  55—COMPETENCY—HUSBAND AND WIFE.

In a will contest case, where one of the contestants testified, the husband of such contestant is incompetent under Civ. Code Prac.  $\S$  606, and his testimony cannot be received on the theory that it was competent for him to testify for the other contestants for the interest of all contestants was the same, and separate judgments could not be rendered as to each.

## Appeal from Circuit Court, Shelby County.

Bill by Louise W. Bailey and others against Erma B. Waddy and others to set aside an order admitting a will to probate. From a decree for defendants, complainants appeal. Affirmed.

Beard & Pickett and E. B. Beard, all of Shelbyville, for appellants.

Willis, Tood & Bond, of Shelbyville, for appellees.

QUIN, J. By his will dated November 4, 1916, George W. Waddy, who died the following June, disposed of an estate of the net value of approximately \$20,000. He gave \$100 each to an only sister and to a niece and two nephews, children of a deceased brother, \$200 to an old servant, and \$500 to the trustees of the Church of Christ at Waddy, Ky. His wife was given the proceeds of a \$1,000 insurance policy, certain live stock, household goods, etc. The balance of the estate was given to Milligan College, of Carter county, Tenn., to endow in said institution what was to be known as the "John W. Garvey Bible Chair" for the education of preachers. Certain conditions were annexed

to the endowment; his wife, during her life or widowhood, to receive a sum equal to the annual interest on said fund at the rate of 5 per cent., payable January 1st of each year.

Testator, an ardent and enthusiastic member of the Christian Church, was an elder, Sunday school superintendent, and teacher of the Bible class in the church at Waddy. The amount to Milligan College was to be known as the "G. W. Waddy and Susie Waddy Memorial Fund." Susie Waddy was his first wife, and from whom he received a large portion of his estate. The mother of the testator at the time of her death owned about 156 acres of land in Shelby county, and this she devised in equal parts to her three children, testator, his sister, and a son named Tom, now deceased.

Testator had never seen the college mentioned in his will, but knew it through articles appearing in the church literature, of which he was a constant reader. Satisfied doubtless that the principles of the Christian faith were taught in the Tennessee college along lines in accord with his views and conceptions of the Bible, testator had an attorney in Tennessee draft his will, sending to him an outline of what he wanted. This was in 1914. The will was not signed then. Testator had a partial stroke of paralysis in October, 1916, and on November 4, 1916, executed the will in contest, in effect a redraft of the one written by the Tennessee lawyer, with the exception of the elimination of a provision for his first wife's mother, she having died in the meantime.

After the will was probated, the present appellants, the sister, niece, and two nephews, filed suit to set aside the order of probate, on the ground of mental incapacity and undue influence and from a verdict sustaining the will this appeal has been taken.

[1] It is claimed the verdict should not be allowed to stand because it is flagrantly against the weight of the evidence.

From the testimony for contestants as given by several witnesses, including the sister, Mrs. Bailey, and three physicians, we find: That testator had a very affectionate regard for his relatives; he had peculiar religious views; there was opposition to his second marriage; he did not know his property, because he stated in his will that he wanted his debts paid, if any, when as a matter of fact he was \$7,000 in debt; his mind was inactive after the first stroke of paralysis; however, the sister and others sought his judgment on a piece of property before purchasing it, and he furnished the money to pay for his sister's home; he was trustee for his sister and managed her estate until his death; had he been in his right mind he would not have made the bounty to a college he had never seen; in conversation he would be talking upon one subject, and suddenly

change to another; was not in his right mind, because he doubted he was in debt, but he knew his relatives and his property. He had embolism, which is thus defined in Webster's International Dictionary: "The occlusion of a blood vessel by an embolus." An embolus being "a plug brought by the blood current and lodged in a blood vessel so as to obstruct the circulation. It consists usually of a clot of fibrin, a shred from a morbid growth, a globule of fat, air bubbles, or a microorganism." He was not the same man socially after the stroke. After a stroke of paralysis a person's mind is usually affected for different periods of time. There is seldom a complete recovery after such a stroke. A person is easily influenced after a paralytic stroke. One of the physicians admitted he thought testator's mind was clear up until the date of his death, and when later recalled and asked to explain what he meant by this answer he says:

"I meant apparently he was all right, as far as his mind was concerned. As far as I can judge, from a medical standpoint no man is right until the clot is entirely absorbed."

Another physician stated that he did not think a man competent to make a will "that will go and take money that some one else gave him and give it to somebody else," and the same witness thinks a man incompetent, though he surveyed large farms, settled matters as executor and administrator for different estates, assisted in laying off a county road, and attended to business the same after the stroke as before. One witness said he did not think Mr. Waddy was himself at times; there was a difference in his speech. Another states he was not the same man after his first wife's death. This was about 14 years before the will was written.

The foregoing is a substantial summary of the evidence introduced by appellants.

Many witnesses testifying in behalf of contestees say that testator was sound mentally, a good business man, devoted to his church, and they noticed no difference in the condition of his mind after he had the stroke of paralysis. Acquaintances for 40-odd years, lawyers, bankers, and business men, so testify. County Judge Ralph Gilbert says that testator was a man of splendid mentality.

Testator was stricken on Monday, the following Wednesday he took supper at a friend's house, and on Saturday of the same week he attended a church meeting and an installation service of the Eastern Star and made a speech on the latter occasion. The next day, Sunday, he taught his Sunday school class and presided at the communion.

A verdict in a will contest, like that in any other case, will not be disturbed if there is any evidence to sustain it, and, after reading the record in this case, we have no hesitancy

in holding that the verdict is amply supported by the evidence.

[2, 3] It is said the court erred in refusing to give a tendered instruction on undue influence, but we fail to find any evidence that would have warranted the giving of such an instruction. As said in *Talbott, Ex'r, et al. v. Giltner*, 179 Ky. 571, 200 S. W. 913:

"By undue influence is meant an influence which obtains dominion over the mind of the testator to an extent that destroys free agency on his part in the disposal of his estate and constrains him in respect thereto to do that which he would not have done if left to the free exercise of his own judgment, and it is not material when this undue influence was exerted if it was present and operating on the mind at the time the paper read in evidence was executed. \* \* \*

"Undue influence cannot be presumed. Proof tending to establish its existence must be adduced. Nor will the fact that the devisee or another had access to the testator, or there was opportunity to influence him, be sufficient to sustain the plea unsupported by evidence of facts which tend to establish the want of free agency on the part of testatrix."

[4, 5] The court did not err in sustaining the objection to questions propounded to the witnesses Cozine and Powell, and the court properly ruled as to the testimony of the witness Landon Bailey, husband of the contestant Louise W. Bailey, who had previously testified.

Section 606 of the Civil Code prohibits a husband or wife testifying against each other, and, while it allows either to testify in a case such as this, it expressly provided that both cannot.

It has been held that, where the defendants are severally liable, and separate judgments may be rendered as to each, the wife of one is competent for the others. *Dovey v. Lam*, 117 Ky. 19, 77 S. W. 383, 25 Ky. Law Rep. 1157, 4 Ann. Cas. 16. But a will contest is not a case of this sort. All the contestants or contestees must stand or fall together. The judgment establishes a status which must determine all their rights. The interest of one cannot be separated from that of the others. The husband of Mrs. Bailey was not therefore a competent witness for her, nor for any of the other parties joined with her as contestants. That others were interested in whose behalf he would have been a competent witness cannot affect the case. Civil Code, § 606, subd. 1; *Wise, etc., v. Foote, etc.*, 81 Ky. 10, 4 Ky. Law Rep. 643; *Williams v. Williams, etc.*, 71 S. W. 505, 24 Ky. Law Rep. 1326; *Henning, etc., v. Stevenson, etc.*, 118 Ky. 318, 80 S. W. 1135, 26 Ky. Law Rep. 159; *Dunbar v. Meadows*, 165 Ky. 275, 176 S. W. 1167.

Perceiving no error in the judgment appealed from, same is accordingly affirmed.



## HURST v. SOUTHERN RY. CO. IN KENTUCKY et al.

(Court of Appeals of Kentucky. June 10, 1919.)

1. EVIDENCE  $\S$ 514(3), 539½(2) — EXPERT TESTIMONY—RAILROADS.

The distance within which an engine may be stopped is a proper subject for expert testimony, but it is necessary that the witness should have a special knowledge of the subject as applied to the facts and conditions.

2. EVIDENCE  $\S$ 539½(2)—EXPERT TESTIMONY—DISTANCE WITHIN WHICH ENGINE CAN BE STOPPED—FOUNDATION.

In action for injuries in collision between street car and train, expert testimony as to distance within which an engine may be stopped was properly excluded, where the witness had not been upon an engine for 15 years, and disqualified himself by showing that he was not acquainted with the equipment in use at the time of the accident.

3. APPEAL AND ERROR  $\S$ 516—BILL OF EXCEPTIONS—MISCONDUCT OF COUNSEL.

Misconduct of counsel in argument to jury cannot be considered on appeal, unless shown by bill of exceptions, since the only way in which matters occurring on a trial in the circuit court may be brought up for review is by bill of exceptions.

4. APPEAL AND ERROR  $\S$ 1171(1)—DAMAGES—INADEQUACY—NEW TRIAL.

Where only general damages are sought, Court of Appeals will not grant a new trial solely on account of the inadequacy of damages awarded.

5. DAMAGES  $\S$ 208(8) — PUNITIVE DAMAGES—DISCRETION OF JURY.

Punitive damages are not recoverable as a matter of right, but their allowance rests entirely in the discretion of the jury.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by Joseph Hurst, Jr., administrator, etc., against the Southern Railway Company in Kentucky, the Kentucky & Indiana Terminal Railroad Company, and another. From judgment against named defendants giving him insufficient relief plaintiff appeals. Affirmed.

Robt. L. Page and W. W. Davies, both of Louisville, for appellant.

Humphrey Crawford, Middleton & Humphrey, of Louisville, for appellees.

CLAY, C. Joseph Hurst, Jr., as administrator of Frances Wessels, deceased, brought this suit against the Southern Railway Company in Kentucky, the Kentucky & Indiana Terminal Railroad Company, and the Louisville Railway Company, to recover damages for her death. From a verdict and judgment

in his favor for \$2,500 against the Southern Railway Company in Kentucky, and the Kentucky & Indiana Terminal Railroad Company, plaintiff appeals.

The decedent, a young woman 32 years of age, was employed as a seamstress by the Kaufman-Straus Company, at a salary of \$7 a week. On the evening of February 12, 1917, she was a passenger upon a street car of the Louisville Railway Company. The street car was going west on Broadway. At Broadway and Thirtieth streets the tracks of the Kentucky & Indiana Terminal Railroad Company cross Broadway. At this point, crossing gates are maintained on each side of the railroad tracks for the protection of the public. The gates were operated by a man in a tower located on the northeast of the intersection. While the gates and tower were owned by the Kentucky & Indiana Terminal Railroad Company, they were operated also for the use and benefit of the Southern Railway Company.

When the street car on which the decedent was a passenger reached Thirtieth street the gates were up, and it proceeded to cross the railroad tracks. At that time, a Southern engine drawing a caboose was approaching at a speed of from 8 to 10 miles an hour, and there is a sharp conflict in the evidence as to whether the headlight was burning. Owing to the physical conditions at the place of the accident, the engineer could not see the street car until he got within 30 or 40 feet of it. According to his evidence, he did all that he could to stop the engine, but was unable to do so. The engine collided with the street car and killed the decedent.

The first error assigned is the exclusion of the evidence of H. A. Larue, an alleged expert as to the space within which the engine that collided with the street car could have been stopped. Larue testified that he had had 20 years' experience in operating freight trains, extending from about 1877 until the year 1900. He was first a fireman, and then served for about 14 years as a freight conductor. His services as freight conductor ended about the year 1894. During his experience as fireman and conductor, they used air brakes and sand on engines for a while. They also had the throttle valve and the necessary apparatus for reversing. Thereupon the following questions were asked and the following avowals made:

"(12) Now, Mr. Larue, from your knowledge on this subject, in your opinion how long, by the use of sand and air, or the reverse apparatus, would it take an engine going on a fairly level track, on a fair night, with the weather fair, with a caboose attached—only a caboose—how long would it take such an engine to come to a stop? (Objected to by counsel for the defendants, and the court sustained said objection, to which ruling of the court the plaintiff, by counsel, excepted.)

"By the Court: You will have to show this gentlemen is familiar with the kind of apparatus that is used now. The court does not know, and neither does the jury, whether the apparatus used in 1894 is the same or similar to that used in—

"A. I was, from 1894 until 1900, on a passenger train.

"By Mr. Humphrey: He says he has been out of it 17 years.

"(13) Well, is the equipment now more modern and perfect than it was in your days? (Objected to by counsel for the defendants.)

"By the Court: Are you familiar with the present day equipment of engines for stopping? A. I could not say that I was; I have not been on an engine for 15 years.

"By the Court: You haven't shown how this engine was equipped.

"By Mr. Davies: I will try to show it; I will submit, of course, to your honor's ruling, but I will try to show that.

"(14) Do you know now whether or not the general equipment for stopping engines is more perfect at this time than it was when you quit running on the road? (Objected to by counsel for the defendants, and the court sustained said objection, to which ruling of the court the plaintiff, by counsel, excepted.)

"By the Court: He said he didn't know how they are at the present day.

"(15) Then I will ask—to get it in the record—I will ask you if the engine that you were familiar with in your day and time had such equipment as you know about in the way of reverse and sand and air, if that engine, under those conditions, or how soon that engine, could be stopped under those conditions?

"By Mr. Humphrey: We are not trying that kind of engine."

And the court sustained the objection of the defendants, to which ruling of the court the plaintiff, by counsel, excepted, and made the following avowal out of the hearing of the jury:

"The plaintiff avows that if the witness were permitted to answer the question he would state, and the same would be true, that the equipment at the present time is more perfect than it was at the time when he was in the railroad business, and acts more efficiently and more quickly, and that at the time he was in the railroad business the equipment which he was familiar with at that time operated so that in these circumstances that engine could have been stopped in 20 feet."

The trial of this case took place on October 22, 1917. It will be observed that the witness was unable to say that he was acquainted with the present day equipment for stopping engines, and admitted that he had not been on an engine for 15 years. Notwithstanding this fact, it is avowed, that he would state that the equipment at the present time was more perfect than it was at the time when he was in the railroad business, and acted more efficiently and more quickly, and that, with the equipment with which he was familiar when he was in the railroad business, the engine could have been stopped in 20 feet.

[1, 2] While it is true that the distance within which an engine may be stopped is a proper subject for expert testimony, it is necessary that the witness should have special knowledge of the subject as applied to the facts and conditions. Here the witness disqualified himself by showing that he was not acquainted with the equipment for stopping an engine then in use, and that he had not been on an engine for 15 years. Had he testified in accordance with the avowal, the result would have been to permit him to make a mere argument concerning a matter about which he had no special knowledge, instead of giving an opinion concerning a matter about which he was qualified to speak. It follows that the trial court did not err in excluding his evidence on the ground that he did not qualify as an expert.

[3] Another ground urged for reversal is the misconduct of counsel for defendant in his argument to the jury. The remarks alleged to have been made by counsel do not appear in the bill of exceptions, but appear only in the affidavit of plaintiff's counsel filed in support of a motion for a new trial. It is now the established rule in this state that the only way in which matters occurring on a trial in the circuit court may be brought up for review is by bill of exceptions, and that the misconduct of counsel in the argument to the jury cannot be considered unless shown by the bill of exceptions. *Southern Ry. Co. in Kentucky v. Thacker's Adm'r*, 156 Ky. 483, 161 S. W. 236; *I. C. R. R. Co. v. Evans*, 170 Ky. 536, 186 S. W. 173; *Bannon v. Louisville Trust Co.*, 150 Ky. 401, 150 S. W. 510.

[4] Another contention is that damages allowed are so small that they do not equal the actual pecuniary injuries sustained. There might be some merit in this contention if special damages, such as medical bills, lost time, etc., had been sought, and the jury had returned a verdict wholly insufficient to compensate for the special damages actually alleged and proven. As a matter of fact, however, only general damages were sought; and, where this is the case, we are not at liberty to grant a new trial solely on account of the inadequacy thereof. *Rossi v. Jewell Jellico Coal Co.*, 157 Ky. 332, 163 S. W. 220; *Conder v. Ledford*, 167 Ky. 137, 180 S. W. 77; *C. & O. Ry. Co. v. Williams' Adm'r*, 179 Ky. 333, 200 S. W. 451.

[5] Another insistence is that the gatekeeper was guilty of the grossest kind of negligence in raising the gates and inviting the street car to cross in front of the approaching engine, and, that being true, the finding of the jury that plaintiff was entitled only to compensatory damages was flagrantly against the evidence. It is the well-settled rule in this and in almost all jurisdictions that punitive damages are not recoverable as a matter of right, but that their allowance rests entirely in the discretion of the jury.

Ky. Central R. R. Co. v. Gastineau, 83 Ky. 119; Louisville & N. R. Co. v. Cottengim, 104 S. W. 280, 13 L. R. A. (N. S.) 624; 8 R. C. L. § 136, p. 592; Fink v. Thomas, 66 W. Va. 487, 66 S. E. 650, 19 Ann. Cas. 571, and note. Were we to uphold plaintiff's contention and announce the rule that a verdict disallowing punitive damages should be reversed whenever flagrantly against the evidence, the necessary effect would be to deprive the jury of its discretion, and to hold that under certain circumstances punitive damages were recoverable as a matter of right, thus overturning the long-established rule.

Judgment affirmed.

# HOWARD v. STEARNS COAL & LUMBER CO., Limited, et al.

(Court of Appeals of Kentucky. June 6, 1919.)

## 1. MASTER AND SERVANT — 125(1)—PERSONAL INJURIES—DEFECTIVE JACK—LIABILITY.

To render an employer liable for injuries to employé resulting from lever of jack flying back and striking him, employé must show that jack was defective, and that defect was known to employer, or could have been known by exercise of ordinary care.

## 2. MASTER AND SERVANT — 278(14)—PERSONAL INJURIES—OPERATION OF JACK—EVIDENCE.

In action for injuries to employé struck by lever of jack when it flew back, evidence held insufficient to show that defendant had knowledge of defect in jack or that it was defective.

Appeal from Circuit Court, McCreary County.

Action by Lonnie Howard against the Stearns Coal & Lumber Company, Limited, and others. From a judgment on verdict directed for defendants, plaintiff appeals. Affirmed.

J. W. Rawlings, of Danville, and John W. Sampson, of Whitley City, for appellant.

O. H. Waddle & Sons, of Somerset, for appellees.

CLAY, C. Plaintiff, Lonnie Howard, brought this suit against the Stearns Coal & Lumber Company, Limited, and others, to recover damages for personal injuries. At the conclusion of the evidence, the court directed a verdict in favor of the defendants. Plaintiff appeals.

Plaintiff was a driver in the employ of the Stearns Coal & Lumber Company. Just prior to the accident, the car that he was

driving jumped the track. He sent another driver after a jack to be used in placing the car on the track. The other driver went to Lee Ballou, the boss driver, to obtain the jack. Upon the return of the other driver with the jack, plaintiff began to operate the jack with a wooden sprad used as a lever. After pressing down on the jack, he raised it two notches. He then raised it to the third notch. After remaining there for half a minute, it slipped and flew back, and the end of the lever struck him in the eye. While he did not see any defect in the jack, he stated that it must have been defective or it would not have slipped. James M. Hale testified that the defendant's foreman, John Wright, told him before the accident to be careful with the jack; that one man had got his finger cut off with it. Other witnesses testified that, if the jack was properly caught, it would stand, if the jack was all right, but, if the operator let loose of it too soon, it would fly back. On direct examination Silas Boyer stated that the jack that was used by plaintiff had slipped with him before the accident, but on cross-examination he stated that he was not positive that it was the same jack, and that he did not know whether the slipping of the jack was due to his fault or the fault of the jack.

[1, 2] To make out his case, it was necessary for plaintiff to show not only that the jack was defective, but that the defect was known to defendants or could have been known to them by the exercise of ordinary care. Even if we concede that the mere slipping of the jack, under the circumstances detailed by plaintiff, was some evidence of its defective condition, there is no evidence tending to show the character of the defect or how long it had existed. Evidence that the foreman knew that another employé had gotten his fingers cut off by the jack did not show any knowledge of any defect in the jack, because that accident may have been due entirely to the negligent operation of the jack. Had the witness Boyer adhered to his statement that the jack in question had slipped with him several times before the accident, this evidence might have been sufficient to show that the defendants could have known of its defective condition by the exercise of ordinary care, but the probative effect of his evidence was destroyed when he stated that he was not positive that the two jacks were the same, and admitted that he did not know whether the slipping of the jack that he used was due to his fault, or the defective condition of the jack. We are therefore of the opinion that the court did not err in holding the evidence insufficient to take the case to the jury.

Judgment affirmed.

## GRUBB v. McAFEE. (No. 2691.)

(Supreme Court of Texas. May 21, 1919.)

## 1. MINES AND MINERALS ¶78(1, 2) — OIL LEASE—OBLIGATION TO DRILL—FORFEITURE.

The lessee of oil lands after oil was encountered in the first well sunk *held* under obligation implied by law to exercise reasonable diligence to continue drilling and mining operations on the land, but the contract, which specified as the sole cause of forfeiture of the lessee's right a failure to drill a first well within time, did not make the obligation a condition subsequent, and did not authorize forfeiture of the lease for non-compliance.

## 2. CONTRACTS ¶168—CONSTRUCTION—ADDITIONS BY IMPLICATION.

Additions ought not to be made to contracts by implication beyond that which is necessary.

## 3. MINES AND MINERALS ¶77—OIL LEASE—ABANDONMENT.

Lessee of oil lands for 20 years *held* to have abandoned his rights under the lease in having drilled as required by the lease and struck oil and then having removed his machinery when the well ceased to flow without expectation of resumption of operations.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Suit by Mrs. Maria Grubb against C. M. McAfee. From judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed and rendered judgment for defendant (164 S. W. 925), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the district court affirmed.

Wantland & Parrish, of Henrietta, and Carrigan, Montgomery & Britain, of Wichita Falls, for plaintiff in error.

Taylor & Humphrey, of Henrietta, for defendant in error.

GREENWOOD, J. On August 26, 1903, Thomas Grubb executed to defendant in error, C. M. McAfee, a written contract, as follows:

"Know all men by these presents, that I, Thomas Grubb, of the county of Clay and state of Texas, for and in consideration of one dollar to me in hand paid by C. M. McAfee, the receipt of which is hereby acknowledged, and other consideration, have granted, demised and let to said C. M. McAfee, his executors, administrators and assigns, for the sole and only purpose of prospecting, drilling or operating for and in petroleum, oil, gas, coal or minerals, for the term of twenty years from the date hereof, and as long thereafter as petroleum, oil, gas, coal or minerals are found in paying quantities, all that certain tract or parcel of land situated in Clay county, Texas, and described as follows, to wit: [Here follows description.] I, the said lessor, am to have one-tenth of all the oil produced and

saved from said land, delivered free of cost in tanks or pipe line by the said lessee, and the lessee is to market the above-mentioned oil together with his, and settlement for same to be made monthly. In case gas, coal or other minerals are found on said land, the lessee is to pay the lessor such a royalty on the product which is mined, as is customary to be paid. No well shall be drilled within one hundred feet of any building now on the premises, without the consent of the lessor, and the lessee shall not unnecessarily disturb the crops, fence or improvements on said land, but the said lessee shall have full right, which is hereby granted to him, to enter upon and remain on the above-described premises at any time for the purpose of prospecting, mining, drilling or operating thereon, to have the right of way to and from the place of drilling or operating, to have the use of sufficient water, gas, coal or oil for operating thereon, to have exclusive right to erect, construct and operate on said land all necessary equipment for pumping, piping, storing, refining and operating generally for oil, gas, coal or other minerals. The lessee is to use and occupy so much only of the surface of said land as may be necessary to conduct the work and operations above mentioned. And the lessee is to pay all damage done to the growing crops that are now on the said land, which may be caused by his erection of derricks or other operations. The said lessee shall have the right to remove at any time any and all machinery, oil well supplies, pumping equipment or appurtenances of any kind, belonging to said lessee. The said lessee is to begin the drilling of a well within thirty days from the date hereof, and is to prosecute the work with due diligence until said well is completed to the depth of 300 feet, unless oil is found in paying quantities at a less depth. And failing to drill said well as above provided, shall render this instrument of writing null and void as to all parties hereto.

"In witness whereof, I hereunto set my hand, this the 26th day of August A. D. 1903.

"Thomas Grubb."

Defendant in error, McAfee, began to drill a well on the land within 30 days from the date of the contract, and prosecuted the work with diligence until oil was found at a depth of about 250 feet, on which a royalty was paid to Thomas Grubb for about 60 days, when the well ceased to produce. Two other wells were sunk by defendant in error on the land within the next 12 months, without finding oil, and thereupon he removed all machinery, equipment, and supplies from the land, and, for some 9 years had conducted no prospecting or drilling or producing operations on the land, when plaintiff in error, Mrs. Maria Grubb, as the survivor of the community estate of Thomas Grubb and herself, to which estate the land belonged, brought this suit against defendant in error, averring the above facts, all of which were proven by uncontradicted evidence, and further averring that when defendant in error completed his last well on the land he abandoned his contract, and refused to comply

with his obligations, and plaintiff in error sought judgment canceling the contract.

Defendant in error testified that in addition to the three wells which he sunk on the land he drilled two others within a short distance; that none of them, save the first, contained any oil; and that he made a thorough test, without success. Defendant in error did not deny that he intended to abandon the contract when he ceased to drill on the land, and did not testify to any desire or purpose to resume operations.

The trial court rendered judgment for plaintiff in error, canceling the contract, and this judgment was reversed by the Court of Civil Appeals, who rendered judgment for defendant in error.

The Court of Civil Appeals was of the opinion that the contract had the effect to invest defendant in error with the right to develop the land, at his election, at any time during the full term of 20 years, after he had completed a well, begun within the prescribed 30 days, to a sufficient depth to discover oil in paying quantities, and that such right was unaffected by defendant in error's subsequent intention and acts. 164 S. W. 925.

Section A of the Commission of Appeals has recommended that the judgment of the Court of Civil Appeals be reversed, and that of the district court be affirmed, having concluded that there was an implied obligation to continue the work of exploration for, and production of, the minerals, and that this obligation was not in the nature of a covenant, but was a condition subsequent, the breach of which operated to forfeit the contract.

[1] We approve the conclusion of the Commission that the law implied the obligation from defendant in error to exercise reasonable diligence to continue drilling and mining operations on the land after oil was encountered in the first well, but we do not agree that the terms of the contract made this obligation a condition subsequent and authorized a forfeiture of the contract for non-compliance with the obligation. We think that the cancellation of the contract, as adjudged by the trial court, on the facts alleged and proved, can be sustained only by reason of the abandonment of the contract by defendant in error.

It is to be noted that the written contract expressly required nothing of defendant in error save to begin a well within 30 days and to continue to drill it until oil was found in paying quantities or until a depth of 300 feet was reached. And the Court of Civil Appeals determined that the law required no more of defendant in error, in order to acquire a vested right in the land for 20 years. To uphold that construction of the contract would require us to assume that the owner of the land intended to grant such

a vested right, not only without benefit to himself, but even to his positive detriment. The consideration for this contract to the owner consisted alone in royalties on the minerals to be produced during the term of the contract, unless we can reasonably assume that it would benefit him to have his land proven as containing valuable oil deposits, though no oil was produced therefrom for a term like 20 years. No assumption of that sort can be reasonably indulged. It would ignore the very nature of oil and gas, which were the minerals first mentioned in the contract. For the natural result of stopping the production of oil or gas from the tract on which it was discovered in paying quantities for such a period of time would be to invite its drainage from adjacent tracts, to say nothing of the danger of the oil's migration.

It is because of such considerations that the rule has become settled that—

"Even in the absence of an express covenant, when a lessee undertakes to develop oil or gas land on a rental or royalty basis, and the contract does not specify the number of wells to be drilled, there is an implied obligation that he will fully develop the land with reasonable diligence." 18 R. O. L. § 114.

The Supreme Court of Iowa declares that all the authorities unite in this holding. *Price v. Black*, 126 Iowa, 306, 101 N. W. 1056. See, also, 27 Cyc. 728; *Black on Rescission and Cancellation*, § 471; *Brewster v. Lanyon Zinc Co.*, 72 O. O. A. 213, 140 Fed 801; note, 20 Ann. Cases, 1167, 1168.

The opinion of the Commission of Appeals deals well with this subject in saying:

"No express provision is made in the lease contract herein for operation or further development in the event of the discovery of minerals in paying quantities. The evident intent of the parties in the execution of the instrument being the production of such minerals, possible only through operation and development, the obligation to operate with reasonable diligence and to reasonably develop the land, will be implied in order to effectuate this intent."

In *Benavides v. Hunt*, 79 Tex. 396, 15 S. W. 396, it was held that though there was no express agreement for the operation of a mine, under a contract granting a right to mine for coal, for the full period of 50 years, yet if the land was found to contain coal which could be profitably worked, the law implied an agreement to that effect.

And, in *J. M. Guffey Pet. Co. v. Chalson Town-Site Co.*, 48 Tex. Civ. App. 555, 107 S. W. 612, it is said:

"While the original lease contract did not specify the number of wells that appellant should sink upon the property, and did not expressly require the sinking of offset wells to protect the land from drainage, from the nature of the contract an implied obligation rested upon appellant to use reasonable diligence and care

to develop and protect the property, and this obligation required it to sink as many wells as the exercise of such diligence and care would suggest under the circumstances."

It is plain that the contract here amounts to a grant of the right or option to prospect upon the land for oil, gas, and other minerals, and to reduce those minerals to possession and ownership. *Texas Co. v. Daugherty*, 107 Tex. 233, 176 S. W. 717, L. R. A. 1917F, 989; *Oil & Pipe Line Co. v. Teel*, 95 Tex. 591, 68 S. W. 979.

The contract specifies as the sole cause of forfeiture of this right a failure to drill the first well within the time or to the depth there specified, and the difficult question in this case is whether in the face of this express stipulation of the cause of forfeiture we should imply another based on the breach of an obligation not itself expressed in the contract.

*Johnson v. Gurley*, 52 Tex. 222, was a case where the owner of land leased it to a tenant, rent free, under a written contract expressly providing that the tenant should use the land for farming and pasturage purposes, but should not sell growing timber. Suit was brought to forfeit the lease because of the tenant's breach of the stipulation against the sale of the growing timber. In determining that such breach furnished no ground of forfeiture, the court said:

"A covenant is an agreement duly made between the parties to do or not to do a particular act. *Taylor's Land. and Ten.* § 245. For breach of mere covenant the lessor has no right of re-entry, unless, as is not the case here, there is an express clause in the agreement to this effect, but has the right to sue for damages only. *Taylor's Land. and Ten.* §§ 290, 291; 1 Wash. on Real Prop. (3d Ed.) marg. p. 320; *Dennison v. Read*, 3 Dana (Ky.) 586; *Brown's Administrators v. Bragg*, 22 Ind. 123.

"A condition is a qualification annexed to an estate by the grantor, whereby it may be created, enlarged, or defeated upon an uncertain event. *Taylor's Land. and Ten.* § 271; 1 Wash. on Real Prop. (3d Ed.) marg. p. 316. The lessor may, without an express clause to that effect, take advantage of a breach of condition by re-entry or ejectment. *Taylor's Land. and Ten.* § 291. \* \* \*

"In case of doubt as to the true construction of a clause in a lease, it should be held to be a covenant, and not a condition or limitation, as the law does not favor forfeiture. 1 Wash. on Real Prop. (3d Ed.) marg. pp. 319, 320; *Taylor's Land. and Ten.* § 273; 4 Kent's Comm. marg. p. 129; *Wheeler v. Dascomb*, 3 Cush. [Mass.] 288.

"We are of opinion that the clause under consideration is neither one of limitation nor condition, but equivalent simply to a covenant or agreement between the parties, to the effect that the lessors agreed to give to the lessee the right to the use of such timber as might be necessary for the purposes of the lease, and the lessee agreed not to cut and sell the growing timber. *Spear v. Fuller*, 8 N. H. 174 [28 Am. Dec. 391];

*Wheeler v. Dascomb*, 3 Cush. [Mass.] 285; *Taylor's Land. and Ten.* §§ 279, 489. The breach of this covenant did not forfeit the estate of the defendant under the contract, or give the plaintiff the right to sue him otherwise than for damages."

In *Harris v. Rather*, 134 S. W. 755, in which a writ of error was denied, many Texas cases are reviewed, wherein forfeitures of contracts have been denied for breaches of obligations furnishing the essential considerations of the contracts, because such obligations could not rightly be construed otherwise than as covenants instead of conditions. The ground of that decision, as applied to the facts of that case, is fairly summarized by the following portion of Judge Rice's good opinion, viz.:

"If, as insisted by appellant, the agreement on the part of appellee to begin the erection upon the land conveyed within 12 months of a \$10,000 residence was a part of the consideration for the conveyance, and if this consideration had been recited in the deed, still we do not think that this would have given appellant a right to rescind. The grantor did not make or attempt to make the failure on the part of his grantee to erect said building a cause for forfeiture or rescission of the contract. \* \* \* The appellant had the right to have inserted such a clause, but, having failed to do so, it seems to us the presumption would obtain that he intended to rely upon his contract, a breach of which would merely authorize a suit for damages."

In *Kachelmacher v. Laird*, 92 Ohio St. 333, 110 N. E. 935, Ann. Cas. 1917E, 1117, the Supreme Court of Ohio said of an implied obligation to continue drilling under an oil lease:

"Even if there be such implied covenant, as contended by counsel for the lessors, it cannot be made the ground of forfeiture. Under the express terms of this lease the right to declare a forfeiture arises upon the failure of the lessee to drill or pay rental, and hence forfeiture can be enforced only if the lessee neither drills nor pays the stipulated rental in accordance with the terms of the lease. Such cause of forfeiture being expressly mentioned, none other can be implied."

The reason for this holding had been set out by the same court in the earlier case of *Harris v. Ohio Oil Co.*, 57 Ohio St. 131, 48 N. E. 506, in these words:

"It is strongly urged that it is inequitable for the lessee to hold on to his lease and still fail to so operate the premises as to produce reasonable results, and that he should either reasonably operate the premises or get off and permit his lease to be forfeited. The answer is that, while there is an implied covenant to reasonably operate the premises, there is no implied or express covenant to get off and forfeit his lease for a breach of such covenant.

"The lease in question provides for a forfeiture for the failure to comply with the conditions, or to pay the cash consideration in the lease mentioned, at the time and in the man-

ner agreed; but the implied covenant, to reasonably operate the premises, is not mentioned in the lease, and is therefore not included in the causes of forfeiture. Some causes of forfeiture being expressly mentioned, none other can be implied. *McKnight v. Kreutz*, 51 Pa. 232.

"The remedy for a breach of the implied covenant to reasonably operate the premises is therefore not by way of a forfeiture of the lease in whole or in part, but must be sought in a proper action for a breach of such covenant. *Blair v. Peck*, 1 Pennypacker [Pa.] 247."

The Supreme Court of Illinois followed the holding in *Harris v. Oil Co.*, on facts strikingly like those here, when it said in *Poe v. Ulrey*, 233 Ill. 65, 84 N. E. 50:

"Counsel for appellants insist that there was an implied agreement that the lessee would drill wells to reasonably develop the farm for the production of oil and gas, and that the lease could be canceled by the court and the rights under it forfeited for a failure to do so, and that the lease might be forfeited for a failure to drill the well although compensation was agreed upon. The argument would have greater force if the lease had not contained a provision that it could be forfeited for a failure to complete a test well on the block of leases before the 1st day of May, 1905. That agreement would imply an exclusion of other grounds of forfeiture and the agreement for compensation effectually excludes a forfeiture not stipulated for. The remedy for the breach of that contract would be by an action for damages. *Harris v. Ohio Oil Co.* [57 Ohio St. 181] 48 N. E. 502."

In line with *Harris v. Oil Co.* are *Core v. Petroleum Co.*, 52 W. Va. 280, 43 S. E. 128; *Carr v. Light Co.*, 33 Ind. App. 5, 70 N. E. 552; *McClendon v. Busch-Everett Co.*, 138 La. 730, 70 South. 781; *Vanatta v. Brewer*, 32 N. J. Eq. 270.

The Dallas Court of Civil Appeals said in *Wade v. Madison*, 206 S. W. 119:

"It seems settled, however, that ordinarily breaches of express covenants, much less those that arise only by implication, do not forfeit the right of possession or confer the right of re-entry, in the absence of an express provision to that effect in the contract. *Johnson v. Gurvey*, 52 Tex. 222; *Ewing v. Miles*, 12 Tex. Civ. App. 27, 38 S. W. 235."

This statement is fully supported by the 18 A. & E. Enc. of Law, on page 369, as follows:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants to pay rent; covenants to pay taxes; in case of a mining or oil lease, covenants to explore for minerals or oil," etc.

Thornton's Law of Oil and Gas, vol. 2, § 866, announces the general rule to be that—

"The remedy for a breach of an implied covenant is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by its breach."

[2] It is a recognized rule that additions ought not to be made to contracts by implication beyond that which is necessary. And we see no reason to doubt that full protection may be accorded the owner with respect to the enforcement of the implied covenant of the lessee to use due diligence in mineral development, without making a breach of the covenant a ground of forfeiture. In the first place, the party obligated to drill cannot abandon his contract without subjecting same to cancellation on that ground. And the power of a court of equity in decreeing specific performance is far-reaching, such power having been exercised in a proper case to compel either performance or abandonment by a lessee of an oil lease, within a very few days. *Kleppner v. Lemon*, 176 Pa. 511, 35 Atl. 109; *Id.* 198 Pa. 581, 48 Atl. 483.

There can be no doubt that defendant in error's rights under his contract were of such a nature as to be lost by abandonment.

On facts similar to those disclosed by this record, without contradiction, it was held in New York that a contract very like that between these parties was abandoned as matter of law. To quote from the opinion:

"This lease was for the term of 15 years from its date, 'or as long as oil is found in paying quantities.' It further provided that the lease should be null and void unless Galletts should commence to drill a well within three months from the date of the lease, prosecute the same diligently, and bore the same to the depth of 1,200 feet, unless oil was sooner found in paying quantities. During the year 1893 Galletts commenced drilling the well in pursuance of this lease and finished it to the requisite depth in 1894, but found no oil in paying quantities. He paid the lessor \$10 a month until the well was completed. Oil not having been discovered, in 1894 Galletts took away his derrick, machinery, and rigging which he had used in drilling the well, leaving only the casing which had been put in to shut off the water while he was drilling the well. Galletts did nothing further for 11 years, and made no claim that his lease was valid.

"In July, 1905, Galletts entered upon the plaintiff's farm, put down another well, and found oil in paying quantities. It will be observed that this was 11 years after he had abandoned the premises, and more than 8 months after the contract with the plaintiff.

"The court submitted to the jury the question for them to determine whether Galletts had abandoned the lease. I think this was error. The facts were not in dispute, and as matter of law the lease had terminated long before the contract made with the plaintiff. When Galletts took away his machinery, and all the implements which were necessary for the prosecution of the work under the lease, and after having drilled one well and found no oil, these acts on his part

indicated that he had abandoned the project, and this is especially true when the work was not resumed again for 11 years." *Conkling v. Krandusky*, 127 App. Div. 763, 764, 112 N. Y. Supp. 18.

The Supreme Court of West Virginia, in *Sult v. Oil Co.*, 63 W. Va. 329, 61 S. E. 312, laid down very clear rules relative to the abandonment of oil contracts. The opinion in that case says:

"Whether a lease has been terminated by abandonment on the part of the lessee and the acceptance of, or re-entry upon, the premises by the lessor is a question of intention. Though a lease, so terminated, is said to have come to its end by operation of law, the legal result arises from the acts of the parties. The intention on the part of the lessee to abandon, and on the part of the lessor to resume, possession of the premises on his own account and treat the lease as having been surrendered, ascertained from their acts and conduct, is the test."

[3] Applying the test stated to the facts of this case, we have no doubt of the correctness of the judgment of the district court in ordering the cancellation of the contract here involved on the ground of abandonment, and for that reason the judgment of the Court of Civil Appeals is reversed, and the judgment of the district court is affirmed.

#### ALLEN v. POLLARD. (No. 2779.)

(Supreme Court of Texas. May 21, 1919.)

##### 1. TRUSTS — 33 — DELIVERY OF MONEY — DEBTOR AND CREDITOR.

Where a nephew deposited money with his uncle on the latter's proposal that he would place the money at interest or in the bank for him, the relation of debtor and creditor was not created, but the uncle's holding of the money was as an acknowledged trustee.

##### 2. WITNESSES — 178(4) — TRANSACTION WITH DECEDENT — COMPETENCY OF OTHER PARTY — "CALLED TO TESTIFY" BY DEPOSITION.

Where a nephew, suing his uncle's executor to recover a deposit with the uncle as trustee, had his *ex parte* deposition taken by the executor, but it was not offered in evidence, the nephew was "called to testify" by the adverse party within the meaning of the statute, and became competent to give evidence in his own behalf in relation to his transaction with his uncle, deceased.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by F. M. Allen against Jas. T. Pollard, executor of the estate of W. C. Thomas. From the judgment, defendant appealed to the Court of Appeals, which reversed and rendered (171 S. W. 530), and plaintiff brings

error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

Tatum & Tatum, of Dalhart, and Boyce & Davidson, of Amarillo, for plaintiff in error.

J. H. H. Stahl, of Stratford, and Turney & Burges and Goldstein & Miller, all of El Paso, for defendant in error.

PHILLIPS, C. J. The action was one by Allen in the District Court to establish a claim against the estate of W. C. Thomas.

In his petition Allen charged that in 1907 he was in possession of a sum of money, which was known to Thomas, his uncle. Thomas proposed that Allen turn over the money to him, assuring Allen that in such event he would put it out at interest for Allen's benefit and that Allen could obtain it whenever he needed or desired it; that he would place it so that it would be at all times safe and yield Allen an interest return. Upon this understanding, it was alleged, Allen delivered the money to Thomas. The agreement, as pleaded, was established by Allen's testimony. There was no variance between the pleading and the proof, as is contended by the defendant in error, except that, according to Allen's testimony, Thomas' proposal was that he would put the money "in the bank" on interest for him, which is an immaterial distinction. Thomas died in 1912. Prior to Thomas' death, Allen had not requested the return of the money and Thomas had not returned it. Thomas at no time repudiated the agreement under which Allen intrusted the money to him. The suit was seasonably brought after Thomas' death.

[1] It was held by the Court of Civil Appeals that the claim was barred by limitation. 171 S. W. 530. We granted the writ of error upon the view that the transaction amounted to an express trust in Allen's favor, as to which, under the facts, there was no limitation. It is plain, we think, that Thomas did not borrow the money and that the relation of debtor and creditor, therefore, was not created by the transaction. Thomas' proposal contemplated that his possession of the money should be in recognition of Allen's right to it, and that he would so use it for Allen's benefit as to certainly afford Allen the interest. His holding of the money was clearly that of an acknowledged trustee.

The case was withdrawn from the Commission for the determination of another question, for which purpose we set it down for argument.

[2] The *ex parte* deposition of Allen was taken by the executor, but not offered in evidence. The interrogatories propounded called for Allen's testimony touching the transaction with the decedent Thomas. Holding that thereby Allen had, within the meaning of the statute, been "called to testify," by the adverse party in regard to the



transaction, and his incompetency as a witness in that particular thus removed, the trial court permitted him as a witness in his own behalf to recite what transpired between Thomas and himself in reaching the trust agreement. The Commission of Appeals was of the opinion that the ruling should be sustained. After a full review of the question we have reached the same conclusion.

The Supreme Court's jurisdiction of the case is governed by the Act of 1913. Allen's right of recovery depends upon this testimony. Having this vital relation to the case, the question of the admissibility of the testimony is to be regarded as one of substantive law.

The taking of the deposition was for the purpose of obtaining Allen's testimony in respect to the matters inquired about. It was effective for the purpose. By its means the testimony was developed. Allen was made to disclose the facts. He was compelled "to testify" regarding them. The method was one which the law furnished the adverse party and of which he availed himself, just as he might have called Allen to the stand. Allen's testimony was made subject to his use. It was not within Allen's power to prevent its use. He could not recall it. It stood adduced as a part of the record of the proceeding. With his testimony compelled under oath and obtained at the instance of the adverse party through the force of the law, with it available for the free use of the adverse party and at his disposal, with it of record and constituting an integral part of the trial, we think it is evident that within the full intentment of the statute Allen must be regarded as having been called by his adversary to testify concerning the transaction with the decedent, and as competent, therefore, to give evidence in his own behalf in relation to it. Regardless of any use of the deposition, Allen had thereby been required to give the testimony in a way sanctioned by the law as only another and equivalent method to placing him upon the stand. The purpose of his adversary in seeking the testimony had been accomplished. It had been attained as fully as though Allen had been called to the stand, since the testimony was as effectually developed and rendered as freely available. The trial court made the proper ruling. *Gilkey v. Peeler*, 22 Tex. 663.

The judgment of the Court of Civil Appeals is reversed and the judgment of the District Court is affirmed.

HAWKINS, J. (filing statement). This case presents several important questions, upon some of which I have not had reasonable opportunity for full investigation of the record or of the law of the case, and upon those questions I have reached no definite conclusion.

My request for a postponement, for one week, of the decision of this court in this recently submit-

ted cause having been denied, I decline to express therein, at this time, any opinion whatever. Later I will file a statement of my views in the premises.

KIRBY et al. v. CONN. (No. 2574.)

(Supreme Court of Texas. May 28, 1919.)

**PUBLIC LANDS §173(5)—SALE OF TIMBER—SETTLING OF LANDS—STATUTE.**

Under Acts 27th Leg. (1901) c. 125, an award of the timber on public lands carried with it the right of purchase of the land within five years if the timber was not sooner removed on condition of actual settlement. In 1907, the requirement as to actual settlement was abrogated. *Held*, that plaintiff, to whom the timber was awarded under said act, and who within the five-year period, but after 1907, was awarded the land without the condition of actual settlement, was entitled to the same as against a previous purchaser of other public lands whose conveyance, made in 1906, erroneously included the lands acquired by plaintiff.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Trespass to try title by R. C. Conn against John H. Kirby and others. A judgment for plaintiff for the lands involved was affirmed by the Court of Civil Appeals (156 S. W. 232) and defendants bring error. Affirmed.

H. C. Howell, of Jasper, Terry, Cavin & Mills, of Galveston, and Andrews, Ball & Streetman, of Houston, for plaintiffs in error.

Smith & Blackshear, of Jasper, and John B. Warren, of Houston, for defendant in error.

PHILLIPS, C. J. In 1904, under the Act of 1901 (Acts 27th Leg. c. 125), R. C. Conn was by the Commissioner of the General Land Office awarded the timber upon the north quarter of a section of public land. A timber deed in his favor was duly executed and delivered.

In 1899, A. V. Wright applied to the Commissioner to purchase the south three-quarters of the same section. His application was accepted, and upon his complying with the law, in 1906 a patent was issued him. The patent, while describing the land in accordance with Wright's application and award, embraced within its field notes 98.97 acres of the land described in Conn's timber award and deed.

The controversy here concerns this 98.97 acres, the plaintiffs in error claiming under the patent to Wright.

Under the Act of 1901, the award of the timber to Conn in 1904 entitled him to become the purchaser of the land embraced in the award within five years thereafter, if the timber was not sooner removed, on con-

dition of actual settlement. In 1907, the requirement as to actual settlement under the purchase of such lands by those who had previously been awarded the timber rights therein, was abrogated by the Legislature. In 1908, as the purchaser of the timber and while it was still uncut, Conn duly made application to purchase the quarter section described in his timber award and deed. The Commissioner thereupon awarded him the land without the condition of actual settlement.

The plaintiffs in error admit that had Conn, by due award, become the purchaser of the quarter section, on condition of actual settlement, as was his right under the Act of 1901, his title to the 98.97 acres in controversy—a part of the quarter section—would be superior. But they say that with the patent, embracing the land, issued to Wright, under whom they claim, in 1906, when the law required actual settlement in the sale of land purchased in virtue of a previous timber award, Conn could not defeat the right conferred by the patent by a purchase of the land thereafter without complying with that requirement; and, since he did not comply with it, their title under the patent should prevail.

If the patent had conferred any right, the question thus presented might have a different phase. But it in fact conferred no intervening right, and for that reason those holding under it are in no position to complain of a failure by Conn to comply with the Act of 1901 even if it were true that that act and not the Act of 1907 governed his purchase of the land. The award of the timber in 1904 invested Conn with the right to purchase the land. This necessarily withdrew the land from the market for sale to others during the period that this right existed. Any attempt by the Commissioner to sell it to others while the right was in force was without lawful authority. *Wing v. Dunn*, 60 Tex. Civ. App. 16, 127 S. W. 1101. At the time, therefore, that the patent was issued to Wright, in 1906, the land was not subject to sale except to Conn or his assigns. If it could not be lawfully patented to Wright because of the want of any authority for the Commissioner's act, the patent could not be made the basis of any claim of right. In fact, the inclusion of the land within the description of the patent was clearly erroneous. Wright made no application to purchase any part of the quarter section, and no part of it was awarded to him. The case was correctly determined by the Court of Civil Appeals. We agree with the recommendation of the Commission of Appeals that the judgment of the Court of Civil Appeals should be affirmed, and it is so ordered.

ARNO CO-OP. IRR. CO. et al. v. PUGH et al.  
(No. 82-2873.)

(Commission of Appeals of Texas, Section B.  
June 11, 1919.)

APPEAL AND ERROR 1114—DISPOSITION OF  
ISSUES—STATUTE.

Where Court of Civil Appeals on issues presented by pleadings and evidence correctly applied the law favorable to contention of plaintiffs in error, and where there was no further issue to be developed or determined, it should have rendered judgment for plaintiffs in error, in view of Rev. St. 1911, art. 1628, and its judgment reversing cause would be affirmed, and its judgment remanding it would be reversed, and judgment rendered for plaintiffs in error.

Error to Court of Civil Appeals of Eighth  
Supreme Judicial District.

Separate actions by the Arno Co-operative Irrigation Company and others against Spencer B. Pugh and others, and by Spencer B. Pugh and others against Robert G. Werner and another, which by agreement of the parties were consolidated and tried as one suit. From a judgment of the Court of Civil Appeals, *El Paso* (177 S. W. 991), reversing and remanding a decree determining the rights of the parties on appeal by the Co-operative Irrigation Company and others, those parties bring error. Judgment of reversal affirmed, and judgment of remand reversed, and judgment rendered for plaintiffs in error herein.

Clay Cooke, of Pecos, for plaintiffs in error.

Ross & Hubbard, of Pecos, and Leslie A. Needham, of Chicago, Ill., for defendants in error.

SADLER, J. This suit originated over the rights of the plaintiffs in error to the possession of the properties of the Arno Co-operative Irrigation Company, and the right to vote certain shares of stock therein by Robert G. Werner. The defendants in error were in possession of the properties of the irrigation company, had excluded it from the possession thereof, were exercising the claimed right to vote 7,804 shares of the capital stock of the company, same being a majority thereof, and were performing the duties of directors and officers of the company. A full statement of the pleadings and of the facts necessary to an understanding of the issues presented on the trial and before this court are contained in the opinion by the Court of Civil Appeals. 177 S. W. 991.

The Court of Civil Appeals reversed and remanded the cause to the district court, and writ of error has been prosecuted to the Supreme Court complaining of the judgment of the Court of Civil Appeals in remanding

the cause and in its failure to render for plaintiffs in error.

### Opinion.

Careful consideration of the opinion by the Court of Civil Appeals and of the record manifests that the findings of fact as contained in its statement of the case and the conclusions of law thereon as set forth in the opinion are correctly presented by the Court of Civil Appeals.

However, we are of opinion that, having disposed of all the issues presented in the case by the pleadings and evidence on a correct application of a law thereto favorable to the contention of the plaintiffs in error, the Arno Co-operative Irrigation Company, Robert G. Werner, R. S. Johnson, and F. E. Knapp, and contra to the position taken by the defendants in error, Spencer B. Pugh, John B. Dandridge, Leslie A. Needham, and L. O. Carroll, and there appearing no issue of fact to be further developed and determined in the trial court, the Court of Civil Appeals should have rendered judgment in favor of the plaintiffs in error, who were the appellants in that court.

The plaintiffs in error sought to recover from the defendants the title and possession of the properties described in their petition, to obtain a writ of possession and a restraining order prohibiting the defendants in error, and each of them, from pretending to act for or on behalf of said company, and from using the seal, or purported seal, of said corporation, and from in any manner interfering with the plaintiffs in the management and control of said company, or entering upon and interfering with the use and possession of any of its properties, and to restrain the defendants in error from attempting to vote or exercise control over 7,804 shares of stock of the corporation.

The Court of Civil Appeals found the facts and the law favorable to the contention of this prayer; and clearly plaintiffs in error were entitled to the relief sought.

The defendants in error sought judgment of the court as to whether R. G. Werner could be heard to claim or assert any right, title, or interest in or to all or any portion of the stock of the Arno Co-operative Irrigation Company acquired from John B. Dandridge and Spencer B. Pugh, and sought to require certificate No. 30, covering said stock, to be surrendered and canceled, and to enjoin Werner from asserting claim or title thereto. The Court of Civil Appeals determined this issue against the contention of defendants.

These seem to be the only issues which were involved in the consolidated causes before the court for trial; and, such being the determination of the issues by the Court of Civil Appeals, it follows that judgment

should have been rendered in accordance with the opinion delivered. Article 1626, Revised Statutes 1911; Young v. Van Benthuyssen, 30 Tex. 771; Sweeney v. G., C. & S. F. Ry. Co., 84 Tex. 437, 19 S. W. 555, 31 Am. St. Rep. 71; Thompson Lumber Co. v. Bryant, 144 S. W. 293.

We therefore recommend that the judgment of the Court of Civil Appeals reversing the cause be affirmed, that its judgment remanding same be reversed, and that judgment be here rendered for the plaintiffs in error in accordance with their prayer, and denying the relief prayed for by defendants in error, and that all costs be adjudged against defendants.

PHILLIPS, O. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

MOYE v. BEAUMONT, S. L. & W. RY. CO.  
(No. 68-2823.)

(Commission of Appeals of Texas, Section B.  
May 28, 1919.)

### 1. RAILROADS — 350(13)—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action against a railroad for death of plaintiff's son while driving an automobile at a crossing, question of the son's contributory negligence held for the jury.

### 2. RAILROADS — 346(5)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action against a railroad for death of plaintiff's son struck in an automobile at a crossing, the burden rested on the railroad to establish the son's contributory negligence exculpatory of its own negligence.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by M. F. Moye against the Beaumont, Sour Lake & Western Railway Company. From judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed (174 S. W. 697), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and that of the trial court affirmed.

Smith, Crawford & Sonfield, of Beaumont, for plaintiff in error.

Andrews, Streetman, Burns & Logue, of Houston (W. L. Cook, of Houston, of counsel), for defendant in error.

SADLER, J. The plaintiff in error recovered a judgment against the Beaumont, Sour Lake & Western Railway Company for

the death of his son, Alfred Moye. The young man was killed at Grayburg, Tex., being struck by a freight train of defendant in error while he was endeavoring to cross its track on the public highway. He was driving an automobile. One of the defenses insisted upon by the railway company was the contributory negligence of the plaintiff. The Court of Civil Appeals held that plaintiff was guilty of contributory negligence, as a matter of law, and reversed and rendered the cause for the defendant. Writ of error was granted on the application of the plaintiff. For a statement of the facts upon which the Court of Civil Appeals based its decision, see 174 S. W. 697.

We think it necessary to give a more extended statement of the evidence touching upon the question of contributory negligence.

Alfred Moye was employed as a laborer and as a driver in a garage at Sour Lake. On the morning of the accident he was sent to Grayburg for a party who desired to come to Sour Lake. Shortly after leaving Sour Lake Miss Ellen Cowart and Miss Bonnie Belle Parr were picked up by him, and were riding on the rear seat of the automobile. After taking the young ladies in the car, he drove at a very fast pace, until he reached a hotel at Grayburg, situated about one block north of defendant's railway line. He was driving upon a shell road, which ran through the town of Grayburg from north to south. The defendant's line of road crossed this highway, and ran east and west. Its passenger station was situated some distance east of the point where the public road crossed the railroad track. The railway company had been repairing and ballasting its main line through Grayburg. At the point where the public road crossed, there were two tracks, the main line and a house track, which left the main line about 10 or 12 feet west of the public road, and branched off to the south of the main track, extending beyond the depot. This house track, very shortly after branching from the main line, descended until it was some 18 inches lower than the main line, and extended south of the depot, connecting with the main line again at some distance east of the depot. About the time Alfred Moye reached the hotel, he slowed down, and was driving very slowly in the direction of the crossing. Just as the front of the car reached the main line it was struck by a box car, demolished, and the driver killed. The two young ladies were thrown out on the north side of the track, but were not injured. After striking the automobile, the box car and the other cars in the train continued to move until the box car was about three car lengths from the crossing.

Miss Cowart testified:

"I was with Alfred Moye at the time he was killed, and was in the car when it was struck.

Bonnie Belle Parr was with me. We were in the rear seat. Alfred was driving. After we got in the automobile, Alfred ran fast, until we got right in front of the King's Hotel, and then he commenced to go slow. The King's Hotel is before you get to the railroad track. It is not right close, but I don't know just how far. I am not able to state the distance. At the time we got to the hotel, he looked back, and said, 'How do you like that?' and I said, 'Fine'; and he never looked back any more. It was then that he changed his speed, right in front of the hotel; but up to that time he had been running pretty fast. He got slow right in front of the hotel. From that point on he was going slow. I don't know just exactly how slow; for I cannot tell how many miles per hour an automobile runs. \* \* \* Of course, when he came right up to the railroad and went onto the railroad, I suppose he got slower then. I don't know how far he had gotten upon the railroad, but he had not crossed it. I just had time to holler, 'There is a car,' and then it hit. I don't know which way I was looking. I just glanced around toward the car, and saw it before it hit. \* \* \* I think it was a box car that hit us. I am not sure. \* \* \* That was the first thing I saw about the accident. \* \* \* When I thought of myself, I was sitting in the shell road, and Bonnie Belle was making me go home. \* \* \* I don't know why I did not see the railroad car before I did. \* \* \* When the automobile was struck, it was going slow. \* \* \* I did not see any signal, and I do not know whether any one was there or not; but I did not see them. \* \* \* I did not hear any bell ringing or whistle blowing. It made no noise that I heard before that. \* \* \* As to the length of time before the box car struck the automobile, that I hollered, 'There is a car,' I just had time to say it before it hit. It was almost like the snap of the finger. \* \* \* As to the time when I hollered, I do not know whether the automobile was actually on the track then or not; I am not sure. \* \* \* I would say that I did not hear the whistle blow. \* \* \* At the time the box car struck, the automobile was still in motion. \* \* \*

Bonnie Belle Parr testified:

"When he went upon the railroad, he was running still, as well as I remember. It is a high-track there. As to whether the car came to a dead standstill, or whether it was moving, that is, the automobile, I am not sure; but I think it was moving; as well as I remember, it was moving. I did not see the box car at all. The first thing I knew, I was crawling out from under that old top; that is the first thing. \* \* \* The jolt which that car got was hard enough to tear it all to pieces and to knock us out, without me seeing it or knowing anything about it. \* \* \* I did not hear the car coming, and I heard no whistle or bell, or any signal of any kind. \* \* \* I was facing toward the crossing, coming right down the shell road, and I was not looking behind me. \* \* \* Yes, sir; I thought in going across that crossing that it was a good idea to listen and look for things. I guess maybe if I had been looking for cars like I was listening for that bell, I might have seen that car sooner; maybe I would, but I was looking right that way. \* \* \* I do not know when this train of cars started to

moving, nor how close it was to the crossing when it started to moving. I did not see it from across the track going east just before we got there. Yes, sir; my face was toward the front. If that car had been coming for a long distance up this track, I believe I would have seen it."

**J. T. Bremmer testified:**

"I went there in a car as quick as I could, along the shell road, from Sour Lake to Grayburg. This was in the middle part of the day, between 11:30 and 1 o'clock, something like that. No one else went with me. The first thing when I got there, the little Cowart and Parr girls were standing in the middle of the shell road; had just got out of the top of the car. \* \* \* The flat car was standing over him, I think. The automobile was three car lengths down the track from his body on the main line and on the track, having been pushed ahead of the car. Between the shell road and the automobile as I found it there was one box car and some log cars they were fixing to take to Budconnor. The car next to the automobile was a box car, and the others were flat cars. \* \* \* At that time the cars were still across the road and extending to the east back to the depot. You could not see the end standing in the shell road, because the depot cut the observation off. There was no engine about the shell road crossing; the engine was at the water tank. It is something like 200 yards from the shell road to the depot, but I did not count the cars. \* \* \* The string of cars that struck the automobile was moving onto the main line in the south switch. \* \* \* There were some cars on one of the other tracks, but I cannot state which track. I could not say how close they came up to the crossing, because I paid not much attention to those cars. I noticed them, but did not notice how close they were. They were tolerably close. I did not look for obstructions, and do not know whether those cars were on the switch or on the main line. There were cars on only one of the other tracks. They were either on the siding or on the main line, but I could not say which. They were flat cars, and with no engine attached to them about the crossing, but I do not know how many there were. The south switch track is a foot or so lower than the main line track—maybe 18 inches. It begins to fall just as it runs off the roadbed. The main line at the point of the accident is about 14 or 15 inches higher than the lay of the land. \* \* \* Yes; I know where the King Hotel is; it is one block east of the shell road, and one block north of the railroad track. At the time of this accident, there were houses near the railroad track on the shell road, but they are not there now. I do not know when they were moved, but it was since the accident. One of these buildings was a residence, and the other was a kind of a little restaurant or short-order business. These were right on the edge of the shell road, and the little house was right close to the telephone post, and the big house was something like 40 or 60 feet back. The telephone post was right at the edge of the right of way, just about the distance telephones run alongside of railroads, right at the edge of the depot. This short-order house was a little house, and there was a space and then a dwelling house; both of them being right

along the shell road on the north side of the railroad, and on the opposite side from the depot. These houses were also on the east side of the dirt road, and on the side of the railroad towards Sour Lake, and would be passed by Alfred Moye in going to the railroad. I would estimate that the telephone post against which the little bittle short-order outfit stood was about 50 feet from the railroad track—hardly as far as the length of this room. This residence and this restaurant would occupy about 150 or 200 feet. As to how close one would get along that road going south approaching the railroad before he would get to where he would see from the small house after he emerged, it would be about 75 feet—maybe 100 feet—from the railroad track. Yes; I said the little house is about 50 feet from the railroad track; but I say that at a distance of between 75 and 100 feet he could have a clear view toward the depot and of the train on that south switch; but he would have to look across that way. If he kept his eyes looking that way, he could see. The box cars would be between the man approaching and emerging from behind the restaurant and the depot. They would be between him, and it would be about five or six car lengths from the shell road to the closest car of the string of cars that struck the automobile."

This witness says that those box cars standing on the main line or on the switch on the north side of the depot were something like 50 or 75 yards from the shell road—something like 150 to 225 feet—that is his recollection.

**T. S. Crosby testified:**

"On that occasion I remember seeing some box cars there, but on which track I could not say. There were some box cars on the east side of the shell road on the left side as you approach the crossing going south. I do not remember how close they were to the shell road—somewhere between the shell road and the depot. I do not remember how many cars there were; there was a string of them. I do not know how far the depot is from the shell road; I suppose about 100 steps. The engine that was attached to the train that ran over the boy was on the south side of the depot when I got there. \* \* \* That south track comes into the main line at the crossing right in the shell road, and leads off slightly to the south, and hooks around the depot; \* \* \* that string of cars extending from the point where I found the automobile back to the depot. \* \* \* There were three cars that had passed the crossing, and one car was standing over the crossing. \* \* \* The body was still there when I got there, and the coroner held the inquest while I was there. \* \* \* If a string of cars and an automobile met at a crossing, both of them getting there practically the same time, I expect you would be able to stop before reaching the track, if you saw those cars 15 feet before you reached the track."

**E. A. Boyd testified:**

"When I was there they had taken the body up, and I met them about 150 yards from the track, going to Sour Lake in a wagon. I was going south to Grayburg on the shell road when I met the body in the wagon. At that time the

train was switching, the train that struck him. They were switching a string of cars. It was the string of cars that they said had killed the boy. It was coming off the track that goes around below the depot on the south side of the main line. At that time they were going west, and had a string of flat cars in ahead. They were pushing across the road, crossing it when I came up. They had already held the inquest when I got there. Besides that train that was on the south switch, I saw some cars standing on the main line. I was going south, and the cars were on the left-hand side from me—that is, on the depot side. When I got there, the string of cars was standing right along here just a short distance from the crossing. It was quite a string of cars there on the main line, and they reached a good piece, as far as the depot, and beyond the depot. I was traveling on horseback, and going south. Coming along the road south from Sour Lake to Grayburg you would have to be mighty close to the crossing before you could clear the string of cars on the main line so you could see up the switch south of the depot. They have very little room to get by the main line string of cars, very little space in between the two tracks from where the main line cars were standing; I mean that there was just clearing space between the rear car standing on the main line and that switch track that led off south of the depot; I mean the closest car on the main line, it was just far enough away from the switch to clear it. The switch stand on the west side is not over 10 feet from the shell road. The closest car to the shell road standing on the main track was about 15 or 20 feet from the center of the shell road. It may not have been quite so much, and it might have been more. If one were coming down the shell road, going to Grayburg, and a train of cars were moving on the switch line south of the depot and joining with the main track at that crossing, you would have to be right on the railroad before you could see those moving cars beyond the standing train on the main line. You could not see it at any distance. You could not see it but a short distance. The south track is lower than the main line track, and that would naturally hide a train or engine, or anything else. If it was on a level, you could see the top of the engine—notice it quickly. No, sir; the train of cars standing on the main line would prevent you seeing a moving train on the switch at all. \* \* \* I think those were flat cars they were pushing in front of the engine, about eight or ten of them. \* \* \* I do not know how long it was before the accident occurred that I got there. They had picked up the body. It was the same day. I think it was in the afternoon. It was the day of the accident, and I met them about 150 yards from the crossing, carrying the body to Sour Lake. The string of cars was moving across the crossing, and a string of box cars was standing on the main line. The moving cars were going west off the switch track."

Van Dorn, defendant's roadmaster, testified:

"If a string of box cars were standing on the main track just so it would clear the switch, a man would have to be within 50 feet of the track before he could begin to see down the house track. Yes, sir; You could not begin to see down the

house track further down the end of the car standing on the main line; and, of course, the closer you got the further down the house track you could see. That is a fact I know. I could see beyond the end of the box car standing 50 feet north of the crossing on the shell road. I could see down the house track down beyond the end of the box car that would be standing on the main line, and me standing 50 feet north of the crossing."

Badgett, defendant's superintendent, testified:

"I think a man would have to get within 55 or 60 feet of the rail approaching on the shell road before he could see a moving car coming toward the crossing, if the box cars were standing clear of the switch on the east side of the shell road. If a box car was standing within 15 feet of the shell road, you would have to go to the center of the crossing. You could not shove cars out of the main line, with cars within 15 feet of the crossing, without turning them over. Yes, sir; a car out there would cut off the view entirely; but you could not move the car out of this track with a car 15 feet from the crossing. \* \* \* The turn-out, to use a particular illustration, is where the house track switch leads off from the main line—merely another name for turning off from the main line. It would be about 150 feet east of the frog from the turn-out where it reaches a point where the tracks are 60 feet apart. At a distance of 150 feet east of the shell road the two tracks would be about 14 feet apart. A box car will hang over on an average of 3 feet from the rail—that is, the body of the car. If you put two box cars, one on the main line and one on the house track, 150 feet from the shell road, they would be about 6 feet apart; there would be space between them of about 5 or 6 feet. \* \* \* As to whether I say they were running a store not any bigger than a piano box, it was a hamburger and sandwich stand. A man had just about room enough to walk in, but did not have any room to stand. It stood on the ground, and was about 5 or 5½ feet high. It was about 4 feet wide and 6 feet long. As to whether the man carried it home with him every night, if there was anything in it very valuable, it would pay him, because somebody else could have come along and carried it away. Some one did carry it away. No, sir; the railroad did not move it, and did not order it off. It stood on the right of way. \* \* \*"

Bennett testified for defendant:

"I live at Sour Lake; have lived there five years. I have traveled the road from Sour Lake to Grayburg frequently, and am acquainted with the crossing over the Frisco where Alfred Moye is supposed to have been killed. \* \* \* On the north side of the track, along the shell road, and on your left as you approach, you notice a little hamburger joint, right near, probably on, the right of way, not more than 30 or 40 feet from the railroad track. It was about the size of an ice box, a good, big ice box. It was just a little hamburger joint. The house was probably 40 or 50 feet from the stand. That stand was maybe 6½ feet high. In traveling along the shell road in a buggy or automobile, you could see a box car. It was nothing like as

high as a box car. The closest building to it was a house built for a saloon; but the mill company kicked, and they never did put it in, and it was used for a residence by several people. It was probably 50 or 60 feet from the stand; I never paid much attention. \* \* \* Now, approaching that crossing on that shell road, and bearing in mind the location of those buildings, as to how near you would have to be to see up the track at Grayburg, if you mean the one that goes around on the south side of the depot, that house would not be in the way nowhere, unless you got out of the road."

On cross-examination he testified:

"One approaching on the shell road, in order to see cars approaching on the house track, meaning the track that runs east of the shell road around the depot, and goes back to the main line toward Beaumont, one could see those cars at a distance of 50 or 75 yards from the track, maybe 100. He could see them by the time he was in front of this dwelling or this house built for a saloon. \* \* \* If there were box cars on the main line between where you are when you come out in front of that house, you could see box cars on the house track after you got in front of that house. Yes, sir; if the house track was lower than the main track, that would let the cars on it down lower than the top of the cars on the main line. Then you could not see a box car, not from that house, and not over another box car."

Mr. Ogg testified for defendant:

"I live at Sour Lake, and am now engaged in the real estate business. \* \* \* I am acquainted with the structures on the left of the shell road as you approach the crossing from Sour Lake. There was an old building, built for a saloon, and then a little hamburger joint. The building was 75—probably 100—feet from the track, and about 10 or 12 feet from the embankment on the shell road. It had a porch in front of it. The hamburger shack was setting right south of the old house, right at the edge of the shell road. The top of it was 6 or 8 feet from the ground. The shell road as you approach that crossing would be a little higher than the ground, but one would have to be some distance back to see over the top of that shack, sitting in an automobile or buggy. If you got opposite the shack, I do not believe you could see over it; but if you were some distance back, I believe you could see over it. If box cars were approaching on the track that leads around the depot, one of the switches, it could be easily seen. There would be nothing to keep you from seeing it as you approached. The hamburger joint would not obstruct the view of the box cars. The size of that hamburger shack was 6 or 8 feet high and about 4 or 5 feet in width. \* \* \* Supposing there were box cars standing on the main line between you and the moving or standing box car on the house track; I mean a string of box cars on the main line, and another one on the other side of it; I would not think I could see them then."

James Lisch, defendant's conductor in charge of the switching on the day of the accident, testified:

"I was standing in front of the depot on the main line when the train started to move toward the crossing, not when it hit. I did not see it strike. It was making the last one of those moves that I have described at the time the accident happened. After the accident the train stopped and stood there until after the inquest—never moved again. We were there from 1:30 to 3:15 in the afternoon before any movement at all. At the time the boy was struck, we were pushing in off of the house track. We left the train on the passing track and the train of cars that hit the automobile on the house track, and we cut our engine loose and went down the main line and headed into the house track. When we got this train made up, as it was left on the house track, the engine was on the rear end of it. The way we got out there was we went down the main line and headed in; we backed down the main line east toward Beaumont, having left the string of cars on the house track until we could get out and go up the main line and get to the rear of them. We left the nearest car to the shell road about a distance of 80 feet. It was in the clear on the house track. An engine or car could pass it on the main line standing there, 80 feet of the shell road, clear of the main line. \* \* \* At the time this string of cars started to move I was standing right in front of the depot. I stood there until they got within about 10 feet of the shell road crossing. I saw the brakeman walk across and throw the switch, and I knew everything was all right, and I started over to seal up two cars. The train did not stop for him to throw the switch. They were going on slow, and it had gotten within 10 feet of the crossing. I did not see the automobile coming. I could see clear up to this house. I did see the negro give them the signal to go ahead. It was his place to do that, even if it was moving. It was the 'come ahead' signal given so the engineer could see, and so I could see it, too. I was watching for it. If he had not given the signal, I would have stopped him before he got to the crossing. He was going slow for that purpose. When he says, 'Come ahead,' we go ahead—throw on more speed. I was on the other side when they stopped, and went around to see what was the matter. They had already stopped, and I did not give the signal for the engineer to stop the train. I could not say who did give the signal to stop. I heard the cars stop, but I did not hear the train hit the automobile. \* \* \* As to whether it is not often the case, when we come in with a train like that, that we bring it up the main line and uncouple on the main line, and then carry out the part we want to separate from the train, and put it on the house track, carry it on past the switch, and across the shell road, throw the switch, and run the cars back on the house track, cut the engine loose, and back up and get the train, and back up and get your string of cars on the house track ahead of your engine, and push them on to Budconnor, I say that I always do it like I told you. Yes, sir; we can do it that way. It is an easy way to do it, and when you do it that way, you would leave your train that you first left near this switch. The reason you have to do that, put part of the train on ahead, is because you have not got the switching facilities at Budconnor; we have to get the train in shape to do what we have to do at Budconnor."

In this instance it was necessary to push the part of the train we had on the house track ahead of us to Budconnor. We could have left the train on the main track, and put those cars on the passing track and run around them, but it would have taken longer. Every man does it different; some do it one way, and some another."

Stephenson, the locomotive engineer, testified:

"When we started the movement shoving these cars off the house track, the brakeman and conductor both signaled to move forward. I saw both signals. The brakeman was in the middle of the shell road on the left-hand side at the time he gave the signal, and the conductor was right in front of the depot, on the right-hand side of the depot. I could not see the switch, and do not know whether the switch was thrown, aside from the fact that I was signaled to move forward. From what happened afterwards, I know the switch was thrown, because I looked at it, and saw it had been thrown. If it had not been thrown, it would have broken. \* \* \* I cannot tell exactly how near the lead car was to the dirt road crossing at the time the brakeman and conductor signaled for me to move forward. It was far enough to clear the side track, but I do not know the distance. \* \* \* We were going to stop that train out on the main track, if we had not stopped when we did. No one signaled me to stop."

There are other witnesses who testified with reference to the situation, but the foregoing gives an accurate view of the testimony touching on the question of the negligence of the plaintiff.

#### Opinion.

[1, 2] We have given very careful consideration to this record, and are of the opinion that the evidence is not sufficient to show that as a matter of law the plaintiff was guilty of contributory negligence. The conditions as they actually existed at the time of this accident, in view of the testimony of the two girls, and of those who undertake to detail the location of obstructions to the view of the driver, are such as tend to support the finding by the jury that plaintiff was not wanting in that degree of care with which he was charged. We cannot say that it is reasonable to conclude that, under the circumstances in which plaintiff was placed, and in view of the situation of the premises, by the exercise of ordinary care he could have discovered the movement of the train.

The evidence is conflicting as to the character of obstruction presented by the dwelling house, the hamburger stand, the box cars on the main line or on the passing track, and it is conflicting as to whether the string of cars which struck the automobile was moving with sufficient speed just before the accident to attract the attention of plaintiff. It appears from the testimony of the conductor that the string of flat cars, with the box car at the end, nearest the crossing, was moving very slowly, and that the box car was in about 10 feet of the crossing when the brakeman gave the signal for the engineer to move ahead. This signal was communicated by the conductor to the engineer; and then, under the testimony, he put on steam and moved forward more speedily than he had been moving. The conductor says that the train, at the time that the signal to move forward was given, was moving so slowly that, with the box car in 10 feet of the crossing, he could have stopped the train before the box car reached the road crossing. This indicates that the movement of the string of cars was such as may have presented the appearance of standing still, even though seen by the plaintiff; and from the testimony it appears that the signal to move forward must have been given at such a time as that plaintiff either did not anticipate a movement before he could cross the track, or else could not stop his car in time to prevent the wreck. All the circumstances detailed in the testimony leave the question of negligence on the part of the plaintiff in such doubt that it becomes proper for the jury to resolve the question at issue. The burden rested upon the defendant to establish contributory negligence excusatory of its own negligence; and we are not prepared to say that it has met this requirement by such clear proof as removes from the jury the province to determine the issue. Following *Beck v. Texas Co.*, 105 Tex. 303, 148 S. W. 295, approved in *Tweed v. Western Union Tel. Co.*, 107 Tex. 247, 166 S. W. 696, 177 S. W. 957, we recommend that the judgment of the Court of Civil Appeals be reversed, and that of the district court be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.



COLLINS v. PECOS & N. T. RY. CO.  
(No. 64-2807.)(Commission of Appeals of Texas, Section B.  
May 28, 1919.)1. MASTER AND SERVANT  $\Leftrightarrow$ 85—ANTICIPATION OF INJURY TO SERVANT.

Where there is reason to anticipate some injury may result to the servant, the master must exercise such care as will prevent the injury, and a failure to do so is actionable negligence, if injury follows the breach of duty.

2. NEGLIGENCE  $\Leftrightarrow$ 1—ELEMENTS.

Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation, but to render negligence actionable it must be incorporated into some injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

3. NEGLIGENCE  $\Leftrightarrow$ 59—"PROXIMATE CAUSE"—"PROBABLE CONSEQUENCES."

"Proximate cause" incorporates in it such anticipation of result as ought, from the circumstances, to have been foreseen as natural consequences of a negligent act; and if a negligent act produces an injury, and more serious injury naturally flows from the negligence, without any intervening independent cause, those consequences are probable and ought to be foreseen, and are chargeable to the negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Consequence; Proximate Cause.]

4. MASTER AND SERVANT  $\Leftrightarrow$ 285(12)—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

In action by section foreman for injury to his hands and face from handling ties wet with a poisonous mixture known as creosote, whether the permanent injuries suffered were the natural and proximate result of defendant's negligence in not warning him of danger, *held*, on the evidence, a question for the jury.

5. MASTER AND SERVANT  $\Leftrightarrow$ 276(2)—PERMANENT INJURY—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that permanent injury to a section foreman, poisoned by handling creosoted ties, was the proximate result of negligence in failing to warn him of the danger.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by Robert Collins against the Pecos & Northern Texas Railway Company. Judgment for plaintiff, and defendant appeals, and from a judgment of the Court of Civil Appeals of Amarillo (173 S. W. 250), reversing and remanding, plaintiff brings error. Reversed, and judgment of trial court affirmed.

J. Marvin Jones, L. C. Barrett, and Jas. N. Browning, all of Amarillo, for plaintiff in error.

Terry, Cavin & Mills, of Galveston, Madden, Trulove & Kimbrough, of Amarillo, and Carl Gilliland, of Hereford, for defendant in error.

SADLER, J. This suit was filed in the district court of Parmer county by Robert Collins, to recover damages from the Pecos & Northern Texas Railway Company, for injuries alleged to have been caused by negligent poisoning while he was acting for the defendant as section foreman in unloading railroad ties recently treated with a mixture known as "creosote." The negligence is charged to have been the failure of defendant to warn him of the danger of poisoning resulting from contact with the solution.

The findings of the jury, and there is evidence to support same, sustain the allegations that about the 27th of May, 1912, plaintiff was working on the line of defendant's road, in charge of a section gang, unloading and placing ties which had recently been treated with a creosote solution for preservation; that these ties were wet with the solution, and that it got on the hands and face of plaintiff, causing injury; that he had theretofore handled creosote ties and timbers on which the solution had dried, but had no experience in handling wet timbers, and did not know that creosote, when wet, would produce injury to his hands and face by coming in contact therewith; that he did not know the properties of the solution, or that it was poisonous; that defendant did know, or by reasonable diligence could have known, that the solution used by it, when coming in contact with the skin before it had dried, would cause injury thereto, and would poison the flesh; that the defendant did not warn plaintiff of the dangers of poisoning or injury which were incident to handling wet creosote solution with his hands, and permitting it to come in contact with his face and hands; that plaintiff was permanently injured as a proximate result of the poisoned condition produced by the solution; and that this injury was the proximate result of the negligence of the defendant.

The honorable Court of Civil Appeals finds that the facts are sufficient to support the conclusion of the jury, except, as it says:

"Assuming that creosote is a poison, and so recognized by the chemists or the medical world, but, as noted by them, all known effects of such poison when applied to the skin is a burning sensation compared to a sunburn, and never known to the profession or treated by standard authorities as producing constitutional disorders, or systemic poisoning, whether an employer would be charged with negligence in

failing to warn of such danger, when it did not know and could not know that a constitutional disorder would result from such a use—in other words, was such an injury incidental to the wrong done, and was it such as may have reasonably been supposed to have entered into the contemplation of the appellant? \* \* \* The fact that appellee's condition is a serious one, it will not necessarily follow that the hands burned by creosote produced it, though the opinion of the two doctors may have warranted the jury in finding as a fact it did. The evidence is lacking to show that such injury could or would reasonably have been anticipated, and that appellant did know or should have known thereof, and therefore, in order to prevent it, have warned appellee of such danger."

For a more extended statement of the pleadings, evidence, and discussion of the Court of Civil Appeals, see 173 S. W. 250.

#### Opinion.

Plaintiff in error complains of the holding by the Court of Civil Appeals that defendant in error was not liable for the constitutional and permanent injuries sustained by him, because it did not, and could not, anticipate that the failure to warn him would naturally result in the permanent injuries to the extent shown by the evidence. He also complains of the holding that the evidence was not sufficient to show that defendant in error had notice, or by the exercise of ordinary care would have known, of the extent of the injury produced by the poisoning of the creosote ties.

As we interpret the opinion of the Court of Civil Appeals, it holds that there is no evidence supporting the contention that the negligence of the defendant, as found by the jury, was the proximate cause of the permanent injuries. We further understand the holding to be that, though the permanent injuries may be the natural consequence of the negligence, responsibility therefor cannot be chargeable against the defendant, without showing anticipation of such permanent injuries to exist at the time of the negligence.

We are thus brought face to face with the question of whether or not, when permanent injuries result from negligence, the wrongdoer is chargeable with all the consequences that naturally and proximately flow from such negligence; also with the question as to whether or not there is any evidence to support the finding of the jury that the permanent injuries to plaintiff were the natural and proximate result of defendant's negligence.

[1, 2] We believe that the correct rule for determining negligence is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant, the duty is incumbent to exercise such care demanded by the relationship as

will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. We are not willing to subscribe to the rule that requires the master to anticipate all ensuing results which flow from the breach, before duty arises to exercise care to prevent the consequences. Anticipation is applied in the determination of negligence *vel non*. If no injury may be anticipated, no duty is breached by a failure to exercise care; but, if anticipated injury may result, then the duty arises. Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation. Negligence may exist abstractly; but, to render it actionable, it must be concretely incorporated into some injury.

In the Kieff Case, 94 Tex. 334, 60 S. W. 543, Chief Justice Gaines says:

"The negligence which results in actionable wrong is the failure to discharge a duty owed to the party injured. It is a duty incumbent upon all men to use ordinary care so to act as not to injure others. The duty arises when there is reason to anticipate danger."

See *Ebersole v. Sapp*, 208 S. W. 156.

In *Heiting v. Railway Co.*, 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912D, 451, it is held that:

"It is not, however, essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen. If the consequences follow in unbroken sequence from the wrong to the injury without any intervening efficient cause, it is sufficient that if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from the negligence."

[3] Anticipation of injury as applied in the determination of negligence and proximate cause should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to effect in ascertaining whether cause is so related to effect as to bring negligence in union with the result rendering liable a negligent actor for certain consequences. Whether a result can be chargeable to a certain dominant cause is determined by ascertaining whether the result flows naturally, without lapse, from the cause, although there may be intervening ancillary or subsidiary causes which contribute to the injury. Proximate cause incorporates in it such anticipation of results as ought, from the circumstances, to have been foreseen as the natural consequences flowing from a negligent act.

In *Railway Co. v. Leslie*, 57 Tex. 83, our Supreme Court says:

"The liability of the defendant is measured by the fact that the injury received follows

proximately from the culpable act complained of, and if erysipelas sprang from the injury, the dangers from that disease, as well as the sufferings produced by it, constitute a portion of the injury itself, and it is none the less so because, under similar accidents producing fractures, that disease would not ordinarily ensue."

Judge Brown, in *Railway Co. v. Powers*, 101 Tex. 161, 105 S. W. 491, says:

"The railroad company, being liable for the infliction of the injury on the party, would be liable for all the consequences flowing from that injury, including such as a jury might say from the evidence presented to them would with reasonable probability occur at some future time."

In *Railway Co. v. Smith*, 148 S. W. 820, it is said that:

"It is not necessary that the precise injury should have been anticipated, but that some injury might follow from the act of negligence. The injuries, proximate and natural consequences of an act of negligence, are always deemed to be foreseen."

Where some injury has resulted, chargeable to negligence, later followed by serious consequences, to ascertain whether these consequences proximately flow from the negligence, it is always necessary to look back down the line for causation; and if the consequences naturally flow from the negligence, without the intervention of any independent cause, such consequences ought to have been foreseen, and are chargeable to the original negligent act. Or, on the other hand, if the negligent act produces an injury, and looking down the line to the future it can be ascertained that other and more serious injuries will naturally flow from the negligence, without any intervening independent cause, these consequences are probable, and ought to be foreseen, and are chargeable to the negligence. We cite further on this question the *Bellar Case*, 51 Tex. Civ. App. 154, 112 S. W. 323; the *Peterson Case*, 28 Tex. Civ. App. 194, 67 S. W. 183; *Billman v. Railway Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Cowan v. Telegraph Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; *Sorenson v. Railway Co.* (C. C.) 36 Fed. 166; *Buck, Administrator, v. Railway Co.*, 96 Ind. 346, 49 Am. Rep. 168.

The defendant in error relies upon the *Bigham Case*, 90 Tex. 228, 38 S. W. 162, and the *Welch Case*, 100 Tex. 118, 94 S. W. 833, as sustaining its proposition that plaintiff can have no recovery for the permanent injuries sustained, because they could not be foreseen.

It is believed that, when properly understood, the *Bigham Case* is in consonance with the position which we take. In that case it is held, as we interpret it, that the railway company was not liable for the injuries to *Bigham*, because, in the negligent act, anticipation of injury to a person did

not exist. The court in that case held that *Bigham's* injury was chargeable to an independent cause, which independent cause was not in anticipation of defendant. As we understand the application of the rule there announced, it is that where an independent cause follows a negligent act, in order to connect the subsequent result with the original cause, such independent cause producing the result should have been anticipated by the original wrongdoer. We do not understand that case as militating against the doctrine that where anticipation of injury arises, or is chargeable to an actor, he will be responsible for all of the consequences which naturally and proximately flow from that wrong. The court in that case, in our opinion, uses "anticipation" or "foresee," not as applying to the injury sustained by *Bigham* as such, but as applicable to the intervening independent cause producing that injury; that is, since the cause producing the injury is an independent one, the result of that cause is independent of the original negligence, and does not arise proximately from it. The same may be said with reference to the holding in the *Welch Case*. The view here given with reference to the *Bigham Case* is believed to be sustained by reference to the *Kellogg Case*, 94 U. S. 469, 24 L. Ed. 259, cited in support of the holding in the *Bigham Case*, wherein it is said:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

[4] Whether or not the permanent injuries suffered by plaintiff were the natural and proximate result of defendant's original negligence was a question of fact to be determined by the jury. *Powers Case*, *supra*; *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Seckinger v. Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; *Wieting v. Town of Millston*, 77 Wis. 523, 46 N. W. 879; *Railway v. Kemp*, 61 Md. 619, 48 Am. Rep. 134.

[5] In the instant case, defendant's negligence caused anticipated injury. The testimony is conflicting as to whether the permanent injuries flowed from that negligence naturally and were the proximate consequences of same. There is evidence in the record requiring the submission of this question to the jury, and upon which it was

authorized to find that issue for the plaintiff.

In view of the disposition to be recommended in this case, we have considered the other assignments of error presented by appellant, and find therein no error calling for a reversal of the judgment of the lower court. The paragraph of the court's main charge to which exception is leveled is cured by the special charges given at the request of the defendant.

We are therefore of the opinion that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

McBRIDE et al. v. LOOMIS. (No. 58-2777.)

(Commission of Appeals of Texas, Section A. May 28, 1919.)

1. TRESPASS TO TRY TITLE §41(2)—COMMON GRANTOR—PRIMA FACIE PROOF.

Evidence that defendant in trespass to try title claims under a common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims, and this necessarily involves the assumption that he had acquired the title of all previous owners.

2. TRESPASS TO TRY TITLE §38(2)—BURDEN OF PROOF—COMMON SOURCE OF TITLE.

In trespass to try title, where there was evidence that both parties claimed under M., who was not shown to have had any title, as a common source of title, defendant also showing the acquisition by him of the interest of the heirs of a person admitted to have previously had title, burden is on defendant to show that M. had not acquired an equitable title from the former owner.

3. TRESPASS TO TRY TITLE §18—DEFENSES—OUTSTANDING TITLE.

While it is not necessary for a defendant in trespass to try title to connect himself with an outstanding title, it is necessary that he establish the validity of such outstanding title.

4. EXECUTORS AND ADMINISTRATORS §145—ADMINISTRATOR'S DEED—EFFECT.

An administrator's deed to land is but an assertion that the title remained in decedent to the date of his death, and is not evidence of such ownership.

5. DEEDS §82—VALIDITY—RECORDATION.

The recordation of a deed is not essential to its validity.

6. TRIAL §53—EVIDENCE.

In trespass to try title, where defendant, relying on a deed, introduced the same in evidence, the recitals in the deed were available to the plaintiff in the establishment of his title, although defendant was also relying on a quitclaim deed from heirs of a former owner.

7. TRESPASS TO TRY TITLE §11—COMMON SOURCE.

Where one held land for years under a void administrator's deed, a quitclaim deed from the heirs of one who had owned the property at a time prior to the death of the administrator's deceased did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed.

8. TRESPASS TO TRY TITLE §10—SUFFICIENCY OF EQUITABLE TITLE TO SUPPORT ACTION.

The assertion of an equitable title arising out of a contract to convey and payment of the purchase money is sufficient to support an action in trespass to try title.

9. LIMITATION OF ACTIONS §39(12)—TRESPASS TO TRY TITLE.

The statute of limitations of four years, or any other period, unaccompanied by adverse possession, is without application in trespass to try title.

Appeal from Court of Civil Appeals of Eighth Supreme Judicial District.

Action by Thomas McBride and others against A. M. Loomis. From a judgment of the Appellate Court (170 S. W. 825), affirming a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

F. G. Morris and Sam B. Gillette, both of El Paso, for appellants.

T. A. Falvey, Peyton F. Edwards, and Loomis & Knollenberg, all of El Paso, for appellee.

SONFIELD, P. J. Action in trespass to try title by Thomas McBride and others, plaintiffs, against A. M. Loomis, defendant, involving a tract of land in El Paso county. Defendant pleaded not guilty, the statutes of limitation of three, four, five, and ten years, and improvements in good faith. The court peremptorily instructed the jury to return a verdict for the defendant. On appeal the Court of Civil Appeals affirmed the judgment of the district court, Associate Justice Higgins dissenting in part. 170 S. W. 825.

Plaintiffs sue as the heirs of Anna Louisa McBride, who was the sole heir of John E. McBride, the evidence establishing, and the Court of Civil Appeals finding, that they were such heirs.

Plaintiffs, for the sole purpose of proving common source of title, introduced in evidence a deed from Charles Kerber, temporary administrator of the estate of John E.

McBride, to John C. Ford, dated April 1, 1881, conveying the land in controversy, and a regular chain of transfers from and under said Ford to defendant Loomis, the deed to defendant being dated the 5th day of January, 1906, and, after establishing heirship, plaintiffs rested.

The material documentary evidence adduced by defendant was as follows: Stipulation between the parties that Charles H. Howard had title to the land in controversy during and prior to the year 1874, and as to what title, if any, he had after that date should be left open to be shown by the evidence; minutes of the county court of El Paso county in the estate of John E. McBride, deceased, showing report of sale of the land in controversy by Charles Kerber, temporary administrator of the estate to John C. Ford, the sale being reported as made on February 9, 1881, and order of confirmation of said sale dated February 15, 1881; minutes of the same court in the estate of Charles H. Howard, deceased, showing the appointment and qualification of Charles Kerber as administrator of the estate at the March term, 1878; and an order in the said estate reading as follows:

"Came on to be heard the complaint of John C. Ford against Charles Kerber, administrator of the estate of Charles H. Howard, for title to certain land hereinafter described, and it appearing to the court that said Charles Kerber had accepted services of said complaint and waived time and issuance of citation, and it appearing further that said Charles H. Howard during his lifetime at various times in the years 1875, 1876, and 1877 agreed in writing to make deeds to John E. McBride for certain parcels of land in the Quadrilla, in El Paso county, Tex., and that said John E. McBride fully paid for said lands according to the terms of said agreement, and that said Charles H. Howard departed this life December 18, 1877, without making deeds to said lands to the said McBride in accordance with such agreement, and it further appearing to the court that said John C. Ford has become the owner of all of the said John E. McBride interest in and to said land by purchase under a sale of the same made by Charles Kerber, temporary administrator of the estate of John E. McBride, deceased, on February 9, 1881, in obedience to an order of this court made and entered on January 24, 1881, it is therefore the order, judgment, and decree of this court that Charles Kerber, administrator of the estate of Charles H. Howard, convey by good and sufficient deeds to said John C. Ford all the right, title, and interest of said Charles H. Howard's estate in and to the following described tracts of land, to wit: Two certain tracts of land lying and being in El Paso county, Tex. [here follows description of said two tracts by metes and bounds, which includes the land in controversy]."

Defendant introduced a deed from Charles Kerber, administrator of the estate of Charles H. Howard, to John C. Ford, dated April 1, 1881, the deed incorporating the

212 S.W.—31

above and foregoing order of the court; the chain of transfers and deeds from John C. Ford to defendant, being the same deeds introduced by plaintiffs to show common source, all the deeds so offered by the plaintiff for this purpose being introduced by the defendant, except the deed from Charles Kerber, temporary administrator of the estate of John E. McBride, to John C. Ford; quitclaim deed from the heirs of Charles H. Howard through their attorney in fact, George W. Graves, to defendant dated September 20, 1907, conveying to defendant all the interest of the heirs of Charles H. Howard in and to the land in controversy. It was agreed between the parties that these executing the power of attorney under which the deed was executed were the sole heirs of Charles H. Howard. The record discloses that both John E. McBride and Charles H. Howard died in the year 1877.

It is conceded by all the parties, and recognized by the Court of Civil Appeals, that the sale by Kerber as temporary administrator of the estate of John E. McBride was void. This being true, it cannot be questioned that, viewed alone in the light of plaintiffs' evidence, it was established that John E. McBride was common source of title, and plaintiffs entitled to recover the land. The Court of Civil Appeals so holds.

The court further held, however, that the parties having stipulated that Howard owned the land in 1874, the defendant, by introducing the deed from Kerber, administrator of Howard, to Ford, showed the common source back of McBride in Howard. And it thereupon devolved upon plaintiffs to establish that the common source had acquired the Howard title, and this, under the majority opinion, without reference to the recitals in the probate order and in the deed from the administrator of the Howard estate to Ford.

[1-3] The stipulation of the parties to the effect that Howard had the title in the year 1874 did not rebut plaintiffs' prima facie case. Evidence that the defendant claims title under the common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims, and this necessarily involves the assumption that he had acquired the title of all previous owners. *Rice v. Railway Co.*, 87 Tex. 90, 28 S. W. 1047, 47 Am. St. Rep. 72. As said in *Ogden & Johnson v. Bosse*, 88 Tex. 346, 24 S. W. 802:

"Proof that defendant claims under the same vendor with plaintiff prima facie establishes plaintiff's title, back of the common source, and this may be done by showing a claim through a void deed."

It is not sufficient, therefore, to show that Howard at one time held the title. De-

defendant must go further and show at least prima facie that the common source was without title; the presumption obtaining that the title agreed to have been in Howard in 1874 had passed to the common source. Nor does the quitclaim deed from the heirs of Howard to defendant, viewed in connection with such stipulation, rebut plaintiffs' prima facie case. While it is not necessary that defendant connect himself with an outstanding title, it is necessary that he establish the validity of such outstanding title. The mere production of the quitclaim deed showing an assertion or claim of title on the part of the heirs, together with the stipulation, in view of the rule of common source, falls far short of establishing any title in the Howard heirs. *Rice v. Railway Co.*, supra.

[4, 5] The deed from the administrator of the Howard estate, without reference to its recitals, considered as though it were but an ordinary administrator's deed, stands on a parity with the quitclaim deed from the Howard heirs and has no greater probative force. Claiming under McBride as common source, the onus was on defendant to prove affirmatively, not merely that Howard had the title in the year 1874, but also that such previous title did not pass into McBride, the common source, prior to the death of Howard and McBride; both having died in the year 1877. This burden was not discharged by the introduction of the administrator's deed, which is but an assertion that the title remained in Howard to the date of his death. It is an assertion with no facts to sustain it other than that the records of El Paso county shows no conveyance out of Howard. There is no evidence that Howard asserted ownership of the land between the year 1874, when it was stipulated he had the title, and the date of his death in 1877. It does not appear that the land was inventoried as a part of the Howard estate, nor is there evidence of any act of ownership of any character on the part of Howard between the years 1874 and 1877. The recitation of a deed is not essential to its validity, and the fact that a conveyance out of Howard does not appear upon the records of the county in which the land was situated does not, in connection with the other evidence adduced by defendant herein discussed, rebut the presumption arising out of the rule of common source that McBride, the common source, acquired the Howard title.

[6] The deed from the administrator of the Howard estate to Ford was introduced without qualification or limitation by defendant. Were the recitals of this deed evidence as against the defendant of the facts recited?

Defendant concedes that, if the recitals were in a deed constituting a link in a chain of title under which he claimed, such re-

citals would be admissible against him. He seeks to avoid their effect by repudiating any claim thereunder and by denial that he was either a party or privy thereto, basing his title upon the quitclaim from the Howard heirs, a separate and distinct title.

Defendant claimed title under the administrator's deed. He testified that he went into possession of and occupied the land in January, 1906, shortly after the execution of the deed to him under the Ford chain of title, and prior to the execution of the deed from the Howard heirs. His claim of title and possession were referable exclusively to his deed under the Ford title of which the deed in question formed a link. Defendant's predecessors in title were in possession and asserting the Howard title through McBride many years prior to the execution of the quitclaim from the Howard heirs. Nor is there evidence of a repudiation of claim under this deed to the date of and during the trial of this cause. In so far as the record discloses, the deed constituted one of the links in a chain of title upon which he relied. There was no admission in the trial court by defendant that the administrator's deed was invalid; such admission being made only on appeal. The deed being thus relied on by defendant, and it, together with its recitals, having been introduced by him, the recitals were available to plaintiffs in the establishment of their title.

[7] Further, if the deed from the administrator of the Howard estate to Ford had any effect on common source, it, considered as a whole, in connection with its recitals, but established Howard as a prior or more remote common source; both plaintiffs and defendant claiming under Howard through McBride. The inception of defendant's title was under Howard as common source. The quitclaim deed from the Howard heirs to defendant did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed by him under Howard, the common source.

In our view of the case, the introduction by defendant 'without qualification or limitation of the deed from the administrator' of the Howard estate to Ford, together with the probate order upon which same was based, established that McBride acquired from Howard the equitable title to the land, and there passed to the heirs of Howard the bare legal title, which is subordinate to the title which thus vested in McBride. The deeds to Ford from the administrators of the estates of McBride and Howard being void and conveying no title, it follows that, if McBride was the common source, defendant showed no title whatever; if Howard be regarded as common source, plaintiffs claiming through McBride, holding the equitable title, and defendant under the quit-

claim deed from the Howard heirs, holding only the bare legal title, plaintiffs have established the superior title to the land.

Defendant asserts that at best plaintiffs show but an equity entitling them to specific performance, and the cause of action was barred by the four or ten year statutes of limitation.

[8, 9] This action is for the recovery of land. Plaintiffs asserted an equitable title arising out of a contract to convey and payment of the purchase money. The title is sufficient to support the action. The statute of limitation of four years or of any other period, unaccompanied by adverse possession, is without application. *Stafford v. Stafford*, 96 Tex. 106, 70 S. W. 75.

Defendant pleaded limitation by adverse possession and improvements in good faith. These questions were not passed upon by the trial court or the Court of Civil Appeals, and we have not considered same.

We are of opinion that the judgment of the Court of Civil Appeals affirming the judgment of the district court should be reversed, and the cause remanded, with instruction to the court to find the record title in plaintiffs and determine the questions of limitation by adverse possession and improvements in good faith.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

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BROWN v. FLEMING, Sheriff, et al.  
(No. 57-2772.)

CAVITT et al. v. BEALL HARDWARE & IMPLEMENT CO. (No. 102-3227.)

(Commission of Appeals of Texas, Section B.  
May 28, 1919.)

**1. APPEAL AND ERROR ¶781(2) — MOOT QUESTIONS—INJUNCTION SUIT.**

The relief prayed for by plaintiff in an injunction suit against the sale of property by the sheriff cannot be granted, where the sale has taken place subsequently to the rendition of judgment in the trial court, so that the appeal therefrom involves only moot questions, except in so far as the determination of costs is concerned.

**2. APPEAL AND ERROR ¶781(2) — DETERMINATION OF MOOT QUESTIONS — LIABILITY FOR COSTS.**

The Supreme Court will not decide moot questions in an injunction suit merely to ascertain who is liable for costs.

**3. EXECUTORS AND ADMINISTRATORS ¶272-1  
PAYMENT OF DEBTS OF DECEDENT—PRIMARY FUND.**

Personal property is the primary fund for the payment of the debts of a decedent.

**4. COURTS ¶200½—PROBATE JURISDICTION  
—DETERMINATION OF TITLE TO PERSONALTY.**

The county court is without jurisdiction to determine title to the personal property of a decedent on the application of his son to have the administrator deliver the property to him.

**5. EXECUTORS AND ADMINISTRATORS ¶72—  
CONCLUSIVENESS OF INVENTORY—STATUTE.**

Neither the original nor the corrected inventory of the personalty of a decedent is conclusive for or against the administrator under Rev. St. 1911, arts. 3337-3343.

**6. EXECUTORS AND ADMINISTRATORS ¶325—  
SALE OF LAND TO PAY DEBTS—LOSS OF PERSONAL ESTATE.**

If the personal property belonging to the estate of a decedent had been lost by the wrongful act of a former administrator, decedent's land could nevertheless be sold to pay his debts before exhaustion by the creditors of their remedy against the administrator.

**7. EXECUTORS AND ADMINISTRATORS ¶325—  
PAYMENT OF DEBTS—RESORT TO REALTY—  
EXHAUSTION OF PERSONALTY.**

Under Rev. St. 1911, art. 3235, though the personal estate of a decedent is the primary fund for the payment of his debts, the personalty need not be exhausted in the sense that before the administrator can resort to the realty all of the personal assets should be reduced to possession by him.

**8. EXECUTORS AND ADMINISTRATORS ¶358  
(1)—SALE OF LAND TO PAY DEBTS—POWER  
OF DISTRICT COURT.**

The district court, on appeal in proceedings for the sale of land of a decedent to pay debts, has no greater power than the county court had originally.

**9. EXECUTORS AND ADMINISTRATORS ¶334—  
SALE OF REALTY FOR DEBT—DEVASTAVIT BY  
ADMINISTRATOR.**

Where the question whether an administrator had committed a devastavit could be determined only by suit, a creditor of the estate was not required to postpone collection of its debt and sale of realty of the estate to satisfy the debt, until litigation over the question of devastavit should be determined by the court of last resort.

**10. EXECUTORS AND ADMINISTRATORS ¶349  
(2)—SALE OF PROPERTY FOR DEBTS—JUDG-  
MENT OF COUNTY COURT—COLLATERAL AT-  
TACK.**

The county court, so far as the administration of estates of decedents is concerned, is a court of general jurisdiction, having jurisdiction to sell property for the payment of debts, and its judgment, in such regard, where jurisdiction over an estate is once acquired, is as binding as that of any other court, and not subject to collateral attack.

**11. EXECUTORS AND ADMINISTRATORS 672—  
INVENTORY — JURISDICTION OF COUNTY  
COURT.**

The inventory of a decedent's estate required by Rev. St. 1911, arts. 3330-3349, to be filed by the administrator, should be at least prima facie a guide for the county court in respect of what property belongs to the estate and comes under the jurisdiction of the court.

**12. EXECUTORS AND ADMINISTRATORS 670—  
ELIMINATION OF PROPERTY FROM INVEN-  
TORY.**

Where an administrator, while inventorying the personality of the estate, apprised the county court that it was claimed by decedent's son, who applied to have the property turned over to him, an application which the court granted, and the administrator turned the property over, the effect of the order was to eliminate the property from the inventory, at least until some action was taken in a court of competent jurisdiction to recover it.

**13. EXECUTORS AND ADMINISTRATORS 672—  
APPLICATION FOR SALE OF REALTY TO PAY  
DEBTS—ATTACKING CORRECTNESS OF INVEN-  
TORY.**

Where, when district court entered order denying administrator's application for sale of realty to pay debts, certain personality was not in his hands as administrator, and was not even a part of his inventory, having been turned over to decedent's son, who claimed it, pursuant to the order of the county court, and no objection was made to the inventory, which did not refer to the personality, decedent's creditor cannot, by way of contest of the application for sale by the administrator, inject the issue of the correctness of the inventory.

**Error to Court of Civil Appeals of Third  
Supreme Judicial District.**

Suit by J. E. Brown, administrator, against S. S. Fleming, Sheriff, and others, and contest by the Beall Hardware & Implement Company of application to sell land to pay debts by J. F. Cavitt, administrator, and others. From judgment for plaintiff Brown in the first suit, defendants appealed to the Court of Civil Appeals, which reversed and remanded (178 S. W. 964), and plaintiff brings error. From judgment for the administrator and others in the second case, contestant appealed to the Court of Civil Appeals, which remanded the case, with instructions (204 S. W. 798), and the administrator and others bring error. In both cases, judgments of the Court of Civil Appeals and the trial court reversed, and both causes remanded, with instructions to dismiss the first suit, etc.

In Case No. 57-2772.

D. A. Kelley, of Waco, for plaintiff in error.

L. Aubrey, of Waco, and Neyland & Neyland, of Greenville, for defendants in error.

In Case No. 102-3227.

D. A. Kelley and Allan D. Sanford, both of Waco, for plaintiff in error.

Neyland & Neyland, of Greenville, Marshall Surratt, of Waco, for defendants in error.

MCLENDON, J. The two causes mentioned in the caption were consolidated by order of the Supreme Court, after writs of error had been granted.

The cause first mentioned was a suit brought by J. E. Brown, in his capacity as administrator of the estate of C. R. Phillips, deceased, in the district court of McLennan county, against the sheriff of that county and Beall Hardware & Implement Company, to restrain a sale of eight acres of land belonging to the estate of C. R. Phillips, deceased, under an order of sale upon a judgment of the district court of Hunt county, in which judgment the hardware company had recovered a personal judgment against three of the heirs of C. R. Phillips, with foreclosure of an attachment lien levied upon the interest of said heirs upon the eight acres of land in question. The district court denied the injunction, and the Court of Civil Appeals of the Third District (178 S. W. 964) reversed the judgment of the district court, and remanded the cause to that court, with the instruction to dismiss the case on the ground that the district court of Hunt county alone had jurisdiction of the cause.

[1] It appears from the record in the second case above mentioned, that subsequently to the rendition of judgment in the trial court in the injunction suit, the sale of the property under the Hunt county judgment has been proceeded with, and the land bought in by the hardware company. Under this state of the record, the relief prayed for by the plaintiff in the injunction suit cannot now be granted, as the sale has already taken place, and the correctness of the decisions of the trial court and the Court of Civil Appeals involve only moot questions, except in so far as the determination of costs is concerned.

[2] Since the cases of *Gordon v. State*, 47 Tex. 208, and *Laccoste v. Duffy*, 49 Tex. 767, 30 Am. Rep. 122, to use the language of Chief Justice Roberts in the latter case:

"It has not been customary in this court to decide questions of importance after their decision has become useless, merely to ascertain who is liable for the cost. The amount of business of practical importance would forbid that the time of the court should be so occupied."

We believe the decision in that case has been uniformly followed. *McWhorter v. Northcutt*, 94 Tex. 86, 58 S. W. 720; *Riggins v. Richards*, 97 Tex. 526, 80 S. W. 524.

In the case of *Bolton v. City of San Antonio*, 4 Tex. Civ. App. 174, 23 S. W. 279, the



same principle was applied to injunction cases. There the city of San Antonio and its officers were sought to be enjoined from issuing certain negotiable coupon bonds of the city, on the ground of their alleged invalidity. The trial court sustained a demurrer to the petition, and dismissed the suit. On motion for rehearing in the Court of Civil Appeals, it was admitted that, since the action of the trial court, the bonds had been issued. Following the case of *Laccoste v. Duffy*, above, the Court of Civil Appeals declined to consider the merits, and dismissed the case, the court saying:

"Whether rightfully or wrongfully done, it is useless for us now to undertake to determine, for appellees cannot now be restrained from doing that which they have already done. Should this cause be remanded to the trial court, upon its being made to appear that the bonds have been issued and sold, it could only dismiss it, or render judgment for appellees."

For other cases upon this question, see *Michie's Texas Digest*, vol. 1, pp. 365, 367, and *Corpus Juris*, vol. 4, pp. 1135, 1136, and note 28.

We, therefore, conclude that there is now no controversy, so far as the injunction suit is concerned, that can be determined by the Supreme Court.

The second case mentioned in the caption arose in the county court of McLennan county upon a contest filed by the hardware company to an application of the administrator to sell the land in question for the purpose of paying debts of the deceased. The Court of Civil Appeals remanded the case to the district court, with instructions to try the issue as to the present availability of certain personal property as assets in the hands of the administrator, before resorting to a sale of the real estate. 204 S. W. 798.

The record in this case shows the following facts:

C. R. Phillips died intestate on September 10, 1913; and on November 3d following J. E. Brown was appointed administrator of his estate by the county court of McLennan county. On November 23, 1913, the administrator filed an inventory, appraisalment, and list of claims of the estate, listing, among other property, certain personal property, consisting of live stock and farming implements, appraised at \$1,895 in the aggregate. As to this personal property, the inventory states:

"In making this inventory it is proper to state to the court that Earnest Phillips, a son of the deceased, claims to own the following items of personal property in the foregoing inventory."

This is followed by a list of the personal property referred to. This inventory was approved. On December 10, 1913, Earnest Phillips filed in the county court a petition

seeking to have the administrator deliver this property to him, he claiming to be the owner thereof. Upon hearing of this petition, the court on January 17, 1914, adjudged the property to belong to Earnest Phillips, subject, however, to a mortgage in favor of the First National Bank of McGregor, and ordered it turned over by the administrator to Earnest Phillips. There was no appeal from this order. On April 3, 1914, the administrator Brown filed an application to sell the land in question, which appeared from the orders of the court and the several reports of the administrator to be the only property of the estate not converted into cash. It was also shown that the cash on hand was not sufficient to pay the debts of the estate. This application was contested by the hardware company as owner of the interest in the land of three of the heirs under the foreclosure above referred to. The pleadings upon this contest are rather voluminous, and we deem it unnecessary to notice them, further than to state that it was contended by the hardware company that the order finding that the personal property above referred to belonged to Earnest Phillips, and requiring the administrator to turn it over to him, was void; that this property still constituted an asset of the estate, and that the administrator should be required to make good the appraised value thereof, the result of which would be that there would be no necessity to sell the real estate. As we construe the pleadings of both parties, it was conceded that the administrator had complied with the order of the court, and that the personal property had been turned over to Earnest Phillips under said order, and was no longer in the custody of the administrator.

On February 14, 1916, upon hearing of the application to sell the real estate, the court held that the contest of the hardware company showed no sufficient grounds for setting aside the previous orders of the court had in the administration, sustained a general demurrer to the contest, granted the application of the administrator, and ordered the property sold. The hardware company appealed from this order to the district court, but before the matter was tried in that court the administrator Brown died, and J. F. Cavitt was appointed administrator de bonis non. Cavitt qualified and filed an inventory, appraisalment, and list of claims showing that the only property which came into his hands as administrator was cash amounting to \$79.14, of which \$54.14 was balance in the hands of Brown at the time of his death. This inventory contains the following:

"All of the balance of the property originally belonging to the estate has been disposed of pursuant to the orders of this court in due course of administration by J. E. Brown, so far as the knowledge of the affiant extends."

No objection appears to have been made to this inventory.

The district court, upon hearing of the application for the sale of the real estate, held that the exceptions of the administrator, which were joined in by the First National Bank of McGregor, one of the chief creditors of the estate, were not well taken, and denied the application for sale of the real estate, and certified his ruling to the county court. From this judgment the administrator Cavitt and the bank appealed.

The Court of Civil Appeals of the Third District reversed the judgment of the district court, and remanded the cause, with instructions to try the issue as to the present availability of the personal property as assets in the hands of the administrator Cavitt, and to enter judgment for or against said administrator, according as such facts should be found in his favor or against him.

The following conclusions reached by the Court of Civil Appeals, in our opinion, are correct:

[3] 1. That personal property is the primary fund for the payment of the debts of a decedent. *Minter v. Burnett*, 90 Tex. 248, 38 S. W. 350.

[4] 2. That the county court was without jurisdiction to determine the title to the personal property upon the application of Earnest Phillips. *Wise v. O'Malley*, 60 Tex. 588; *Timmins v. Bonner*, 58 Tex. 555; *Edwards v. Mounts*, 61 Tex. 398.

[5] 3. That neither the original nor the corrected inventory is conclusive for or against the administrator. *Rev. St. arts. 3337-3348*; *White v. Shepherd*, 16 Tex. 168.

[6] We have reached the conclusion that the Court of Civil Appeals was further correct in holding that, if the personal property belonging to the estate had been lost by the wrongful acts of the former administrator, this would present no reason why the land should not be sold to pay the debts of the estate, although, as we shall show hereafter, the decisions of some states are to the effect that before resorting to the real estate, the creditors would be required to exhaust their remedy against the administrator and his bondsmen, where it was shown that the administrator had wasted the assets of the estate that had come into his hands.

We are of opinion, however, that the Court of Civil Appeals committed error in remanding the cause to the district court to determine whether or not the personal property was an available asset in the hands of the administrator, Cavitt. We think the record clearly shows that the administrator, Brown, prior to his death, had parted with the possession of the personal property by delivering it to Earnest Phillips under the order of the county court; and it certainly clearly appears from the inventory of the administrator Cavitt that this personal property never came into his hands. The question,

therefore, presents itself whether creditors can be delayed in the payment of their debts to await the determination of the ownership of the personal property, which has been turned over to Earnest Phillips, or the determination of the liability of the sureties of the former administrator for wrongfully delivering said property to Earnest Phillips. As we understand the opinion of the Court of Civil Appeals, the sale of the real estate cannot be delayed on these accounts.

[7] Article 3235, Revised Statutes, provides that all property of the deceased, except that which is exempt, shall be subject to the payment of his debts, and gives to the administrator, when appointed, the right to its possession. As we have seen above, the personal estate is the primary fund for the payment of debts. This latter rule, however, is not the creature of a specific statute, but is the application of the common law. We have reached the conclusion that, under the weight of authority, and upon principle, this rule should not be interpreted to mean that the personal property belonging to the estate should be exhausted in the sense that, before resort can be had to the real estate, all of the personal assets should be reduced to possession by the administrator. We have not found that this specific question has been decided in this state.

A case which has been often cited by text-writers is that of *Clanmorris v. Bingham*, 1 *Molloy's Reports*, 514, where the question here under consideration was directly involved. In that case the Lord Chancellor of Ireland says:

"There is a deficiency of personal assets, when there is a deficiency of immediately available personal assets to pay a creditor.

"A creditor is not to wait for payment attendant on the ultimate solvency of securities belonging to the testator—I have known that acted on 20 times. No matter how soon assets may be likely to come in, or rents to amount to the sum necessary, a creditor shall not be obliged to wait beyond the shortest reasonable time. It is sometimes said that the care which the court takes of the interest of minors will influence it in this point. But delaying creditors is no part of the court's duty for the protection of minors' interest. That is a protection the court has no right to give.

"The court has two points to consider: First, that there is a debt presently due; and, second, not to sell real estate, while there is personalty available. But this does not mean that if debts are due to the estate, the creditor is not to be satisfied until they are collected. The court will order immediate application of such funds as are immediately available, and then resort to the real estate, without waiting for the coming in of other personal effects, which may become capable of being applied within a shorter or longer period of time."

The same rule was announced in *Bridge v. Swain*, 3 *Redf. Sur. (N. Y.)* 487. In that case certain claims were listed as assets of the estate, and it was contended that these as-

sets should be exhausted before a sale of the real estate. The court, however, says:

"It seems to me that the assets had in view by the statute are not what shall be deemed assets for the purpose of the inventory, but the amount of personal property converted into money or immediately available which has actually come into the hands of the executor or administrator. The doubtful and worthless debts are to be inventoried, and are assets to be accounted for, but if not collected at the time of making such an application as this, clearly the possibility of their ultimate recovery cannot be alleged in bar of this proceeding. The courts have repeatedly held, as shown by the authorities cited by the counsel for the petitioner, that debts due to the testator, only recoverable by suits, are not assets to be charged as in his hands until the actual receipt of them by him. \* \* \* I do not think I can compel creditors to await the doubtful issue of that litigation. They have rights to be protected, as well as heirs at law and devisees."

In the case of *Blickensderffer v. Hanna*, decided by the Supreme Court of Missouri (1910) 281 Mo. 93, 132 S. W. 678, the executor had delivered to a representative of one of the heirs certain funds of the estate which were sufficient to discharge the debts. The court says:

"The question is: Were the creditors compelled to sue Hanna, or the bondsmen of Jones, the executor, who had died, for this \$800 before they could resort to the real estate? We think not. We think the principle was properly ruled in *Van Bibber v. Julian*, 81 Mo. loc. cit. 625, wherein on a like contention this court said it would not require a creditor 'to resort to a suit on the bond of the administrator, with the trouble, expense, and delay incident thereto,' before proceeding for an order for the sale of real estate. While the statute wisely requires the personal estate to be applied first to the payment of debts of the deceased, a creditor should not be relegated to an action on the bond for waste or a misappropriation for which he is in no way responsible."

In the case of the *Estate of Adam Fritz*, 83 N. J. Eq. 610, 91 Atl. 1017, it was held that a creditor could not be delayed in an application to sell real property belonging to the estate of the decedent merely by showing that an estate of which the creditor was executrix was a debtor of the former estate in an amount sufficient to satisfy her claim.

In *American & English Ency. of Law* (2d Ed.) vol. 11, pp. 1066, 1067, it is said:

"The preponderance of authority, however, seems to establish the rule that creditors are not to be defeated by the neglect or mistake of the personal representatives of the deceased debtor, but that a sale of the real estate, in case the personalty, originally sufficient for the payment of debts, has become insufficient by reason of a devastavit, will not be ordered until the creditors have exhausted their remedy against the executor or administrator and the sureties on his bond."

[8, 9] In support of the text cases are cited from Alabama, Massachusetts, North Carolina, and an early case in Missouri. As we have seen above, however, a recent case in Missouri seems to hold the contrary doctrine, at least as applied to devastavit of a former executor. It is very often the case that special statutes may furnish a reason for decisions in matters of administration, especially with regard to sales of property by administrators, and we doubt the correctness of this rule as applied to administration in this state. The administrator is not the agent of the creditors, but is an officer of the court. All the property of the deceased, not exempt, is by statute made subject to the payment of debts, and we see no ample reason why a creditor should be delayed to await the action on the bond of an administrator who has committed a devastavit any more than to require a creditor to await the determination of any other claim in favor of the estate. When an administrator dies, or is removed, the court has no further power over him, and his liability and that of his bondsmen to the estate is upon the same footing as that of any other creditor. However, the decision of this question, in our judgment, is not essential to a correct disposition of the present case. Here the question as to whether the former administrator has committed a devastavit, and whether there will be any liability upon the bond, is by no means certain, and this is a question which could not be determined by the county court under the authorities above cited. It could only be determined by suit. The district court on appeal in the present proceeding has no greater power than the county court would have originally. We do not believe that the creditors should be required to postpone the collection of their debts until this doubtful litigation should be determined by the court of last resort. The defendant in error stands in no better position in this regard than the original heirs, whose title to the land it has acquired through attachment proceedings. In resorting to this land as payment for its debt, the hardware company was charged with knowledge that the property was subject to the payment of debts of the deceased in the hands of the administrator, and that it was acquiring only such interest as its debtors had in the property subject to administration.

[10, 11] There is another ground on which we think the order of the county court for the sale of the real estate should be upheld. It is true that the inventory is not conclusive upon the heirs or administrator, upon the question of title; but the county court, in so far as the administration of the estates of decedents is concerned, is a court of general jurisdiction. It has jurisdiction to sell property for the payment of debts, and its judgment in this regard, where jurisdiction

over an estate is once acquired, is as binding as that of any other court, and not subject to collateral attack. In the proper administration of an estate it is necessary that there should be some guide by which the court can determine, for the purposes of administration, what property belongs to the estate and should come under its jurisdiction. We think that the inventory provided for by statute should, at least *prima facie*, be a guide for the court in this regard. Chapter 10, title 52, Revised Statutes, requires the administrator to file an inventory, appraisement, and list of claims. This is to be sworn to by the administrator and the appraisers, and must be approved by the court. The correctness of the inventory may be questioned by any one interested in the estate, and the court may of its own motion disapprove the inventory and appraisement, and appoint new appraisers. There is ample provision made for the correction of the inventory and for the requirement of additional inventories. The only limitation upon the power of the court in this regard appears to be found in article 3347, which provides that there shall only be one reappraisement. Article 3385 provides that subsequent administrators shall make and return to the court an inventory, appraisement, and list of claims of the estate within one month after being qualified, in like manner as required of original executors and administrators; and they shall also in like manner return additional inventories and list of claims.

In *Clifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105, it was held that no land can be sold until after it has been inventoried and appraised; and it was further held that proceedings to compel an additional inventory cannot be properly included in a proceeding to compel an exhibit of the true condition of the estate, but that this should be done by requiring an additional inventory.

In *Aitgeld v. Bank*, 98 Tex. 265, 83 S. W. 11, Judge Brown in rendering the opinion said:

"The court can regularly order the sale of property only after it has been inventoried and appraised as required by law; hence the administrator could not get an order of the court to sell property which could not be placed upon the inventory of the estate."

In *Johnson v. Morris*, 45 Tex. 463, it was held that the inventory is *prima facie* evidence of the property of the estate coming into the hands of the administrator.

[12, 13] While the particular question we are considering was not involved in the decisions above quoted from, we think the expressions of the court in these cases lead to the conclusion that the inventory is the guide to the court in determining the property of the estate in administration which should be resorted to for the payment of debts. All

parties interested in the estate have the right to be heard upon the correctness of the inventory; and, while the inventory is not conclusive upon any of the parties as to title to the property, there should be some means whereby the probate court in the administration of the estate can determine upon an application for sale what property belongs to the estate and is subject to sale, without having to require the administrator to resort to some other court to determine that question. The correctness of the conclusion of the county judge upon matters arising in connection with the inventory is reviewable in like manner as other orders made in the administration of the estate. In the present case, the administrator Brown, while inventoring the personal property, apprised the court that it was claimed by Earnest Phillips. The latter at once made application to the court to have the property turned over to him; the court granted the application, and the administrator complied with it. No question was raised as to the correctness of this conclusion. We think the effect of this order was to eliminate this property from the inventory, at least until some action was taken in a court of competent jurisdiction to recover it, or its value, for the estate. But, aside from this, it is clear that at the time the district court entered its order denying the application for sale, the property was not only not in the hands of the administrator, but was not a part of the inventory. The administrator *de bonis non* had, in compliance with the statute, filed an inventory, appraisement, and list of claims showing all the property coming into his hands. No reference is made in said inventory to this personal property. No objection was made to this inventory. We are clearly of opinion that under this state of facts the hardware company cannot, by way of contest of an application for sale by the administrator, inject the issue of the correctness of the inventory. The statutes above referred to afford ample relief to those interested in the estate, but this relief must be exercised, in our opinion, by a direct attack upon the inventory, and not in a contest of an application to sell real estate.

We conclude that the judgments of the Court of Civil Appeals and district court should be reversed, and both causes remanded to the district court, with instructions to dismiss the injunction suit and to make such order on the application to sell the land as should have been made by the county court, sitting in probate, treating the contest as averring no sufficient grounds for refusing the application.

PHILLIPS, O. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

HEARD et al. v. VINEYARD et al.  
(No. 49-2721.)(Commission of Appeals of Texas, Section A.  
June 4, 1919.)1. EXECUTORS AND ADMINISTRATORS §349(2)  
—SALE UNDER ORDER OF COURT—COLLATERAL ATTACK.

In a collateral proceeding, no presumption can be indulged against the validity of an order of the probate court directing a sale of lands.

2. EXECUTORS AND ADMINISTRATORS §349(2)  
—ORDER FOR SALE OF LAND TO PAY DEBTS—ESTABLISHMENT OF CLAIMS—VALIDITY OF ORDER—COLLATERAL ATTACK.

An order of sale of land to pay a claim, made by the county court on an application under Rev. St. 1911, arts. 3489, 3490, is not void and subject to collateral attack because the claim was not then established, where the record shows subsequent establishment, classification, and payment, and therefore its existence.

## 3. HUSBAND AND WIFE §276(6)—COMMUNITY PROPERTY—ADMINISTRATION—SALE—EXISTENCE OF COMMUNITY DEBTS.

Where a wife died prior to her husband and their estates were combined, persons claiming under sale by the executor or administrator of the husband's estate, in order to establish title to the interest of the heirs of wife, must prove the existence of the community debts at date of the sale.

## 4. HUSBAND AND WIFE §276(6) — COMBINED ESTATES—SALE OF LANDS—TITLE OF PURCHASER.

Where plaintiffs proved the existence of community debts established by suit, classified in the estate of deceased husband and one-half thereof paid out of the consolidated estates of the deceased husband and deceased wife, the lands being sold prior to the opening of administration on the wife's estate and not inventoried as a part thereof, and the proceeds of the sale formed assets of the consolidated estates and entered into the amount distributed to the heirs of both, *held*, in view of the record, that the sale by the executor of the estate of deceased husband was valid, vesting purchaser with title of both of the estates.

## 5. JUDGMENT §712—JUDGMENT IN FORMER SUIT BETWEEN SOME OF THE PARTIES—EVIDENCE OF TITLE.

In an action of trespass to try title, a judgment in another proceeding vesting in one of plaintiffs an undivided interest in the land in controversy, was admissible as a link in plaintiff's chain of title, notwithstanding defendants were not parties to that suit, and such judgment, in connection with the decree of partition and sale by an executor, *held* to establish title in plaintiffs.

## 6. JUDGMENT §486(1)—BINDING UPON PARTIES—COLLATERAL ATTACK BY STRANGER—PREJUDICE TO CLAIMS.

While a judgment binds only the parties thereto and those in privity with them, it is not subject to collateral attack by a stranger unless

he shows that he has rights, claims, or interests which would be prejudiced or injuriously affected by its enforcement.

## 7. JUDGMENT §501—VALIDITY—ERRONEOUS VIEW OF LAW—COLLATERAL ATTACK.

A judgment based upon an erroneous view of the law is not for that reason void and subject to collateral attack.

## 8. ESTOPPEL §97—THEORY OF FORMER SUIT BETWEEN ONE OF THE PARTIES AND ANOTHER—ESTOPPEL TO ASSERT CONTRARY THEORY.

In trespass to try title, defendants not being parties to a suit of plaintiffs against purchaser, plaintiffs are in no manner estopped to assert another and contrary theory, from that upon which they recovered from the purchaser, upon which to base a recovery against defendants.

## 9. TRESPASS TO TRY TITLE §6(2)—NECESSITY OF TITLE IN PLAINTIFFS—TRANSFER PENDENTE LITE—JUDGMENT INURING TO GRANTEE'S BENEFIT.

While the plaintiffs in trespass to try title must have title at the commencement of the suit, and one without title cannot sue for the use of another, in such action, a conveyance pendente lite by plaintiff does not affect the progress or determination of the suit, and grantee is bound by the judgment rendered, and a judgment for plaintiff inures to grantee's benefit, and such conveyance does not constitute an outstanding title.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Trespass to try title by Lillian Vineyard and others against Fannie W. Heard and others in which Anna W. Vineyard and another intervened and adopted plaintiffs' pleadings. Judgment that plaintiffs and interveners recover interest in lands to which parties had filed disclaimers, but that they take nothing as against any of the other parties, and plaintiffs appealed to the Court of Civil Appeals, where the judgment of the district court was reversed in part, and judgment rendered for plaintiffs (167 S. W. 22), and defendants bring error. Judgment of the Court of Civil Appeals affirmed.

Wilson, Dabney & King, of Houston, and E. A. Stevens, of Rockport, for plaintiffs in error.

Fiset, McClendon & Shelley, of Austin, for defendants in error.

SONFIELD, P. J. Action in trespass to try title instituted by Lillian Vineyard, J. M. Thornton, Mattie B. Iglehart and husband, and K. J. Edwards, plaintiffs, against Fannie W. Heard and husband, W. J. J. Heard, and Rob Johnson, defendants, for the recovery of an undivided 11/24 interest in certain tracts of land out of what is known as the "Lamar Peninsula." By amendment, J. M. Brundrett was made a party defendant, and judgment of partition prayed for as

against him. Heard and Johnson pleaded not guilty, and answered that subsequent to the institution of the suit Lillian Vineyard had executed a deed to her mother, Anna W. Vineyard, and her brother, S. H. Vineyard, conveying to them all her interest in the lands sued for. Anna W. Vineyard and S. H. Vineyard intervened in the suit, adopting as their own the pleadings filed by the plaintiffs. Brundrett answered by general denial and a special plea that the land in question, so far as it included lands set apart to James B. Wells, Sr., in a partition of the Lamar tract, was acquired by him with the community funds of himself and deceased wife, Hannah Brundrett, and that her children had an interest therein, and he prayed that they be made parties. The children intervened, setting up their interest in the land. James B. Wells filed a plea, claiming an interest through purchase by himself and W. J. Heard from Mrs. Hynes, a daughter of Hannah Brundrett.

The cause was tried by the court without a jury, and judgment rendered that plaintiffs and interveners, Anna W. and S. H. Vineyard, recover an 11/24 interest in the lands to which parties had filed disclaimers, and that they take nothing as against any of the other parties. The cause was held on the docket for the purpose of partition. On appeal, the judgment of the district court was reversed, and judgment rendered for the plaintiffs. 167 S. W. 22.

The facts are set out fully in the statement of the case by the Court of Civil Appeals. The following are the pertinent facts taken in the main from such statement:

The title to parts of and interests in the Lamar Peninsula has been before our courts in the following cases: Vineyard v. O'Connor, 90 Tex. 59, 86 S. W. 424; O'Connor v. Vineyard, 91 Tex. 488, 44 S. W. 485; Vineyard v. Brundrett, 17 Tex. Civ. App. 147, 42 S. W. 232. The last-cited case involves the very lands and interests therein in controversy in this suit. Each of the other cases has an indirect bearing upon this controversy.

J. W. Byrne, the grandfather of Anna W. Vineyard, at one time owned the whole of the peninsula. At the time of his death, he owned 27/144; Allen and Hale, 27/144; Samuel Colt or his heirs, 78/144; and E. Williams, 12/144. The interest of the Colt heirs passed 1/2 or 39/144 to Allen and Hale, the other 1/2 or 39/144 to Anna W. Vineyard, the conveyance to Anna W. Vineyard being made in settlement of a claim held by the Byrne estate against the Colt estate. The Allen interest passed to James B. Wells, Sr. J. W. Byrne died prior to May, 1862, testate. His will was probated, and Ann Willie Byrne (afterwards Vineyard) and her mother, Ann E. Byrne, were made the residuary legatees and devisees. J. W. Vineyard, the administrator

de bonis non of the Byrne estate, was regularly authorized to sell all the interest of the estate in the Lamar peninsula. He thereafter made the sale to S. C. Vineyard, which was duly reported and confirmed on May 28, 1872. S. C. Vineyard conveyed the interest thus acquired to Samuel Harvey Vineyard by deed dated the 8th day of October, 1873, and filed for record the same day. Samuel Harvey Vineyard subsequently conveyed same to Lillian Vineyard, one of the plaintiffs herein, and under whom the other plaintiffs and interveners claim.

In 1876, a suit entitled Hale v. Vineyard was filed in Aransas county for the purpose of the partition of the Lamar peninsula. S. C. and Anna W. Vineyard were parties to this suit, but Samuel Harvey Vineyard was not a party, though the deed from S. C. Vineyard to him was duly of record at that time, and plaintiffs claim that he was not represented in said partition suit. Certain tracts were set apart in severalty to S. C. Vineyard and to the other parties to said partition suit, including James B. Wells, Sr. Soon after the decree of partition, S. C. Vineyard executed powers of attorney to his wife, who in virtue thereof and for herself conveyed to John C. Herring the greater part of the lands set apart to S. C. Vineyard in the partition. The lands so conveyed by mesne conveyances vested in D. M. O'Connor, and were the subject of litigation in the suits of Vineyard v. O'Connor, supra, and O'Connor v. Vineyard, supra.

James B. Wells, Sr., died, testate, in February, 1880, some 15 months after the death of his wife, Lydia A. Wells, his will being duly probated. Thereafter the executor (not independent) of his estate made application for an order of sale of the lands set apart to Wells in the partition proceedings. The order was entered and in virtue thereof the executor sold and conveyed the same to John M. Brundrett. The sale was duly reported and was confirmed on November 21, 1881.

After the purchase of the lands by Brundrett, a suit was instituted against him by S. C. and Anna W. Vineyard as guardians of Lillian Vineyard to recover an undivided 11/24 of said lands. Lillian Vineyard claimed title under the hereinabove mentioned deed to her from Samuel Harvey Vineyard. The 11/24 sought to be recovered was composed of two separate and distinct fractional interests, one of 27/144 owned by J. W. Byrne at his death, and one of 39/144, being the interest conveyed by the heirs of Samuel Colt to Anna W. Vineyard.

In the district court, judgment was rendered in favor of defendant Brundrett. On appeal, the Court of Civil Appeals reversed the judgment of the district court and rendered judgment in favor of Lillian Vineyard, vesting in her title to an 11/24 undivided interest in said lands. Vineyard v. Brundrett, 17 Tex. Civ. App. 147, 42 S. W. 232.

Writ of error was refused by the Supreme Court. In that case the court held that the deed from the heirs of Samuel Colt to Anna W. Vineyard, conveying the 39/144 interest, was in trust for the estate of J. W. Byrne, and this interest, together with the 27/144 interest owned by Byrne at the date of his death, passed by the deed from the administrator of the estate of Byrne to S. C. Vineyard. Recovery by plaintiff was based on the theory that the partition decree was not binding upon Samuel Harvey Vineyard, the grantor of Lillian Vineyard, he not being a party to said suit or represented therein.

Pending the suit of Vineyard v. Brundrett, a separate and distinct suit, involving other tracts in the peninsula, was instituted by Lillian Vineyard, through her guardians against O'Connor. In that case the construction of the deed to the 39/144 undivided interest in the peninsula from the heirs of Samuel Colt to Anna W. Vineyard was before the court. The Court of Civil Appeals held, as in Vineyard v. Brundrett, that the title vested in Anna W. Vineyard in trust for the estate of J. W. Byrne. On writ of error the Supreme Court held that through the deed from the heirs of Samuel Colt the title to a 39/144 undivided interest vested in Anna W. Vineyard as her separate property, and passed by her deed for herself and as attorney in fact for S. C. Vineyard to John C. Herring. In that case the recovery of the Vineyards was limited to 27/144.

Defendant Fannie W. Heard, wife of W. J. J. Heard, asserts title as heir of James B. Wells, Sr., and his wife, Lydia A. Wells, having, apparently, acquired the title of the other heirs. Defendant Johnson was the tenant of the Heards. J. M. Brundrett was made a party defendant for the purpose of partition. Interveners, James B. Wells and the children of J. M. Brundrett, assert title to the community interest of Hannah Brundrett, deceased wife of J. M. Brundrett. The Court of Civil Appeals having found that through the purchase by Brundrett from the executor of James B. Wells, Sr., the lands became his separate property, and, no error being assigned to such finding, the claim of the interveners need not be further considered.

The facts are somewhat complicated, and many interesting as well as intricate questions are raised, all such questions having been passed upon by the Court of Civil Appeals in its opinion. The case, as viewed by us, presents for determination three questions: The validity of the sale by the executor of the estate of James B. Wells, Sr., to J. M. Brundrett; the effect of the judgment in the case of Vineyard v. Brundrett; and the effect of the conveyance by plaintiff, Lillian Vineyard, pending the suit, of all her interest in the lands to Anna W. and S. H. Vineyard.

[1] Defendants assert the invalidity of the sale of the lands by the executor of the estate of J. B. Wells, Sr., to J. M. Brundrett on the ground that the record affirmatively discloses that no necessity existed for such sale, or that such sale, if valid, did not pass title to the one-half interest of the heirs of Lydia A. Wells, wife of J. B. Wells, Sr., who predeceased him some 15 months. They assert that there were no community debts; that all of the allowed claims were the separate debts of Wells, created subsequent to the death of his wife; and, as stated in their application for writ of error herein and the argument accompanying same, "the recorded application for sale on which the order was made showed that money on hand of the estate exceeded all allowances and debts of the estate."

In the exhibit of the estate, accompanying and made a part of the application of sale, the item of \$2,141.65 appears under the head of "amount realized from sale of personal property." This amount was sufficient to pay all of the allowed claims, allowances to the children, and estimated expenses. The record discloses that the personal property was sold some months prior to the application for sale of the lands. Under the head of "property of the estate remaining on hand," various properties were listed, but the money derived from the sale of personal property was not included. From the mere statement in the exhibit of the amount realized from the sale of personal property, it cannot be held that it appears affirmatively that the amount so realized was on hand at the date of the application for sale of the lands. It might under some circumstances be so inferred or presumed, but in this collateral proceeding no presumption can be indulged against the validity of the order of the probate court directing a sale of the lands. *Tom v. Sayers*, 64 Tex. 339; *Guliford v. Love*, 49 Tex. 715.

[2] If, however, it were established that the money from the sale of personal property was on hand at the date of the application for sale, such amount would not have been sufficient to pay the claims against the estate. In addition to the allowed claims, allowances, and estimated expenses, the exhibit disclosed claims rejected and then in suit amounting to \$2,842. One of these claims was that of "T. M. White, note and interest about \$2,500." Subsequent to the sale of the lands herein, this claim was reduced to judgment, the judgment being in the sum of \$2,185.11. The note was executed by James B. Wells, Jr., as principal and James B. Wells, Sr., and Jno. M. Brundrett as sureties in 1877. The record discloses an order classifying said judgment as a claim of the fourth class and ordering same paid in due course of administration.

After the application for the order of sale and prior to the execution of the deed by

the executor of Wells' estate to Brundrett, administration was opened on the estate of Lydia A. Wells, wife of James B. Wells, Sr. The executor of the estate of James B. Wells, Sr., was appointed administrator of her estate. Thereafter the two estates were consolidated. One-half of the judgment recovered by White was paid out of the consolidated estate and charged in the final distribution to J. B. Wells, Jr., primarily liable on the note. The indebtedness was unquestionably a community debt.

At the date of the application and order of sale, the claim had not been established. It was, however, a claim against the estate then due and payable. The court had full and complete jurisdiction, and was empowered to order a sale of lands belonging to the estate for the payment of debts of the estate. Under article 3489, an application for order of sale may be made by an administrator when deemed necessary by him "to pay the local charges and claims against the estate." Under article 3490, it is provided that the application shall be accompanied by an exhibit "showing fully \* \* \* the charges and claims against said estate that have been approved or established by suit, or that have been rejected and may yet be established, and the amount due, or claimed to be due, on each." The statute does not limit the exercise of the power to claims established against the estate, when the application is made by an administrator or executor. The test is not the establishment, but the existence of the claim. It may not be good policy or expedient to order the sale of lands of an estate for claims not then established, but it is not inhibited by statute. A claim may be rejected even though liability is recognized, in order that the exact amount may be ascertained, or, as is probable with reference to the White claim, to fix the liability of other parties jointly or otherwise liable with the estate. The claim of T. M. White was a note. James B. Wells, Sr., and J. M. Brundrett were sureties; J. B. Wells, Jr., being primarily liable. The suit upon the rejected claim fixed the liability of all the parties to the note. It is made incumbent upon the court to pass upon the application for sale and to determine whether a necessity exists therefor. The fact that the administrator or executor applying for the sale must include in the exhibit, not only claims allowed, but also claims that have been rejected and may yet be established, contemplates that such rejected claims should be considered by the court in determining whether a necessity exists for such sale.

County courts in all matters relating to administration of estates of deceased persons are courts of general jurisdiction as to all matters within the scope of the power conferred upon them. The order of sale is a judgment of such court, and to be subject

to collateral attack must be shown to be void. It cannot be held that an order of sale to meet a claim, not then allowed or established, the record showing its subsequent establishment, classification, and payment, and therefore its existence, is void and open to collateral attack.

[3, 4] Lydia A. Wells having died prior to the death of her husband, persons claiming under a sale by the executor or administrator of the husband's estate, in order to establish title to the interest of the heirs of Lydia A. Wells, must prove the existence of community debts at the date of the sale. *Moody v. Butler*, 63 Tex. 210; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367. In the first cited case, the wife predeceased the husband, and the court said:

"Joel Clapp did not die till the 1st of January, 1854, and we have no evidence that at the time of his death any debt existed against the community estate. In order to give the deed of Joel Clapp's executor the effect of passing title to the entire land, as well that portion of which he died possessed as of the share inherited by the children from their mother, it was necessary that there should have been community debts of Joel Clapp and wife existing at the time the land was sold by Clapp's executor. *Sanger v. Moody*, 60 Tex. 96. The burden of proving this fact was upon the parties attempting to give this effect to the deed. There was no proof offered by them on this subject, but they relied upon the simple fact that debts had been presented and allowed against the estate, claiming that the presumption was that they were community debts, as the wife had died not quite two years before the death of her husband."

Herein, plaintiffs prove the existence of a community debt, established by the suit, classified in the estate of Wells and one-half thereof paid out of the consolidated estates of Wells and wife. The lands were sold to Brundrett prior to the opening of administration on the estate of Lydia A. Wells, and were not inventoried as a part of her estate. The proceeds of the sale of the lands to Brundrett formed part of the assets of the consolidated estates, and as such entered into the amounts distributed to the heirs of Wells and wife. We hold that, in view of the record, the sale by the executor of the estate of James B. Wells, Sr., to Brundrett was valid, vesting in him the title of the estate of James B. Wells, Sr., and that of the heirs of Lydia A. Wells.

So, holding, it becomes unnecessary to pass upon the question of the estoppel of the Wells' heirs by their acceptance of the benefits of the sale and their participation in the final distribution of the joint estates, without offer of restitution of the amounts so received; the Court of Civil Appeals holding such heirs thereby estopped to deny the validity of the sale.

[5] Subsequent to the purchase of the



lands by Brundrett, in the case of Vineyard v. Brundrett, referred to in the statement of the case, judgment was rendered divesting title to an undivided 11/24 of the lands out of the defendant Brundrett, and vesting same in the plaintiff therein, Lillian Vineyard, being the same interest involved in this suit.

Defendants admit the conclusive effect of the judgment on the parties thereto, and that as between plaintiffs and Brundrett and those in privity with him the title is in plaintiffs. Defendants say, however, that they, not holding or claiming under Brundrett and not having been parties to that suit, have the right to show the exact issues litigated in Vineyard v. Brundrett and the theory upon which the plaintiff recovered therein. They assert that, Lillian Vineyard having recovered judgment against Brundrett on the ground that she had the title and Brundrett had no title, such judgment is not admissible as against them to establish that Brundrett did have title, and that his title through such judgment vested in Lillian Vineyard.

The recovery in Vineyard v. Brundrett was predicated upon the proposition that the partition decree in Hale v. Vineyard was not binding upon Samuel Harvey Vineyard, he not being a party thereto or represented therein; that the 39/144 interest conveyed by the heirs of Samuel Colt to Anna W. Vineyard was conveyed to her in trust for the estate of Byrne, and it, together with the 27/144 owned by Byrne at the time of his death, making a total of 11/24, vested in S. C. Vineyard by deed from the administrator of the Byrne estate, and by mesne conveyance title thereto vested in Lillian Vineyard. Defendants insist that in Vineyard v. Brundrett the proposition that the partition decree was not binding upon Samuel Harvey Vineyard was not contested, and herein they seek to establish that said decree was binding upon him, he being represented in the suit by S. C. Vineyard, who reserved the right of control as guardian in his deed conveying the lands to Samuel Harvey Vineyard. They further insist that the holding in Vineyard v. Brundrett, as to the 39/144 interest conveyed by the heirs of Samuel Colt to Anna W. Vineyard was subsequently repudiated by the Supreme Court in the case of O'Connor v. Vineyard, supra, a separate and distinct suit between different parties involving an interest in other lands, but necessitating a construction of the same deed.

Conceding the contention of defendants that the decree in partition was binding upon Samuel Harvey Vineyard, and that the 39/144 interest, as held in O'Connor v. Vineyard, contra to the holding in Vineyard v. Brundrett, vested in Anna W. Vineyard as her separate property, it follows that the interest of James B. Wells, Sr., in the Lamar tract was, through said partition decree, seg-

regated and set apart to him free and clear of any rightful claim therein on the part of Samuel Harvey Vineyard. In other words, it establishes a good and valid title in James B. Wells, Sr., to the several tracts so set apart to him. The tracts set apart to Wells were, under the order of the court, sold by the executor of the estate of James B. Wells, Sr., to Brundrett. This sale was in all things valid, and resulted in divesting the estate of James B. Wells, Sr., and the heirs of Lydia A. Wells of all right, title, and interest in and to the lands. The judgment in Vineyard v. Brundrett divested title out of Brundrett, and vested same in Lillian Vineyard, one of the plaintiffs herein, and under whom the other plaintiffs claim.

Plaintiffs in this cause introduced in evidence the partition proceedings, including the decree, which proceedings defendants contend were in all things valid and binding; the proceedings in the administration of the estate of James B. Wells, Sr., including the order of sale, the report of sale to Brundrett, its confirmation, and the deed from the executor of the estate of James B. Wells, Sr., to John M. Brundrett. Having shown title in Brundrett, the defendant in Lillian Vineyard v. Brundrett, the judgment therein in favor of Lillian Vineyard vesting in her an undivided 11/24 interest in said lands was admissible in evidence as a link in plaintiffs' chain of title, notwithstanding defendants were not parties to that suit. This judgment in connection with the decree of partition and the sale by the executor of the estate of James B. Wells, Sr., to Brundrett established title in plaintiffs. *McCament v. Roberts*, 66 Tex. 260, 1 S. W. 260; *Ellis v. Le Bow*, 96 Tex. 532, 74 S. W. 528; *Grassmeyer v. Beeson*, 18 Tex. 753, 70 Am. Dec. 309.

[6] Admittedly, as between plaintiffs and Brundrett, the judgment is conclusive, and the title is in the plaintiffs. While it is true that a judgment is binding only upon the parties thereto and those in privity with them, it is also true that a judgment is not subject to collateral attack by a stranger unless he shows that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment. 23 Cyc. 1068; *Grassmeyer v. Beeson*, 18 Tex. 753, 70 Am. Dec. 309.

[7] The title of the Wells' estate and of the heirs of James B. Wells, Sr., and Lydia A. Wells having vested in Brundrett, defendants, as such heirs, are in no wise affected or prejudiced by the judgment against Brundrett. They are in no better position to attack or impeach the judgment than if their ancestor had never held an interest in or title to said land. The judgment being concededly conclusive upon Brundrett and those in privity with him, and as between them and plaintiffs the title being in the plaintiffs,

a successful impeachment of the judgment would not establish an outstanding title in Brundrett, and certainly would not re-vest the title in defendants as heirs of James B. Wells, Sr., and his wife; their title having passed to Brundrett. The evidence adduced established, under defendants' own theory, a good and valid title in James B. Wells, Sr., which title we hold vested in Brundrett. The judgment in *Vineyard v. Brundrett* clearly and definitely vested the title to an 11/24 interest in the lands so acquired by Brundrett in Lillian Vineyard. Conceding to defendants the right to go back of the judgment, establishing that it was based upon an erroneous view of the law, this would avail them nothing, for a judgment based upon an erroneous view of the law is not for that reason void and subject to collateral attack.

[8] Defendants stress the proposition that the Vineyards, having recovered in the Brundrett Case upon the theory that James B. Wells, Sr., and consequently Brundrett, never had title to the 11/24 interest therein, and herein involved, are estopped to urge in this case the entirely contrary theory that Wells did have a title which passed to Brundrett through the executor's sale and vested in Lillian Vineyard through her judgment against Brundrett. Such an estoppel can only be urged in favor of parties to that suit. Defendants not being parties to the suit of *Vineyard v. Brundrett*, plaintiffs are in no manner estopped to assert another and contrary theory upon which to base a recovery, which in this case is but an adoption of defendants' theory.

[9] During the pendency of this suit, Lillian Vineyard, the plaintiff, conveyed all her interest in the lands to Anna W. Vineyard and S. H. Vineyard. Defendants pleaded this by way of defense as an outstanding title. Thereupon the grantees in said deed intervened, adopted the pleadings of plaintiff, Lillian Vineyard, and prayed "that any interest they may have in said lands be embraced in the recovery of plaintiff, Lillian Vineyard, in trust for said interveners."

It is well settled that a plaintiff in trespass to try title must have title at the commencement of the suit, and that one without title cannot sue for the use of another in such action. To this effect are the cases cited and relied upon by defendant. *Hooper v. Hall*, 30 Tex. 154; *Birmingham v. Griffin*, 42 Tex. 147.

It is equally well settled that a conveyance pendente lite does not affect the progress or determination of the suit. The grantee is bound by the judgment rendered, and if a proper, is not a necessary, party to the suit. The effect of a judgment in favor of plaintiff who has thus conveyed pending the suit is as prayed for in the intervention of grantees

herein. It inures to the benefit of the grantee, and such conveyance does not constitute an outstanding title. *Lee v. Salinas*, 15 Tex. 496; *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631.

We are of opinion that the judgment of the Court of Civil Appeals should be affirmed.

HAWKINS and GREENWOOD, JJ. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

PHILLIPS, C. J., not sitting.

#### BONATZ v. STATE. (No. 5351.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. EMBEZZLEMENT $\S$ 10—LARCENY $\S$ 15(3)—THEFT DISTINGUISHED FROM EMBEZZLEMENT.

Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft and not embezzlement.

#### 2. CRIMINAL LAW $\S$ 1091(4)—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

Where the evidence set out in a bill of exceptions showed that a confession admitted on behalf of the state was a mere oral statement, not reduced to writing and signed in the presence of two disinterested witnesses, the bill was not defective in failing to suggest or raise the question that the statement was not written.

#### 3. ARREST $\S$ 68—CRIMINAL LAW $\S$ 519(3)—CONFESSIONS.

As it is not necessary to make an arrest in formal words, and the fact of arrest can be shown by surrounding facts and circumstances, a defendant, who objected to the admission of a purported confession made at a time he was in the presence of two officers who would not have allowed him to escape, must be deemed under arrest.

#### 4. CRIMINAL LAW $\S$ 518(2), 530—WRITTEN CONFESSIONS—WARNING.

An alleged oral statement, made by defendant when he was in the presence of two officers, who later took him into custody, that he was guilty, not having been reduced to writing, and signed in the presence of two disinterested witnesses, held not admissible as a confession, no warning having been given.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

John Bonatz was convicted of theft of property over the value of \$50, and appeals. Reversed and remanded.

W. W. Wander, J. P. Rogers, and J. M. Gibson, all of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of property over the value of \$50 from the possession of L. N. Lyons.

Ownership was alleged in Lyons, depot agent of the San Antonio & Aransas Pass Railroad Company at Houston. Appellant was a clerk, "foreman of the warehouse." His duties were to check goods that came on trains into the warehouse and out when shipped to their destination. A box of goods came in a car. Appellant, in pursuance of his duty, checked the box out of the car into the warehouse. From the warehouse the box of goods was to be transferred to another car going west, to Hertz, the consignee, at Yoakum. It was discovered that the box was not accompanied by a freight bill. It was put in what Lyons called "an over pile." This over pile seems to be stored in the warehouse when not accompanied by a freight bill. The state's theory of the case was that the box was sent by appellant from the over pile or warehouse to Mintz, a merchant in Houston, by a couple of negro truck drivers. The state's theory was that there had been a previous understanding between Mintz and appellant that appellant would send him goods. Mintz received them under such circumstances as to show he believed the goods were fraudulently acquired. He took the goods from the box, put them in a room attached to his business house in which he stored hay, and there covered them with hay. The goods were bolts of gingham. The officers arrested the two negroes, who told them where the goods were. They took the negroes and went to Mintz's and found the goods. Mintz denied having them, but his wife told him to tell the officers about the goods, which he finally did. These officers took the negroes and Mintz to the depot, where appellant was at work. A conversation occurred there between appellant and Herbst, an agent and detective in the employ of the San Antonio & Aransas Pass Railroad Company, in which Herbst claimed that appellant made a confession. Appellant denied taking the goods, and said he made no confession to Mintz with reference to taking the goods. He said that after the negroes carried the goods to Mintz's house there came up some conversation about the negroes bringing him some goods, but that he had nothing to do with taking the goods, nor did he inform Mintz that he would take or send him any goods. He also denied turning the goods over to the negroes at the depot, and in this he is to some extent supported by the witness Williams, also an employé of the railway company working at the depot. Williams' testimony indicates that appellant, about 12 o'clock, went to Mintz's restaurant

for the purpose of getting lunch, which he was in the habit of doing for his midday lunch. Williams says that at the time he saw appellant at the depot, and about the time he left, the box was in the depot, and after defendant left he saw the box on a truck controlled by the negroes. They hauled it away. This is a sufficient statement of the case to review the questions presented.

[1] It is contended by appellant the state's case did not make one of theft, but of embezzlement under the general statute, which provides any agent, clerk, or employé of a corporation or individual who shall fraudulently appropriate the property intrusted to him shall be guilty of embezzlement. The state meets this with the contention that appellant was the employé of Lyons, who had the control and management of the property for the company, and appellant's possession was that of servant or custodian. In other words, that he simply sustained the relation of custodian, and his appropriation of the property would therefore constitute theft. The writer is of opinion that appellant's contention should be sustained. There is no question that he came in possession of the property by lawful means, and only by reason of his employment. That he was specially employed to receive this property under such employment is shown specifically by the state. His appropriation of it would be as such agent or clerk of the company. This created a trust relationship, as his possession was thereby acquired. If there was fraud on his part, it was not in receiving, but in subsequent appropriation. The majority of the court are of opinion that the state's case is one of original theft.

[2-4] There was a bill of exceptions reserved to the admission of what is contended by the state to be a confession. This bill recites that while the evidence for the state was being submitted and part of it had been heard, the state showed by the testimony of the witnesses Lyons, Barnes, Pope, Williams, Mintz, and Herbst that a certain box of dry goods, consigned and shipped over the San Antonio & Aransas Pass Railroad Company, which box of dry goods arrived at the freight depot of said railroad company, at Houston, Harris county, Tex., had been conveyed on a dray from said depot by Barnes and Pope, which box had marked on it E. Hertz, or A. Hertz, Yoakum, Tex., during the month of May, 1918, to the store of Abe Mintz, in Houston, Tex., and Pope and Barnes further testified that the goods were carried to Mintz's store at request of defendant, and, Mintz having testified that the defendant had told him he would send some goods to him, the witness Herbst then testified that he had with him two police officers of Houston, to wit, Goodson and Bryson, and that he and the officers took Mintz with them to the freight depot, where they found the defendant; that Mintz identified the defendant in the presence of

witnesses and the officers; that the witness Herbst called defendant, after he had been so identified, to one side from the officers and Mintz, and the defendant made an oral statement to him. To the introduction of this statement the defendant objected, because it appeared the defendant was in custody and under arrest for the alleged theft of the goods, that the defendant was under duress and legal restraint, and the statement, or confession, was not competent evidence against him, the same not having been voluntarily made after being first duly warned that whatever he might say could be used against him, and not for him, in the prosecution of said cause, and said statement was not reduced to writing and signed in the presence of two disinterested witnesses; that the same was incompetent and inadmissible, which objections were overruled. Witness then testified:

"And I had stepped to one side, and the defendant stepped to one side, and there was no one right at me, and I asked the defendant what he done it for, and he said, 'I will admit it; I am caught. I needed the money, and thought I could get away with it.' When I was talking to the defendant I had stepped to one side, from both officers and Mintz, and there was no one right at me. I had stepped to one side, and he stepped to one side after Mintz told me he knew him. We had no warrant for his arrest, and he was not arrested."

On redirect examination this witness testified that defendant said:

"Now you have me; what are you going to do with me?" and I said, 'Here are the officers; I presume they will take you to the station;' and they did."

The state's contention is that the predicate was not sufficient to sustain the objection; that the grounds of objection, as stated, are not verified as facts, and therefore the bill is insufficient to suggest or raise the question that the statement was not in writing, etc. We cannot agree with this contention. This bill does show on its face, verified by the statement of Herbst, that there was no warning, and that the statement was not reduced to writing. Wherever the stated facts show that there was no written statement, then the grounds of objection are sufficient without a further statement that it was not in writing. All that is required is that the bill show on its face, either by direct statement or by the evidence itself as detailed, that it was not in writing. If the evidence as detailed shows that it was not reduced to

writing, this would be a sufficient predicate for the objection. This statement does exclude the idea that there was any written confession. This witness testifies, "When I was talking to the defendant, I had stepped to one side, from both officers and Mintz, and there was no one right at me," and this occurred after Mintz had identified appellant. Herbst was acting in the capacity of officer for his company, had secured the assistance of two policemen of the city of Houston, had gone to where defendant was with Mintz, and the evidence shows that they had with them the two negroes. The officers were at hand. Appellant testifies that he understood that he was under arrest at the time, and could not go away. Herbst testified that when the defendant asked him, "What are you going to do with me?" he told him the officers would take him to the station, and they did take him to the station. Under the authorities this testimony is to be regarded as statements of defendant under arrest. See *Patrick v. State*, 74 S. W. 550, where the rules in regard to this matter are fairly well discussed. See, also, *Jones v. State*, 44 Tex. Cr. R. 408, 71 S. W. 962, and *Jones v. State*, 52 Tex. Cr. R. 207, 106 S. W. 128. In *Nolan v. State*, 9 Tex. App. 425, a defendant was held to be under arrest where the officers came upon him and would not have permitted him to escape. It was also held in *Buckner v. State*, 52 Tex. Cr. R. 271, 106 S. W. 363, that where a defendant is arrested the law does not require that an officer must be in bodily presence of the defendant in order to keep him under arrest. It is also a well-settled rule that a defendant may be shown to be under arrest by surrounding facts and environments. It is not necessary that the officer should make an arrest in formal words. *Nolan v. State*, 8 Tex. App. 505; *Nolan v. State*, 9 Tex. App. 426; *Wood v. State*, 22 Tex. App. 440, 3 S. W. 336; *Patrick v. State*, 74 S. W. 550; *Zimmer v. State*, 64 Tex. Cr. R. 114, 141 S. W. 781. We are of opinion that appellant was under arrest, that the evidence was not reduced to writing, that he was unwarned, and that it was only an oral or verbal conversation occurring between Herbst and defendant with the officers at hand, or, as Herbst says, "right near him." They were there for the purpose of arresting appellant, and did arrest him. Appellant denied making the statement imputed to him by Herbst.

The judgment is reversed, and the cause remanded.

## DICKERSON v. STATE. (No. 5299.)

(Court of Criminal Appeals of Texas. Feb. 19, 1919. On Motion for Rehearing, May 28, 1919.)

## On Motion for Rehearing.

## 1. CRIMINAL LAW §211(4) — AGGRAVATED ASSAULT UPON A FEMALE—COMPLAINT.

A complaint which charged that defendant, "an adult male, did unlawfully commit aggravated assault in and upon the person of one Mary Loo D., the said — then and there being a female," sufficiently charged that the person assaulted was a female.

## 2. CRIMINAL LAW §211(2) — VERIFICATION OF COMPLAINT.

A complaint reciting: "Sworn to and subscribed by R. A. D. [the affiant], before me, on this 18th day of October, 1918. —, County Attorney of Ellis County, Texas, W. H. F., Assistant County Attorney, Ellis County," etc., sufficiently showed the affidavit was taken by W. H. F., the assistant county attorney.

Davidson, P. J., dissenting in part.

Appeal from Ellis County Court; W. M. Mitchell, Judge.

Jesse Dickerson was convicted of aggravated assault upon a female, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of aggravated assault, his punishment being assessed at a fine of \$25.

The complaint is attacked for want of sufficiency in its averments to show Mary Loo Dickerson was then and there a female. The allegations are as follows:

"Jesse Dickerson, an adult male, did unlawfully commit an aggravated assault in and upon the person of one Mary Loo Dickerson, the said — then and there being a female."

It does not specify that Mary Loo Dickerson was a female. We are of opinion this is not sufficient. 1 Branch's Ann. P. C. 252 et seq.

The complaint also does not show to have been sworn to; at least there is no jurat of the officer attached to the complaint. It is signed by R. A. Davenport. Following the signature is this language:

"Sworn to and subscribed by R. A. Davenport, before me, on this 18th day of October, 1918. —, County Attorney of Ellis County, Texas."

There is marked on the complaint the following:

"W. H. Fears, Assistant County Attorney, Ellis County. Filed October 18, 1918. Rush Hickman, County Clerk, Ellis County, Texas."

The name of the county attorney is left blank, and thereby fails to allege or show that the county attorney of Ellis county took the affidavit or swore the affiant. The assistant county attorney's name appearing upon it does not show that he took the affidavit. Without a complaint sworn to there is no basis for the information. This defect can be taken advantage of on the appeal in this court.

The judgment is reversed, and the cause remanded.

## On Motion for Rehearing.

On a former day of the term the judgment herein was reversed. The state has filed a motion for rehearing, insisting that the reversal was erroneous and should be set aside, and the judgment affirmed.

[1] The charging part of the complaint is as follows:

"One Jesse Dickerson, an adult male, did unlawfully commit an aggravated assault in and upon the person of one Mary Loo Dickerson, the said — then and there being a female."

The contention of appellant was that this did not sufficiently allege that the "then and there being a female" referred to Mary Loo Dickerson. Upon a more careful review of this question the court is of the opinion that the complaint is sufficient to charge that the statement "then and there being a female" referred to Mary Loo Dickerson. The word "said" preceding the blank may be treated as surplusage, but, if not, then the expression "then and there being a female" would refer to the last preceding name mentioned in the complaint. Under that view of it this allegation would be sufficient to show that Mary Loo Dickerson was referred to by the expression "then and there being a female." From that viewpoint of it we are of opinion the reversal should be set aside.

[2] It is also contended that the former opinion was in error in holding that the complaint did not show it was sworn to before W. H. Fears, assistant county attorney. Without repeating the complaint, it is signed by R. A. Davenport, affiant, and recites:

"Sworn to and subscribed by R. A. Davenport, before me, on this 18th day of October, 1918. —, County Attorney of Ellis County, Texas. W. H. Fears, Assistant County Attorney Ellis County. Filed October 18, 1918. Rush Hickman, County Clerk, Ellis County, Texas."

The majority of the court is of the opinion that this sufficiently shows that the affidavit was taken by W. H. Fears, assistant county attorney of Ellis county. The writer is inclined to the opinion that it does not show that W. H. Fears took the affidavit. He re-

gards it as an indorsement on the complaint that W. H. Fears was assistant county attorney, and not that he took the affidavit.

For the above reasons, the judgment of reversal is set aside, and the judgment is affirmed.

### McCONNELL v. STATE. (No. 5187.)

(Court of Criminal Appeals of Texas. May 7, 1919. On Motion for Rehearing, June 11, 1919.)

#### 1. FORGERY $\S$ 19—PASSING FORGED INSTRUMENT—ATTEMPT.

One who presents a false check to a paying teller, and disappears when the teller steps into another part of the bank, without accepting the check or paying money thereon, and calls an officer, is guilty of attempting to pass a forged instrument.

#### 2. FORGERY $\S$ 44(1/2) — PASSING FORGED CHECK—INTRODUCTION OF CHECK IN EVIDENCE.

In prosecution for passing a forged check, state's failure to introduce the alleged forged check in evidence constitutes reversible error.

#### On Motion for Rehearing.

#### 3. CRIMINAL LAW $\S$ 1110(7) — APPEAL — STATEMENT OF FACTS.

When a statement of facts fails to contain any fact essential to a conviction, a recital in the charge that such fact is admitted will not supply the omission.

#### 4. CRIMINAL LAW $\S$ 1112—APPEAL—ATTACKING STATEMENT OF FACTS.

Ex parte affidavits will not be considered as attacking or assailing the correctness of the statement of facts.

Appeal from Criminal District Court, Dallas County; C. A. Pippen, Judge.

Walter McConnell was convicted of passing a forged instrument, and he appeals. Reversed and remanded.

McCutcheon & Church, of Dallas, for appellant.

J. Willis Pierson, Cr. Dist. Atty., of Dallas, and E. B. Hendricks and E. A. Berry, Asst. Attys. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the criminal district court of Dallas county of passing a forged instrument and his punishment fixed at two years' confinement in the penitentiary.

[1] From the record it is reasonably certain that appellant took a false check to the American Exchange National Bank of Dallas and handed it to R. C. Ferris, paying teller. Nothing was said by either party. Mr. Ferris did not accept the check as true and pay

any money thereon, but stepped into another part of the bank and phoned for an officer. When he got back to his own window, appellant was gone. This was the transaction. This evidence makes out a case, if any, of attempting to pass such forged instrument. *Houston v. State*, 59 Tex. Cr. R. 505, 128 S. W. 618.

[2] The alleged forged check was not introduced in evidence. This is reversible error. *Muniz v. State*, 59 Tex. Cr. R. 365, 128 S. W. 1104; *Dovalina v. State*, 14 Tex. App. 312; *Bobbitt v. State*, 59 Tex. Cr. R. 314, 128 S. W. 1104.

The Assistant Attorney General moved to strike out the statement of facts. Same is a literal reproduction of the answers of the various witnesses, and is not in strict accord with the narrative form contemplated by the statute, but we have considered the same.

For the error indicated, the judgment is reversed, and the cause remanded for another trial.

#### On Motion for Rehearing.

This case was reversed because the statement of facts failed to show that the alleged forged check was introduced in evidence, and is before us at this time upon the state's motion for rehearing.

Appellant was convicted of attempting to pass as true a forged check. The judgment entered in the trial court showed appellant to be adjudged guilty of passing such instrument. We did not notice on the original hearing that there was a variance between the verdict and judgment. This, however, is immaterial. Affidavits are now filed in support of the state's motion for rehearing to the effect that the instrument upon which the prosecution was based was in fact introduced in evidence. The statement of facts which appears in the record was agreed to by both parties and approved by the trial court. The uniform holding of this court has been that, after the expiration of the time for filing, neither the trial court nor any one else may add to, amend, or change such statement of facts. *Belcher v. State*, 35 Tex. Cr. R. 169, 32 S. W. 770; *Gherke v. State*, 59 Tex. Cr. R. 508, 128 S. W. 380.

[3] When the statement of facts fails to contain any fact essential to a conviction, a recital in the charge, even that such fact is admitted, will not supply the omission. *Treue v. State*, 44 S. W. 829; *Johnson v. State*, 44 S. W. 834.

[4] Ex parte affidavits will not be considered as attacking or assailing the correctness of the statement of facts. *Lewis v. State*, 73 Tex. Cr. R. 16, 163 S. W. 705; *Boyd v. State*, 72 Tex. Cr. R. 452, 162 S. W. 850; *Bigham v. State*, 36 Tex. Cr. R. 453, 37 S. W. 753; *Arcia v. State*, 28 Tex. App. 200,

12 S. W. 599; Glass v. State, 15 S. W. 403; Gorman v. State, 42 Tex. 221; Pickett v. State, 12 Tex. App. 98. The statement of facts before us fails to show that the alleged forged instrument was offered in evidence. The parties to the record should examine the statement of facts and see that the same is correct before it leaves the trial court.

The motion for rehearing must be overruled.

### GRIFFIN v. STATE. (No. 5388.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

#### 1. FALSE PRETENSES $\S$ 4—PAYMENT OF INSURANCE PREMIUM—ELEMENTS OF OFFENSE.

To sustain a conviction, under Vernon's Ann. Pen. Code 1916, art. 690, providing that any agent or solicitor, who knowingly procures, by fraudulent representations, payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, there must be in existence at the time the fraudulent representations are made a complete binding obligation to pay an insurance premium.

#### 2. FALSE PRETENSES $\S$ 49(1)—EXISTENCE OF OBLIGATION—EVIDENCE.

Facts held not to show the existence of an obligation, the payment of which was induced by fraudulent representations knowingly made by defendant, within Vernon's Ann. Pen. Code 1916, art. 690, providing that any agent or solicitor who knowingly procures by fraudulent representations payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor.

#### 3. FALSE PRETENSES $\S$ 7(5)—PROMISES AS TO FUTURE HAPPENINGS OR EVENTS.

Under Vernon's Ann. Pen. Code 1916, art. 690, providing that any agent or solicitor who knowingly procures by fraudulent representations payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, the representations must not be mere false promises or professions as to future happenings or events, but must relate to something present or past.

Appeal from Hill County Court; R. T. Burns, Judge.

C. H. Griffin was convicted under Vernon's Ann. Pen. Code 1916, art. 690, for knowingly procuring by fraudulent representations payment of an obligation for the payment of a premium of insurance, and he appeals. Reversed and remanded.

J. E. Clarke, R. M. Vaughan, and J. D. Abney, all of Hillsboro, and I. Dreeben, of Dallas, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Hill county, for viola-

tion of an offense set forth by the terms of article 690, Vernon's P. C., and his punishment fixed at a fine of \$300.

Appellant presented a preliminary motion or challenge to the array of the jury based upon various grounds, but one of which was preserved by bill of exceptions, and is before us.

As here presented, it is claimed that said motion should have been sustained because of the fact that one of the jury commissioners who drew the jury for the week had served as such more than one time during the year, in derogation of article 5123, Rev. Civ. Statutes of Texas, which specifically states that the same person shall not act as jury commissioner more than once during the same year.

This article was enacted in 1876, and was not carried forward into the Code Criminal Procedure in 1879, when the procedures in civil and criminal matters were separated and enacted into separate Codes. Said article nowhere appears in our Code Criminal Procedure, and we can but think that the act of the Legislature in omitting it was intentional. However, no penalty attaches to a failure to observe the provisions of said article, even if applicable to the practice in selecting or drawing juries to try criminal cases. We can conceive of no injury resulting from failure to observe said provision, and none is shown or attempted to be shown in the instant case. If applicable, the statute is directory only. The trial court did not err in overruling the challenge to the array.

Article 690, P. C., under which this conviction was had, reads as follows:

“Any such agent or solicitor who knowingly procures, by fraudulent representations, payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars.”

[1, 2] We think it immaterial whether the same be written or oral, but in order to constitute the offense set forth in said article, there must be in existence, when the fraudulent representations are made, an obligation to pay an insurance premium. To constitute such obligation there must be a complete agreement, binding upon the obligor and enforceable by the obligee. In order to make one guilty under this article, he must, by fraudulent representations knowingly made, procure the payment of such an obligation. Do the facts in the instant case show an obligation, the payment of which was induced by fraudulent representations knowingly made by this appellant?

The injured party, Brown, testifies that appellant misrepresented to him the terms of an insurance policy in order to induce him to

purchase same; that he signed an application therefor. This application is not in evidence, and we are not apprised of the terms of the same in any way, except that the witness Thorpe testified that the policy issued to Brown was in exact accord with said application. If there was anything in said application creating any obligation upon said Brown we are left in ignorance of same, but it is reasonably certain that there could be no legal obligation created thereby except the contingent liability upon the said Brown to pay in the event a policy was delivered to him as applied for. Certainly, if the policy was not issued and delivered according to any contract evidenced by the application, no obligation would be created against Brown to pay therefor. It was testified substantially by both Brown and appellant that the former was told by appellant that when his policy came, he could have the same examined by a lawyer at any time within ten days after the receipt of same, and if it was not according to representation the money or note would be returned. Brown testifies that a week or ten days after the application was signed a Mr. McKinsey brought the policy to him, and he also states that he took it and paid for it, but was very busy and did not examine it. Shortly thereafter he did examine such policy, and became dissatisfied with it and demanded his money back from appellant. The main Texas office of the Federal Insurance Company, which issued said policy, and for which appellant was working, was in Dallas. It is not disclosed by the record whether or not the policy passed through appellant's hands after it was sent from the Dallas office and before it was delivered. It is clear from the record that the representations, if any, made by appellant were made prior to the time of the delivery and acceptance of the policy, and that the obligation to pay therefor, if any, arose at the time of such delivery and acceptance.

[3] For another reason the evidence fails to make out a case. The gist of this offense is the procuring by appellant of the payment of the obligation to pay, etc., by fraudulent representations. It has always been held in this state that in cases dependent upon such representations, same must not be mere false promises or professions as to future happenings or events, but must relate to something present or past. Conceding the truth of the claim of Brown and that all the representations of appellant were made as he set forth, still the same were but promises, and related only to future issuance and delivery of an insurance policy of a certain kind. The act of delivery of the policy and the collection from Brown do not seem to have been accompanied by any declara-

tions, and if any were made they were by a man by the name of McKinsey.

There are various questions raised, but what has been said sufficiently disposes of the case.

For the reason stated, the judgment will be reversed, and the cause remanded.

Ex parte ACKER. (No. 5171.)

(Court of Criminal Appeals of Texas. May 23, 1919.)

1. WAR  $\S$  4 — DISLOYAL LANGUAGE — ELEMENTS OF OFFENSE.

To constitute an offense under Disloyalty Act, 35th Leg. (4th Called Sess.) c. 8, § 1, prohibiting the use of language which "is disloyal \* \* \* or is of such a nature as to be reasonably calculated to provoke a breach of the peace, if said in the presence and hearing of a citizen of the United States," the language complained of must be both disloyal and calculated to provoke breach of the peace, and must have been said in the hearing of a citizen of the United States.

2. HABEAS CORPUS  $\S$  30(2) — DISCHARGE OF PRISONER—INSUFFICIENCY OF COMPLAINT.

In habeas corpus proceedings for discharge of prisoner charged with violation of Disloyalty Act, 35th Leg. (4th Called Sess.) c. 8, § 1, court will not discharge prisoner, though complaint does not set out the language used, or show wherein it was calculated to provoke a breach of the peace, and does not allege that it was used in the presence and hearing of a United States citizen, since under Code Cr. Proc. 1911, art. 206, the prisoner will not be discharged where there is probable cause to believe an offense has been committed.

Original application for writ of habeas corpus by William Acker. Application dismissed.

Mathis, Teague & Mathis, of Brenham, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Applicant was arrested charged with a violation of the Disloyalty Act of the Fourth Called Session of the Thirty-Fifth Legislature (chapter 8). The charging part of the complaint is that he did, "in the presence and hearing of Albert Werth and Aug. Eber, use language which is disloyal to the United States and of such a nature as calculated to provoke a breach of the peace, against the peace and dignity of the state."

[1] In Ex parte Meckel, 214 S. W. —, recently decided by this court, this act of the Legislature was held valid in so far as it denounced a breach of the peace by the use



of the language or means denounced in section 1 of said act. In order to constitute the use of language which must be disloyal and of such a nature as calculated to provoke a breach of the peace, it must be said in the hearing and in the presence of a citizen of the United States of America. It will be observed this complaint does not so charge, and on the face of it does not charge a violation of the statute. If the statute is valid, however, this would not authorize this court to discharge under a writ of habeas corpus. Article 206, C. C. P. That article prescribes that—

"Where, upon an examination under habeas corpus, it shall appear to the court or judge that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or admitted to bail, according to the facts and circumstances of the case."

What the language was is not stated, nor that it was stated in the hearing or presence of a citizen of the United States of America. Upon investigation of this matter by the justice of the peace before whom this complaint was lodged, or by the grand jury, this language might be ascertained, and it might be further ascertained that it was done in the presence and hearing of a citizen of the United States, and that such language was calculated to provoke a breach of the peace. If the evidence should disclose a probable case, it may be sufficient to hold the accused for the action of the grand jury under article 206, C. C. P. *Ex parte Oakley*, 54 Tex. Cr. R. 608, 114 S. W. 131. As we observe, under the terms of the statute the language must first be disloyal; second, the language must be of such a nature as that it may be reasonably calculated to provoke a breach of the peace; and, third, it must be in the hearing and presence of a citizen of the United States of America. In order to constitute the offense under said article, these three things must concur; otherwise there would be no offense.

[2] The facts are not before us, except in so far as the charge in the complaint. The language is not set out, and it is not known, outside of a general statement, whether it was disloyal to the United States or not, nor that it was calculated to provoke a breach of the peace, nor is there any allegation that it was made in the presence and hearing of a citizen of the United States. But under article 206, *supra*, we are of opinion that the applicant should not be discharged, but should be relegated to an examining trial before the justice of the peace before whom the complaint was lodged, where the matter may be fully investigated and all the facts elicited. Therefore this court does not feel justified in discharging

the prisoner, but remands him to custody to be tried before the examining court.

For the above reasons, the application will be dismissed.

### FROMME v. STATE. (No. 5179.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

#### 1. INDICTMENT AND INFORMATION $\S$ 125(20) —CONJUNCTIVE ALLEGATIONS—DISLOYALTY —"OR."

The word "or" in Disloyalty Act, § 1, forbidding the use of language in the presence and hearing of another person of and concerning the United States of America, etc., which language is disloyal to the United States of America, etc., or is of such nature as to be reasonably calculated to provoke a breach of the peace, etc., was intended to be and should be read "and," and each element of the offense must be charged conjunctively.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

#### 2. ~~WAB~~ $\S$ 4—DISLOYALTY—"OR."

The word "or" in Disloyalty Act, § 1, forbidding the use in language disloyal to the United States of America, etc., "or as of such nature as to reasonably calculated to be proved a breach of the peace," etc., was intended to be and should be read "and."

Appeal from District Court, Victoria County; John M. Green, Judge.

Adolph Fromme was convicted of a violation of the Disloyalty Act, and he appeals. Reversed and dismissed.

Meek & Kahn, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was given ten years in the district court of Victoria county for a violation of the Disloyalty Act. See page 12 Acts of the Fourth Called Session of the Thirty-Fifth Legislature.

[1, 2] Said act in section 1, forbids the use of language in the presence and hearing of another person of and concerning the United States of America, etc., which language is disloyal to the United States of America, or abusive in character, and calculated to bring into disrepute the United States of America, etc., or is of such nature as to be reasonably calculated to provoke a breach of the peace, etc.

An inspection of the caption of said act, also section 2 of same, and section 8 thereof, as well as the context of section 1, has satisfied this court that the last word "or," *supra*, was intended to be and should be read "and," and same has heretofore been so held by us. See *Ex parte Meckel*, 214 S. W. —, decided at this term. So construing the law, each element of the offense, under well-settled

rules of construction, must be charged conjunctively. The third count of the indictment is the only one which charges that the alleged utterances of appellant were of such nature as to be reasonably calculated to provoke a breach of the peace, and in said count it is nowhere alleged that the language used was disloyal to the United States of America and abusive in character, and calculated to bring into disrepute the United States of America, etc., and of such nature as to be reasonably calculated to provoke a breach of the peace.

The indictment, thus omitting necessary allegations is fatally defective and the cause is reversed and dismissed.

### RABE v. STATE. (No. 5366.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

LARCENY  $\S$ 32(1), 40(9) — VARIANCE AS TO OWNERSHIP.

Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom, under Rev. St. art. 5664, rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance, and the indictment should have alleged ownership in T. or real ownership in S. and special ownership in T.

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

J. C. Rabe was convicted of theft, and appeals. Reversed and remanded.

Mantooth & Collins, of Lufkin, and J. J. Collins, of Huntington, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charges appellant with having committed the theft of 11 head of cattle, taken from the possession of the alleged owner, C. B. Stewart.

The only question presented for revision is a variance between the allegation in the indictment and the evidence upon the trial as to possession and ownership. Stewart was the real owner. He had the cattle placed in a pasture that belonged to Herrington. Herrington made a contract with Thomas by which they became jointly possessed of the pasture, and Thomas lived upon the property and controlled it. Stewart placed his cattle in this pasture under a rental contract, and was to pay a reasonable rental value to be fixed by Herrington. The cattle were taken from this pasture. The rent had not been paid, and was due Herrington and Thomas, for which, under article 5664 of the

Revised Civil Statutes, they held a lien on the cattle.

Stewart testified as follows:

"Mr. Thomas, who lived on Mr. Herrington's place where the cattle were pastured, notified me on Wednesday morning that some of the cattle were missing from the pasture. I rented the pasture from Mr. Herrington and Mr. Thomas, and had the cattle placed in there."

Thomas testified that he lived ten miles below Huntington on the Josh Herrington place, and had been so living for two years, and was working it on halves, and was so living at the time of the rental contract between Stewart, himself, and Herrington, and that he owned one-half interest in the pasture at the time of the taking of the cattle. He also testified that Dr. Stewart made arrangements with him for pasturing the cattle in his (Thomas') pasture. He made a rental contract with Thomas to rent the place, but set no price on the rental value. This was left to Mr. Herrington to determine. Thomas' business was to look after the place, to keep up the fences around the pasture, close gates, and matters of that sort. He says:

"I saw to the cattle that were in the pasture; that is, I was supposed to keep them in there and to keep other people's out. I saw that the fences were kept up and the gates closed the best I could."

We are of opinion that the evidence shows a variance. Ownership should have been alleged, under these facts, in Thomas, or the possession alleged in him as special owner, and real ownership in Stewart. This matter has been decided in quite a number of cases, one of which we will notice. McKnight v. State, 70 Tex. Cr. R. 470, 156 S. W. 1188. Under a similar statement of facts the court reversed the judgment on the question here urged. Quoting from that opinion, it is said:

"Under these circumstances Jeeter was the special owner as against Pritchard, the real owner. Article 5664 of the Revised Civil Statutes gave Jeeter a lien on the cattle for the pasturage, and Pritchard could not take his cattle until this pasturage had been paid. If Pritchard had taken the cattle surreptitiously with intent to defraud Jeeter of the pasturage, he could even have been charged with the theft of the cattle from Jeeter under the terms of article 1835 of the Revised Penal Code. The real ownership could have been alleged in Pritchard and special ownership in Jeeter, but this was not done. Ownership was alleged only in Pritchard. Under all of our authorities ownership should have been alleged in Jeeter. Of course, as before stated, real ownership could have been alleged in Pritchard and special ownership in Jeeter. Taylor v. State, 62 Tex. Cr. R. 611 [138 S. W. 615]; Littleton v. State, 20 Tex. App. 168; Frazier v. State, 18 Tex. App. 434; Bailey v. State, 18 Tex. App. 426; Alexander v. State, 24 Tex. App. 126 [5 S.

W. 840]; Branch's Criminal Law, § 785, for collation of cases; Honea v. State, 56 Tex. Cr. R. 278 [119 S. W. 851]; Bryan v. State, 54 Tex. Cr. R. 59 [111 S. W. 1085]."

For this reason, the judgment will be reversed, and the cause remanded.

# WALES v. STATE. (No. 5815.)

(Court of Criminal Appeals of Texas. April 16, 1919. On Motion for Rehearing, June 4, 1919.)

## 1. INTOXICATING LIQUORS ⇨228(5) — EVIDENCE—TIME OF SALE.

The evidence must show that defendant's illegal sale of intoxicating malt liquor occurred prior to the filing of the indictment therefor.

## 2. INTOXICATING LIQUORS ⇨236(1) — SALE WITHOUT LICENSE—EVIDENCE—LICENSE.

In a prosecution for the selling of malt intoxicating liquor without license, a showing only by witness' belief that defendant did not have a license is insufficient to sustain a conviction; the statute requiring a license for the selling of malt drinks, both intoxicating and nonintoxicating.

## 3. INTOXICATING LIQUORS ⇨236(13)—SALE WITHOUT LICENSE — EVIDENCE AS TO THE LIQUOR BEING INTOXICATING.

In a prosecution for the selling of intoxicating malt liquor without license, where the witnesses testified they did not know whether the liquor was intoxicating or not, the evidence is insufficient to sustain a conviction.

Appeal from Galveston County Court, at Law; J. C. Canty, Judge.

Willie Wales was convicted of selling intoxicating liquors, as a retail malt dealer, in quantities of one gallon or less, without having first procured a license therefor, and appeals. Reversed and remanded.

Turnley & Clark, of Houston, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with selling intoxicating liquors, as a retail malt dealer, in quantities of one gallon or less, without having first procured a license for such purpose, and did sell one bottle of beer to E. Herrin.

There are some very interesting questions raised; but, as we view the statement of facts, the state has failed to make a case. It was agreed that local option was not in force in Galveston county, where this transaction is alleged to have occurred. Herrin testified that on — day of —, 1917, he was in defendant's place of business in the evening or night, it being after 9 o'clock and about 11 o'clock. He found defendant

in an upstairs room at No. — street in the City of Galveston, Galveston county. He requested appellant to sell him a bottle of beer, which he did, and witness paid him — for it and drank it. He said: "I asked him for beer, and he gave it to me, and I paid him for it, and drank it." He did not know whether appellant had license or not. He believed he had none. Wern testified that he was in defendant's place of business on — day of —, 1917, with a friend, and requested two bottles of beer. Defendant handed them two bottles, and his friend paid for them, and he, witness, bought a bottle of beer, paying — cents for it. He did not know whether appellant had license or not, but believed he did not have. Chief of Detectives Dave Henry testified that he was an officer of the city of Galveston, and was on the — day of —, 1917; that he went with a squad of officers to defendant's place on that night, and found several men there drinking; that they arrested several of them; that defendant at first refused to open his place, and after the officer threatened to break it open he did open it, and the officer says he found several cases of beer, some of it on ice, and some whisky. Herrin was recalled and testified:

"I supposed it was beer that I bought. I could not say that it was intoxicating. I could not say it was or was not. I was once fooled by believing I was drinking beer, and found out afterwards that it was near beer that I drank."

This is the statement of facts.

[1-3] The indictment was returned in November, 1917, charging the transaction to have occurred on the 19th of August, 1917. The witnesses say they were in appellant's place of business on — day of —, 1917. This does not show whether before or after the indictment was returned, or whether before or after this transaction. The evidence must show that the transaction for which appellant was prosecuted occurred prior to the filing of the indictment. It may have occurred afterwards so far as this record is concerned. Nor is it shown, except by belief, that appellant did not have a license. Nor is it shown that what these parties say they bought and drank was intoxicating. Appellant was charged with selling intoxicating malt liquors, to wit, beer, to Herrin. Herrin did not know whether the liquor he drank was intoxicating or not. We cannot afford to sustain a conviction with a statement of facts presenting the case as this does. The statute provides for license to sell intoxicating liquors, and also for malt drinks that are intoxicating, and also provides for the issuance of license to sell malt drinks that are nonintoxicating. Issuance of license is a matter of record by

comptroller and proper county officers, and could have been easily shown *vel non*. The state, having charged malt drinks to be intoxicating, should prove it; and the state was required also to prove other matters which were not proved, as above mentioned.

The judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

On a previous day of the term the judgment herein was reversed. The Assistant Attorney General has filed a motion for rehearing, and suggests that the statement of facts should not be considered. The reason for this proposition is found in the fact that the statement of facts was attached to and not incorporated in the transcript. The Assistant Attorney General bases his motion on the case of *Carney v. State*, 63 Tex. Cr. R. 370, 140 S. W. 440. As a matter of fact, the statement of facts was attached to and made a part of the transcript, but not included in the record, correctly speaking. We observed the condition of the record before handing down the opinion and at the time of writing it. The writer did not consider this as a reason why the statement of facts could not be considered since the rendition of the case of *Gribble v. State*, 210 S. W. 215. In the *Gribble* Case Judge Lattimore reviewed the matter, not particularly with reference to whether the statement of facts should be embodied in the record or sent up separately, but overruled that line of decisions which hold that the recent stenographic act of the Legislature did not apply to misdemeanors. The *Carney* Case, *supra*, and a lot of other cases, grew out of the same statute, which the opinion in the *Gribble* Case holds was repealed, and for that reason the writer did not take into consideration the fact that the transcript did not contain the statement of facts. To meet the objection of the Attorney General, however, appellant has filed a corrected transcript which does embody the statement of facts. An inspection of the statement of facts contained in the transcript shows that it is identical with that which was attached to it, and upon which the opinion was based. It is therefore deemed unnecessary to review the questions or restate the matters forming the basis of reversal. On the former opinion the motion for rehearing will be overruled.

#### MEYER v. STATE. (No. 5358.)

(Court of Criminal Appeals of Texas. May 21, 1919.)

Appeal from Criminal District Court, Travis County; James R. Hamilton, Judge.

Joe Meyer was convicted for uttering language disloyal to the United States and under circum-

stances reasonably calculated to provoke a breach of the peace, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The appeal is from a judgment condemning appellant to confinement in the penitentiary for two years, upon conviction under an indictment which charged that he uttered certain language in the presence and hearing of a named citizen of the United States, which language was disloyal to the United States, calculated to bring it into disrepute, and said under circumstances reasonably calculated to provoke a breach of the peace.

There are no statement of facts nor bills of exceptions. The validity of the act of the Legislature (Acts 35th Leg. [4th Called Sess.] c. 8), under which the prosecution is had, in so far as it bears on the facts charged, was upheld in the case of *Ex parte Ben F. Meckel* (No. 5081) 214 S. W. —, this day decided.

The judgment is affirmed.

#### MEYER v. STATE. (No. 5359.)

(Court of Criminal Appeals of Texas. April 2, 1919.)

#### CRIMINAL LAW §1182—AFFIRMANCE.

Where appeal from a conviction under Acts 35th Leg. (4th Called Sess.) c. 8, creating offense of disloyalty came up without any bills of exceptions or statement of facts in the record, and motion for new trial only questioned the sufficiency of the evidence to support verdict, and court, on examination, finds that indictment appears to follow language of statute, and that language imputed to defendant, if uttered, violated the law, the conviction would be affirmed.

Appeal from Criminal District Court, Travis County; James R. Hamilton, Judge.

Joe Meyer was convicted of a violation of the statute creating the offense of disloyalty, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was charged with violation of Acts 35th Leg. 4th Called Sess. c. 8, creating the offense of disloyalty, and upon trial his punishment was fixed at two years' confinement in the state penitentiary.

The case comes before us without any bills of exceptions or statement of facts in the record, and no question raised by the motion for new trial except the insufficiency of the evidence to support the verdict.

We have examined the indictment which appears to follow the language of the statute. The language imputed to the appellant therein is sufficient, if uttered, to constitute a violation of the law.

No error appearing in the record, the judgment of the lower court is affirmed.

## JEFFERSON v. STATE. (No. 5377.)

(Court of Criminal Appeals of Texas. April 23, 1919. On Motion for Rehearing, June 4, 1919.)

**1. BURGLARY §42(1) — EVIDENCE — POSSESSION OF RECENTLY STOLEN PROPERTY.**

Where a breaking is shown, the recent possession of property that came from the premises entered, if unexplained, may warrant a conviction.

**2. BURGLARY §42(4) — EVIDENCE — SUFFICIENCY—EXPLANATION OF POSSESSION.**

In a prosecution for burglary, where the one who broke and entered the premises was not identified, and the only evidence to connect defendant with the offense was his possession of a knife which the owner of the premises identified as having been taken, such evidence will not support a conviction where defendant explained his possession, and the evidence tended to show that the knife was taken from him a few days before the burglary, when he was arrested for fighting.

Appeal from District Court, Austin County; M. C. Jeffrey, Judge.

Sidney Jefferson was convicted of burglary, and appeals. Reversed and remanded.

Johnson, Matthaël & Thompson, of Bellville, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary; his punishment being assessed at five years' confinement in the penitentiary.

Briefly stating the facts, it is shown that some one entered the residence of the alleged owner, who testified he did not see anybody, but his wife testified that she was aroused at night by what she thought was something touching her, and saw a shadow of what she took to be a man, and as he reached the door of the room he looked at her. She aroused her husband. When he awoke they both heard a door "slam." The wife testified she did not recognize the defendant or who it was; whether he was white or black. The owner of the house testified that his pants were hanging on the head of the bed containing his watch, a pocketknife, and some other things; that the pocketknife was gone, but the other things were in his pants. Appellant was arrested by the constable charged with an assault, to which he seems to have pleaded guilty and paid the fine.

When the defendant was arrested for the assault, the officer says he took two knives from his pocket, one of which was afterwards recognized by the alleged owner of the burglarized house as his property. There was a serious contest as to whether the knife belonged to the alleged owner or to

the brother-in-law of defendant. Defendant proved by himself and other witnesses that the knife belonged to his young brother-in-law, from whom he had gotten it some days before. The alleged owner testified that he recognized the knife, among other things, by reason of the fact there was a gap in the larger blade, there being four blades to the knife. The defendant says the gap was in the blade, but that he caused it opening a can of peaches some days before the alleged burglary. Jackson testified he saw defendant open the can of goods, which defendant said were peaches; that they were working together on the railroad, and each furnished his own lunch. It was at the noon hour when eating lunch he saw defendant open the can of goods.

[1, 2] A most patent fact was the date of appellant's arrest for the fighting. He and his witnesses testify that this arrest occurred on the 17th of June. The burglary was committed on the night of the 20th or the morning of the 21st of June. The constable testifies when he arrested appellant for the fighting he took the knife claimed by the alleged owner of the house and another knife out of appellant's pocket. Later he saw the alleged owner of the burglarized house, and, in speaking of the defendant having two knives and describing them, the alleged owner stated that one of the knives was his, and it was identified by him on the trial and at the time the knife was shown him by the constable. Appellant's testimony all showed, as before stated, that he was arrested on the 17th of June, and was that day fined, and that night or evening paid the fine. If this occurred, then the knife the constable took from him did not come out of the burglarized house, and there was a mistake in the identity. The officer testified he did not know whether it was before or after the burglary that he arrested defendant for the fighting. That is the state's case on the arrest. If the defendant was arrested on the 17th for fighting, or was arrested any time before the burglary, and the knife taken from him, then such knife did not come out of the burglarized house. The whole case revolves around the ownership of the knife and the facts which tend to identify it and the transaction. The date of the fine of appellant for the fighting ought to and could have been readily shown by the docket of the court assessing the punishment. If it was before the burglary, then the knife in question was not a criminative fact. Under the decisions it seems that, a breaking being shown, recent possession of property that came out of the house would be a circumstance of more or less cogency to identify the possessor of the stolen property with the burglary. Unexplained it would have more cogency than where the possession is explained in an ex-

culpatory manner. Here it was explained, and not controverted. We are unwilling to sanction the conviction with the record in this condition.

The judgment will therefore be reversed, and the cause remanded.

#### On Motion for Rehearing.

The state has filed a motion for rehearing asking that the judgment of reversal be set aside and an affirmance granted. The contention is that the opinion is erroneous in stating the facts with reference to one of the knives which was found upon the person of appellant when arrested.

An inspection of the record tends to sustain this contention. In stating the history of the two knives mentioned by the witnesses which were obtained from appellant, it was stated the small knife which was claimed by the owner of the alleged burglarized house was obtained by appellant from his brother-in-law. We find this was a mistake; that the larger knife was that which appellant obtained from his brother-in-law. In some way this mistake was made, and it will be now corrected by stating that the larger knife was obtained by appellant from his brother-in-law, and not the smaller, as stated in the original opinion. However, we do not think this is of any serious moment, nor would it have such bearing upon the case as could or should have affected the result, as stated in the opinion. There was no question appellant got one of the knives from his brother-in-law. The only fact upon which the state could and did rely for a conviction was that the four-bladed knife mentioned was found in appellant's possession. With that fact omitted, the state has no possible chance of connecting appellant with the burglary, or to obtain a conviction. It should be a conceded fact that the party who entered the alleged burglarized house was not recognized while in the house. The husband did not even see him, and the wife was unable to recognize or tell who he was, whether he was a negro or white man. The state proved by the alleged owner that he missed the knife from his pants pocket, which was hanging on the head of the bed, similar to that found in possession of appellant, and this knife he sought to identify as that taken from his pants. Omitting this fact, there is nothing to show that defendant was the party who entered the house, or was in any way connected with the burglary. Appellant proved by himself and others that he had this knife long prior to the supposed burglary. That he was arrested, convicted, and fined, and his fine was paid by his wife in a misdemeanor case on the 17th of June, is hardly a debatable or even an issuable fact from the record. If we look to the evidence produced on the motion for new trial, this conclusion is intensified. Such evidence also

shows only two cases were filed against the defendant in the justice court, the misdemeanor case above mentioned and that for the burglary on the 28th of the month. The evidence produced upon the motion for new trial, however, cannot be considered in disposing of the case, because the said agreed statement of facts was not filed until after the adjournment of the term of court. Omitting the knife from the record, we would have no connecting fact to show appellant was the guilty party. The case would remain upon the bare statement that the house was entered and the knife taken. This would be giving full credence to the testimony of the state's witnesses. This is a case purely of circumstantial evidence, and the possession of this knife recently after being taken, if so taken, is the only fact that can be considered as connecting the defendant with the burglary. Possession of property recently after being taken is a fact of more or less cogency when taken in connection with the other facts of the case. If unexplained, it may be sufficient to justify the jury in awarding a conviction. If accounted for in a way consistent with his innocence, or inconsistent with his guilt, a conviction could not be sustained. The constable states in his direct examination that he arrested appellant for a misdemeanor after the alleged burglary. On cross-examination, however, he states as follows:

"As to whether it isn't a fact that this negro, Sidney Jefferson, was arrested for a misdemeanor, for an assault on another negro, on the 17th of June, on Monday, it may have been June—I am not sure, June or July. I arrested this defendant for the misdemeanor offense and took two knives off of him, and that probably might have been on the 17th of June, but I don't remember exactly. I do not remember that Mr. Michaelis' house was burglarized on the morning of the 20th of June, at about 5 o'clock, the next day right after the negro celebration on the 19th; I just don't remember the dates of it."

He was called in rebuttal, and stated:

"At the time I arrested this defendant, Sidney Jefferson, for fighting and when I searched him and got a couple of knives off of him, I asked him where he got so many knives," etc.

It is rendered certain by this witness that defendant had the knives when arrested for the misdemeanor, if this witness' testimony is to be credited. This occurred on June 17th, and the fine was paid that night by his wife. In the attitude of the record his possession of the knife is not sufficient to justify this conviction. If the facts on the motion for new trial could be considered, we would find this witness admitted collecting the fine between 8 and 9 o'clock on the night of June 17th from appellant's wife. In this connection, however, his testimony on the motion for new trial states that he arrested

him again for fighting afterwards, and it was with the same negro for which he had previously arrested him. This seems to be rather an amendment to his former testimony. The new trial evidence would further show that there were but two cases filed in the justice court and found on the docket, numbered, respectively, 309 and 321; the latter being the burglary case. Inasmuch as the whole case of guilt depended upon the possession of the knife, and in the attitude of the testimony, we are of opinion that this judgment should not be affirmed. The facts as to the arrest and conviction for the misdemeanor, and the dates, can and should be made certain, because the whole case depended upon the knife in question. His possession of that knife does not exclude the doubt of his innocence nor does it meet the requirements of circumstantial evidence. These matters ought to be rendered certain and accurate upon another trial. If appellant had the knife when arrested for the misdemeanor, then it was not the knife, and could not have been the knife, taken from the burglarized house, because the arrest and conviction occurred about four days before the supposed burglary. The justice of the peace and the docket and its entries would throw light upon this, and ought to settle the question one way or another. The explanation given by appellant and his witnesses as to his possession of the knife seems to be practically uncontroverted, except from the testimony of the constable above mentioned. The motion for rehearing is overruled.

### Ex parte NIX. (No. 5390.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. HABEAS CORPUS $\S$ 85(2)—EXTRADITION—GOVERNOR'S WARRANT—SUFFICIENCY.

Where warrant recited that Governor of demanding state had made known to Governor of this state that relator is charged "with the crime of false pretenses committed in said state," the production of the warrant made a prima facie case for respondent in habeas corpus proceeding, in view of rule that offense may be designated by name in general terms, and the trial court did not err in holding that warrant was not fatally defective, in that it charged relator with "false pretenses," not dominated an offense in demanding state.

#### 2. HABEAS CORPUS $\S$ 85(2) — EXTRADITION PROCEEDING—BURDEN OF PROOF.

The certificate of the Governor of this state, to the fact that the Governor of the demanding state had made it known to him that relator was charged by complaint, and that the demand for his surrender was "accompanied by

a copy of the complaint duly certified as authentic by the Governor" of the demanding state, was sufficient to put upon relator the burden of proving that demand was not accompanied by a copy of the complaint duly certified by Governor of demanding state, and it was not necessary that Governor's warrant be accompanied by complaint charging the offense.

#### 3. EXTRADITION $\S$ 82—AFFIDAVIT CHARGING OFFENSE—SUFFICIENCY.

In extradition cases the test is the sufficiency in the demanding state of the affidavit filed with requisition.

#### 4. HABEAS CORPUS $\S$ 85(2) — BURDEN OF PROOF—REQUISITION PAPERS—SUFFICIENCY.

Where the Governor did not attach to the warrant issued by him in extradition proceeding the various papers which he recites therein as furnished to him as the basis for the issuance of the warrant, it devolved upon relator in habeas corpus proceeding to show that the papers before the Governor were insufficient to authorize the issuance of the warrant.

Appeal from Criminal District Court, Dallas County; C. A. Pippen, Judge.

Habeas corpus proceeding on the relation of W. L. Nix. Discharge refused, and relator appeals. Affirmed.

Puckitt, Mount & Newberry, of Dallas, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. This appeal is from an order of the district court refusing to discharge relator under writ of habeas corpus. It appears that he was arrested and held under an executive warrant as follows:

"In the Name and by the Authority of the State of Texas (Executive Department).

"To All and Singular the Sheriffs, Constables, and Other Civil Officers of said State:

"Whereas, it has been made known to me by the Governor of the state of Oklahoma that W. L. Nix stands charged by complaint before the proper authorities with the crime of false pretenses committed in said state, and that the said defendant has taken refuge in the state of Texas, and:

"Whereas, the said Governor, in pursuance of the Constitution and laws of the United States, has demanded of me that I cause the said fugitive to be arrested and delivered to John B. Hill who is, as is satisfactorily shown, duly authorized, to receive him into custody and convey him back to said state, and:

"Whereas, said demand is accompanied by copy of said complaint and warrant duly certified as authentic by the Governor of said state:

"Now, therefore, I, W. P. Hobby, Governor of Texas, by virtue of the authority vested in me by the Constitution and laws of this state and the United States, do issue this my warrant, commanding all sheriffs, constables, and other civil officers of this state to arrest and aid and assist in arresting said fugitive and to

deliver him when arrested to the said agent in order that he may be taken back to said state to be dealt with for said crime.

"In testimony whereof, I have hereunto signed by name and have caused the seal of the state to be hereon impressed at Austin, Texas, this fourteenth day of March A. D., 1919.

"[Seal.] [Signed] W. P. Hobby,  
"Governor.

"Geo. F. Howard, Secretary of State."

[1] The sufficiency of the warrant is attacked upon the ground that the statement in the warrant that the relator is charged with the crime of "false pretenses" vitiates the warrant for the reason that there is no offense so denominated in the demanding state or any state, and there is a failure in the warrant to recite facts necessary to show an offense. It is necessary that the warrant should name the offense. *Thomas v. State*, 37 Tex. Cr. R. 142, 38 S. W. 1011. But it is only required that it be done in general terms. *Ex parte Cheatham*, 50 Tex. Cr. R. 53, 95 S. W. 1077; *Ex parte Stanley*, 25 Tex. App. 378, 8 S. W. 645, 8 Am. St. Rep. 440; *State v. Clough*, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946; *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 513; *Hayes v. Palmer*, 21 App. D. C. 450; *State ex rel. McNichols v. Justus*, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325. The authorities uniformly declare that in a habeas corpus trial the Governor's warrant makes a prima facie case for the respondent. *Ex parte McDaniel*, 76 Tex. Cr. R. 184, 173 S. W. 1019, *Ex parte White*, 39 Tex. Cr. R. 498, 46 S. W. 639; U. S. Statutes Ann. vol. 2, p. 909; Cyc. vol. 19, p. 92.

[2] As it is recited in the warrant that the Governor of the demanding state has made known to the Governor of this state that the relator is charged "with the crime of false pretenses committed in said state," it would seem that, giving effect to the rule stated, the production of the executive warrant makes a prima facie case, and the rule that it is not required that the elements of the offense be set out, but that it be merely designated by name in general terms, would sustain the decision of the trial court in holding that the warrant in the instant case was not fatally defective. It was not necessary that the Governor's warrant be accompanied by the complaint charging the offense. The certificate of the Governor of this state to the fact that the Governor of Oklahoma had made it known to him that the relator was charged by complaint, and that the demand for his surrender was "accompanied by a copy of the complaint duly certified as authentic by the Governor of Oklahoma," was sufficient to put upon relator the burden of proving that the demand was not accompanied by a copy of the complaint duly certified by the Governor of Oklahoma. *Ex parte Jones*, 199 S. W. 1110; *Ex parte Falhtinger*, 72 Tex. Cr. R. 633, 163 S.

W. 441; *Ex parte McDaniel*, 76 Tex. Cr. R. 184, 173 S. W. 1018, Ann. Cas. 1917B, 335; *Ex parte White*, 39 Tex. Cr. R. 498, 46 S. W. 639; *Ex parte Pearce*, 32 Tex. Cr. R. 301, 23 S. W. 15; *Ex parte Cheatham*, 50 Tex. Cr. R. 54, 95 S. W. 1077; *Kingsbury's Case*, 106 Mass. 223.

[3] The relator introduced no evidence other than a section of the statute of Oklahoma, denouncing the offense of "obtaining property under false pretenses," and the respondent introduced a certified copy of the affidavit filed with the requisition, which in several counts purports to charge relator with obtaining property under false pretenses, setting out the facts in great detail, and we are referred to nothing suggesting that it is not sufficient under the laws of the state of Oklahoma to charge the offense named. The test is its sufficiency in the demanding state. *Coleman v. State*, 53 Tex. Cr. R. 93, 113 S. W. 17; *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116, 39 L. Ed. 164. The requisition was not introduced in evidence, and objection was made to the introduction of the affidavit because its introduction was not accompanied by the certificate of the Governor of Oklahoma to its authenticity. It was certified by the secretary of state of Texas to be a correct copy of the affidavit filed with the requisition, and this, identified, was admissible, as the recital of the Governor of Texas in his warrant, that the Governor of Oklahoma duly certified that it was authentic, was before the court, and established the fact in the absence of controverting proof.

We are referred to the case of *Ex parte Thornton*, 9 Tex. 635, as in conflict with the view that the recitals in the executive warrant supply proof of the existence of the requisites for its issuance. In so far as the Thornton Case does conflict with this principle, it appears to have been overruled in the case of *Ex parte Stanley*, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440, from which we quote as follows:

"In the case we are considering, the warrant recites, but does not set forth in full, the affidavit upon which it is issued. We have found no decision or authority which requires that the warrant should set forth the evidence in full, except the intimation referred to in Thornton's Case. The correct rule is, we think, laid down in *Donohue's Case*, 84 N. Y. 438, in a syllabus as follows: 'Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires.'"

[4] The Governor of the state of Texas not having attached to the warrant issued by him the various papers which he recites therein as furnished to him as the basis for the issuance of the warrant, it devolves upon the relator to show that the papers before



him were insufficient to authorize the issuance of the warrant. These papers, including the requisition, were on file in the office of the secretary of state, and available to relator to negative the recitals in the warrant, but, except the affidavit which was introduced by the respondent, were not used in evidence. On the trial of this case we think it was not incumbent upon the respondent to introduce evidence other than the warrant issued by the Governor of Texas. If, however, this was made doubtful owing to the manner in which the offense is described in the Governor's warrant, the question is met by the introduction in evidence by the respondent of the affidavit which the Governor filed with the secretary of state with the requisition made upon him by the Governor of the demanding state.

The judgment of the lower court is affirmed.

### BERRIAN v. STATE. (No. 5355.)

(Court of Criminal Appeals of Texas. May 28, 1920.)

#### 1. WITNESSES $\S$ 240(1), 286—EXAMINATION—LEADING QUESTION.

Action of trial court in refusing to permit the counsel of accused to ask, and the only eyewitness, who was tendered to both the state and accused by the court, to answer, leading questions in a prosecution for murder, was error, and when such witness was examined by the state, accused should have been accorded the same liberty of cross-examination of such witness as any other witness for the state.

#### 2. CRIMINAL LAW $\S$ 666(4)—COMPELLING INTRODUCTION OF EYEWITNESSES.

The state is not bound to introduce all or any of the eyewitnesses to a transaction.

#### 3. CRIMINAL LAW $\S$ 741(6)—QUESTION FOR JURY—CIRCUMSTANTIAL EVIDENCE.

Direct evidence is not per se better than circumstantial evidence.

#### 4. CRIMINAL LAW $\S$ 561(1)—EVIDENCE—REASONABLE DOUBT.

The state must make out its case by competent evidence beyond a reasonable doubt.

#### 5. CRIMINAL LAW $\S$ 449(1)—OPINION EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, where there was some conflict in the testimony as to whether two shots were fired simultaneously, one by deceased and the other by accused, and as to who fired first, a witness may be allowed to testify that an automatic pistol of the caliber of that of deceased, in shooting smokeless powder, would make very little noise.

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Early Berrian was convicted of murder, and appeals. Reversed and remanded.

John E. Clarke, of Hillsboro, for appellant.  
Earl Carter, Co. Atty., H. P. Shead, Asst. Co. Atty., and Wear & Frazier, all of Hillsboro, and E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. This appeal is from a conviction for the murder of J. L. Norris in Hill county, Tex. The facts are quite lengthy, and full of many minor contradictions not necessary to recite here. The killing took place in a small negro cabin formerly occupied by appellant on the farm of deceased on May 17, 1918. There were but three people in the house when the homicide occurred—deceased, who was a white man, appellant, and another negro by the name of Vince Brackins. Brackins was summoned as a witness both by the state and the appellant. He had been before the grand jury and testified regarding the homicide, and had also made a statement of the facts to the officers. The principal complaint that is made in this case is with regard to the attitude of said Brackins as a witness. Appellant's bill of exceptions No. 4 is as follows:

"Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to wit:

"After the state had failed to make out her case against the defendant, and had practically rested her case, and after it had been shown that the witness Vince Brackins was the only eyewitness to the homicide, that he was present at the time the homicide occurred, the defendant moved the court to require the state to place said Vince Brackins on the stand to testify in behalf of the state, and the court overruled the defendant's request and motion to require the state to place said witness Vince Brackins on the stand, and stated in the presence of the jury that 'the court now tenders to both the state and the defendant the witness Vince Brackins, who was an eyewitness on the day of the alleged killing.'

"To the action of the court in refusing to compel the state to place upon the witness stand in its behalf the eyewitness Vince Brackins (it being shown that he was the only eyewitness and that the state's case depended wholly upon circumstantial evidence, outside of the testimony of said witness Vince Brackins, and that the circumstances thus far offered by the state and testified to by witnesses were not sufficient to justify the submission of the case to the jury), the defendant objected and excepted, on the ground that the testimony of said Vince Brackins was the best evidence in the case, and that the defendant was entitled to have the state put on its only eyewitness against him, and such action of the court was prejudicial to defendant's rights. The court overruled defendant's exception, and refused to compel the state to put said witness on the stand, and tendered said witness as a witness for the state

and the defendant, to which action of the court the defendant further excepted, on the ground that it was prejudicial to the defendant's rights in forcing upon him a witness before the state had rested its case, thereby depriving him of the legal right to the management of his case, and of his right to cross-examine the witness under the rules of evidence, and was in effect requiring the defendant to make out a case against himself. And defendant here now tenders this his bill of exception and asks that same be approved, filed and made a part of the record in this case.

"The foregoing bill is qualified with the following:

"The witness Vince Brackins was subpoenaed by the defendant and state. The defendant sought and obtained one continuance on account of the absence of this witness. The witness in question was hostile to the state, and by mannerisms, attitude, and appearance was favorable to defendant. The court of its own volition called the witness to the stand and tendered him to both the state and defendant. Neither side was permitted to lead him, and both the state and defendant examined him and developed his testimony fully. Thus examined, his testimony is in the record. To have required the state to place him on the stand and to vouch for and become bound by his testimony would have made it idle either to try the case or to submit it to the jury. So it would be in any case presenting similar conditions. If the contention of counsel for appellant should be held to be the settled law of the land, then certain and easy means of escape is made plain to the criminal element, who with premeditated design have surrounded themselves and the criminal transaction with the conditions here presented.

"So qualified, this bill is approved and ordered filed as a part of the record."

Appellant's bill of exception No. 2 further complains because said witness Vince Brackins was not allowed to answer as to a certain matter in response to the questions of appellant, because the question relative thereto was leading. His bill No. 3 complains because he was not permitted to lead the witness as to anything upon said trial, except those matters brought out by the state on direct examination.

[1] The action of the trial court in refusing to permit appellant to ask, and the witness to answer, leading questions, was erroneous. For a trial judge to be permitted, even in the utmost good faith in any case, to distinguish between witnesses, or attempt to place any witness in the attitude where he cannot be led by either side, is to lay a predicate for such action as to other witnesses in other cases, which destroys the right of cross-examination, as well as the duty and right of the respective parties to manage and be responsible for the conduct of their own cases. It might be better practice for the trial courts to introduce the witnesses, and neither side be held to vouch for them, nor permitted to at-

tack them in any way; but such is not the practice in this state or any other within our knowledge. There are certain duties devolving upon each person legitimately connected with the trial of one convicted of a crime. Under our system, as has often been remarked by our courts, the state furnishes the prosecuting attorney to decide the order of the state's testimony, to decide what witnesses the state will introduce, to examine witnesses, and generally conduct the prosecution. If any given witness be the witness of neither side, but be the court's witness, so that he may not be cross-examined, this not only deprives one side or the other of that valuable right of cross-examination which is recognized by all courts, but one side or the other might easily be deprived of the power to impeach, for it is well said that one may not, generally speaking, impeach his own witness, and if it be successfully denied that he is the witness of the opposite party, there could be no impeachment.

[2-4] The state is not bound to introduce all or any of the eyewitnesses to a transaction, nor is direct evidence better than circumstantial, per se. The state must make out its case by competent evidence beyond a reasonable doubt, and there the trial rule stops. The motion to compel the state to introduce Vince Brackins should have been denied; but, when said witness was introduced and examined in chief by the state, the appellant should have been accorded the same liberty of cross-examination of him as of any other witness for the state.

[5] A question arose as to the testimony of Sheriff Long as to the noise made by the firing of an automatic pistol whose cartridges carried smokeless powder. The pistol of deceased was a small automatic, shooting steel-jacketed bullets, which make a small smooth hole. Appellant's pistol was a large pistol, firing a lead bullet. A small empty shell was found by the officers on a bed in the room where the homicide took place. It was in proof that an automatic pistol ejects the empty shells and loads itself automatically when being fired. The deceased was shot by a large bullet; appellant by a small one. Dr. Barnes said the bullet which struck the deceased produced instantaneous motor paralysis, and that he could not have shot appellant after being struck by the bullet which caused his death. Several witnesses who were at a little distance from the house where the homicide occurred said they heard but one shot. Vince Brackins, who was in the room where the shooting took place, said the deceased and appellant both fired, deceased firing first: that there was little difference between the shots—just enough to tell.

As the case must be tried again, we are of opinion that in this condition of the record the witness Long should be allowed to testify that an automatic pistol of the caliber of that

of deceased, in shooting smokeless powder, would make very little noise.

For the error indicated, the judgment of the trial court will be reversed, and the cause remanded.

### DUNN v. STATE. (No. 5303.)

(Court of Criminal Appeals of Texas. May 14, 1919.)

#### 1. CRIMINAL LAW $\S$ 596(1)—CONTINUANCE—ABSENT WITNESSES — CUMULATIVE EVIDENCE.

The denial of a second motion for continuance filed by defendant, who was accused of murder, on the ground of the absence of a witness to whom deceased made threats, which were communicated by the witness to defendant, was error, and cannot be sustained on the theory that the testimony of such witness was merely cumulative because other witnesses testified to threats; it appearing the absent witness was the only one who had communicated the threats, and that defendant had to rely solely on his testimony as to the communication thereof.

#### 2. CRIMINAL LAW $\S$ 419, 420(2, 12), 706, 1171(1) — PRESENTATION OF EVIDENCE — HEARSAY—CURE.

It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement, and the impropriety was not cured because the attorney for the prosecution brought out the facts by an inquiry as to whether defendant would consent to the introduction of the statement.

#### 3. CRIMINAL LAW $\S$ 396(1)—EVIDENCE—REBUTTAL EVIDENCE.

Where defendant's brother saw the homicide, and defendant testified on cross-examination that he did not care if his brother was a witness, for, if he told the truth, it would not injure his case, but that the brother was crazy about half the time, such testimony did not warrant the introduction of a written statement by defendant's brother.

#### 4. CRIMINAL LAW $\S$ 721½(2)—ARGUMENT—FAILURE TO PRODUCE EVIDENCE.

In a prosecution for homicide, where defendant stated that his brother, who was present, was crazy about half the time, and refused the offer of the prosecution to introduce a purported written statement by the brother, argument of the prosecutor that it was a fair inference from the fact the brother did not testify, and that defendant would not agree for his written statement to be introduced, that it was adverse to him, was improper, and aggravated the impropriety of the attempt by the prosecution to get the statement before the jury.

#### 5. CRIMINAL LAW $\S$ 1037(2) — APPEAL—IMPROPER ARGUMENT — REQUEST FOR CORRECTION.

Where the prosecution by an offer to admit a purported written statement of defendant's brother as to the homicide brought out the fact of the statement, and the attorney for the prosecution argued that the refusal of defendant to allow the same to be introduced warranted an inference that it was unfavorable, such argument was obviously so harmful that it would have been futile to withdraw it, so the fact that defendant, after his objection was overruled, did not request withdrawal of the same by special charge, was not a waiver of objection.

Appeal from District Court, Hamilton County; J. H. Arnold, Judge.

Tom Dunn was convicted of murder, and appeals. Reversed.

Arthur R. Eldson, of Hamilton, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. This appeal is from a conviction for murder, the punishment being assessed at 35 years' confinement in the penitentiary.

The deceased was the husband of appellant's daughter. A separation had taken place, and she had returned to her father's home, and complained to her father of various acts of abuse, including a charge of infidelity and threats of personal violence. Eyewitnesses for the state described an unprovoked and an unjustifiable homicide. Appellant, testifying in his own behalf, presented the theory of manslaughter, due to information of insulting conduct toward his daughter; also that of self-defense against danger, real and apparent. These issues were presented to the jury by the court in its charge.

[1] The court overruled appellant's second application for a continuance upon the ground that the evidence sought was cumulative of the testimony of appellant and some of his witnesses. The absent witness would have testified in detail to several conversations with the deceased in which animosity toward the appellant was expressed, and threats to kill him and other members of his family; also efforts to arm himself in preparation for the execution of his designs. The witness also would have disclosed his communication of these matters to the appellant a short time before the homicide, and would have testified, in connection therewith, he had told the appellant that the threats were seriously made, and advised precautions against harm to himself and family. The appellant, testifying in his own behalf, claimed that the absent witness Thompson had made to him the statements detailed in the application for continuance,

and the fact that such communication was made comes, so far as we are able to ascertain, from no other witness. There was testimony that the deceased had made threats to kill his wife, which were communicated to the appellant; also testimony that the deceased at one time said he felt like killing the appellant and the outfit, or something like that, and that he at one time got a pistol belonging to the witness Thompson, but the date is not fixed. Appellant's daughter testified that she had heard Thompson tell her father "a lot of things."

The fact that the matters detailed in the application for a continuance were said by the deceased to Thompson was not directly in evidence at all, and that Thompson communicated them to appellant was before the jury from appellant's testimony alone, and it was contended in argument by the state that his testimony in that specific particular was untrue. The testimony of the absent witness was material in support of appellant's theory and testimony that the deceased was the aggressor. Appellant claimed that at the time he fired deceased was making an attack upon him with an open knife in his hand. It was conceded that the deceased had the knife in his hand at the time, but denied that he made a demonstration. Thompson's affidavit verifying the correctness of the allegations in the application for a continuance was before the court and considered on motion for a new trial. We think it is not entirely accurate to say that the testimony of the absent witness was cumulative of that of other witnesses. In the sense that other witnesses testified to other threats of a similar character, and that some of them were communicated, the testimony was cumulative, but that the particular things to which the absent witness would have testified there was no other witness. The fact that Thompson communicated them to the appellant rested upon appellant's testimony alone. The rule justifying the refusing of an application for a continuance to secure cumulative testimony, as declared in *Harvey v. State*, 35 Tex. Cr. R. 545, 34 S. W. 623, has been held inapplicable to a state of facts like these. *Beard v. State*, 55 Tex. Cr. R. 157, 115 S. W. 592, 131 Am. St. Rep. 806; *Asken v. State*, 47 Tex. Cr. R. 366, 83 S. W. 706; *Koller v. State*, 36 Tex. Cr. R. 499, 38 S. W. 44; *Casey v. State*, 51 Tex. Cr. R. 433, 102 S. W. 725; *Philpps v. State*, 34 Tex. Cr. R. 560, 31 S. W. 397; *Morgan v. State*, 54 Tex. Cr. R. 549, 113 S. W. 984; *Gilcrease v. State*, 33 Tex. Cr. R. 619, 28 S. W. 531. The best evidence that the deceased had made the threats in the presence of Thompson and that Thompson had told the appellant of them, would have been the evidence of Thompson, and the appellant was entitled to the best evidence obtainable to support his defense, and to obtain the best evidence

he was entitled to a reasonable delay, and not driven to the necessity of relying upon his own testimony alone. The rule applied by Presiding Judge Hurt in *Gilcrease v. State*, and which is adopted in the case of *Morgan v. State*, and others, *supra*, should, in our judgment, control in this one. We quote it as follows:

"An application to continue for the want of testimony of the witnesses to prove threats made by the deceased to kill defendant, which were communicated to him; also, to prove that deceased, as well as his brother, had guns at the place and time of the shooting. The theory of the state was that appellant, unprovoked, killed the deceased; that of the defendant was self-defense. Both theories were supported by testimony; hence a conflict in the testimony as to who was the aggressor—who began the violence. Threats, whether communicated or not, in such a conflict, are of very great importance, as they tend to solve the problem at issue. The state's witnesses deny that the deceased was armed with a gun at the time he was shot. If this be true, appellant was in no actual danger when he shot deceased, nor was the danger apparent, when all the circumstances are considered, and self-defense was not in the case. The application should have been granted, although it was the second application; and, after the trial, the court, viewing the facts of the case as developed on the trial, should have granted a new trial to have enabled the appellant to obtain the testimony, though it was somewhat cumulative."

[2, 3] Henry Dunn, brother of appellant, was an eyewitness to the homicide, but not present at the trial. In cross-examination of the appellant the district attorney said: "Henry Dunn, your brother, made a written statement, didn't he, before he left? Do you want to use his written statement? We have got it and will put it in evidence. You know his evidence would hurt you if he told the truth about it. Here is his written statement. You know his signature. Here is Henry's written statement. If you and your lawyer want to use it, you may have it." Turning to the attorney for appellant, and holding the paper, he said: "I agree that this is what he would swear if he was here." Appellant's attorney said: "We don't want to use it." The district attorney remarked: "I know you don't." Subsequently, before closing the case, the district attorney said: "I now offer the written statement of Henry Dunn to the defendant and his counsel, and agree that this statement is what Henry Dunn would testify if he was here and on the stand." To all of this appellant addressed a prompt objection, and brings it for review by several bills of exception.

The trial judge justified his action, as stated in his qualification, upon the ground that the appellant in his cross-examination sought to leave the impression on the jury that his brother's testimony, if present, would help rather than hurt him. The tes-

timony to which he refers is as follows: "I don't care if Henry was here as a witness. It would not go against me if he told the truth about it." To which he added: "He would tell the truth about it if he was at himself, but he is crazy about half the time." The court sustained the objection to the introduction of the statement in evidence, but overruled appellant's objection to the statements made by the district attorney in his cross-examination and in his side-bar remarks. Doubtless his failure to produce his brother as a witness, or make an effort to do so, was a circumstance available to the state, but no facts are shown which would render the statement of his brother admissible as original testimony against appellant. The trial court, as we understand the record, entertained the view that the contents of his statement were not admissible, but sanctioned the action of state's counsel in informing the jury that appellant's brother had made the statement. Under the facts disclosed by the bill, the court sustaining the objection to the introduction of the written statement was of little consequence for the reason that the district attorney, through the proceeding sanctioned by the court, had thoroughly made the jury understand that the appellant's brother had made a statement in the presence of the county attorney; that it was in writing; that the state desired to use it; that the defendant would not use it; and that the inference to be drawn was that the statement would show his guilt. The fact that the statements of the district attorney were in the form of an inquiry does not alter the fact that they conveyed to the jury the information mentioned above. Neither the fact that the statement was made nor the substance of it was admissible against the appellant. Both were hearsay. 38 Cyc. 1495; *Baldwin v. Railway*, 64 N. H. 596, 15 Atl. 412; *Sarll v. State*, 80 Tex. Cr. R. 161, 189 S. W. 154; *Rushing v. State*, 62 Tex. Cr. R. 310, 137 S. W. 372; *Harris v. State*, 72 Tex. Cr. R. 120, 161 S. W. 125. Proof of them is not rendered admissible by the cross-examination referred to in the court's qualification to the bill.

[4, 5] In his closing argument to the jury the district attorney drew attention to the fact that the appellant had refused to offer the statement in evidence, and objected to the state reading it and that it had been excluded, adding:

212 S.W.—33

"The jury don't know what is in the statement; I do know from the fact that the defendant's own brother was not present at the trial as a witness, and from the further fact that defendant would not agree for his written statement of what had occurred to be offered in evidence, that it would be fair to infer that, if the said Henry Dunn were present as a witness, his testimony would corroborate the state's witnesses as to how the killing occurred, rather than Tom Dunn, the defendant."

This statement is taken from the court's qualification of the bill relating to the argument. The conclusion is not to be escaped that the effect of this argument was to intensify the error in bringing the written statement and its substance before the jury, and to urge and use against the appellant the fact that he had invoked the ruling of the court to exclude the written statement, which, in the opinion of the court, was inadmissible. The obvious and necessary consequence of the whole proceeding was to prejudice the appellant's case by getting before the jury illegal and inadmissible testimony of a harmful character, and using the fact that he objected to its admission in argument against him. The error in failing to sustain objection to this argument, which was made at the time, is not waived by the failure of appellant to request its withdrawal by a special charge. He did his utmost to prevent it getting before the jury, and it was so obviously harmful that it would have been futile to attempt its withdrawal. *Harris v. State*, 72 Tex. Cr. R. 120, 161 S. W. 125; *Millner v. State*, 72 Tex. Cr. R. 58, 162 S. W. 348; *Askew v. State*, 54 Tex. Cr. R. 416, 113 S. W. 237; *Rushing v. State*, 62 Tex. Cr. R. 310, 137 S. W. 372; *Bullington v. State*, 180 S. W. 631; *Bradley v. State*, 72 Tex. Cr. R. 287, 162 S. W. 516; *Sarll v. State*, 80 Tex. Cr. R. 161, 189 S. W. 149; *Faulkner v. State*, 80 Tex. Cr. R. 341, 189 S. W. 1082; *Hollingsworth v. State*, 190 S. W. 628; 38 Cyc. 1495; *Baldwin v. Railway*, 64 N. H. 596, 15 Atl. 412; *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 440; *Moran v. Baldi*, 71 N. H. 490, 53 Atl. 307.

In the other bills of exception considered, with their qualifications, we have discovered no error.

The matters discussed require a reversal, which is ordered.

**SANGER BROS. v. HUNSUCKER et al.**  
(No. 9078.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 29, 1919. On Motion for Rehear-  
ing, May 10, 1919.)

**1. MORTGAGES**  $\S$ 372(4) — **FORECLOSURE SALE**  
**PURCHASER—RIGHTS AS TO GROWING CROPS.**

Purchaser, at trustee sale, under deed of trust, was not entitled to crops growing and un-  
matured at time of sale as against assignees of  
crop-sharing rental contract.

**2. MORTGAGES**  $\S$ 372(4)—**FORECLOSURE SALE**  
**PURCHASER—RIGHT TO CROPS UNDER RENT-**  
**AL CONTRACT—REPLANTED CROPS.**

Where land is rented under crop-sharing  
rental contract, and, while crops are growing, is  
sold under deed of trust, and, after sale, a por-  
tion of the land is replanted by tenant under  
agreement with purchaser, assignees of rental  
contract are entitled to the rent crop share of  
the replanted crops as against purchaser.

**3. CHATTEL MORTGAGES**  $\S$ 12—**SALES**  $\S$ 12  
—**RENT CROP—UNPLANTED CROP.**

Where a tenant under a valid contract with  
owner agrees to pay a crop rent, and thereafter  
actually plants and cultivates the specified crop,  
the crop may be sold or mortgaged even though  
at the time of the sale or mortgage the crop  
has not actually been planted.

**4. MORTGAGES**  $\S$ 372(4)—**FORECLOSURE SALE**  
**PURCHASER—VALIDITY OF RENTAL CON-**  
**TRACT.**

Rental contract, entered into by purchaser  
under deed of trust with tenant in possession,  
with knowledge of tenant's rental contract with  
former owner, and assignment of rents there-  
under, is of no effect as against assignees.

On Motion for Rehearing.

**5. MORTGAGES**  $\S$ 137, 197—**NATURE OF MORT-**  
**GAGE—STATUS OF MORTGAGEE.**

Mortgagee of lands is but a lienholder, the  
legal title remaining in the owner of the mort-  
gaged premises, with an unimpaired right to  
lease and obtain the emblements in the way of  
growing crops.

**6. CONSTITUTIONAL LAW**  $\S$ 278(1) — **TAKING**  
**OF PROPERTY—DUE PROCESS—EXECUTION OF**  
**RENTAL CONTRACT BY MORTGAGOR.**

The execution of rental contract and assign-  
ment thereof by mortgagor does not constitute  
the taking of mortgagees' property or an impair-  
ment of their security within federal Const.  
Amend. 14, prohibiting taking of property with-  
out due process of law.

Appeal from Johnson County Court; B.  
Jay Jackson, Judge.

Suit by Emily Hunsucker and others  
against Sanger Bros. and others. Judgment  
for plaintiffs, and named defendants appeal.

W. F. Ramsey, Jr., of Yuma, Ariz., and  
Coke & Ooke, of Dallas, for appellants.

J. E. Warren, of Cleburne, and G. W. Dob-  
son, of Burleson, for appellees.

CONNER, C. J. On June 30, 1916, Mary  
S. Taylor, a feme sole, was the owner in her  
own name and right of 163 acres of land sit-  
uated in Johnson county. On that day she  
made, acknowledged, and delivered to T. P.  
Barry, trustee, for the use and benefit of  
Sanger Bros. a deed of trust covering said  
land, to secure the payment of certain indebt-  
edness aggregating \$4,687.25. The deed con-  
veyed the land, for the purpose stated, to-  
gether with all improvements thereon and  
thereafter to be placed thereon, and with all  
and singular the rights and appurtenances  
to same belonging to or in any wise apper-  
taining or incident thereto. The conveyance  
was forthwith duly recorded upon the prop-  
er records of Johnson county. On Decem-  
ber 1, 1916, Mary S. Taylor entered into a  
valid rental contract of the premises men-  
tioned with Watters & Sons for one-fourth of  
the Johnson grass, cotton, and cotton seed,  
after paying the expenses of ginning and  
baling and one-third of all other crops.  
Thereafter, on January 2, 1917, while she yet  
owned the premises, and while the said Wat-  
ters & Sons were in the use and occupa-  
tion thereof, cultivating the land under their  
said rental contract, the said Mary S. Tay-  
lor duly assigned, for a valuable considera-  
tion, the rental contract to appellees to secure  
certain indebtedness for which they sue in  
this suit. Thereafter, on June 6, 1917, crops  
of corn, oats and Johnson grass were growing  
on said premises under the contract Watters  
& Sons had made with Mary S. Taylor, when  
Sanger Bros. duly caused T. B. Barry to duly  
execute the trust vested in him by selling  
the 163 acres of land owned by Mary S. Tay-  
lor. Sanger Bros. purchased the land at the  
trustee sale, and at once entered into posses-  
sion thereof, made new rental contract with  
Watters & Sons upon terms the same as  
Watters & Sons had made with Mary S. Tay-  
lor, and thereafter received from Watters &  
Sons, and appropriated for their own use, the  
rents specified in the rental contract with  
Mary S. Taylor.

The circumstances stated gave rise to the  
present suit, which was instituted by appel-  
lees against Mary S. Taylor for the amounts  
due from her and against Watters & Sons  
and Sanger Bros. for the value of the rents  
specified.

The case was tried upon an agreed state-  
ment of facts, and, judgment having been  
rendered in favor of plaintiffs, Sanger Bros.  
have appealed.

One of the appellants' material contentions

is presented by a proposition under the first and second assignments of error. The proposition reads as follows:

"A lease contract made by a mortgagor after the execution and record of a valid mortgage is subject and subordinate thereto. Foreclosure of said mortgage extinguishes said lease, and the purchaser at foreclosure sales takes the land free from the same, is entitled to immediate possession, and all the rights of user and beneficial enjoyment incident to ownership, and, as a consequence, to all crops unmatured and growing at the date of purchase."

The case of *Willis v. Moore*, 59 Tex. 623, 46 Am. Rep. 284, and cases following it, seem to be conclusive against appellants' proposition. The question in the case named is thus stated:

"The question for our decision then is, Is the purchaser of mortgaged lands, as against the mortgagor or any person claiming under him by a purchase of the crops, entitled to such crops as were standing ungathered upon the land at the time of his purchase?"

The question, after an elaborate discussion, was answered in the negative. The decision, which is opposed to the holding in England and to some of the other states, is based upon the proposition that in Texas the mortgagee of lands is but a lienholder, and not the owner or holder of the legal title, and that until foreclosure the mortgagor has full title, with right to dispose of the crops. It was particularly said that—

"A mortgagor is entitled to sever in law or fact the crops which stand upon his land at any time prior to the destruction of his title by sale under the mortgage; this results from his ownership and consequent right to the use and profits of the land, and the mortgage is taken with knowledge of that fact."

[1] Appellants' counsel recognize the authority of the case of *Willis v. Moore*, supra, but insist that it is distinguishable from the case before us, in that there the crops at the time of the transfer or assignment thereof (which was in September) were matured and ready for severance from the soil, whereas in the case before us the transfer of the rental contract was in June, at a time when the crops, with the possible exception of the Johnson grass, were growing and unmatured, the contention being that until matured the crops were essentially part of the land, which necessarily passed to the purchaser at the trustee sale. But the case of *Willis v. Moore* was not so limited by the able judge who wrote the opinion, nor is the distinction suggested recognized in any of the cases called to our attention, which follow the case of *Willis v. Moore*. On the contrary, in the cases of *McKinney v. Williams*, 45 S. W. 335, and in *Lombardi v. Shero*, 14 Tex. Civ. App. 594, 37 S. W. 613, 971, and in *Brown v. Leath*, 17 Tex.

Civ. App. 262, 42 S. W. 655, 44 S. W. 42, the distinction is repudiated. In those cases it was distinctly held that a sale by the owner of land of crops growing thereon worked a severance, so that the crops did not pass to a purchaser at mortgage sale of the land, although the sale of the crops was subsequent to the maturity of the mortgage debt, and that at the time of the mortgage sale the crops had not approached maturity. Writs of error were refused in both of the cases last cited, which would seem to be now here controlling.

We should perhaps notice a further contention of appellants, predicated upon the following extract from the agreed statement of facts, viz.:

"That at the said time (June 6, 1917), out of the 65 acres of cotton, 60 acres had on it a very poor stand, and it was of doubtful propriety or expediency to let said land go without replanting; so that it was then and there mutually agreed by and between T. V. Watters & Sons and the said Sanger Bros. that said 60 acres of land should be replowed, reprepared, and replanted in cotton, and the said 60 acres of land under such agreement was replanted in cotton after the 6th day of June, 1917."

Appellants insist that at all events Mary S. Taylor's assignment of rents to appellees did not operate so as to include the rent cotton raised upon the 60 acres of land replanted, it being shown that the rents therefrom and collected by Sanger Bros. amounted to \$495.59. While appellants' counsel have forcibly presented a contrary view, we think we must hold that appellees, under the terms of the rental contract by Watters & Sons and by virtue of the assignment from the owner under which they hold, are entitled to the rents upon the 60 acres of cotton planted at the instance of appellants after their purchase.

[2, 3] It is to be noted in the first place that there is no clear showing in the statement of facts (and from which we have quoted that part pertinent to the question now under consideration) that there was a real necessity to replant any of the cotton. The statement is merely that the 60 acres "had on it a very poor stand," and that the propriety or expediency of permitting the land to go without replanting was "doubtful." There is no showing that, had the 60 acres not been replanted, no cotton of material value would have matured, and we think the appellants and the tenant at their own peril assumed the responsibility, and must have the doubt resolved against them. But regardless of this suggestion, and assuming for the purpose of our conclusion that the replanting was necessary, we nevertheless think that appellees were entitled to the rents due upon the replanted land, which undoubtedly thereafter produced a crop. As we understand the rule in this

state to be, not only crops planted, but crops to be planted, and which are thereafter actually planted pursuant to a contract with the owner of the land, may be sold or mortgaged. That is to say, that if a tenant, under a valid contract with the owner of the soil, agrees to pay a crop rent and thereafter actually plants and cultivates the specified crop, the same may be sold or mortgaged even though at the time of the sale or mortgage the crop has not actually been planted. In such case the crop is considered as having a potential existence, and, having such potential existence, it may be assigned or mortgaged before the crop is actually planted, as well as thereafter while growing. See *Richardson v. Washington et al.*, 88 Tex. 339, 31 S. W. 614; *Dupree v. McClanahan*, 1 White & W. Civ. Cas. Ct. App. § 594 et seq.; *Conley v. Nellin*, 60 Tex. Civ. App. 395, 128 S. W. 424; *Barron v. San Angelo Nat. Bank*, 138 S. W. 142.

[4] It is undisputed that appellants had notice of the rental contract between Mary S. Taylor and Watters & Sons and of the assignment thereof to appellees at the time of appellants' purchase under their trust deed. Hence we conclude that by such assignment appellees acquired the full right as against Watters & Sons and appellants to the rents in question, and that the new rental contract entered into between Watters & Sons and appellants was of no effect as against appellees. It is accordingly our judgment that appellants' assignments of error and all propositions thereunder should be overruled and the judgment affirmed.

#### On Motion for Rehearing.

The counsel for appellants very earnestly insist that we were in error, at least, in holding that the appellees were entitled to recover the cotton replanted after the sale of the land to Sanger Bros. It is contended that our ruling leads to unreasonable results; that in accordance therewith an owner of land who had given a mortgage thereon might lawfully make a rental contract extending through a series of years and thereafter assign such contract, and thus deprive the mortgagee in a large measure of the fruits of his mortgage. Logically this may seem true, but as to this contention we deem it sufficient to say that the case before us presents no such condition. The lease by the landlord here was for but one year, and it will be time enough to determine the supposititious cases when they are presented upon the record. Doubtless, if such a case be presented, some rule of law or equity may be found to prevent injustice. At all events, if we are to be controlled by the cases cited in our original opinion, as we think we must, it seems clear that Mary S. Taylor, the owner of the mortgaged

premises involved in this suit, had a clear right to make the rental contract she did with Watters & Sons, and that, having such right, she as clearly could lawfully transfer it with all of its force to appellees. If so, the tenant was liable for the rents as he had contracted for, both as to the growing crops and as to all crops actually planted and maturing for the crop year, and no action on the part of Sanger Bros. or of the tenants could impair, to any extent, appellees' right as assignees of Mrs. Taylor.

[5] In deference to a request on the part of able counsel who argued this case, we will also notice the further contention, not heretofore presented, that our ruling is violative of the Fourteenth Amendment of the Constitution of the United States, in that it amounts to taking of property without due course of law. We will not enter upon any extended discussion of the subject, but will merely say as to this that from an early date in this state, unlike as at common law, the mortgagee of lands is but a lienholder, the legal title yet remaining in the owner of the mortgaged premises, with an unimpaired right to lease and obtain the emblements in the way of growing crops. See *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284, where the subject is fully discussed. This being true, we cannot see that Sanger Bros. have been deprived of any right for which they contracted. The rule of law referred to was in full force in this state at the time they took their liens upon Mrs. Taylor's premises, and the trust deed lien therefore was affected by the rule as fully as if it had been written in the trust deed. By a very familiar rule of construction, Sanger Bros. must be held to have known at the time they took their trust deed that Mrs. Taylor had the lawful right to make the rental contract as she did, and had the further right of assigning such contract to others.

[6] Under such circumstances, we know of no decision of the United States courts which goes so far as to hold that such subsequent lease and assignment of Mrs. Taylor was a taking of appellants' property, or an impairment of their security within the meaning of the clause of the federal Constitution referred to. Indeed, we do not see that such subsequent rental contract and assignment in fact impaired appellants' security. The security was the land owned by Mrs. Taylor, and not the crops involved in this suit, and nothing in the evidence in this case even tends to show that the land at the time of its sale under the trustee process to appellants was not, in fact, of much greater value than the debt to secure which the trust deed had been given.

We conclude the motion for rehearing should be overruled.



## STATE v. LILES. (No. 996.)

(Court of Civil Appeals of Texas. El Paso.  
May 22, 1919.)TAXATION — 733—SALE FOR DELINQUENT  
TAXES—LIABILITY OF PURCHASER FOR TAXES  
ANTEDATING SALE.

In the absence of a provision to the contrary in statute or judgment under which sale is made, the purchaser at a valid tax sale acquires title free from any lien for taxes assessed and delinquent for any years previous to that for which sale is made, and the state cannot recover state and county taxes antedating foreclosure sales.

Error from District Court, Presidio County; Joseph Jones, Judge.

Suit by the State against M. T. Liles. From the judgment rendered the State prosecutes a writ of error. Affirmed.

W. C. Jourdan, of Marfa, for the State.  
Lewright & Douglas, of San Antonio, for defendant in error.

HIGGINS, J. On February 21, 1906, sections 115, 117, and 815 were sold for the taxes for the year 1904. Sections 459 and 643 were sold March 7, 1911, for the taxes for the year 1908. The sales were made by the sheriff under tax foreclosure decrees theretofore regularly rendered by the district court of Presidio county. Defendant in error, Liles, subsequently acquired the title of the purchasers at such sales. On July 24, 1918, plaintiff in error, by its county attorney, filed this suit to recover the sum of \$1,521.91 state and county taxes against said lands. A portion of the taxes sought to be recovered were for years antedating the foreclosure sales aforesaid. Upon trial the plaintiff recovered judgment with decree of foreclosure for the taxes for the years subsequent to the foreclosure sales, and was denied recovery of the taxes due for the years antedating those for which the land had been sold, and the lands were decreed to be free and clear of the taxes for those years. From this judgment the state prosecutes this writ of error.

## Opinion.

In some states it is held that the sale of land for nonpayment of taxes does not divest the lien of delinquent taxes previously assessed and chargeable on the same premises. This rule is undoubtedly correct where the law directs that the purchaser at the tax sale shall assume and pay all previous delinquent taxes, or where the statute or judgment under which the sale is made orders that he shall take title subject to the lien of existing taxes. But in the absence of some such provision in the law or the judgment, the doctrine ordinarily prevails that at a valid tax

sale the purchaser acquires title free from any lien for taxes assessed and delinquent for any year previous to that for which the sale was made. See note and cases cited Ann. Cas. 1913A, 875; 37 Cyc. 1477.

This rule of decision it seems obtains in Texas. *City of Houston v. Bartlett*, 29 Tex. Civ. App. 27, 68 S. W. 730 (writ of error refused); *Ivey v. Teichman*, 201 S. W. 695. It has been held by the Supreme Court that one holding several liens upon the same property, and who causes the same to be sold in satisfaction of one of his liens without having secured in the foreclosure decree any provision for the preservation of the other lien, cannot maintain a subsequent suit to foreclose such other lien, and that the purchaser at the sale took the property discharged of the other lien. *Vieno v. Gibson*, 85 Tex. 432, 21 S. W. 1028; *Brown v. Canterbury*, 101 Tex. 86, 104 S. W. 1055, 130 Am. St. Rep. 824. See, also, *Rembert v. Wood*, 16 Tex. Civ. App. 468, 41 S. W. 525; *Alston v. Piper*, 34 Tex. Civ. App. 589, 79 S. W. 357. The doctrine of these cases it would seem should apply to tax liens.

We are of the opinion, therefore, that the court properly refused a foreclosure for taxes for the years antedating the foreclosure sales for the years 1904 and 1908.

Affirmed.

HARPER, O. J. (concurring). I concur in this opinion because it is in line with the holdings of other courts in cases between individuals and between cities and individuals in tax cases. The principle has not been applied to states in tax suits, but inferentially, as noted hereafter, has been repudiated.

As I see it, the rule invoked applies to persons holding the legal title to secure the payment of one's debts and a sale for one debt with lien carries with it his entire title, but the state does not base its rights upon any claim of title or claim of right to the land itself, but simply has an interest in the land to the extent of the amount of taxes due.

But for the fact that the effect of the holding in *Vieno v. Gibson*, 85 Tex. 432, 21 S. W. 1028, is that there can be but one foreclosure by a person holding several liens upon property, there could be no question that the rule would not apply to the state's statutory lien for taxes, under the authorities cited as a basis for the holding. But, notwithstanding the line of authorities, it appears to me that the rule cannot be applied to the state because of the Constitution and statute applicable to delinquent taxes. Section 15, art. 8, Const., provides that all assessments upon landed property shall be a special lien thereon. And it shall be subject to seizure and sale for the payment of all taxes, etc., due under such regulations as the Legislature may provide.

Article 7684, Rev. Stat. Vernon's Sayles; provides that all lands or lots which have been returned delinquent since 1885, "or may hereafter be returned delinquent or reported sold to the state or to any city; \* \* \* said taxes shall remain a lien upon the said land, \* \* \* and may be sold under the judgment of the court for all taxes, interest, \* \* \* shown to be due by such assessment for any preceding year." To me this language means that the state's lien shall remain for each and every year until the taxes are paid and cannot be divested except by payment. In *Traylor v. State*, 19 Tex. Civ. App. 86, 46 S. W. 81, it is held that the lien remained where the land was reported sold to the state by virtue of this same statute, and the provision "shall remain a lien" applies with equal force to lands "returned delinquent," as to lands sold to the state or any city.

#### HINTON v. D'YARMETT et al. (No. 9152.)

(Court of Civil Appeals of Texas. Ft. Worth. March 29, 1919. On Motion for Rehearing, May 10, 1919.)

#### 1. INJUNCTION $\S$ 118(1)—SPECIFIC PERFORMANCE $\S$ 113—PLEADING—PETITION.

Petition held to state cause of action for injunction to restrain removal of oil-drilling equipment and casing delivered to plaintiff under an executed contract, and not an action for specific performance of an executory contract to drill well.

#### 2. CONTRACTS $\S$ 237(2)—MODIFIED CONTRACT—CONSIDERATION.

Where owner of oil leases assigns shares of stock and his interest in certain oil leases in consideration of assignee's agreement to drill test well, and purchaser from assignee of an interest in the contract assumes obligation of drilling well, but after commencing work refuses to continue, whereupon contract is modified so as to permit owner himself to drill well with equipment furnished by such purchaser, the preceding contracts and proceedings constitute a sufficient consideration for modified contract.

#### 3. CORPORATIONS $\S$ 399(2) — IMPLIED AUTHORITY—"GENERAL MANAGER" OF CORPORATION.

The term "general manager" imports general authority to perform all reasonable things in conducting the usual and customary business of his principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Manager.]

#### 4. CORPORATIONS $\S$ 406(4) — IMPLIED AUTHORITY — GENERAL MANAGER — MODIFICATION OF OIL-DRILLING CONTRACT.

General manager of oil-drilling corporation had authority to modify contract under which the corporation was obligated to drill well for

owner of oil lease so as to permit owner to drill well with equipment and casing furnished by the corporation.

#### 5. INJUNCTION $\S$ 59(1)—CONTRACTS—DRILLING OF OIL WELL—REMOVAL OF EQUIPMENT.

Owner of oil leases who has transferred stock and assigned certain oil leases in consideration of use of drilling equipment and casing in drilling test well, and who has sold oil leases conditioned upon the drilling of the well to certain depth, and who has insufficient funds wherewith to himself supply equipment and casing, is entitled to injunction restraining the removal of equipment and casing from premises where drilling of well has commenced, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, as to scope of remedy by injunction.

#### 6. INJUNCTION $\S$ 34—SUBJECTS OF RELIEF—CONSTRUCTION OF STATUTE.

In granting injunction under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, the court is not confined to the general rules of equity practice on the subject, and will give relief where applicant has a substantial right cognizable in law that is or is about to be invaded, where injunction is necessary to restrain some act prejudicial to him.

Appeal from District Court, Montague County; C. R. Pearman, Judge.

Action by Harley R. Hinton against E. O. D'Yarmett and others. General demurrer to plaintiff's amended petition sustained, and the plaintiff appeals. Reversed and remanded.

Cook & Spencer, of Wichita Falls, and J. W. Templeton, of Ft. Worth, for appellant.

Paul Donald, of Bowie, George B. Rittenhouse, of Oklahoma City, Okl., and Thompson, Barwise, Wharton & Hiner, of Ft. Worth, for appellees.

CONNER, C. J. The only question presented on this appeal is whether the trial court erred in sustaining a general demurrer to appellant's amended petition, which, omitting formal parts, appellees thus set forth, viz.:

"That plaintiff resides in the county of Montague and the state of Texas. That defendant E. C. D'Yarmett resides in the county of Muskogee, Okl. That the defendant O. M. Topley resides in the county of Oklahoma, and the state of Oklahoma, and that defendant Assurance Oil & Refining Company is a corporation duly incorporated under the laws of the state of Oklahoma, its principal office in the city of Oklahoma and the state of Oklahoma; Wallace is its president, and defendant O. M. Topley is, and has been since the 3d day of October, 1917, and continuously thereof its vice president and general manager, and H. W. Munsen its secretary and treasurer.

"That on and prior to the 1st day of October, 1917, plaintiff was the owner and holder of certain leasehold estate in and to various tracts of land situated in Montague county,

Tex., about 4 miles south from, lying in a body, and consisting of 4,000 acres. That on said date he made and entered into a contract with the defendant E. C. D'Yarmett whereby the latter agreed to drill a well for oil or gas upon the said leasehold estate to the depth of 2,500 feet unless oil or gas, or either of them, are found in paying quantities at a lesser depth, said defendant to furnish all of the necessary tools, labor, casing, and other materials necessary for the proper prosecution of the work, including the tubing and other equipment, plaintiff to furnish certain steel rig then located at a point where it was proposed that the said well should be drilled, of which said defendant should have the exclusive use for the purpose of performing said contract, and it was agreed in said contract that, in the event said well so to be drilled should be productive of oil and gas or either of them, the said material, equipment, tubing, tools, and other personal property thereon, except the drilling tools, shall belong to and be the property of the said Harley R. Hinton, plaintiff aforesaid, and he hereby binds himself and agrees to pay unto said defendant for the same the market price therefor at the time of the completion of said well, said contract being as follows:

"Memorandum of Agreement.

"This memorandum of agreement made and entered into at Muskogee, Okl., this the 1st day of October, 1917, by and between E. C. D'Yarmett first party, and Harley R. Hinton, second party, witnesseth:

"Whereas the second party is the owner of certain leasehold estate in and to a tract of real estate situated in Montague county, state of Texas, and desirous to have a test well drilled thereon for oil and gas or either of them; and

"Whereas, there is located on the lands above described one certain steel rig, the location thereof being known to both parties to this contract:

"Now, therefore, for the consideration herein mentioned and agreed upon to be paid and performed by the second party, the said first party hereby agrees to drill a well for oil and gas upon this leasehold estate belonging to the second party, such well to be located at the place where the above-recited derrick now is upon said property, and the same to be drilled to the depth of twenty-five hundred (2,500) feet unless oil or gas or either of them be found in paying quantities at a lesser depth, it being understood that the said first party shall furnish all the necessary tools, labor, casing, and other materials necessary for the proper prosecution of the work, including the tubing and other equipment, in the event the well should produce oil, but including the rig, it being the further understanding and agreement of the parties that the said first party, for the purpose of drilling said well, shall have the exclusive use of the above-mentioned rig for the purpose of performing this contract. And the said first party agrees to commence the operations under this contract within a period of fifteen (15) days from and after the date when abstracts are furnished covering the leasehold estate to be assigned unto the first party, in accordance

with the provisions of this contract hereinafter contained.

"It is further understanding and agreement of the parties hereto that, in the event the test well so to be drilled should prove to be non-productive of oil and gas or either of them in paying quantities, all material, equipment, casing, tubing, tools, and other personal property thereon, with the exception of the steel rig above mentioned, shall belong to and be the property of the said first party, but in the event such well should be productive of oil and gas, or either of them, the said material equipment, casing, tubing, tools, and other personal property therein, except the drilling tools, shall belong to and be the property of the said second party herein, and the said second party hereby binds himself and agrees to pay unto the first party for the same the market price thereof at the time of the completion of said well.

"And in consideration of the premises and agreement heretofore contained to be by the first party performed, and for the drilling of such well, the said party hereby sells and transfers to the first party two hundred and fifty thousand (250,000) shares of the capital stock of the Big Six Petroleum Company, a corporation of the state of Delaware, and further sells, assigns, and transfers unto the said first party all of his rights, title, and interest in and to certain oil and gas leases which are particularly mentioned and set forth in schedule A which is hereto attached and made a part of this contract.

"And for the sum consideration the said second party hereby binds unto the first party the exclusive right and option of six (6) months to purchase from the second party five hundred thousand (500,000) shares of the capital stock of the Big Six Petroleum Company, a corporation, at the price of twenty (20) cents per share.

"The said second party further agrees to furnish abstracts of title to all of the real estate mentioned and described in Schedule A hereunto attached, such abstract to show valid oil and gas leases on each of said tract in the name of the belonging to the second party herein, and the title to the real estate therein described to be good and marketable, free and clear of and from all incumbrance and prior leases in the name of the respective lessors therein mentioned.

"It is the intention of the parties hereto that actual transfers of the two hundred and fifty thousand (250,000) shares of stock herein mentioned and the oil and gas leases mentioned in Schedule A shall be made at any time after the date hereof when requested by the first party, and to the effect that end the second party has executed concurrently herewith an order upon the United States Corporation Company at No. 38 Nassau street, New York, the register and transfer agent for the said Big Six Petroleum Company, to issue unto the said first party herein the said two hundred and fifty thousand (250,000) shares of the capital stock. It is further understood and the agreement of the parties hereto that the said shares of the capital stock of the Big Six Petroleum Company and the oil and gas leases mentioned in Schedule A shall be transferred and assigned unto the first party or to such parties or per-

sons, firms, or corporation as he may designate.  
 "This contract shall extend to and be binding upon the representative parties hereto, their executors, administrators, and assigns.

"Witness the parties hereto the day and year aforesaid.

"E. C. D'Yarmett, First Party.

"Harlie R. Hinton, Second Party.

"Schedule A.

"Description of the leases in Montague county, Texas, agreed to by Harley R. Hinton to be assigned to E. C. D'Yarmett or his assigns:

"Tract No. 119 of the John H. Belcher subdivision, being 160 acres of the leases of J. W. Belcher and wife to A. A. Berch to Harley R. Hinton, dated June 1, 1916, and recorded in Montague county, Tex., records, Book 85 of the Deed Records at page 308.

"Tract No. 118 of the John H. Belcher subdivision, being 160 acres of the lease of J. D. Bybee and wife L. A. Bybee, to Harlie R. Hinton, dated May 31, 1916, and recorded in Montague county, Tex., records, Book 85 of the Deeds at page 306.

"Tract No. 117 of the John H. Belcher subdivision, being 160 acres of the leases of A. J. Cox and wife, L. E. Cox, to Harley R. Hinton, dated June, 1916, and recorded in Montague county, Tex., Record Book No. 85, page 309.

"The north 75 acres of tract 132 of the John H. Belcher subdivision, being the leases of C. C. Long and wife, Rillie Long, to Harley R. Hinton, dated June 1, 1916, and recorded in Montague county, Tex., records, Book 85 of the Deeds at page 341.

"The south 85 of tract No. 132 of the John H. Belcher subdivision, being the lease of J. A. Wilson and wife, I. A. Wilson, to Harley R. Hinton, dated June 1, 1916, and recorded in Montague county, Tex., records, Book 85 of Deeds at page No. 357.

"The north 80 of tract No. 131 of the John H. Belcher subdivision, being a part of the lease of D. G. Dunn and wife, M. B. Dunn, to Harley R. Hinton, dated June 1, 1916, and recorded in Montague county, Tex., records, Book 85 of Deeds at page 313.

"Tract No. 130 of the John H. Belcher subdivision, being the lease of W. L. Kennedy and wife, Mattie Kennedy, to Harley R. Hinton, dated June 1, 1916, recorded in Montague county, Tex., records, Book No. 85, page 335.

"The north 80-acre tract of No. 156 of the John H. Belcher subdivision and tract No. 155 out of the John H. Belcher subdivision, being the lease of J. B. Reeves and wife, Modarie Reeves, to Harley R. Hinton, dated June 1, 1916, recorded in Montague county, Tex., records, Book 85 of Deeds at page 351.

"The south half of tract No. 156 and the E.  $\frac{3}{4}$  of tract No. 285 of the John H. Belcher subdivision, being the lease of John Kirby and wife, Della Kirby, to Harley R. Hinton, dated June 2, 1916, and recorded in Montague county, Tex., records, Book No. 85 of Deeds at page No. 328.

"Tract No. 154 and the W.  $\frac{1}{2}$  of tract No. 153 of the John H. Belcher subdivision, being the lease of C. H. Kirby, a widower, to Harley R. Hinton, dated June 1, 1916, in Montague county, Tex., record deeds, Book 85 of Deeds at page 323.

"Tract No. 156 and a part of tract 184 of the John H. Belcher subdivision, being the lease of M. F. Kirby and wife, Fannie Kirby, to Harley R. Hinton, dated June 1, 1916, and recorded in Montague county, Tex., records, Book 85 of Deed Records at page No. 329.

"That by the terms of said contract plaintiff, Harley R. Hinton, sold and transferred to defendant E. C. D'Yarmett 250,000 shares of the capital stock of the Big Six Petroleum Company, a corporation of the state of Delaware, and contracted to sell, assign, and transfer to said defendant all of his right, title, and interest in and to a certain oil and gas lease, which are mentioned and described in Schedule A attached to said contract. That, in pursuance of said contract, plaintiff has furnished abstracts of title to all of the real estate mentioned and described in said Schedule A showing valid oil and gas leases on each of said contract in the name and belonging to plaintiff.

"That thereafter, on the 3d day of October, 1917, defendant E. C. D'Yarmett and O. M. Topley made, executed and delivered a certain assignment and contract in reference to said contract made and entered into by plaintiff and defendant E. C. D'Yarmett, whereby said E. C. D'Yarmett sold and assigned unto defendant O. M. Topley an undivided one-third interest in and to said contract, said assignment being in words and figures as follows:

"Assignment.

"Whereas, E. C. D'Yarmett is the owner and holder of certain contract made and entered in by and between the said E. C. D'Yarmett as first party, and Harley R. Hinton, as second party dated 1st day of October, 1917, a copy of said contract being hereto attached and in all respects made a part hereof:

"Now, therefore, for the consideration hereinafter mentioned, the said E. C. D'Yarmett hereby sells and assigns unto O. M. Topley an undivided one-third interest in and to said contract.

"And as a full consideration for the transfer of said undivided interest in and to the above-described contract, the said O. M. Topley has paid unto the said E. C. D'Yarmett the sum of one dollar (\$1.00), the receipt which is hereby acknowledged, and further agrees to assume and to pay a proportionate amount of the expenses and cost incurred by the said E. C. D'Yarmett in the performance, and to furnish casing, tools, etc., for drilling of test well. The provisions of this agreement and the agreement herein contained shall inure to the benefit of and shall be binding upon the respective executors, administrators, and assignors of the parties hereto.

"Witness the said E. C. D'Yarmett, the assignor, and the said O. M. Topley, assignee, herein this the 3d day of October, 1917.

"E. C. D'Yarmett, Assignor.

"O. M. Topley, Assignee."

"That therefore defendant O. M. Topley executed an assignment in writing of the above assignment to the defendant the Assurance Oil & Refining Company in words and figures as follows:

"For and in consideration of one dollar, value received, I hereby assign all my right,

title, and interest in the within contract to the Assurance Oil & Refining Company, this the 8th day of December, 1917.

"O. M. Topley."

"That, in pursuance of said contract and the assignments thereunder as above quoted and as therein agreed, defendant O. M. Topley and the Assurance Oil & Refining Company moved the well-drilling equipment, boiler, engine, string of tools, casing, and other personal property, as hereinafter mentioned, upon the premises of D. G. Dunn, the location thereof agreed upon, and where said steel rig was located, and that drillers were employed by defendants, and the work of drilling said well was begun.

"That it was agreed by the parties hereto that plaintiff should sell such part of the said 2,000 acres leasehold as would be necessary to procure sufficient funds to meet the expenses of drilling said well, and in pursuance of such agreement plaintiff has sold in leasehold 1,400 acres of said 2,000 acres to various parties, and has received therefor between \$10 and \$11, and it was a part of the consideration with said purchasers that a well should be completed to that depth, to which plaintiff became and is necessary and legally bound, and that, according to said agreement, he made transfers direct to such purchasers. That said sum of money have been expended in the prosecution of said contract in the drilling of said well.

"That, in pursuance of said contract and assignments, drillers were employed and the drilling of said well was begun as aforesaid, the well was dug to the depth of 750 or 800 feet, at which depth certain tools were lost in the hole, and after considerable time and effort said tools were yet unrecovered therefrom. That, in the absence of the plaintiff, defendant O. M. Topley came down from Oklahoma City, and, without the knowledge or consent of plaintiff, drew the casing out of said hole, and was at the time and before the institution of this suit preparing to remove said casing and said equipment off of said land and premises and out of the state of Texas, which drilling material is as follows: One boiler and engine, a complete string of tools and drilling equipment, and casing as follows: About 120 feet of 12½-inch, about 800 feet of 10-inch, about 1,400 feet of 8½-inch. All of said equipment and casing are the equipment and casing agreed to be so furnished and were furnished on the ground by defendant O. M. Topley and the Assurance Oil & Refining Company, which said boiler, engine, tools, and equipment are of the value of \$7,000, and said casing is of the value of \$4,000. That, unless the temporary writ of injunction heretofore prayed for and granted in this cause be perpetuated, said defendant will remove said equipment and casing off of said premises and out of the state, and plaintiff would be defeated in the use thereof, and owing to the large amount of the acreage already used, and, expended of the leasehold heretofore obtained by the plaintiff, he would not be able to purchase other drilling outfit and the necessary casing for the completion of said well as agreed by the first contract and as agreed by and between plaintiff and the purchasers of the leasehold in said 1,400 acres. That a failure to finish said well according to the agreement will cause a forfeit of the oil and gas

leases as aforesaid, and subject plaintiff to the repayment of the amounts received and expended under said contract to the purchasers of leasehold in the said 1,400 acres of land, and that, unless the said temporary writ of injunction is made permanent, and plaintiff be allowed the use of said drilling outfit and casing, he will suffer great and irreparable injuries and damages. That said restraining order theretofore made in this cause is as follows, to wit:

"In vacation, Denton, Texas, October 14, 1918.

"Upon execution and filing with the district clerk of Montague county, Tex., by plaintiff, of a good and sufficient bond in the sum of \$1,000 as provided by law, said clerk will issue a writ of injunction restraining defendants, either in person or by agent, from selling, hypothecating, or otherwise disposing of any part of the machinery or equipment described in this petition or in any way interfering with plaintiff's possession thereof as same now exists, and from removing same or any part thereof from said premises pending this suit. The prayer for mandatory writ of injunction denied before hearing the testimony.

"John Speer, Judge 16th District."

"That, after said tools were so lost in said hole, plaintiff and defendant O. M. Topley, for himself and as vice president and general manager for defendant Assurance Oil & Refining Company, made agreement that plaintiff take control and management of the drilling of said well, and he was then and thereby given control and custody of said equipment and casing, and as such control and management of said equipment and casing at the time said defendant drew the casing aforesaid, and was threatening to undertake to remove same from the premises, plaintiff has no adequate remedy at law.

"Wherefore, a temporary writ of injunction having been heretofore granted, and defendant having been cited and having filed their respective answers herein, plaintiff prays that said temporary writ be made permanent restraining defendant from moving said drilling outfit and casing described above from said premises, or in any way interfering with plaintiff's possession and use of same until said well is completed to the depth of 2,500 feet according to said contract, and that they be also restrained from selling or in any wise disposing of said drilling equipment and casing so as to interfere with plaintiff's possession thereof, and that plaintiff has completed said well according to the said contract, and that an order therefore be entered to that effect, for his damages, and for the cost of this suit, and for general relief."

Appellees urge many reasons in their briefs in support of the court's ruling. It is insisted that the petition fails to allege that appellant had or could sell enough of his 2,000-acre leasehold to meet the expense of drilling the well in question, and hence fails to show performance or an ability to perform the contracts on his part, and that for this reason appellant is not entitled in equity to a specific performance of the contract. To the same end it is further insisted that the peti-

tion is fatally deficient in that it fails to allege that appellant had furnished abstracts showing good and marketable title free from all incumbrances and former leases to his leasehold lands as provided by his contract, and fails to show that the tools lost in the well as partially drilled can be removed and the well completed to a depth of 2,500 feet as provided in the contract, and fails to show that there was any consideration for or authority in O. M. Topley to act for the Assurance Oil & Refining Company to agree that appellant might take control, manage, and drill the well contemplated by the contracts between the parties.

There may be other supposed defects in appellant's petition thought to be material by appellee, but they are all of like import with those we have noted, and all are urged in support of the same general proposition which may be epitomized by the following brief quotation from one of appellee's propositions, viz.:

"It is apparent from the allegations in the petition on which this case was decided that the appellant is not only directly, but indirectly, trying to enforce by injunction specific performance of the contract or contracts mentioned and set forth in his petition."

The contentions, as before indicated, are that such specific performance cannot be awarded for the reasons assigned, and that hence the court correctly held the general demurrer to be good.

We are of opinion, however, that appellee's construction of appellant's petition, with which they evidently impressed the trial court, is wholly wrong. Much of the reasoning, therefore, and many of the authorities presented in aid of the court's ruling, have no application and will not be discussed.

[1] It seems manifest to us that the appellant's petition, in its relation to the order appealed from, should not be construed as seeking a specific performance of the unexecuted contracts mentioned. There is no prayer for any such relief, nor does the dissolved order extend any such relief. Nor does the petition seek a recovery of damages because of the failure of appellees to drill the well as they contracted to do. On the contrary, the only prayer was to the effect that appellant be left undisturbed in the possession and use of drilling tools delivered to him under a contract. If appellee actually delivered to appellant the specified tools, as alleged, pursuant to a valid agreement to do so, then the agreement or the contract was an executed one, and not executory in the sense that the court's aid was needed. It had already been performed. It had already served its primary and principal purpose. What was left was for appellee to do in completing the well; the original contracts being modified to this extent. The relation of the

contracts and other things antedating the contract under which appellant became possessed of the tools is to be viewed, we think, as merely leading up to and explanatory of the contract for the attempted breach of which appellant complains.

[2-4] There can be no doubt, we think, that the preceding contracts and proceedings, as alleged, constituted a sufficient consideration for the new or modified agreement. *Galveston v. Ry. Co.*, 46 Tex. 435, *Foley v. Storrie*, 4 Tex. Civ. App. 377, 23 S. W. 442. And while the petition should perhaps have been a little more specific on the point, we nevertheless think the allegations as a whole sufficiently show, as against a general demurrer, that the appellee oil and refining company is so far bound upon the new contract as to at least preclude disturbance of appellant's possession of property thereunder. As alleged, within a few days after D'Yarmett made the original drilling contract with appellant, Topley purchased an interest therein and assumed part of its obligation. Soon thereafter the oil company took an assignment of said interest from Topley, and thus made itself a party to the original agreement. Indeed, the expressed consideration for the Topley assignment was but nominal, which, with other circumstances, seems to raise the inference that Topley's purchase from D'Yarmett was in truth a purchase for the benefit of the oil company of which he was vice president and general manager. "O. M. Topley and the Assurance Oil & Refining Company," as is alleged, moved the well-drilling equipment in controversy to the designated spot, employed drillers, and began drilling the well. It seems plainly inferable from the petition, as a whole, that the difficulty specified in drilling the well, together with the failure or refusal of the oil company to continue, was the originating cause or inducement for the modifying agreement, which evidently shifted the burden of completing the well under the terms of the original contract with D'Yarmett, as it had undertaken to do, from the oil company to the appellant. In other words, the new or modifying contract was plainly in the interest and for the benefit of the oil company, and to secure such benefit and as an inducement thereto, we think it was within at least the apparent scope of O. M. Topley's authority to agree that appellant might take and use the well equipment in question as specified in the new agreement. It is alleged that O. M. Topley was the appellee oil company's "general manager." The very terms import general authority to perform all reasonable things in conducting the usual and customary business of his principal. In *Railway Co. v. Reisner*, 18 Kan. 458, it was held that the terms "general manager" and "general agent" are synonymous; that the general agent of the company was virtually the corporation itself, and

therefore had authority to bind the company for the expense of board, etc., for an injured brakeman. While a general agent may not ordinarily, without special authority, surrender important rights of his principal, yet there are many cases, says Mechem in his work on Agency, p. 991, where a "general manager" or "general agent" (and he treats the terms synonymously) "may meet emergencies, and provide for unexpected exigencies, and these may involve waivers of time, or alterations of terms, as waivers of condition, or surrender of technical rights, as mere natural and ordinary incidents." Numerous illustrations of the test are given in the notes, and we think the allegations of appellant's petition bring this case within the principle stated, especially in view of the fact that, viewing the petition as a whole, the new contract is so manifestly for the benefit of the oil company and so apparently within the scope of the business and practice of developing oil companies as generally understood.

[5, 6] But without further discussion we conclude that the allegations of appellant's petition are sufficient to show that the contract under which he acquired the possession of the property in question was upon a sufficient consideration and binding upon the appellee oil company, and that by virtue thereof appellant has the right to the undisturbed possession and use of the property described in his petition as contemplated by the contract. Assuming this to be true, what remains for determination is very simple and requires but brief notice. Our statutes on the subject authorize writs of injunction "where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant." See 3 Vernon's Sayles' art. 4643. In granting the relief authorized by this statute, we are not confined to the general rules of the equity practice on the subject. Generally all that is required is that the applicant has a substantial right cognizable in law that is or is about to be invaded, and that a writ of injunction is necessary to restrain some act prejudicial to him. Under the circumstances alleged in this case and as against a nonresident corporation, it seems clear to us that no other remedy is as adequate or as efficacious as the writ of injunction, and we think the trial court erred in his said order sustaining the demurrer, and in dissolving the temporary writ of injunction theretofore issued. See *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Birchfield et al. v. Bourland*, 187 S. W. 422; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 83; *El Campo Co. v. Water & Light Co.*, 63 Tex. Civ. App. 393, 132 S. W. 868;

*City of Brownwood v. Tel. Co.*, 152 S. W. 709; *Mitchell v. Burnett*, 57 Tex. Civ. App. 124, 122 S. W. 987; *Tomlin v. Clay*, 167 S. W. 204; *Cement Co. v. Am. Cement Co.*, 167 S. W. 183; *Tel. Co. v. Smithdeal*, 104 Tex. 258, 136 S. W. 1049; *Lakeside Irr. Co. v. Kirby*, 166 S. W. 715.

The judgment below is accordingly reversed, and the cause remanded.

#### On Motion for Rehearing.

Appellees present a very voluminous and insistent motion for rehearing. Its length precludes any extended notice. We can only say that the motion has been carefully examined, and we can but think, as expressed in our original opinion, that the court erred in sustaining the general demurrer to appellant's petition. To the authorities cited in our original opinion we wish to add the case of *Booker-Jones Oil Co. v. National Refining Co.*, 63 Tex. Civ. App. 142, 131 S. W. 623, 132 S. W. 815. We refer to this case and to the authorities therein cited as supporting the effect given by us in our original opinion to the term "general manager."

We think the motion for rehearing must be overruled, and it is so ordered.

#### RICHARDSON v. TERRY et al. (No. 975.)

(Court of Civil Appeals of Texas. El Paso.  
May 1, 1919. Rehearing Denied  
May 29, 1919.)

#### 1. APPEAL AND ERROR — 285, 719(4)—EXCEPTIONS TO MERITS—FUNDAMENTAL ERROR.

If exceptions to pleading were special exceptions and not assigned as error in compliance with Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, requiring motion for new trial and assignments of error, the appellate court would not be required to consider them, but where they are addressed to the merits and not the sufficiency of the allegations they are general demurrers, the overruling of which presents fundamental error.

#### 2. SPECIFIC PERFORMANCE — 65—CONTRACT TO CONVEY HOMESTEAD.

A contract to convey a homestead is not one for which specific performance may be decreed.

#### 3. TORTS — 12—INTERFERENCE WITH PERFORMANCE OF CONTRACT.

A person interfering with a contract of sale of real estate is liable in damages in a proper case, although the contract was obnoxious to the statute of frauds, but not if the contract breached be one which the party may or may not perform at his option.

**4. DAMAGES — \$85 — SPECIFIC PERFORMANCE — \$58 — LAND SALE CONTRACT — OPTION TO PAY FORFEIT.**

Where a contract between plaintiff and one of defendants provided that a \$200 check deposited therewith was placed as a forfeit on the land deal, defendant had the absolute right arbitrarily to refuse to carry out the sale and lose such amount, and plaintiff had no cause of action against such defendant; the deposit not being earnest or escrow money but liquidated damages or forfeit.

**5. EVIDENCE — \$462 — SALE CONTRACT — VARYING TERMS BY PAROL.**

A written contract for sale of land providing for a deposit "placed as a forfeit" cannot have its terms varied by parol evidence to show that the money was deposited as earnest or escrow money and not as liquidated damages or forfeit.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Action by M. H. Richardson against J. W. Terry and others. Judgment for defendants, and plaintiff appeals. Affirmed.

D. G. Hunt, of Eastland, for appellant.

R. B. Truly, of Ballinger, Scott & Brelsford, R. L. Rust, and J. R. Stubblefield, all of Eastland, and J. J. Butts, of Cisco, for appellees.

**HARPER, C. J.** This action was instituted by M. H. Richardson against J. W. Terry and wife and L. A. Harrison, G. B. Ward, J. W. Mancil, and Charles Fleming; as to Terry and wife for specific performance of a contract for sale of certain land, and in the alternative for damages for its breach; and as to the other defendants for damages for fraudulently procuring the said Terry and wife to convey the land to them instead of plaintiff, and for cancellation of their deed. Demurrers were sustained to the plaintiff's petition, as hereinafter indicated, and upon refusal to amend the cause was dismissed. From which judgment plaintiff has appealed.

For cause of action plaintiff alleged:

"That defendants Terry and wife were the owners in fee-simple title of the lands described and in possession of the same. That on October 6, 1917, they contracted to convey it to plaintiff, and entered into the following written memorandum, written by Rex Outlaw, and deposited in the bank of which said Outlaw was cashier, subject to the statements, etc., hereinafter made:

"Ranger, Texas, Oct. 6, 1917. This check is placed as a forfeit on land deal between M. H. Richardson and J. W. Terry. If J. W. Terry fails to make deed and good and sufficient title by Dec. 15, 1917, the checks are to be delivered to M. H. Richardson, and should said Terry make such deed and title within the time required and said Richardson fails to pay \$1,-

000.00 and assume loan against land, checks to be delivered. The check for \$200.00 marked "for cows" is the property of J. W. Terry.

"J. W. Terry.

"M. H. Richardson.

"Witness: Rex Outlaw."

"While no specific tract of land is mentioned in said contract, yet in truth and in fact the said J. W. Terry at the date of said contract owned no other land situated in Eastland county except the 172 acres described, and it was to this tract the said contract referred. That 100 acres thereof was subsequent to the date of the contract sold (by Terry) to defendants Harrison, Mancil, Ward, and Fleming. That the \$200 was not deposited as liquidated damages but was deposited as earnest or escrow money, and that it was agreed and understood between them that it should maintain the contract until the maturity of the cash consideration of \$1,000. That at the time of this contract said Terry and wife sold plaintiff seven head of cattle for \$200. That they were delivered together with the pasture situated on the 172 acres, and it was agreed that the cattle and pasture were to remain in the possession of plaintiff until the maturity of the contract. That on October 22d oil was discovered in the neighborhood of this land, by reason whereof it was greatly enhanced in value, and by reason of which said Terry and wife refused to consummate the contract, but, on the contrary, they combined and confederated with defendants Harrison, Ward, Mancil, and Fleming for the purpose of defrauding plaintiff, and so combining and confederating the latter procured said Terry and wife to deed to them 100 acres out of the 172 acres of land. That the said Terry was old and infirm, and ignorant of his rights and liabilities under and by virtue of his contract with plaintiff. The specific representations were: That the land was worth \$50 per acre. That they would pay him that price for it. That he was getting old and was not financially able to accept \$22.50 per acre therefor, as he had contracted to do to plaintiff. That when Terry told them of his written contract with plaintiff to sell they went to the bank and procured the contract, and after examining same with intent to defraud plaintiff they falsely represented to Terry that the contract was not binding on him, etc., and so believing he executed the deed to them. That said land is now worth \$750 per acre. That by making said deed Terry and wife abandoned the said 100 acres as a part of their homestead, and that in the event plaintiff is not entitled to specific performance of his contract, by reason of the fact that same is not signed and acknowledged by Terry and wife, as to the whole of the 172 acres, then he is entitled to specific performance as to the said 100 acres, and to a judgment canceling the deed to the other defendants."

Terry and wife filed the following exceptions:

I. "General exceptions."

II. "Especially except to the amended original petition in so far as same seeks specific performance, for the reason that the character of contract pleaded by plaintiff is not such a one upon which specific performance could be decreed."



B. "Especially except for the reason that the escrow agreement set out in *hæc verba* in the first count of said amended petition discloses that \$200 deposited by said Terry was a deposit as forfeit and as liquidated damages for breach of the alleged contract, and that it would be the limit of the amount or recovery to which plaintiff would in any event be entitled."

The defendants Harrison, Ward, Mancil, and Fleming filed the following exceptions, which were sustained by the court:

"1. These defendants specially except to said petition and say the same is insufficient in law, and shows no cause of action against these defendants nor against any or either of them, because the contract and agreement alleged and set out by plaintiff, and relied upon as ground for specific performance of the contract to convey to plaintiff the land and premises herein involved, is not signed by the defendant Martha Terry, and it appeared from the allegations made and contained in plaintiff's said petition that, at the time the defendant J. W. Terry executed the memorandum or contract set out in plaintiff's petition, said defendants, J. W. Terry and Martha Terry were husband and wife, and that the land in controversy was at that time their homestead.

"2. The defendants specially except to all that part and portion of plaintiff's amended petition wherein the memorandum of the agreement alleged to have been made and entered into by and between plaintiff and the defendant J. W. Terry is set out and copied, and says the same is insufficient in law, because the said memorandum is not a contract to convey the land in controversy, describes no particular land, and refers to no writing for a description thereof.

"3. For further special exceptions to plaintiff's said amended petition the defendants say that the contract sued upon, a copy of which is set out on pages land 2 of said amended petition, is wholly insufficient for plaintiff to maintain this suit upon, and is contrary to the statute of frauds, in that it wholly fails to describe any lands, or to furnish means of description of any lands, or to refer to any writings for description of any lands that were to be conveyed.

"4. Defendants further specially except to all that part and portion of plaintiff's said amended petition wherein said petition undertakes to describe the lands alleged to have been intended to be conveyed by said contract, and says the same is wholly insufficient, and is contrary to the statute of frauds, and that plaintiff thus seeks to ingraft upon said written memoranda an agreement for a description which is wholly wanting in said contract, and pray the court to strike the same from the record. \* \* \*

"7. Said defendants specially except to all that part and portion of plaintiff's amended petition wherein it is sought to recover of and from them damages alleged to have resulted from the breach of the contract by the defendants J. W. and Martha Terry, whereby it was alleged they contracted and agreed to sell and convey the lands in controversy to the plaintiffs."

[1] There was no motion for new trial filed nor any assignments of error otherwise filed in the trial court as provided by article 1612, Vernon's Sayles' Revised Civil Statutes. For this reason appellee urges that the assignments urged in appellant's brief should not be considered.

If the exceptions were in fact special exceptions, as denominated in defendants' answer and the judgment of the court, and not assigned as error in compliance with the statute, we would not be required to consider them. *Texas Glass Co. v. Darnell L. Corp.*, 185 S. W. 965. But these exceptions are addressed to the merits of the cause of action, and not the sufficiency of the allegations; therefore are general demurrers, the overruling of which present fundamental error. *Insurance Co. v. McCurdy*, 183 S. W. 796.

[2] The exceptions by Terry and wife. It is not error for the court to sustain their exception to the effect that this is not the class of contract for which specific performance may be decreed, being a contract to convey their homestead. *Jones and wife v. Goff*, 63 Tex. 248; *Hudgins v. Thompson*, 163 S. W. 659.

[3-5] But, as we understand, appellant does not contend that he is entitled to specific performance of the contract between him and Terry and wife as to the whole of the homestead tract of 172 acres, but insists that by their act in conveying the 100 acres to Harrison et al., prior to the date at which his option expired they, Terry and wife, abandoned their homestead rights to that portion of the homestead, and for that reason their right to rescind their contract based upon claim of homestead no longer existed; therefore specific performance of his contract for the 100 acres may now be decreed, and, if not, still he urges that he is entitled to damages for interference with his contract as against Harrison et al., and for damages against Terry and its breach.

That a person interfering with a contract of sale of real estate is liable in damages in a proper case is well settled in Texas. *Bowen v. Speer*, 166 S. W. 1183; *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914. And that the contract was obnoxious to the statute of frauds, as urged in this case by appellees, would not relieve the parties so interfering. 15 R. C. L. pp. 61, 62, §§ 21, 22. But if the contract breached be one which the party may or may not perform at his option, the rule does not apply. *Roberts v. Clark*, 103 S. W. 417, L. R. A. 1915F, 1076, note, and *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746. Since the writing, termed the contract of sale, between Terry and plaintiff Richardson, provides that the check for \$200 deposited with the writing was "placed as a forfeit on the land deal," Terry had the ab-

solute right to arbitrarily refuse to carry out the sale, and in that event suffer the loss of the \$200, and he did so by selling to the other appellees. It follows that appellant has no cause of action against either party for damages for the alleged tort, nor for specific performance of the contract in whole or in part; and that it is alleged that the \$200 was deposited as earnest or escrow money and not as liquidated damages or forfeit could not avail appellant in the face of the clear and unequivocal terms of the writing itself, for parol evidence would not be admissible to vary its terms.

Affirmed.

### SPARKMAN v. STOUT. (No. 966.)

(Court of Civil Appeals of Texas. El Paso. May 1, 1919. Rehearing Denied May 29, 1919.)

#### 1. CONTINUANCE §26(11) — GROUNDS — ABSENT WITNESS.

A motion for continuance, based on absence of nonresident witnesses, was properly overruled, where no effort had been made to take their depositions, and their testimony at a previous trial was read.

#### 2. GUARDIAN AND WARD §10 — PERSONS ELIGIBLE—LAWSUITS.

Vernon's Sayles' Ann. Civ. St. 1914, art. 4078, subd. 5, disqualifying as guardians parties to lawsuits affecting the minor, does not disqualify administrator of minor's deceased parents.

#### 3. GUARDIAN AND WARD §10 — APPOINTMENT OF GUARDIAN — MINOR'S GRANDFATHER.

A minor's grandfather has preference right to appointment as guardian, although court may think some other person better qualified.

#### 4. GUARDIAN AND WARD §29 — CUSTODY OF WARD—JURISDICTION.

Possession of a minor cannot properly be awarded in proceedings to appoint a guardian for him.

#### 5. GUARDIAN AND WARD §13(8) — ORDER—SUFFICIENCY.

Upon appeal from a probate court order appointing guardian of a minor's person and estate, a district court order appointing guardian for minor's person only is erroneous, since it did not dispose of entire case.

#### 6. GUARDIAN AND WARD §13(7) — BOND — SUFFICIENCY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4083, subd. 4, providing that orders appointing guardians shall specify amount of bond and direct clerk to issue letters of guardianship, order omitting these requirements is defective.

#### 7. APPEAL AND ERROR §395 — BOND—SUFFICIENCY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3632, requiring bonds in appeals from coun-

ty to district court to be fixed by county court and made payable to county judge, a bond not fixed by county court and made payable to appellee is defective, and appeal should be dismissed, unless bond is amended under article 2104.

#### 8. GUARDIAN AND WARD §29 — CUSTODY OF WARD—JURISDICTION.

In proceeding to appoint a guardian for minor's personal property, appealed to district court from county court, a district court order awarding custody of child is void.

Appeal from District Court, Jack County; F. O. McKinsey, Judge.

Application by T. K. Stout for appointment as guardian of G. W. Sparkman, a minor. A probate court order appointing J. W. Sparkman temporary guardian was appealed to the district court, which appointed T. K. Stout guardian of the minor's person, and J. W. Sparkman appeals. Reversed and remanded.

John P. Simpson and John D. McComb, both of Jacksboro, and Hood & Shadle, of Weatherford, for appellant.

Sil Stark, of Jacksboro, J. L. Rudy, of Bowie, and W. E. Fitzgerald, of Wichita Falls, for appellee.

HARPER, C. J. On the 20th day of February, 1917, the probate court of Jack county appointed J. W. Sparkman temporary guardian of the person and estate of Gilbert Wesley Sparkman, a minor under the age of 14 years. The order discloses that J. W. Sparkman was contesting the application for appointment of T. K. Stout at this time, and it further discloses that Jas. M. Sparkman was contesting the appointment of J. W. Sparkman in the event T. K. Stout could not, for any reason, be appointed, and that each prayed for the appointment for himself. T. K. Stout and J. M. Sparkman took an appeal from this order to the district court of said county.

The amended application for letters filed by the parties in the district court alleges that T. K. Stout is the maternal grandfather of the minor and that the Sparkmans are his paternal uncles. J. W. Sparkman, contesting the appointment of T. K. Stout, alleges that said Stout is disqualified by law, and that he is not a proper person to be appointed for the following reasons:

(1) That he is the administrator of the estate of the minor's deceased father, in which the minor has an undivided one-seventh interest; that there are many claims against the said estate; that among them is the claim of said Stout as administrator for fees, commissions, etc., and that he is a party to a suit on the result of which the condition of the minor or a part of his fortune may depend; that he is not a resident of Texas.

The hearing came on with a jury. After hearing the evidence, the court charged the

jury to find for T. K. Stout and against the other applicant and contestant, which was accordingly done, and thereupon judgment was entered, appointing T. K. Stout guardian of the person of said minor and awarding him the care and custody of said minor, Gilbert Wesley Sparkman. From this order J. W. Sparkman has perfected his appeal.

[1] The first assignment charges that the trial court erred in overruling motion for continuance. In this there was no error. The testimony of the absent witnesses had been given upon a previous trial of this cause, taken by the court stenographer, and was read in evidence upon this trial. They were nonresidents of the county, and no effort was made to take their depositions.

[2] The second assignment is:

"Material and fundamental error was committed by the trial court in giving a peremptory instruction in favor of the applicant, T. K. Stout, for the following reasons, to wit: (1) The undisputed evidence on the trial showed that the said T. K. Stout was disqualified under subdivision 5 of article 4078, Vernon's Sayles' Civil Statutes of Texas 1914, in that he was and is a party to a lawsuit on the result of which a part of the minor's fortune may depend. (2) And that said T. K. Stout was and is disqualified under subdivision 6 of article 4078, in that he is a debtor to said minor. (3) And further that the evidence in the case raised the issue as to whether or not the said T. K. Stout was and is a resident of the state of Texas. (4) The said T. K. Stout being disqualified, the court should have submitted to the jury which in their judgment James W. Sparkman should be appointed guardian of the person of said minor."

The contention is that because the appellee is the administrator of the estate of the minor's deceased parents, and that it is still pending, and that the minor has an interest in the estate, and this constitutes him a party to a lawsuit, within the meaning of subdivision 5 of article 4078, Vernon's Sayles' Civil Statutes of Texas, which reads:

"The following persons shall not be appointed guardian: \* \* \* (5) Those who are themselves or whose father or mother are parties to a lawsuit, on the result of which the condition of the minor or part of his fortune may depend."

We do not believe this to be the class of action contemplated by this provision. There is no evidence in this record that Stout is personally indebted to the minor. The fact that he holds property of the estate as administrator, which upon final account he may be required to under the orders of court, distribute the minor's share to it, does not make him a personal debtor of the minor.

The appellant requested a charge to the effect:

"That T. K. Stout was disqualified in law to be appointed and to find against him. Then to determine as between the other two applicants

the question, whose appointment would be to the best interest of the minor."

We cannot determine from the propositions and statement whether by this is meant the financial or personal interest of the minor. Since the court by the order appealed from has not appointed the appellee guardian of the estate, we take it that the assignment could only apply to the personal best interest of the minor.

[3] The grandfather has the preference right to the appointment, though the court may be of the opinion that some other person might fill the position better. *Heinemier v. Arlitt*, 29 Tex. Civ. App. 140, 67 S. W. 1038; *Walker v. Finney*, 157 S. W. 948.

[4] Possession of the child cannot properly be awarded in this class of proceedings, though the order of the district court is to this effect in this case. The undisputed evidence is that the father placed the child in the custody of Mrs. H. E. Myers, where it still remains, and her right to keep the child cannot be determined in this probate proceeding. *Estes v. Presswood*, 137 S. W. 145. This observation would not be pertinent, except for the fact that this probate proceeding has been converted into a contest for the custody of a child, instead of a proceeding for lawful appointment of a guardian of its person and estate.

There is nothing in the contention that the trial court should have submitted the question of whether Stout was a bona fide resident of Texas; for the testimony conclusively shows that he was at the time of this hearing a resident of Texas, such as is contemplated by the statute.

But the cause must be reversed and remanded for the following reasons:

[5] (1) The appeal from the county to the district court was from an order appointing a guardian both of the person and estate. This appeal transferred the whole case to the district court and vested in it the sole jurisdiction to determine both questions, and it has only disposed of the one question, viz. "guardianship of the person," thus leaving the appointment of a guardian of the estate suspended.

[6] (2) Article 4088, Vernon's Sayles' Statutes, provides that—

"The order \* \* \* appointing a guardian shall be entered upon the minutes of the court, and shall specify: (1) The name of the person appointed. (2) The name of the ward. (3) Whether the guardian is of the person, of the estate, or of both the person and estate of such ward. (4) The amount of the bond required of such guardian. (5) If it be the guardianship of the estate, the order shall also appoint three or more discreet and disinterested persons to appraise such estate, and return such appraisal to the court. (6) It shall direct the clerk to issue letters of guardianship to the person appointed when such person has qualified according to law."

The order appealed from to this court has neither the fourth nor the sixth subdivision incorporated in it; therefore, if certified to the county court as provided by article 3639, Vernon's Sayles' Statutes, for observance, the person appointed could not qualify because no bond had been fixed, etc.

[7] (3) We note that the appeal bond from the county to the district court is made payable to John W. Sparkman, in the sum of \$1,000, and we find no order of the county court fixing the amount of the bond.

Article 3632, Vernon's Sayles' Revised Statutes, provides that the county court shall fix the amount of the bond in cases of appeal to the district court, and it further provides that it shall be made payable to the county judge, so the said appeal bond is defective in these respects, and unless amended as provided by article 2104, Vernon's Sayles' Statutes, the district court is directed to dismiss the appeal. *Wolnitzek et al. v. Lewis*, 162 S. W. 963; *Oliver v. Lone Star, etc.*, 136 S. W. 508.

[8] And (4) because the order of the district court awarding the custody of the child is a nullity. *Estes v. Presswood, supra*.

For the reasons assigned, the cause is reversed and remanded for proceedings in accordance with this opinion.

#### COOPER et al. v. JOHNSON COUNTY et al. (No. 8816.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 15, 1919. On Motion for Rehearing,  
April 5, 1919.)

#### 1. SHERIFFS AND CONSTABLES ⇐157(5)—LIABILITY ON BOND — IMPROPER PAYMENT OF GUARD HIRE.

In a county's suit against its former sheriff and bondsmen to recover moneys illegally received by the sheriff during term of office, the bondsmen were not liable for the sums paid to the sheriff in good faith by order of the commissioners' court for hire of a guard at the county jail, even though the amounts paid were not authorized by law.

On Motion for Rehearing.

#### 2. SHERIFFS AND CONSTABLES ⇐65—GUARD OF JAIL — PAYMENT OF COMPENSATION TO SHERIFF—STATUTE.

Under Code Cr. Proc. 1895, art. 1098, despite its amendments in 1909 and 1915, the sheriff of a county of less than 35,000 population is not liable for moneys paid to him during his term of office by authorization of the commissioners' court for hire of a deputy sheriff as a guard at the county jail, though there was only one deputy sheriff kept at the jail, so that the county contended he was the jailer and not a guard; the commissioners' court being unauthorized to pay the salary of a jailer.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by the county of Johnson and others against L. D. Cooper and others. From judgment for plaintiffs, defendant Cooper appeals. Judgment reversed and rendered in part, and undisturbed in part.

Johnson & Harrell and Walker & Baker, all of Cleburne, for appellant.

S. C. Padelford and J. K. Russell, both of Cleburne, for appellees.

BUCK, J. [1] Johnson county sued L. D. Cooper, former sheriff, and his bondsmen, to recover certain fees and sums of money which were alleged to have been illegally received and retained by him during his two terms of office. So far as this appeal is concerned, the amount involved is \$1,050, alleged to have been paid Cooper for hire of a guard at the county jail. The trial court sustained defendant's plea of limitation as to \$580 of said amount, and gave a peremptory instruction in favor of plaintiff against all defendants for \$470. But before entering the judgment, the court concluded, properly we think, that the bondsmen were not liable for the sums paid to the sheriff by order of the commissioners' court for such guard hire, even though the amounts so paid were not authorized by law, and rendered judgment, on the verdict returned in obedience to the peremptory instruction, only against the defendant Cooper, who has appealed.

The evidence, without material contradiction, shows that when Cooper qualified as sheriff, he asked the county judge, J. B. Haynes, what the commissioners' court was going to do about the employment of a guard at the jail. Judge Haynes told Cooper to come before the commissioners' court, which he did. There it was explained to Cooper that the law did not authorize the commissioners' court to pay any part of the salary of a jailer, but the law did authorize the payment of \$1.50 a day for a necessary guard. Cooper explained that, in order to perform the duties of his office, he was required to be on the outside a great deal of his time, and hence could not stay at the jail. The commissioners' court authorized the employment of a guard. The amounts allowed and paid out for this item during the two terms of Cooper's tenure aggregated the amount sued for. This allowance was received by Cooper and applied on the salary of the deputy sheriff who stayed at the jail and guarded, fed, and cared for the prisoners. There was no jailer, eo nomine, employed, and only one deputy sheriff stayed at the jail at any one time or period. The deputy sheriff who acted as guard or jailer at times performed other duties pertaining to his office as deputy sheriff,

such as serving process, waiting on the court, etc.

The contention of appellee is that as there was only one deputy sheriff kept at the jail, he was the jailer and not a guard, and that under the law the commissioners' court could not pay the salary, or any part thereof, of a jailer. There seems to be no question as to the good faith of the commissioners' court in making the allowance, or of Cooper in receiving it. The insistence is that the court had no authority under the law to make the allowance under the circumstances, and that, therefore, Cooper is liable for the same, or such part thereof as it is not shown to be barred by limitation.

We have concluded that the instant case is controlled by the holding in the case of *Ledbetter v. Dallas County*, 51 Tex. Civ. App. 140, 111 S. W. 193, writ of error denied. There the facts are essentially similar to those disclosed here, and the issues here presented were there discussed fully, and the Supreme Court, by denying the writ of error, has in effect affirmed that holding. See, also, *Jeff Davis County v. Davis*, 192 S. W. 295, and authorities there cited.

Hence we conclude that the judgment of the lower court should be reversed in so far as it awards a recovery against Cooper, and the judgment here rendered for appellant, and that the judgment in favor of Cooper on his plea of limitation should be undisturbed; and it is so ordered.

Judgment reversed and rendered in part, and undisturbed in part.

#### On Motion for Rehearing.

[2] Appellee urges that the case of *Ledbetter v. Dallas County*, 51 Tex. Civ. App. 140, 111 S. W. 193, cited in our original opinion, is not authority in point, because, as averred, Johnson county, according to the last United States census, has a population of less than 35,000, while Dallas county had, at the time of the decision above mentioned, more than 50,000 population. There appears to be no evidence in this case as to what the population of Johnson county was during the period from 1912 to 1916, covering Cooper's two terms of office, though the testimony of the county judge tends to show that the commissioners' court recognized the fact that the law

212 S.W.—34

made no provision for the payment by the commissioners' court of Johnson county of the jailer's salary. Nor was the question of the population of Dallas county in any way determinative of the issues in the *Ledbetter* decision. Moreover, article 1098, Crim. Proc., as it read at the time of this latter decision, made no distinction between counties on account of population with reference to the county's allowance for jail guards or jailer. It provided:

"The sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners one dollar and fifty cents for each day, and there shall not be any allowance made for the board of such guard, nor shall any allowance be made for jailer or turnkey."

In 1909 this article was amended by adding to the sentence above the words, "except in counties having fifty thousand population or more." It was further provided by this amendment that in counties having 50,000 population or more the commissioners' court might allow for each jail guard \$2.50 per day. This article took the number 1143. The latter article was further amended at the first called session of the Legislature of 1915 (chapter 20) by changing the minimum population of the counties authorized to pay \$2.50 a day for each jail guard, from 50,000 to 40,000, and further empowering the commissioners' court in such counties to pay the jailer and turnkey \$2.50 per day. Neither of these amendments, however, affects the question of the maximum allowance for jail guards in counties having less than 40,000 inhabitants, or the question of the lack of authority of the commissioners' court in such counties of less population to make an allowance for jailer or turnkey. However, we are still of the opinion that the decision in the *Ledbetter* Case approved by the Supreme Court by the denial of the writ of error, controls the issues presented in this case. If the questions of law involved had not been determined by the Supreme Court, there might be room for doubt as to the correctness of our former holding, but we conclude that the questions of law presented and the facts in evidence in the two cases are essentially the same, and that the law has been decided adversely to appellee's contention.

The motion for rehearing is overruled.

**RIO GRANDE & E. P. RY. CO. v. J. H. RUSSELL & SON et al. (No. 6229.)**

(Court of Civil Appeals of Texas. San Antonio. May 22, 1919.)

**1. TRIAL  $\S$ 252(7)—REQUESTED INSTRUCTION—EVIDENCE TO SUPPORT.**

Refusal of instruction requested by initial carrier in suit by shipper as to the act of God in destroying the cabbage shipped was not error, where the decayed condition of the cabbage was not traced to low temperature, and there was no fact sustaining such a theory.

**2. TRIAL  $\S$ 194(15)—REQUESTED INSTRUCTION—WEIGHT OF EVIDENCE.**

Refusal of instruction requested by initial carrier in suit by shipper for shipment of cabbage damaged as to time of shipment required from S. in Texas to S. in Missouri was proper; such charge being directly upon the weight of the evidence, which was a matter for the jury.

**3. TRIAL  $\S$ 252(7)—REQUESTED INSTRUCTION—EVIDENCE TO SUPPORT.**

In suit by a shipper for cabbage damaged, refusal of instruction asked by initial carrier as to the freezing of the cabbage was not error, where there was no evidence tending to show that the cabbage had frozen.

**4. APPEAL AND ERROR  $\S$ 742(5)—ASSIGNMENT OF ERROR—INSTRUCTIONS.**

An assignment of error, in a suit by a shipper against carriers for a shipment of cabbage damaged, to a certain paragraph of a charge, which does not show what such paragraph contained and is not followed by any statement as to what such paragraph contained, cannot be considered on appeal.

**5. CARRIERS  $\S$ 187—ACTION FOR INJURIES TO GOODS—CONNECTING CARRIER—DIRECTION OF VERDICT.**

It was not error for the court, in a suit by a shipper for damages to a shipment of cabbage, to instruct a verdict in favor of a connecting carrier, where there was no evidence of negligence on the part of such connecting carrier.

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by J. H. Russell & Son and others against the Rio Grande & Eagle Pass Railway Company, to which defendant made the International & Great Northern Railway Company and other connecting carriers parties, and prayed for judgment over against them for any sum recovered. Judgment for plaintiffs against defendant, the initial carrier, for \$980, and in favor of such initial carrier against the St. Louis, Iron Mountain & Southern Railway Company for \$490, and against the Missouri Pacific Railway Company for \$490, and defendant appeals from the part thereof holding it liable. Affirmed.

A. Winslow, of Laredo, for appellant.

John L. Dannelley, of Laredo, for appellees.

**FLY, C. J.** This is a suit instituted by J. H. Russell & Son, who will be identified as appellees, against appellant, to recover \$1,820, damages to a car of cabbage which was shipped by appellees from Simon, Webb county, Tex., to St. Louis, Mo. Appellant was the initial carrier, and made its connecting carriers, the International & Great Northern Railway Company, the Texas & Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway, and the Missouri Pacific Railway Company, parties to the suit, and prayed for judgment over against them for the damages that might be recovered by appellees. The Texas & Pacific Railway Company was dismissed from the suit by appellant, and upon the verdict of a jury the court rendered judgment against appellant in favor of appellees for \$980, and in favor of appellant as against the St. Louis, Iron Mountain & Southern Railway Company for \$490, and in favor of appellant for \$490 as against the Missouri Pacific Railway Company. No complaint is made of that part of the judgment last named against the two railway companies, but this appeal is perfected by appellant as against all the other parties, except the Texas & Pacific Railway Company.

The car of cabbage was delivered by appellees in good condition, and six days thereafter was delivered at St. Louis in a decayed condition. Appellees refused to receive them, and the cabbage were sold by the Missouri Pacific Railway Company for \$250. It was shown that the cabbage should have been transported to St. Louis in four days. It was shown that the damage to the cabbage was caused by improper opening and closing of ventilators and delay in transportation. No negligence was shown on the part of the International & Great Northern Railway Company.

The first assignment of error complains of the dismissal of the International & Great Northern Railway Company from the suit. The railway company was not dismissed from the suit by the court, but a verdict was rendered in favor of it by the jury, and upon that verdict a judgment was rendered against appellant in its action against the International & Great Northern Railway Company. The court instructed a verdict in favor of the railway company; there being no evidence of negligence against it.

The second assignment of error states that the court erred in overruling an objection to the first paragraph of the charge, because the fourth paragraph is multifarious and imposes too great a burden on appellant, and because the fifth paragraph instructed a verdict for the International & Great Northern Railway Company. There is but one proposition, and that refers to the objection to the fifth paragraph and is answered by the

conclusion that there was no evidence of negligence on the part of the International & Great Northern Railway Company. What is contained in the first paragraph of the charge, to which alone the objection was urged, does not appear from the brief.

[1] The charge requested, the refusal of which is complained of in the third assignment of error, on the subject of the act of God destroying the cabbage, was not supported by the testimony. The decayed condition of the cabbage was not traced to low temperature of the weather, and appellant makes no effort to point out any fact sustaining such a theory.

[2] The charge, the rejection of which is assailed in the fourth assignment of error, was directly upon the weight of the evidence, and was properly refused. A witness for appellant swore that six days was good time for a shipment to St. Louis from the starting point, but a witness for appellees swore that such shipment should have made the journey "not later than the fourth day from the day of shipment." The court could not assume that the witness for appellant was to be credited. That was a matter for the jury.

[3] The charge was properly refused, the refusal of which is complained of in the fifth assignment of error. There was no evidence tending to show that the cabbage had frozen.

[4] The sixth assignment of error does not show what the fourth paragraph of the charge contained, and neither is it shown by any statement following the assignment. It is overruled.

[5] There being no evidence of negligence on the part of the International & Great Northern Railway Company, it was not error to instruct a verdict for it. This disposes of the seventh assignment of error, and the eighth assignment is fully met by our conclusions of fact. While in the seventh assignment of error complaint is made of an instruction in favor of the International & Great Northern Railway Company, in the eighth it is stated there was no evidence of negligence against either of the connecting lines.

The judgment is affirmed.

COBBS, J., entered his disqualification in this case.

#### CRISP v. CHRISTIAN MOERLEIN BREWING CO. (No. 6224.)

(Court of Civil Appeals of Texas. San Antonio. May 14, 1919. Rehearing Denied June 11, 1919.)

#### 1. COMMERCE Ⓒ46—FOREIGN CORPORATIONS—RIGHT TO SUE.

A foreign corporation has the right without obtaining a permit to do business in the

state, to collect a debt incurred in the transaction of interstate commerce, and, having accepted a promissory note of a third person in part payment of such debt, may sue thereon in the state, although the note of the third person, who had dealings with the purchaser of the corporation's goods, had made the note payable direct to the corporation.

#### 2. APPEAL AND ERROR Ⓒ846(6)—FINDINGS OF FACT—EVIDENCE.

Inconsistencies in the evidence, in the absence of findings of fact, must be resolved on appeal so as to support the judgment.

#### 3. CORPORATIONS Ⓒ642(6)—FOREIGN CORPORATIONS—DOING BUSINESS IN THE STATE.

That a foreign corporation reimbursed a purchaser of its goods for rent paid for premises in which the property bought was stored and for money paid for signs advertising the goods, and furnished a truck for the delivery of goods, retaining the ownership, but requiring the purchaser of the goods to pay the expenses of the upkeep, does not conclusively prove that the corporation was transacting business in the state, being only evidence of such fact.

#### 4. CORPORATIONS Ⓒ672(4)—FOREIGN CORPORATIONS—PLEADING—PERMIT TO DO BUSINESS.

A petition by a foreign corporation, which contains no allegation that the transaction involved constituted business done in the state, was not subject to a general demurrer because it contained no allegation that plaintiff had a permit to do business in the state.

Appeal from Bexar County Court; John H. Clark, Judge.

Action by the Christian Moerlein Brewing Company against J. T. Crisp. Judgment for plaintiff, and defendant appeals. Affirmed.

Norton & Brown, of San Antonio, for appellant.

Diedrich A. Meyer, of San Antonio, for appellee.

MOURSUND, J. Appellee, a foreign corporation, sued appellant on a promissory note for \$800, admitting a credit of \$100. Appellant answered by plea in abatement, a general demurrer, special exceptions, a general denial and a special answer. Judgment was rendered for plaintiff.

[1-3] While there are many assignments of error, there is really only one question to be decided, and that is whether the appellee was entitled to sue in our courts. It had not obtained a permit to do business in Texas. It was incorporated under the laws of Ohio for the purpose of the manufacture and sale of pure lager beer, and its principal place of business was Cincinnati, Ohio. The note sued on is referred to in interrogatories as having been given for money loaned appellant by appellee, and in the answer of Funke, assistant secretary of appellee, to

the fourteenth cross-interrogatory the transaction is referred to as a loan. In answer to the eighth interrogatory he described the transaction as follows:

"L. T. Trousdale, a customer of ours at San Antonio, sent us the note in suit, and we credited Trousdale's account in the sum of \$800. On a previous occasion Trousdale sent us a note of J. T. Crisp, made payable to Trousdale and indorsed by him. Mr. Trousdale was given credit for this note. On the present occasion the note received was made payable to the company, but Trousdale was given credit for the note in his account. The purpose of the transaction we have no knowledge of other than as stated by Mr. Trousdale."

In answer to the third cross-interrogatory he said:

"The cash money was not sent direct from Cincinnati to Crisp. The note when received was credited to Trousdale, who was in debt to the company for goods purchased by him, and charged to foreign bills J. T. Crisp."

Crisp was a customer of Trousdale & Bunting. While the note was executed directly to appellee, the court was warranted in finding from the evidence that it did not represent a loan from appellee to appellant, but that such note was delivered by appellant to Trousdale & Bunting in satisfaction of some obligation due them by appellant, but, being intended by them to be used in paying their debt to appellee, was made payable to appellee, and actually delivered to appellee by them in part payment of their indebtedness. The court was further warranted in finding that such delivery was made in payment of a debt incurred for beer bought by Trousdale & Bunting from appellee. There was evidence to support the further finding that the beer for the purchase of which the indebtedness accrued was sold by appellee to Trousdale & Bunting, f. o. b. Cincinnati, Ohio; that the contracts of sale involved interstate commerce; that no agency existed on the part of Trousdale & Bunting to sell the beer manufactured by appellee, but that all sales made by them were for themselves of beer purchased outright by them from appellee. Of course appellee had the right to collect its debt incurred in the transaction of interstate commerce, and, having accepted a promissory note of a third

person in part payment of such debt, it necessarily had the right to sue thereon in our courts. There are some inconsistencies in the evidence, but these, in the absence of findings of fact, must be resolved so as to support the judgment. Certain circumstances shown by undisputed testimony are also relied on as showing the transaction of business in this state. These are, first, that appellee reimbursed Trousdale & Bunting for rent paid for premises in which keg beer bought by them was stored; second, that it reimbursed them for money paid out by them for signs advertising the Moerlein beer; and, third, that it furnished them a truck for the delivery of beer, retaining the ownership, but requiring them to pay the expense of the upkeep. We take it that the granting of these inducements to Trousdale & Bunting would not prove that appellee was transacting business in Texas. *Erwin v. Powder Co.*, 156 S. W. 1097; *Pueblo v. Lukens (Colo.)*, 164 Pac. 1164, L. R. A. 1917E, p. 699.

While the facts thus shown may be consistent with the theory that Trousdale & Bunting were agents for appellee and sold its beer in Texas as such agents, they are not inconsistent with the direct evidence that all beer shipped in was sold to said firm, and that no business was transacted in Texas by appellee. The doing of either of the three acts or all does not in itself constitute the transaction of any business, and such acts are only important as circumstances to be considered in connection with the other evidence. As the performance of such acts did not constitute carrying on business, no reason appears why appellee could not perform same to induce and encourage its interstate commerce in its products.

[4] There is no merit in the suggestion made in argument that the petition is subject to a general demurrer because it contained no allegation that appellee had a permit to do business in Texas. The petition contained no allegation that the transaction involved constituted business done in the state. *New State Land Co. v. Wilson*, 150 S. W. 253; *Panhandle Tel. & Tel. Co. v. Kellogg S. & S. Co.*, 62 Tex. Civ. App. 402, 132 S. W. 963; *Brown v. Guarantee Co.*, 46 Tex. Civ. App. 295, 102 S. W. 138.

The judgment is affirmed.



CURRIE et al. v. GLASSCOCK COUNTY.  
(No. 986.)(Court of Civil Appeals of Texas. El Paso.  
May 22, 1919.)1. EMINENT DOMAIN §=103—DAMAGES TO  
PROPERTY NOT TAKEN—ADDITIONAL FENCE-  
S AND IMPROVEMENTS.

Where construction of a road necessitated additional fencing and the establishment of an additional watering place to restore abutting land to former usefulness and value, for grazing purposes, the district court on appeal from award of jury of view erred in finding that there was no evidence of depreciated value of land not taken.

2. EMINENT DOMAIN §=208(1)—DAMAGES TO  
PROPERTY—EVIDENCE—COST OF FENCES.

In proceeding to determine the amount of damages due to construction of a road, evidence of the cost of additional fencing, establishing watering places and other items of like nature necessitated by the laying of the road is admissible and entitled to be accorded its proper probative force in determining whether tract of land as a whole has been damaged.

3. EMINENT DOMAIN §=145(4) — DAMAGES  
DUE TO ESTABLISHMENT OF ROAD—OFFSET  
OF BENEFIT.

In proceeding to determine the amount of damages to land due to construction of a road by appellee county, increased and better road facilities could be taken into consideration as offsetting damages to land not taken.

4. APPEAL AND ERROR §=994(3)—PROVINCE  
OF COURT TRYING CASE — CREDIBILITY OF  
WITNESSES.

The credibility of witnesses and the weight to be given to their testimony was to be judged by the court who was trying the case without a jury.

5. EMINENT DOMAIN §=205—WEIGHT OF EV-  
IDENCE—BENEFIT AND INJURY FROM HIGH-  
WAY.

In proceeding to determine the amount of damages due to construction of a road, failure of court to recognize evidence of value to tract as a whole, and evidence of decrease in value due to road, as of any probative force upon issue of damage to land not actually appropriated, was reversible error.

6. EMINENT DOMAIN §=233(4) — APPEAL  
FROM AWARD OF JURY—APPEAL BOND.

The road in question being laid out under Rev. St. arts. 6863, 6864, appeal to district court from award of jury of view is governed by article 6866, which does not require bond to be filed in ten days after approval of award by commissioners' court, and not by article 6882.

Appeal from District Court, Glasscock County; Chas. Gibbs, Judge.

Controversy between Lucy Currie, executrix, and others and Glasscock County. From the judgment rendered on appeal to the dis-

trict court, the former appeal. Reversed and remanded.

See, also, 183 S. W. 1198.

Royall G. Smith, of Colorado, Tex., for appellants.

Morrison & Morrison, of Big Springs, for appellee.

HIGGINS, J. Appellants own a tract of land in Glasscock county comprising 24 sections which was used for grazing purposes and by cross-fences was divided into several inclosures. The various inclosures were amply watered, principally by wells with windmills. The commissioners' court of said county caused to be laid out through the land a first-class road from Garden City, its county seat, to the eastern boundary of the county in the direction of the county seat of Sterling county, an eastern adjoining county. Damages being claimed by appellants, a jury of view was appointed which assessed the same in the sum of \$1,640, which was approved by the commissioners' court. Appellants, being dissatisfied with the award, appealed to the district court, where the case was tried without a jury. Findings of fact and conclusions of law were filed by the court, and judgment thereon rendered in favor of appellants for \$1,640, from which they prosecute this appeal. Other facts pertinent to the decision will be indicated in the course of the opinion.

## Opinion.

The various assignments will not be discussed separately, as they all relate to, and their decision is controlled by, one question. Damages were claimed by appellants for the value of the land actually taken by the road and depreciation in value of the remainder of the tract. The court found that the land was used for grazing purposes, and the pastures therein had been arranged so as to give the most beneficial use thereof, and that such pastures were watered by windmills, tanks, and wells; that by the establishment of the road appellants had been obliged to rearrange the pastures, necessitating the construction of 16 miles of fence, which cost \$880; that the value of the land actually taken was \$510; that in order to provide for the beneficial use of the land the pastures had been rearranged to conform to the road, and that it was necessary to establish one additional watering place which would cost \$500. The court found that no evidence had been offered as to whether the land had been rendered more or less valuable by the establishment of the road, and that he was therefore unable to determine whether appellants had been benefited or injured by the road; that, since the burden rested upon appellants to show depreciation in value

and the extent thereof, and there being an absence of proof in that particular, recovery could not be had by appellants in a greater sum than \$1,640, which the county admitted to be due as damages, and which sum exceeded the value of the land actually appropriated.

[1-3] We are of the opinion that the court erred in its finding of fact and conclusion of law that no proof had been offered to show depreciation in value. The fact that the road necessitated additional fencing and establishment of an additional watering place in order to restore the land to its former usefulness and value for the purpose for which it was used by the owner was evidence of a depreciated value. The cost of additional fencing, establishing watering places, and other items of like nature necessitated by the laying of the road do not constitute a measure of damage and are not recoverable as distinct items of damage, but evidence of this nature is admissible, and is entitled to be accorded its proper probative force in determining whether the tract of land as a whole has been damaged. These are matters which may and should be considered by the jury or court trying the case. In like manner increased and better road facilities may be taken into consideration as offsetting such damage. In 3 Sedg. on Dam. § 1163, it is said:

"The measure of damages must not be confounded with the elements of damage, evidence of which is admitted for the purpose of enabling the jury to apply the rule. \* \* \* The measure of damages in condemnation proceedings, stated in one of its most general forms, is the depreciation in the value of the property; for this is the same as the amount of injury to it. The value is most easily measured by the market, when there is one. Consequently, as we have seen, the rule with which we most commonly meet is the difference between the market value of the property as affected and as unaffected by the improvement, or before the improvement, and as it will be after the improvement is completed. As a general rule, under any head of the law, where the measure of damages is determined by a difference in market value, it cannot be a matter of any consequence of what elements this is made up, and evidence giving the market value before and after the injury would be quite sufficient. \* \* \* Land, however, has in many cases a very indeterminate market value, especially farming or wild land, such as is involved in perhaps the greater number of condemnation proceedings. Hence, it has become the practice to take evidence, not only directly as to the market value, but as to every element which enters into it, and tends to diminish it. \* \* \* These elements of damage and value are neither the measure of damages, nor are they allowed as specific items of damage. They go to the jury only to throw light on the general question of depreciation."

In support further of the views expressed, see *Parker County v. Jackson*, 5 Tex. Civ.

App. 36, 23 S. W. 925; *Morris v. Coleman County*, 28 S. W. 380; *Anderson v. Wharton County*, 27 Tex. Civ. App. 115, 65 S. W. 643; *Bexar County v. Herff*, 23 S. W. 409; *Watkins v. Hopkins County*, 72 S. W. 872. The facts found by the court disclose that evidence was offered by appellants upon the issue of damage to the tract as a whole. It further appears from the statement of facts that one witness for appellants testified that the cutting off of three-fourths of a section decreased the value of the whole section a dollar an acre, or \$640.

[4, 5] What has been said is not to be understood as holding that the court must necessarily have accepted as true the evidence adduced by appellants to which we have alluded. The credibility of the witnesses and the weight to be given to their testimony was to be judged by the court. The reversal is based upon the error in the failure to recognize such evidence as being entitled to any probative force upon the issue of damage to the land not actually appropriated.

[6] By cross-assignment appellee asserts that the appeal to the district court from the award of the jury of view was not perfected, and the district court did not acquire jurisdiction, because the bond was not filed in ten days after the approval of the award by the commissioners' court. The road in this case was laid out under the provisions of articles 6863, 6864, R. S. The appeal is governed by article 6866, and not by 6882. *Taylor v. Travis County*, 77 Tex. 333, 14 S. W. 137; *Moody v. Hemphill County*, 192 S. W. 265. Article 6866 does not require the bond to be filed in ten days.

Reversed and remanded.

#### CHANEY v. GLASSCOCK COUNTY. (No. 987.)

(Court of Civil Appeals of Texas. El Paso.  
May 22, 1919.)

Appeal from District Court, Glasscock County; Chas. Gibbs, Judge.

Controversy between W. E. Chaney and Glasscock County. From the judgment rendered, the former appeals. Reversed and remanded.

Royall G. Smith, of Colorado, Tex., for appellant.

Morrison & Morrison, of Big Springs, for appellee.

HIGGINS, J. This appeal is ruled by the decision in *Currie v. Glasscock County*, 212 S. W. 533, this day decided, the same question being presented. For the reason indicated in the *Currie Case*, the case is reversed and remanded.

**RAILROAD COMMISSION OF TEXAS v. PECOS & N. T. RY. CO. (No. 6205.)**

(Court of Civil Appeals of Texas. San Antonio. May 7, 1919. Rehearing Denied May 28, 1919.)

**1. TRIAL  $\S$ 352(5)—SPECIAL ISSUE—ASSUMPTION AS TO FACTS.**

In action to enjoin enforcement of Railroad Commission's order requiring railroad to construct depot building at certain point, where special issue was whether railroad had designated depot grounds at such point, requested addition to issue that designation once made could not afterwards be changed by railroad was properly refused, since it would have been regarded as an intimation by court of abandonment, and since issue could not have been answered in negative upon ground of abandonment.

**2. RAILROADS  $\S$ 58—"STATION"—DESIGNATION.**

Under the statutes a place may become a "station" either by designation by the railroad, or by designation by statute, or by being established as a siding or stopping place to receive and discharge passengers and freight.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Station.]

**3. TRIAL  $\S$ 352(4)—SPECIAL ISSUE—EVIDENCE.**

In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, where there was no evidence tending to show creation of station at such place otherwise than by designation of depot grounds, court properly refused to submit issue of whether railroad established a siding or stopping place at such place or nearby stations.

**4. RAILROADS  $\S$ 9(2)—ORDER TO CONSTRUCT DEPOT BUILDING—REASONABLENESS—AMOUNT TO BE EXPENDED.**

In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, the only question as to the unjustness and unreasonableness of the order, in view of Rev. St. 1911, art. 6552, is whether sum required to be expended is reasonable.

**5. RAILROADS  $\S$ 58—DEPOTS—SPUR TRACKS—STATUTES.**

Rev. St. 1911, art. 6552, if construed so as to require railroads to construct sidings and spur tracks at stations, requires construction thereof only where necessary for accommodations for transportation of passengers and freight.

**6. RAILROADS  $\S$ 9(2)—DEPOT BUILDING—ORDER TO CONSTRUCT—REASONABLENESS.**

The reasonableness and justness of Railroad Commission's order requiring construction of depot building and sidings and spur tracks, whether made pursuant to Rev. St. 1911, art. 6552, or article 6715, depends upon the facts of the particular case.

**7. RAILROADS  $\S$ 9(2)—ORDER REQUIRING CONSTRUCTION OF DEPOT BUILDING—SIDINGS—REASONABLENESS OF ORDER.**

In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building, spur tracks, and sidings, special issue as to reasonableness of order was properly applied to both building and sidings, since it will not be assumed that sidings and spur tracks are indispensable to all stations.

**8. RAILROADS  $\S$ 9(2)—CONSTRUCTION OF DEPOT BUILDING—SIDINGS—REASONABLENESS OF ORDER—EVIDENCE.**

Evidence held to support verdict finding Railroad Commission's order directing construction of depot building, sidings, and spur tracks at expense of from \$250 to \$500 to be unfair and unreasonable to railroad.

**9. RAILROADS  $\S$ 9(2)—DEPOT BUILDING—REASONABLENESS OF ORDER TO CONSTRUCT.**

In passing upon reasonableness of Railroad Commission's order requiring construction of depot building at certain place, court will contrast expense of complying with order with inconvenience and hardships imposed on the public by reason of absence of facilities ordered.

**10. RAILROADS  $\S$ 9(2)—DEPOT BUILDING—SIDINGS—ORDER TO CONSTRUCT—REASONABLENESS—EVIDENCE.**

Evidence as to extent of shipment made by persons living in certain vicinity is admissible upon question of reasonableness of Railroad Commission's order that depot building and spur tracks and sidings be constructed at such point.

**11. TRIAL  $\S$ 85—EVIDENCE—GENERAL OBJECTION.**

There is no error in overruling general objection to evidence a portion of which is admissible.

**12. RAILROADS  $\S$ 9(2)—DEPOT BUILDING—SIDINGS—REASONABLENESS OF ORDER TO CONSTRUCT—EVIDENCE.**

In action involving reasonableness of Railroad Commission's order requiring construction of depot building, sidings, and spur tracks at certain place, evidence as to gross shipments to and from station  $3\frac{1}{2}$  miles distant therefrom during past four years, though remote, is of aid to jury on issue of reasonableness, tending to show increase of business in that section.

**13. APPEAL AND ERROR  $\S$ 1050(1)—REVIEW—HARMLESS ERROR.**

In action involving reasonableness of order requiring construction of depot building and sidings at certain place, admission of evidence of population and growth of nearby town was not reversible error, where other testimony had been introduced without objection comparing the two places.

Appeal from District Court, Travis County; George Calhoun, Judge.

Action by the Pecos & Northern Texas Railway Company against the Railroad Commission of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Looney, of Greenville, Luther Nickels, of Eastland, and N. A. Stedman, of Austin, for appellant.

W. H. Kimbrough and Madden, Truelove, Ryburn & Pipkin, all of Amarillo, and Brooks, Hart & Woodward and Charles L. Black, all of Austin, for appellee.

**MOURSUND, J.** On February 25, 1914, the Railroad Commission made the following order:

"Office of Railroad Commission of Texas.

"Austin, Texas, February 25, 1914.

"Hurley, on P. & N. T. Ry., Petition for Depot and Station Facilities.

"Hearing No. 1446.

"The above numbered and entitled cause having been called for hearing by the commission on the 16th day of December, 1913, in pursuance of notice duly given, and the parties hereto having appeared by their representatives, the commission, having heard the evidence and argument of counsel, and having taken the matter under advisement, and having now duly considered the same, finds that Hurley is a station on what is known as the Texico-Lubbock cut-off of the Pecos & Northern Texas Railway Company, and that said Pecos & Northern Texas Railway Company is under the duty of providing and maintaining an adequate depot and depot building at said station for the accommodation of passengers, and to keep and maintain an adequate freight depot and building at said station for the receiving, handling, storing, and delivering of freight, and to build sidings and spur tracks sufficient to handle all the business tendered said railway company at said station; and the commission further find that one building to be constructed of such material and design as said railway company may determine, and at a cost of not less than \$250, and not more than \$500, within the discretion of said railway company, will be sufficient for the present needs of the public in the accommodation of both freight and passenger business of said station of Hurley.

"It is therefore ordered by the Railroad Commission of Texas that said Pecos & Northern Texas Railway Company be, and it is hereby, ordered and required, within 60 days after the delivery of a copy of this notice to its general manager, to erect and complete at said station of Hurley a building of such material and design as said railway company may determine, and at a cost within its discretion of not less than \$250 and not more than \$500, such building to be suitable for the accommodation of both passengers and freight, and that said railway company shall within said period of 60 days build such sidings and spur tracks at said station as will be sufficient to handle all business tendered said railway company at said station.

William D. Williams,

"Earle B. Mayfield,

"Commissioners.

"Attest:

"E. R. McLean, Secretary."

On April 14, 1914, the P. & N. T. Ry. Co. filed its petition in the district court of

Travis county asking for an injunction to restrain the enforcement of such order. The order was attacked upon two grounds: (1) That the railroad company had never designated Hurley as a station on its line, and consequently could not be required to furnish facilities at such place; (2) that the order was unreasonable and unjust to the company, and therefore should be set aside under the terms of articles 6657 and 6658, Revised Civil Statutes.

The answer consisted of a general demurrer, special exceptions, and a general denial.

The first trial resulted in a judgment against the railroad company, from which it appealed, and procured a reversal thereof. The case is reported in 193 S. W. 770.

The judgment from which this appeal was taken is based upon the findings of the jury upon two special issues, which, with explanatory instructions and the answers of the jury, are as follows:

"Question 1. Did the Pecos & Northern Texas Railway Company, at any time prior to the institution of proceedings before the Railroad Commission of Texas, designate depot grounds at Hurley? Answer this question 'Yes' or 'No.'"

"In connection with the above question, you are instructed that, in determining whether depot grounds were designated by the railway company at Hurley, it is not necessary that such depot grounds should be in or within the town of Hurley as platted, but it would be sufficient if the place at which such depot grounds were designated, if they were designated at all, was within a reasonable distance from the town of Hurley as platted, provided that, in view of the attending circumstances, you believe from the evidence that a place near, but not within, the town of Hurley, was a reasonable designation of that place as the site for the depot grounds. And you are further instructed that the term 'depot grounds,' in legal contemplation, signifies the same thing as a railroad station."

To this issue the jury answered "No."

"Question 2. Was the order of the Railroad Commission of Texas entered on February 25, 1914, offered in evidence in this case, requiring the plaintiff, the Pecos & Northern Texas Railway Company, to erect and complete at a place called Hurley a building of such material and design as said railway company might determine, and at a cost within its discretion of not less than \$250 and not more than \$500, such building to be suitable for the accommodation of both passengers and freight, and requiring said railway company to build such siding and spur tracks at said place as would be sufficient to handle all business tendered said railway company at said place, unreasonable and unjust to said railway company, as to the amount which would be required to be expended thereby?"

"Before you would be justified, under the law, in answering this question in the affirmative, the plaintiff herein, the Pecos & Northern Texas Railway Company, must have shown to you by clear and satisfactory evidence, that said order was unreasonable and unjust to it."

To this issue the jury answered "Yes."

[1] It is contended that the court erred in refusing to submit, at defendant's request, the following addition to question No. 1:

"The designation once made by the railway company of depot grounds at a particular place cannot afterwards be changed by the company."

The question asked was whether the railway company, at any time prior to the institution of proceedings before the Railroad Commission, designated depot grounds at Hurley. If there had been added to this question the statement requested by defendant, it might have been received as an intimation by the court that the company had attempted to abandon depot grounds designated by it. The special issue could not have been answered in the negative upon the theory that there had been on abandonment, as the question was plainly drawn, and it may be presumed that counsel in argument emphasized the limited scope of the inquiry made. The first assignment is overruled.

The further contention is made that the court should have submitted the following issue:

"Because the court erred in refusing to submit to the jury special issue No. 1, requested by the defendant, the same being as follows: 'Did the Pecos & Northern Texas Railway Company at any time prior to the institution of proceedings before the Railroad Commission of Texas establish the place referred to in evidence as Warren's Siding, Muleshoe, or Hurley, as a siding and stopping place for receiving and discharging way passengers and freight?'"

This special issue was refused by the court pursuant to the suggestion upon the former appeal that only one issue be submitted.

[2] As we understand our statutes, in view of the light thrown thereon by the opinion in the case of Railroad Commission v. C., R. I. & G. Ry. Co., 102 Tex. 393, 117 S. W. 794, a place may become a station either by designation by the railroad company or designation by statute, or by being established as a siding or stopping place to receive and discharge passengers and freight.

[3] The only evidence relied on in this case to show the existence of a station, as far as is pointed out to us, related to the issue whether there had been a designation of depot grounds at Hurley. If there is any evidence tending to show the creation of a station at Hurley otherwise than by designation of depot grounds, it has not been called to our attention. This being the case, it appears to us that the additional issue, if given, could have served no useful purpose and might have confused the jury. The issue as submitted directed the minds of the jurors to the direct issue raised by the testimony, and we hold that there was no error in refusing to submit the additional one. No error was committed with respect to the manner of submitting the issue whether

there had been a designation of depot grounds. There is no contention that the evidence does not support the finding of the jury in favor of appellee on such issue.

It is contended by appellant that the only matter that should have been submitted with respect to the unjustness and unreasonableness of the order was whether the requirement for the erection by the railway company of the depot building at a cost of not less than \$250 and not more than \$500 was unjust and unreasonable. In support of this contention articles 6693 and 6552 of the Revised Statutes are cited and discussed.

[4] Article 6693 makes it the duty of railroad companies to provide adequate depot buildings at their several stations, and if Hurley is a station, the only question that can arise as to the unjustness and unreasonableness of an order requiring the erection of a depot building there is whether the sum required to be expended is unreasonable. *Angelina & Neches River R. R. Co. v. R. R. Commission*, 212 S. W. 703, recently decided by this court.

Article 6552 requires the furnishing of sufficient accommodations for the transportation of passengers and property, and it may be admitted that, if Hurley had become a station, an order requiring sufficient accommodations for the transportation of passengers and property could not be unjust and unreasonable, because it would exact only what the law requires, but no such order is under consideration in this case.

The order in question required the erection of a depot building and "sidings and spur tracks sufficient to handle all the business tendered said railway company at said station." The quoted portion does not indicate an attempt to enforce article 6552, but an attempt to exercise the authority conferred on the commission by article 6715. That article provides:

"All railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the railroad commission, as hereinafter provided."

The next article is as follows:

"Power is conferred on the Railroad Commission of Texas to require compliance by railroad companies with the provisions of the preceding article, under such regulations as said commission may deem reasonable," etc.

These articles were enacted in 1903, and the emergency clause recited that there was no adequate law providing that railroads should build sidings and spur tracks sufficient to handle the business tendered them. We find that in the case of *Crosbyton-Southplains R. R. v. Railroad Commission*, 169 S. W. 1038, it is assumed that prior to the enactment of article 6715 the law required rail-

roads to build sidings and spur tracks at stations, and that said article was enacted for the purpose of conferring power to require that they be constructed at other places. In this connection it is stated that the Supreme Court, in *Railway Co. v. R. R. Com.*, 98 Tex. 67, 80 S. W. 1141, gave article 6552 such a construction that it cannot be doubted that it was the duty of railroads to construct all necessary side tracks, switches, and spurs at their stations. We do not so understand the opinion referred to. It only involves, as we understand it, a construction of the language "the business tendered such railroads," contained in article 6715. Nor are we able to find any case to which the court could have had reference. We find that in the case of *R. R. Com. v. Railway Co.*, 102 Tex. 393, 117 S. W. 794, the court questioned the construction placed on the language used in article 6552, made by the New York court in *People v. Railway Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, to the effect that "sufficient accommodations for the transportation," etc., did not require the erection of houses. Article 6552 was enacted in 1853 (section 9, Act Feb. 7, 1853 [Acts 4th Leg., Ex. Sess., c. 46]) and in 1860 the act of which it was a part was amended so as to require the erection of depot buildings (section 3, Act Feb. 8, 1860 [Acts 8th Leg. c. 51]). Thus early there appears to have been a doubt whether the language "accommodations for the transportation" related only to the means for hauling passengers and freight or should be given a broader construction. It can be plausibly argued that a requirement that the railroads shall furnish sufficient accommodations for the transportation of passengers and property at sidings established for receiving way passengers and freight was not intended to make a requirement that sidings should be constructed.

[5, 6] However, even if it be conceded that under article 6552 railroad companies are required to construct sidings and spur tracks at stations, the fact remains that there is no statute which expressly declares that such improvements must be made at all stations, as is the case with respect to depot buildings. The requirement would simply be that such improvements must be constructed, if necessary in order to furnish sufficient accommodations for the transportation of passengers and property. If this construction be correct, it follows that, whether authority be attempted to be exercised by the commission pursuant to article 6552 or article 6715, in either case its order would be one the reasonableness and justness of which would depend on the facts of the particular case.

[7] The objection that question No. 2 should have been confined to the depot building is based on the assumption that sidings and spur tracks are indispensable at all stations, no matter how small the amount of

business. Such an assumption is not made by statute, as in the case of depot buildings, and cannot be indulged as a matter of law. The issue whether the order was unjust and unreasonable as to the sum required to be expended was therefore in the case with respect to the depot building and also to the sidings and spur tracks.

[8] It is contended there was no evidence that \$250 was an unreasonable sum to be expended for a depot building, and the contention, we believe, is sustained by the record, but no objection was made to the inclusion of that item in the question propounded. The jury may have based its answer that the order was unjust and unreasonable upon a finding that the facts proven established that it would be unjust and unreasonable to require the appellee to expend even the minimum sum necessary to reasonably comply with that part of the order requiring the construction of sidings and spur tracks. The statements relied on to show insufficiency of evidence do not justify us in sustaining appellant's contentions, and we hold that the verdict with respect to the second issue is supported by the evidence.

Certain evidence was introduced over the objections of appellant which, it is contended, was inadmissible and prejudicial upon both issues submitted to the jury. This evidence was introduced upon the theory that it was relevant to the second issue.

The witness Davies testified that during the year 1914 the tonnage received at Muleshoe was 3,893 tons, and that forwarded from that station was 961 tons; also that for the year ending February 28, 1918, 9,582 tons were received and 5,909 forwarded. Holt testified that from March, 1917, to March, 1918, 7,576 tons were received, and from August, 1917, to March, 1918, 1,996 tons were forwarded; also that 68 tons were received for persons whose post office was Hurley and 40 tons forwarded for them. Rees testified that from January 1, 1914, to April 30, 1915, 8,000,000 pounds of freight was received at Muleshoe, of which about 300,000 pounds was for Hurley parties. All of this testimony was objected to on the ground that it was immaterial and irrelevant and calculated to mislead and confuse the jury. Muleshoe is a station 3.4 miles east of Hurley. The distance by wagon road is 5½ miles. There is a siding, known as Lariat, 9 miles northwest of Hurley, and Farwell is a station 18 miles northwest of Hurley. The shipping to and from persons residing north of the railroad, and between Muleshoe and Farwell, goes to Muleshoe, Lariat, or Farwell. Farwell appears to be a place of considerable importance, as the evidence shows that it has wholesale establishments. The evidence disclosed that much of the freight for Hurley was hauled by wagon from Farwell. There was evidence

to the effect that carload business for people between Hurley and Lariat was largely handled at Lariat; also that much of the freight for Hurley was hauled from Farwell. The testimony disclosed that there were two settlements, known as Big Square and Spring Lake, situated north of Muleshoe and Hurley. It was admitted that one of these was equally distant from both places, but as to the other there was some controversy, it being contended by one of appellee's witnesses that it was three miles closer to Muleshoe, while one of appellant's witnesses testified that there was not a half mile difference in the distances. The shipping to and from these settlements goes to Muleshoe. The witnesses who undertook to state how much freight was received for and shipped for Hurley parties either limited their statements to persons who received their mail at Hurley or who lived west of a line halfway between Muleshoe and Hurley, and not exceeding five miles north or west of Hurley. This excluded all business from Big Square and Spring Lake.

[9-12] In passing on an issue whether an order is unjust and unreasonable, it becomes necessary, of course, to consider the expense required of the railroad company and to contrast the same with the inconvenience and hardships imposed on the public by reason of the absence of the facilities ordered to be furnished. There is necessarily involved an inquiry as to the number of persons whose interests are involved and the extent of their interests. It was therefore a material inquiry how much freight was shipped to and from persons whose convenience would be subserved by making Hurley a shipping point. The testimony, therefore, as to the extent of shipments made by persons living in the vicinity of Hurley was not subject to the objection urged thereto. It therefore appears that as to the witnesses Holt and Rees part at least of the testimony objected to was admissible, and the court did not err in overruling the general objection made to all of the testimony. *Dolan v. Meehan*, 80 S. W. 99; *Railway v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894. The testimony of Davies related solely to the gross shipments to and from Muleshoe, and a comparison is made which shows an enormous increase between the business and income of the road between 1914 and 1918. It is true that this evidence is somewhat remote; still we cannot say that it would not aid the jury in determining the issue of reasonableness, for it at least showed to what extent railroad business had increased in the section in which Hurley was situated. The theory on which the contention is based that all of the testimony above discussed is prejudicial is that it involves a comparison between the respective merits of Muleshoe and Hurley as

shipping points. Of course, a comparison could be made, but it must have been evident to the jury and fully pointed out in argument that there was no accurate basis for a comparison of tonnage.

[13] The witness Elrod testified, over objection, that the population and production of the Hurley territory had decreased during the past year and a half, and that the population east of Hurley had increased; also that there were about 17 families residing in the territory beginning halfway between Muleshoe and Hurley and extending five miles north and five miles west of Hurley and that there resided in Muleshoe about 20 families, and that the population of the east end of Bailey county extending from the Hurley district north to Parmer county and eastward to Lamb county is close to 200 people. The witness Johnson also testified, over objection, that the number of people residing on the Hurley town site was 25, and that east of a line halfway between Muleshoe and Hurley, outside of the town of Muleshoe, there are 36 families, or a total of 68 people, and that the population of Muleshoe is 97. The objection urged to all of this testimony was that it was immaterial, irrelevant, and calculated to mislead and confuse the jury. There can be no doubt that the inquiry as to how many people would be served by the facilities ordered furnished was material. The objection in each instance was general, and made to all the testimony stated in the bill of exception. The court therefore did not err in overruling such objections. However, there appears to be little merit in the theory that the testimony regarding Muleshoe's population and growth, complained of in the brief, if separately objected to, could be deemed to require a reversal. The theory is that the comparison between Muleshoe and Hurley was prejudicial in that it probably led to a decision upon the false issue of the relative merits of the two places as sites for stations. The opportunity for comparison was furnished by other testimony admitted without objection. For instance, Elrod was permitted to describe the two places, which he did by mentioning each business establishment. The conclusion was inevitable that Muleshoe was a thriving and growing little town, while Hurley, abandoned by its population on account of inability to procure the establishment of a station, had gone steadily down. The witness Blocker was permitted to testify, without objection, that the population of Hurley was 30 people, and that 4 families had moved away; that the others would soon go not to return, and that no one had moved in.

We conclude that the assignments should all be overruled, and the judgment affirmed.

**McCLINTIC v. BROWN. (No. 9072.)**

(Court of Civil Appeals of Texas. Ft. Worth.  
March 22, 1919.)

**1. APPEAL AND ERROR §282—NECESSITY OF  
MOTION FOR NEW TRIAL—TRIAL BY COURT—  
FILING OF FINDINGS AND CONCLUSIONS—  
EXCEPTIONS.**

When the trial is before the court without a jury, the appellant is not required to file a motion for new trial presenting alleged errors as a prerequisite to urging them in the appellate court, where the court has filed his findings of fact and conclusions of law, and exceptions have been taken.

**2. LANDLORD AND TENANT §226—CHANGE—  
DEFENDANT'S PRIVILEGE TO SUE—SUITS FOR  
"RENT."**

Where the court found that the defendant was at no time a resident of the county of venue, and that the contract between plaintiff and defendant was a pasturage contract only, and that defendant did not rent plaintiff's land, Rev. St. 1911, art. 3208, § 5, providing that suits for recovery of rent may be brought in the county in which the rented premises or part thereof are situated, did not authorize plaintiff to sue in such county (citing Words and Phrases, First and Second Series, Rent).

**3. ABATEMENT AND REVIVAL §81—PLEA OF  
PRIVILEGE—WAIVER—FILING CROSS-ACTION.**

While defendant does not waive his plea of privilege to be sued in the county of his residence by pleading generally to the merits, subject to the plea, his privilege is waived by filing a cross-action demanding affirmative relief.

**4. PLEADING §110—PLEA OF PRIVILEGE—  
WAIVER—ASKING AFFIRMATIVE RELIEF.**

If defendant's pleading as a whole conclusively shows he does not intend to waive his plea of special privilege for change of venue, no waiver should be held because he did not specifically state that his plea to the merits was subject to such plea of privilege being overruled; but where he alleges a duty, a subsequent breach thereof on plaintiff's part, loss suffered thereby, specifies the nature and amount of damages, and asks affirmative relief, he waives his plea of special privilege.

**5. PLEADING §110—WAIVER OF PRIVILEGE—  
ASKING AFFIRMATIVE RELIEF.**

Where defendant, following his allegations of a duty and breach thereof on plaintiff's part, and consequent damage to defendant, prayed for affirmative relief, and the pleading was sufficient to have sustained the judgment on defendant's plea in reconvention, he must be held to have asked affirmative relief in a manner to waive his plea of privilege or change of venue.

**6. APPEAL AND ERROR §934(1)—PRESUMPTIONS IN FAVOR OF JUDGMENT.**

Every reasonable presumption should be indulged in favor of a judgment.

Appeal from Parker County Court; E. A. Swofford, Judge.

Suit by W. M. Brown against George T. McClintic. From a judgment for plaintiff, defendant appeals. Affirmed.

Jim L. McCall, of Weatherford, for appellant.

Preston Martin, of Weatherford, for appellee.

BUCK, J. [1] The objection by appellee to the consideration of appellant's assignments, because no motion for new trial was filed in the court below, and hence the alleged errors presented by these assignments were not there urged or called to the attention of the trial court, is not well taken. When the trial below is before the court, the appellant is not required to file a motion for new trial presenting alleged errors as a prerequisite to urging such errors in the appellate court, where the court has filed his findings of fact and conclusions of law, and exceptions have been taken, as in this case. Dees v. Thompson, 166 S. W. 56; American, etc., v. Mercedes Plantation Co., 155 S. W. 286; Cooney v. Dandridge, 158 S. W. 177; Moore v. Rabb, 159 S. W. 85; City of Ft. Worth v. Burton, 193 S. W. 228; Craver v. Greer, 107 Tex. 356, 179 S. W. 862; Hess & Skinner Engineering Co. v. Turney et al. (Sup.), 203 S. W. 593. The authorities cited by appellee in support of his objection are cases where there was a jury, or where a motion for new trial was in fact filed, and a variance was presented between the assignments filed below and those presented in the brief.

[2] The trial court found that defendant's plea of privilege to be sued in Midland County, the county of his residence, was supported by the evidence, and should have been sustained, except for the fact that defendant had waived such right by pleading to the merits. Plaintiff claimed venue in Parker county by reason of section 5, art. 2308, Rev. Civ. Stats., which provides that—

"Suits for the recovery of rents may be brought in the county and precinct in which the rented premises, or a part thereof, are situated."

Plaintiff's original petition in the county court alleged:

"That plaintiff is the owner of a certain farm and pasture situated in Parker county, Texas, and heretofore, on or about the — day of September, the defendant rented pasture from plaintiff, and placed on plaintiff's farm and pasture about 87 head of horses, and agreed to pay pasturage and rent on said horses for the use of the grass and feed stuff on same eaten by defendant's horses," etc.

The court found that defendant was at no time a resident of Parker county, and that



the contract between plaintiff and defendant was a pasturage contract only, and that defendant did not rent plaintiff's land; plaintiff remaining on and retaining possession of the premises. We conclude that the trial court did not err in holding that such facts did not authorize the maintenance of the suit in the precinct and county where the premises were situated, under the section and article above quoted. *Good v. Caldwell*, 11 Tex. Civ. App. 515, 33 S. W. 243; *Shartenberg v. Ellibey*, 27 R. I. 414, 62 Atl. 961, cited in *W. & P.* vol. 4, p. 269; 34 Cyc. 1835; *Noyes v. Stillman*, 24 Conn. 15, 24.

[3] Therefore, we come to the question whether by his pleadings defendant waived his right to be sued in the county and precinct of his residence. While defendant does not waive his plea of privilege by pleading generally to the merits, subject to the plea, his plea of privilege is waived by the filing of a cross-action demanding affirmative relief. *Kolp v. Shrader*, 131 S. W. 860, and cases there cited, including *Douglas v. Baker*, 79 Tex. 499, 504, 15 S. W. 801. In the reply of defendant to plaintiff's controverting plea, the following language is used:

"That if there was any contract between plaintiff and defendant, plaintiff agreed to pasture 37 head of horses belonging to defendant at \$1 per head per month; that plaintiff agreed to furnish good and sufficient pasturage to said horses to keep said stock in an improving condition; that said plaintiff did not furnish said pasturage for said stock as contracted, but the plaintiff, remaining in possession and control of said premises, without the knowledge and consent of defendant, placed great numbers of other stock on said premises, and caused all of the grass to be eaten and defendant's stock to suffer to die; that by reason of plaintiff's overstocking said pasture defendant lost two or more horses to the value of \$140 or more, and the remainder of said stock were damaged to the extent of \$60 or more, all to the plaintiff's [defendant's] great damage of \$200, or more."

Then follows a paragraph alleging defendant's residence to be in Midland county, and that none of the exceptions to exclusive venue in the county of defendant's residence exist in this case, etc. The prayer is as follows:

"Wherefore defendant prays that his plea of privilege be sustained and that plaintiff's suit be moved to Midland county, Texas, precinct No. 1, for further proceedings, and for general and special relief."

[4-6] It is evident that defendant alleges in his reply facts which would sustain a cross-action for damages. He alleges a duty and a subsequent breach thereof on plaintiff's part, and a loss suffered thereby by defendant, and specifies the nature and amount of damages. *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707; *Johnson v. King*, 64 Tex. 226; *Short v. Hepburn*, 89

Tex. 622, 35 S. W. 1056. In the case last cited it is said:

"In the case of *Ellis v. Singletary*, 45 Tex. 27, the defendant by a special plea set up matter which, if alleged in an original action, with a prayer for general relief, would have entitled him to foreclosure of the lien of notes described in the plea upon the land in question; but the court held in that case that he was not entitled to have his lien foreclosed upon the allegations of that plea, because the matter alleged was such as might properly be set up as a defense to the plaintiff's action and as explanatory of the circumstances under which his rights accrued," etc.

Appellant here urges that the allegations as to breach on the part of plaintiff and damages to defendant in the reply above mentioned should be so construed, and that they are merely explanatory of the contract, to show that it was not a rental contract. Doubtless some of the allegations, such as that plaintiff agreed to furnish sufficient pasturage for the stock at so much per head, that plaintiff remained in possession of the premises, etc., may properly be so classed. But we hardly think the allegations as to the loss of certain of the horses and the damage to others by reason of plaintiff's breach may be so construed. In *Hoodless v. Winter*, 80 Tex. 638, 641, 16 S. W. 427, 428, it is said:

"The defendant must not only pray for affirmative relief, but he must state facts showing that he has a cause of action."

In *Short v. Hepburn*, supra, the court discusses the cases of *Hoodless v. Winter* and *Ellis v. Singletary*, supra, and upholds them, because in those cases—

"the pleading indicated an intention to use the legal and equitable title alleged defensively, and not offensively, and therefore the plea was not good as a cross-bill or plea in reconvention."

In *York v. State*, 73 Tex. 651, 11 S. W. 869, it was held that a nonresident, upon whom no valid personal service had been had, waived his privilege to be sued in the county and state of his residence by filing any defensive pleading, even though his appearance was special and declared to be restricted to the sole purpose of presenting and having acted upon his plea to the jurisdiction of the court over his person. This case has been followed generally by the courts in this state, but in spite of some expressions in later cases, tending to enlarge the scope of the holding in the *York Case*, we understand that the rule is that, if the defendant pleads in due order, he does not waive his right to be sued in the county of his residence by filing purely defensive pleas following and subject to action on his plea of privilege. In the case of *Russek v. Wind, Ems & Co.*, 192 S. W. 584, the *York Case* was

referred to, and cited in support of the conclusion that where a cause of action was transitory, and courts of this state had jurisdiction over the subject-matter of the litigation, jurisdiction over the defendant's person was acquired by his appearance in person and by attorneys and answering to the merits. In *Railway Co. v. Ayers*, 102 S. W. 310, the scope of the York Case was limited, properly we think, to a holding that where a defendant submitted its person to the jurisdiction of the Texas court, by its action in filing a plea of privilege and answer to the merits after the suggestion of the *amici curiæ* had been overruled, that defendant had made its appearance for all purposes. We think the rule to be held in *Kolp v. Shrader*, and *Douglas v. Baker*, *supra*. In *Hagood v. Dial*, 43 Tex. 625, 627, it is said:

"Whilst the privilege of being sued only in the county of his residence, which our statute, with specified exceptions, gives a defendant, is waived, if not asserted before answering to the merits, we think it is not waived where \* \* \* the plea asserting it was filed contemporaneously with other defenses. It was held very early by this court that the common-law rules of pleading were inapplicable under our system to this plea. *Richardson and Wife v. Pruitt*, 3 Tex. 228. It is evident that the defendant did not intend by his exceptions and pleas to the merits to waive his privilege which he had already asserted, and we think that as to this point the court ruled correctly."

We conclude, from this case and others of similar import, because we believe the conclusion to be in harmony with sound reasoning and with the spirit of the statutes relating to venue and pleas of privilege, that it is not prerequisite that a defendant, in order to retain the benefit of his plea of privilege, state in so many words that the subsequent plea to the merits is subject to his plea of privilege. If the pleading as a whole conclusively shows that the defendant does not intend to waive, but, on the other hand, insists upon, his plea of privilege urged, no waiver should be held because he did not specifically state that his plea to the merits was subject to his plea of privilege being overruled. But if, in connection with the plea of privilege, the defendant invokes the jurisdiction of the court to grant him affirmative relief, he must be held to have waived his plea of privilege. We conclude that we would have to give a strained and unwarranted construction to the pleading, and especially to the prayer, to hold that defendant did not under his prayer for general relief, following his allegations of a duty and breach on plaintiff's part, and consequent damage to defendant, ask for affirmative relief. Undoubtedly such pleading would have sustained a judgment on defend-

ant's plea in reconvention, which is the test. Every reasonable presumption should be indulged in favor of the judgment.

Hence we overrule all of appellant's assignments and affirm the judgment.

#### PARKER et al. v. HARRELL. (No. 460.)

(Court of Civil Appeals of Texas. Beaumont. May 13, 1919. Rehearing Denied May 28, 1919.)

#### 1. CONTINUANCE $\S$ 25—ABSENCE OF WITNESS.

Refusal of continuance for absence of witness is not error, where it appears that his testimony was not of a character that would have brought about a different result in the trial court.

#### 2. APPEAL AND ERROR $\S$ 544(1)—NECESSITY OF BILL OF EXCEPTIONS—CONTINUANCE.

Refusal of continuance because of absence of witness is not reviewable, in the absence of a bill of exceptions.

#### 3. EVIDENCE $\S$ 271(1), 317(3)—HEARSAY—ADMISSIBILITY.

In suit against operator of jitney and surety on his bond for injuries sustained by plaintiff while a passenger, when jitney collided with a street car, held that court did not err in refusing to strike out testimony of plaintiff's daughter that her father was complaining, on the ground that it was hearsay and self-serving, and not admissible for any purpose.

#### 4. EVIDENCE $\S$ 477(2)—OPINION EVIDENCE—RECOVERY FROM FORMER ACCIDENT.

In suit against operator of jitney for injuries sustained by plaintiff passenger in jitney when jitney collided with a street car, defense being that plaintiff's injuries were the result of prior accident, there was no error in permitting plaintiff's wife to testify that her husband had recovered from a former accident some two years before the accident in question.

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Suit by C. W. Harrell against G. J. Parker, the Motorcar Indemnity Exchange, and the Houston Electric Company. Plaintiff dismissed his cause against defendant last named, and from a judgment in his favor against the other defendants, they appeal. Affirmed.

A. B. Wilson and Baker, Botts, Parker & Garwood, all of Houston, for appellants.

Atkinson & Atkinson and Guy Graham, all of Houston, for appellee.

BROOKE, J. This suit was filed April 11, 1917, by C. A. Harrell against Houston Electric Company, G. J. Parker, and Motorcar Indemnity Exchange, for damages alleged to have been sustained May 7, 1917, by reason

of the collision of a jitney alleged to have been operated by defendant Parker with a street car, plaintiff alleging that he was a passenger in the jitney. Plaintiff alleged:

"When the automobile slid or skid along the back of defendant and along its rail, this plaintiff was thrown against the rear end of the street car with great force, and that the motion of the automobile caused the weight of his wife and daughter, who were sitting with him on the seat, to be thrown against him and to add to the force with which he struck the said street car; \* \* \* that when he was impelled against the rear end of said street car he struck his head, his arm, his side, his hip, and his leg against said street car, and that he injured his head, his side, his arm, his leg and his back by the force of said collision, and that said injuries have crippled him so that he has been unable to walk and has been confined to his bed; that they have caused him intense pain and suffering, both on account of the injuries received and the shock of his injuries, and that he has been permanently injured by reason of the force with which he was thrown against the rear end of said street car, and will never recover therefrom."

Plaintiff sued Motorcar Indemnity Exchange, alleging that it had executed a bond as surety for the defendant Parker, as provided by the city ordinances of Houston.

Defendants Parker and Motorcar Indemnity Exchange filed a general demurrer and general denial, and that plaintiff's alleged injuries were the result of another accident, sustained prior to the injuries as alleged in plaintiff's petition.

Plaintiff dismissed his cause of action against the Houston Electric Company.

Defendant Parker et al. applied for a continuance, which was overruled; the court instructed the jury, and the jury returned a verdict in favor of plaintiff for \$600 against the defendants Parker and Motorcar Indemnity Exchange, and judgment was entered accordingly.

[1, 2] Appellants' first assignment of error complains that the court erred in overruling defendants' motion for a continuance in this cause. The application for continuance has been set out in full in the brief. The grounds for continuance claimed were that suit was filed July 11, 1917; that a witness whose testimony was desired was in the service of the United States army; that he had left Harris county prior to service of citation in this suit; that defendants had no knowledge or belief that suit would be brought; that the witness left suddenly and unexpectedly, and promised to write to defendant Parker, but did not write to him; that defendant had learned of his departure for France through the newspapers; that he knew of his address, and would have his testimony upon the trial of this cause at the next term, and that he expected to prove by said witness that he was driving the automo-

bile at the time of the alleged injury; that upon approaching the intersection of streets, and while in the rear of the street car, said automobile skidded, and the side of the automobile struck the rear end of the street car; that it did not strike the street car very forcibly; that plaintiff and two ladies were in the rear seat of the automobile; that they were not thrown from the seat or in any way displaced from the seat; that each of them stated to witness that they were not injured in the slightest, came to the city of Houston in said jitney, stated at the time that they left the jitney that they were not injured, refused to give the witness their names; that the jitney was not running fast at the time, but moving slowly; and that the defendants had no other witness by whom said testimony could be offered, and if granted a continuance they expected to have the testimony at the next term of the court, and would exercise every degree of diligence to obtain the deposition of said witness at the trial of the cause at the next term, and that the application was not made for delay only, but that justice may be done. The application was duly sworn to. The trouble with this application is that there was no bill of exceptions preserved or shown in the record. From the record it is apparent to this court, even though there had been a bill of exceptions to the action of the court, the testimony was not of such character as would have brought about a different result from that obtained in the trial court on the instant appeal. Therefore, we cannot consider the assignment of error.

The second assignment of error complains: (1) The verdict of the jury and the judgment of the court are unsupported by the evidence in this cause; and (2) the verdict of the jury is against the great weight and preponderance of the evidence in this cause. Suffice it to say that this court is not of such an opinion, and, on the contrary, is of the opinion that the record fully establishes the judgment which the court entered in said cause. Therefore this assignment is overruled.

[3] The third assignment of error complains that the court erred in refusing to strike out the statements of Miss Lola Harrell that her father was complaining, upon motion duly filed by defendants, as shown by defendants' bill of exception No. 5, on the ground that said testimony was hearsay and self-serving, and not admissible as evidence in this cause for any purpose.

From the statement of facts, in so far as it relates to the testimony complained of, it is as follows:

"No complaint was made at that time by any one about being hurt; only I asked my father was he hurt, and he says, 'Yes; I am hurt a little bit, but I hope not much.' My father did not say anything much about being hurt until after we got home, and we came on to court, and the case was postponed, and when we got

ready to go home he said he was hurt. I do not know how long it was before we got home; it was not so awfully long. We came up to the courthouse, and it was postponed, and we went straight home as soon as we could get a jitney. We kinda hurried to get home because papa said he was feeling bad."

This appears to be the matter complained of in the bill of exception. From this record, we are not advised of anything else said by the daughter in the way of her father making a complaint. The error, under the rules, should be distinctly and specifically called to the attention of the court in the motion for new trial, and, viewing the matter in the most favorable light for the complainant, we are of opinion that no error was committed, and the assignment is overruled.

[4] The fourth and fifth assignments complain: (a) The court erred in overruling the defendants' objection to the testimony of Mrs. C. W. Harrell, in substance and effect that the plaintiff had fully recovered from his former accident and injury, same being a conclusion of the witness; and (b) the court erred in refusing to sustain the defendants' objection to the testimony of Mrs. C. W. Harrell that the plaintiff had fully recovered from his former accident and injury, same being the conclusion of the witness; (c) the court erred in overruling the defendants' objection to the testimony of Mrs. Harrell and permitting said Mrs. Harrell to testify that Mr. Harrell complained of suffering, because said testimony was hearsay and self-serving, as shown by defendants' bill of exception. Under the fourth assignment, appellee submits the following as a proposition:

"It is not hearsay, and it is not the conclusion of a witness, but a statement of fact that a party to the litigation was well at the time of the accident."

Mrs. Harrell's testimony was that her husband had recovered from a former accident some two years before he was injured in the accident in controversy. The record shows that no question on direct examination was asked Mrs. Harrell as to her husband's declaration about his injuries in the accident in controversy; but she testified on cross-examination by appellants' attorney, as follows:

"He complained of his head, of his whole head. He was hit on the right side of his head; his head struck the street car. He was not thrown out of the automobile; his head was slammed against the side like that, that part of the street car that is cased in with tin or whatever you call it. His back and head is what he complained with, no other place."

An examination of the record shows that no error was committed by the court in the matters complained of. Therefore these assignments are overruled.

In our opinion, the case was tried fairly and impartially, and the appellants have gotten the benefit of every right that should be accorded them. Therefore the judgment of the trial court is in all things affirmed.

## HOUSTON OIL CO. OF TEXAS v. JORDAN et al. (No. 384.)

(Court of Civil Appeals of Texas. Beaumont. April 28, 1919. Rehearing Denied May 23, 1919.)

### 1. APPEAL AND ERROR $\S$ 773(4)—MATTERS REVIEWABLE—BRIEFS.

Where one who filed assignments of error in the trial court has not briefed the case in the appellate court, the judgment will be affirmed, unless fundamental error is apparent on the face of the record.

### 2. ADVERSE POSSESSION $\S$ 94—PAYMENT OF TAXES.

The five-year statute of limitations does not require, in order to acquire title by adverse possession, that taxes be paid before they become delinquent, but only that such taxes be paid concurrently with the possession held by the occupant, and before adverse suit to recover the land.

Error from District Court, San Augustine County; W. R. Blackshear, Judge.

Actions by the Houston Oil Company of Texas against L. N. Jordan and others and against John W. Robbins and others, consolidated. From adverse judgments, Robbins and others and the Houston Oil Company bring error. Affirmed.

Kennerly, Williams, Lee & Hill, of Houston, for plaintiffs in error.

Jno. F. McLaurin, of San Augustine, and Denman & Thomas, of Lufkin, for defendant in error.

HIGHTOWER, C. J. Houston Oil Company of Texas, plaintiff below, brought this action of trespass to try title in the district court of San Augustine county against L. N. Jordan and his wife, Laura Jordan, and L. A. Jordan and his wife, Mary Jordan, seeking to recover 25 acres of land, a part of the league of land granted to Joseph Shipp, said 25 acres being described by specific metes and bounds. In the same court, at the same time, there was pending another cause, styled Houston Oil Company of Texas v. John W. Robbins et al., involving the title to 50 acres of land, also a part of the Joseph Shipp league, and by agreement of all parties in both causes they were consolidated and tried together. The consolidated cause was tried before the court without a jury, and resulted in a judgment in favor of the Houston Oil

Company of Texas as against Robbins et al. for the 50 acres claimed in that suit, but as to the 25 acres sued for as against the Jordans judgment was rendered in favor of the defendants, L. N. Jordan and wife.

[1] From the judgment so rendered, Robbins and others excepted, and gave notice of appeal from the judgment allowing recovery to the Houston Oil Company of Texas for the 50 acres in that cause, and the Houston Oil Company of Texas excepted and gave notice of appeal from the judgment denying any recovery as against the Jordans. Robbins et al., however, although filing assignments of error in the trial court, have not briefed the case in this court; and, there being no fundamental error apparent on the face of the record as to that cause, the judgment in favor of the Houston Oil Company of Texas for the 50 acres of land awarded it as against Robbins et al. will be in all things affirmed.

What we shall say hereafter will have reference alone to the judgment in favor of L. N. Jordan et al.

The Jordans, in addition to their general denial and plea of not guilty, interposed the statutes of limitation of 3, 5, and 10 years as to the 25 acres of land awarded them by the judgment.

Defendants in error have filed no brief in this court, and we must look alone to the brief of plaintiff in error for assistance in disposing of the appeal.

By the first assignment of error, it is claimed, substantially, that the trial court was in error in refusing to render judgment in favor of plaintiff in error for the 25 acres of land sued for, because the undisputed proof showed that plaintiff in error had a complete chain of title thereto from the sovereignty of the soil, but, if not, that it showed a superior title thereto from a common source.

By the statement contained in the brief of plaintiff in error following this assignment, it will appear that plaintiff in error did, as contended, establish title to the 25 acres in controversy from the sovereignty of the soil; but, if it were relegated to the common source for title, it would appear that it showed a superior title under the claimed common source. We, therefore, conclude at the outset that plaintiff in error showed a superior title to the 25 acres in controversy as against the Jordans, and should have recovered, unless the judgment of the court should be sus-

tained upon the theory that defendants in error showed title by limitation under the 5-year statute. After a careful consideration of the record, in connection with the plea of 5-year limitation, we have concluded that the evidence was sufficient to warrant the judgment in favor of the defendants in error upon that plea.

[2] There is really no dispute in the evidence with reference to the character of the possession held by the Jordans, nor is there any contention that possession was not held for the statutory period of 5 years, but the main contention is that taxes were not paid concurrently during such possession; in other words, that taxes for several of the years during which the possession was held by the Jordans and their predecessors were not paid as they became due, but were permitted to become delinquent, and that, therefore, the 5-year statute was not complied with, which, according to the contention of plaintiff in error, required that the taxes should be paid for each year, and as they accrued, and before becoming delinquent. It would serve no useful purpose to attempt to clear up the confusion that may be conceded to exist in the state of the decisions of this state at the present time as to what the expression "concurrently" means, with reference to the payment of taxes under the 5-year statute. The question was fully discussed by the Court of Civil Appeals for the First District, speaking through Justice Reese, in the case of Hirsch v. Patton, 49 Tex. Civ. App. 499, 108 S. W. 1015. It was again discussed at some length by the same court, speaking through Chief Justice Pleasants, in the case of Fogle v. Baker, 205 S. W. 752. In the case last mentioned, it seems to have been, in effect, held that the 5-year statute of limitation does not require, in order to acquire title by adverse possession, that taxes be paid before they become delinquent, but only that such taxes be paid concurrently with the possession held by the occupant, and before adverse suit to recover the land. If these decisions announce the correct rule, then, unquestionably, the payment of taxes in this case by the Jordans, and those with whom they are in privity, was a sufficient compliance with the statute, and entitled defendants in error to judgment under their plea of limitation of 5 years, the other elements being present.

The judgment will therefore be affirmed; and it is so ordered.

**MEADORS v. SHERRILL et al. (No. 977.)**

(Court of Civil Appeals of Texas. El Paso.  
May 15, 1919. Rehearing Denied June 5,  
1919.)

**PERPETUITIES §4(15) — TRUST PROPERTY — CHURCH.**

Will bequeathing property to named trustees to have full management, control, and sale, with directions to turn proceeds of all property over to certain church when in judgment of trustees the church shall be in need of new church building, did not contravene constitutional inhibition against perpetuities, the property vesting in trustees immediately upon testator's death, in trust for church, and discretionary power given trustees to decide as to time for construction of church building not destroying right of church officers to take proceeds upon need for or propriety of building.

Appeal from District Court, Haskell County; Jno. B. Thomas, Judge.

Action by R. E. Sherrill and others, as executors of last will of W. A. Black, deceased, against J. W. Meadors. Finding for plaintiffs, and defendant appeals. Affirmed.

Scott W. Key, of Waco, for appellant.

H. G. McConnell, of Haskell, and Theo. Mack, of Ft. Worth, for appellees.

**HARPER, C. J.** This action was instituted by R. E. Sherrill, R. C. Montgomery, and H. G. McConnell, as executors of the last will of W. A. Black, against appellant, upon certain promissory notes owned by the estate of said Black.

The defense urged, by plea in abatement, is that the will is a nullity under the Constitution and laws of Texas, which prohibit perpetuities, hence the qualification of the plaintiffs as executors thereunder is void. This is the sole question to be determined.

The court found for plaintiffs and Meadors has appealed.

The will declares:

First, for burial; second, payment of debts; third, appointment of the above-named plaintiffs executors without bond; and, fourth, "I hereby will and bequeath unto the said H. G. McConnell, R. E. Sherrill and R. C. Montgomery, in trust for the purposes hereinafter stipulated all of the property of which I may die seized and possessed, including real, personal and mixed property, and that of every kind and description. And it is my will and desire that the said trustees have the entire management and control of all of said property, hereby granting unto them full power and authority to sell and convey the same, to invest and reinvest the proceeds from time to time, pay all reasonable charges and expenses in connection with the handling, managing, caring for, controlling and selling said property, and finally, whenever in their judgment it is proper or necessary for the First Presbyterian Church

of Haskell, Texas, in connection with the Presbyterian Church of the United States, to have a new church building at Haskell, to pay the entire proceeds of all my property in money then remaining into the hands of the trustees of said church to be by them at once expended in the construction of a new building at Haskell, Texas, which when completed shall be owned by and shall belong absolutely and in fee simple to said Presbyterian Church."

Fifth, "It is my will and I hereby direct that should any one or more of my executors above named from death, removal, inability, or otherwise, fail or refuse to act as such executor that then the survivor or survivors, who do qualify under the law and act as such executor or executors, shall have all the powers, privileges and authorities that I have conferred upon all of them by the foregoing provisions of this will. And be it understood that, whether any one or any number of them shall qualify and act, as such executors, he or they shall nevertheless, be exempt from the giving of any security, or bond as such executor or executors, as the case may be."

The will was duly proved and admitted to probate, and the above-named persons qualified as executors.

The reasons assigned for the claim that this will contravenes the constitutional inhibition against perpetuities are (a) That it does not vest a present estate, nor (b) does it provide that the estate shall vest within 21 years from the date of the death of the testator, but (c) that the title is to rest upon the contingency that the executors make up their minds that it "is proper or necessary for the Presbyterian Church of Haskell in connection with the Presbyterian Church of the United States to have a new church at Haskell," and that this is a contingency which may not happen within the prescribed time, 21 years, and (d) that they are contingencies which may never happen.

Appellant frankly concedes that the will is valid if it creates a vested interest or estate in the church as beneficiary, and cites *Anderson v. Menefee*, 174 S. W. 905. The question of gift in trust for charitable uses was not involved in that case, so the principles of law applied in determining the issues there involved do not apply to the instant case.

It has been said that charitable uses are favorites with the courts of equity, and that a construction of all instruments where they are concerned is liberal in their behalf (*Perry, Trusts*, § 709), and it was declared by the Supreme Court of Texas that the inhibition against perpetuities does not apply to bequests for charitable uses. *Paschal v. Acklin*, 27 Tex. 197. By this will the title to the property vested in the named trustees immediately upon the death of the testator, but in trust for the church, and the fact that the trustees were by the will clothed with discretionary power to decide when the necessity

or propriety of the construction of a church arose does not destroy the right of the officers of the church to take the proceeds of the property when the occasion in fact arose. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. Ed. 450; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *Paschal v. Acklin*, supra.

This is, we conclude, the law applicable to the provisions of this will, under the authorities cited and those referred to therein. Quoting from one of the cases:

"The doctrine finds support upon the ground that the intention in favor of charity is absolute, the gift and the constitution of the trust is immediate, takes effect in present, and the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode which the donor would have applied to the execution of the charity."

These observations are applicable to the points raised and authority for holding the will to be valid.

Affirmed.

#### MACKAY TELEGRAPH-CABLE CO. v. PROCTOR. (No. 994.)

(Court of Civil Appeals of Texas. El Paso. May 22, 1919. Rehearing Denied. June 12, 1919.)

#### 1. APPEAL AND ERROR $\S$ 85 — AMOUNT IN CONTROVERSY—COURT OF CIVIL APPEALS.

Where in justice court defendant itemized the two amounts sued for as \$90 and an unpaid balance of \$15.60 for extra work, but stated the total amount due as \$98.64, and defendant in his cross-action asked for judgment for \$180 and costs, the amount in controversy brings the case within the jurisdiction of the Court of Civil Appeals.

#### 2. APPEAL AND ERROR $\S$ 65—JURISDICTION—AMOUNT IN CONTROVERSY—JUSTICE OF THE PEACE.

The question of jurisdiction of Court of Civil Appeals in case originating in justice court is fixed by the amount involved in the justice court.

#### 3. ARMY AND NAVY $\S$ 24—EMPLOYMENT OF ENLISTED MEN—COMPENSATION PAID.

Where defendant solicited the services as chief night operator of plaintiff, then employed by the United States as censor at the office of defendant, with full knowledge of the law and facts and orders of the military authorities, and the work was actually performed, defendant cannot recover the amount paid for such services, it not appearing that the services conflicted with the federal statute, forbidding enlisted men from engaging in any pursuit in civil life for hire when the same shall interfere with customary employment.

Appeal from El Paso County Court, at Law; W. P. Brady, Judge.

Suit in justice court by B. Proctor against the Mackay Telegraph-Cable Company, in which defendant filed its answer and cross-action. There was judgment for plaintiff for the amount sued for and against defendant on its cross-action, and defendant appealed to the county court, where plaintiff again prevailed, whereupon defendant appeals. Affirmed.

Turney, Burges, Culwell, Holliday & Pollard, of El Paso, for appellant.

Brown & Wilchar, of El Paso, for appellee.

WALTHALL, J. Appellee, B. Proctor, brought this suit in the justice court to recover of appellant, Mackay Telegraph-Cable Company, the sum of \$90 for labor performed by appellee for appellant for the month of July, 1917, and for certain extra work performed in July in the further sum of \$15.60, but alleging the total sum due to be \$98.64. The amounts sued for were for wages for work actually performed as night chief operator, at the agreed sum of \$90 per month.

Appellant filed its answer, a general denial, and cross-action, in which appellant alleged that during the months of May, June, and July, 1917, appellee was employed by the United States government as censor at the office of appellant; that appellant had erroneously paid appellee \$90 per month for May and June, 1917, and did not owe appellee anything for the month of July except the sum of \$15.60 for extra work, and asked judgment for \$180, the amount erroneously paid for the months of May and June, 1917. Appellee recovered in the justice court, and it was adjudged that appellant take nothing on its cross-action. An appeal was duly perfected by appellant to the county court. The county court gave a peremptory instruction against appellant's cross-action, and on special issues submitted the jury found substantially as follows: That appellant, through its manager, R. H. Cornwall, entered into a contract with appellee at or about the time he enlisted in the army (the date not found) by which appellant agreed to pay appellee the sum of \$90 per month. Appellant, after notifying appellee on July 14, 1917, it would not pay him for services as night chief operator, received notice from appellee that he would not work for appellant except they paid him. Appellant, subsequently to said notice, received and accepted the services of appellee as chief night operator, with the agreement and understanding that he would be paid by appellant for his services. The military superior officer of appellee notified

appellee (the date not found) that he could not receive pay from appellant for services as night chief operator.

In addition to the above findings the evidence discloses the following: For some months prior to April, 1917, appellee was night chief operator for appellant at El Paso. In the month of April, 1917, at the suggestion of the manager of appellant company, appellee applied to become, and was appointed, censor in the United States army and assigned at El Paso. The date of the appointment as censor is not shown. It was the understanding between appellee and the manager of the appellant company at El Paso that if appellee received the appointment as censor the company would continue to pay appellee his monthly salary of \$90 per month as long as he continued to perform for the company the service of night chief operator. After receiving his appointment as censor with the government, appellee continued to perform his duties for appellant as night chief operator in addition to his duties as censor for the government. The services as stated continued without change or interruption during the months of May and June and until some time in July, date not made clear by the evidence, when an order was issued by Maj. A. Clifton, of the Signal Corps, El Paso District, to the effect that military censors would devote all of their time while on duty to the censoring of messages for the government, and that no other work must be done during that time, until the decision of the chief censor at Washington could be had. After the receipt of the above order appellee informed Mr. Cornwall, appellant's manager, and himself, then a government censor, that he could not do the work as night chief operator for the company. Mr. Cornwall immediately took the matter of appellee's continued service as night chief operator up with Maj. Clifton, with the result that appellee was excused from the operation of the above order. Appellant paid appellee \$180 for his services rendered the appellant for the months of May and June. Judgment was rendered for appellee for \$98.64 and against appellant on its cross-action.

#### Opinion.

[1] Preliminary to the questions presented by appellant, appellee suggests that this court is without jurisdiction for the reason that the amount in controversy does not exceed \$100, exclusive of interest and costs. We think the amount in controversy brings this case within the jurisdiction of this court. In the justice court, appellee itemized the two amounts sued for as \$90 and an unpaid balance of \$15.60 for extra work, but stated the total amount due was \$98.64. Appellant made general denial, and filed its cross-action in the justice court, asking judg-

ment against appellee for \$180 and costs of suit.

[2] The question of jurisdiction is fixed by the amount in controversy in the justice court. It was held in *Texas & Pacific Ry. Co. v. Hood*, 59 Tex. Civ. App. 363, 125 S. W. 982, that the correct sum of the items set out in the body of the pleading will control in ascertaining the amount sued for, rather than in a statement of the aggregate amount sued for. If the rule stated applies here, appellee really sued for \$105.60, although he stated the aggregate amount sued for to be \$98.64. However, appellant's cross-action was for an amount sufficient to give this court jurisdiction. *Crosby v. Crosby*, 92 Tex. 441, 49 S. W. 359; *Ford v. Johnston*, 164 S. W. 424; *Bledsoe v. Railway Co.*, 6 Tex. Civ. App. 280, 25 S. W. 814.

[3] The other questions presented by appellant arise on the peremptory instruction given on appellant's cross-action. The insistence is that appellee was an enlisted soldier in the United States Army Signal Corps, and in said service was censor of appellant, and, while such enlisted soldier, could not be an employé of appellant; that under the pleadings and evidence it was shown that appellant paid appellee for his services for the months of May and June the sum of \$180, the amount sued for, under the mistaken belief that appellee was entitled to compensation from appellant, as well as from the government. The federal statute (Act June 3, 1916, c. 134, § 35, 39 Stat. 188 [U. S. Comp. St. 1918, § 1892f]), invoked by appellant under this assignment reads:

"Hereafter no enlisted man in the active service of the United States in the Army, Navy, and Marine Corps, respectively, whether a noncommissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions."

The hours for the military censors, as fixed by the order of Maj. Clifton, were from 7:30 a. m. until close of business, at 9:30 p. m. It is not shown by the record that appellant's duties as night chief operator conflicted in point of time with his duties as censor. And we take it that it did not, as the undisputed evidence is that, on the application of Mr. Cornwall, appellant's manager at El Paso, appellee was excused from the order directing that the censors should perform no other work during the hours of their service, had the two services conflicted. The evidence does not show the hours during which appellee served the company as night chief operator. There is no suggestion that the service was not satisfactorily ren-



dered, but the contrary appears. The undisputed evidence also shows that to perform the service of night chief operator appellee was not required to leave his post; nor does it appear that the service of night chief operator in any way interfered with the customary employment or regular engagement of local civilians in that character of service, but rather the contrary is shown, inasmuch as there was a scarcity of operators, and it was the desire of the government to place men as censors who understood telegraphy.

We believe the evidence shown in the record does not bring appellee within the inhibition of the statute, or the military orders shown. Appellant solicited the service of appellee for the months of May and June, with a full knowledge of the law and the facts, and the orders of the military authorities, and voluntarily paid appellee, as it had agreed, for work actually performed. We see no reason why appellant should have a judgment for the amount so paid.

If the remarks of counsel for appellee were objectionable, we think they did not cause the rendition of an improper verdict.

No reversible error appearing in the record, the judgment is affirmed.

**BOWMAN et al. v. OAKLEY et al.**  
(No. 8982.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Feb. 8, 1919. Rehearing Denied April 5,  
1919.)

**1. MORTGAGES ⇐333—DEED OF TRUST—SALE BY SUBSTITUTE TRUSTEE—REQUEST OF BENEFICIARY.**

Where a trustee under deeds of trust or his substitute was authorized by the deeds to sell the property only at the request of the beneficiary or other holder of the notes secured, the request provided for was essential to passing of title by the substitute trustee.

**2. EVIDENCE ⇐318(1), 383(7)—HEARSAY—SALE BY TRUSTEE—AUTHORIZATION—RECITALS IN DEEDS OF TRUST.**

Despite provision of deeds of trust that any recitals of certain character in any deeds made by any trustee should be prima facie evidence, recitals of deeds executed by substitute trustee that beneficiary or holder of notes secured had requested trustee to sell the land, which request was necessary to authorize the trustee to sell, held unauthorized by the deeds, and no evidence of the fact of request, being mere hearsay as to the beneficiaries.

**3. EVIDENCE ⇐383(7)—DEEDS OF TRUST—PROVISION AS TO RECITALS OF DEEDS OF TRUST—CONCLUSIVENESS.**

Where the recitals of deeds executed by a trustee under deeds of trust by a provision of

the deeds of trust constituted merely prima facie evidence, the power of the courts to ascertain the real truth, when necessary to determination of rights in litigation, was not taken away.

**4. MORTGAGES ⇐372(1)—DEEDS OF TRUST—SALE BY SUBSTITUTE TRUSTEE—VOID CHARACTER.**

Where the purchasers of land from a substitute trustee under deeds of trust by his deed were not relieved from necessity of inquiring into and ascertaining whether the trustee had been empowered to sell by having been requested so to do by the beneficiary or holder of the notes secured, having made no inquiry, the purchasers assumed the trustee had power at their peril, and where he was without power his sale was void.

**5. MORTGAGES ⇐372(1)—DEEDS OF TRUST—SALE BY TRUSTEE—BONA FIDE PURCHASERS.**

Where the substitute trustee under deeds of trust sold the land without authority because not on request of the beneficiary or holder of the notes secured, the purchasers are not protected as bona fide purchasers of the legal title, for the rule of bona fide purchasers applies only to cases of purchase from a holder of the legal title who has power to convey.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by J. C. Oakley and another against Lloyd Bowman and others. From judgment for plaintiffs, defendants Bowman and another appeal. Affirmed.

Theodore Mack and Slay, Simon & Smith, all of Ft. Worth, for appellants.

B. K. Goree, of Ft. Worth, and Preston Martin and H. C. Shropshire, both of Weatherford, for appellees.

CONNER, C. J. In so far as we deem it necessary to state, in 1909 one Miller and wife conveyed three tracts of land described in the plaintiffs' petition, and secured the payment of one note given therefor in a principal sum of \$1,000, by a trust deed in due form to Thomas D. Ross, trustee. Later, in 1910, Seyster and wife, who in the meantime had become the owners, executed a deed of trust to Thomas D. Ross, trustee, conveying the fourth tract of land described in the petition to secure the payment of a note in the sum of \$800. The two notes mentioned, in due course, became the property of one Ernest Walker who was the owner at the date of the sales hereinafter mentioned under the trust deeds made to Thomas D. Ross. Yet later, in 1914, Seyster and wife conveyed the four tracts of land referred to in consideration, among other things, of six promissory notes, the first five being in the sum of \$1,000 each and the last being in the sum of \$900. These notes were secured by vendor's lien upon the four tracts of land. The trust deeds, however, had been duly recorded and

the vendor's lien, reserved by Seyster and wife, was subordinate to the lien of the trust deeds. The six second lien notes, last mentioned, in due course became the property of J. C. Oakley and Mrs. Willie L. Flinn, the appellees in this case. On November 23, 1915, in due course the four tracts of land mentioned were conveyed to R. E. Logan, subject to the incumbrances and liens hereinbefore mentioned. While the lands and liens were in the condition named, and while R. E. Logan was yet the owner of the equity of redemption, Thomas D. Ross, the trustee named, refused to act, and a substitute was appointed, who, on May 2, 1916, sold the four tracts of land mentioned to Pattie & Horton Land Company, which, in the purchase, acted for R. E. Logan, and which, on the following day, to wit, May 3, 1916, without consideration, conveyed the same to Mrs. Abbie Logan, wife of R. E. Logan. Thereafter, on June 20, 1916, Abbie Logan, joined by her husband, conveyed the four tracts of land to R. C. Sweeney and wife, who, in turn, on July 22, 1916, conveyed the lands to Lloyd Bowman.

This suit was instituted by the said J. C. Oakley and Mrs. Willie Flinn, to recover upon the six second lien notes owned by them, and hereinbefore described, alleging, among other things not necessary to mention, that the sales under the Thomas D. Ross trust deed had been fraudulently induced and secured by R. E. Logan, with the purpose to thus extinguish the vendor's lien which had been given to secure the notes declared upon, of all which it was alleged R. C. Sweeney and Lloyd Bowman had due notice.

The case was submitted to a jury upon special issues, and upon the verdict the court rendered a judgment for the plaintiffs, decreeing a sale of the land, adjusting certain equities not necessary to notice, etc., and from this judgment the defendants R. C. Sweeney and Lloyd Bowman alone have appealed.

While a number of questions are presented we have concluded to dispose of the case by a determination of a single one; a statement of many details and of other questions having been pretermitted as unnecessary to our conclusion.

The jury found that Ernest Walker did not request either Thomas D. Ross or the substitute trustee in the deeds of trust to sell thereunder in satisfaction of the notes and indebtedness held by Walker, and that he did not, before or at the time of the sale made by the substitute trustee, by word or act, agree to or acquiesce in said trustee making such sale as he did make it. The jury further found that the sales of the land by the substitute trustee were made at the instance and request of R. E. Logan, and that R. E. Logan caused such sales of the land for the purpose of destroying the second lien

held by the plaintiffs, and of acquiring the title to be passed by the foreclosure of the first lien in the protection of the title to which he, Logan, then had in said land. The jury further found that neither Sweeney nor Bowman at the time of their acquisition of the property was an innocent purchaser for value, without notice, as defined in the court's charge.

The controlling question, presented in various forms, is whether either Sweeney or Bowman was an innocent purchaser for value, without notice, of the lands upon which plaintiffs' second lien rested. While the jury found that neither was such a purchaser, no evidence is pointed out, and we have found none, sufficient to establish that either Sweeney or Bowman had any actual notice of the plaintiffs' right, and to this extent it may be said that the findings of the jury to the contrary are not supported by the evidence. We think, however, that it must be held that neither of those parties appear to be in the attitude of an innocent purchaser as claimed by them. In the registration records and in the muniments of title, under and through which Sweeney and Bowman claimed, were full recitals of the notes and liens under which the plaintiffs claimed, and we are unable to say that the finding of the jury to the effect that Ernest Walker, the owner of the prior lien and beneficiary in the deed of trust lien, neither agreed to nor requested the sale of the lands in controversy, is unsupported by the evidence in the case. Among other things, Ernest Walker testified on this point as follows:

"I did not request Mr. Clyde Milliken, as trustee, to foreclose and sell under these notes. I did not pay any taxes on the property after I acquired the notes in controversy. I did not make any demand of interest of anybody. I did not make any request of any kind that the property be sold. I did not know anything about the condition of the property at the time of the sale. I never did go on the property. I did not know where the property was, and I did not know that it had a silo on it. I did not request the sale to be made that was made in June, and that was advertised in May. I did not have a thing to do with the foreclosure under these deeds of trust and notes that were transferred to me. I had no agent or any one representing me in the matter of the sale of this property."

[1] As provided in the trust deeds after default of the conditions therein named, assuming that there was a default, the trustee, Thomas D. Ross, or his substitute, was authorized and empowered to sell the property only "at the request of said beneficiary or other holder of said notes." The request provided for was essential to the passing of the title by the substitute trustee. In *Perry on Trusts* (3d Ed.) § 602, it is said:

"It must be constantly borne in mind that the power in the deed or mortgage must be strictly

followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally, and precisely. Such a power admits of no substitution and of no equivalent, even in unimportant details. If the power contains the details, the parties have made them important; and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner. If the power is not executed as is given in all particulars, it is not executed at all, and the mortgagor still has his equity of redemption."

As supporting this quotation, we give the following from the case of *Bemis v. Williams*, 32 Tex. Civ. App. 393, 74 S. W. 832:

"It is the unbroken rule that a power of sale given in a deed or mortgage must be strictly followed in all its details. The authority to alienate and convey the property of another is an extraordinary and most important grant of power—so much so that courts governed by the common law for a long time viewed such grants with suspicion, and, although they increased in numbers until they are in universal use in England and America, the strictness required in their execution has never been relaxed; and, even in minor and seemingly unimportant details contained in such grants of power, no change will be tolerated, but a strict and literal compliance therewith is demanded. The trust must be executed in the mode and upon the exact terms and conditions prescribed in the deed of trust. If the property is to be sold in a certain place at a certain time, or in a certain manner, as at private sale or public auction, with the consent or at the request of certain persons, these details must be literally followed and carried out, because the owner of the property has so provided. The details may appear frivolous and unimportant, but the maker of the deed saw proper to guard and protect his property by means of them, and for that reason they become important and essential. In this case the power of sale vested in the trustee remained dormant and inactive until called into action by the request of the beneficiary. Until that request was made, he had no power to act, and without that request there could not be a failure or refusal on his part to perform the powers given him by the deed of trust."

On the same subject it was said by our Supreme Court in the case of *Boone v. Miller*, 86 Tex. 74, 23 S. W. 574:

"The power of sale in a deed of trust is an important power, granted by the maker, and he has the right to place upon it such limitations and conditions as he may deem proper for his own protection. When the exercise of a power is made to depend upon the direction or request of a given person, then the direction or request of that person must be given in order to authorize the exercise of the power."

Also in the case of *Boone v. Miller*, supra, it was held by our Supreme Court that where a deed of trust authorized a sale of the land, at the request of the payee named in the

deed of trust, the sale by a trustee under such power was void when made at the request of any other party. See also, *Bomar v. West*, 87 Tex. 299, 28 S. W. 519; *Michael v. Crawford*, 108 Tex. 352, 193 S. W. 1070; *Crosby v. Huston*, 1 Tex. 203; *Bracken v. Bounds*, 96 Tex. 200, 71 S. W. 547; *Cheveral v. McCormick*, 58 Tex. 440; *Chestnutt v. Gann*, 76 Tex. 150, 13 S. W. 274; *Davis v. Hughes*, 38 Tex. Civ. App. 473, 85 S. W. 1161; *Rawlings v. Lewis*, 191 S. W. 784; *Kelsay v. Bank*, 166 Mo. 157, 65 S. W. 1007.

It follows, we think, that the potential power to sell given in the trust deeds was never brought into existence, and that the sales, under consideration, made by the substitute trustee, were wholly void because of the failure on the part of the holder of the notes to request the trustee to sell. It is insisted, however, in behalf of *Sweeney* and *Bowman*, that as to them the request of the beneficiary, *Walker*, to the trustee to sell is supplied by recitals in the trustee deeds. The trust deeds to the *Pattie & Horton Land Company* do, in substance, recite that *Ernest Walker* had requested the substitute trustee to sell. It is apparent, of course, that such recital by the substitute trustee is a mere declaration on his part, and as to appellants purely hearsay, unless it can be said that the trust deeds under which the trustee acted authorized the recital. The deeds of trust on this subject has the following provision:

"And it is further and lastly specially agreed by the parties hereto that in any deed or deeds given by any trustee hereunder, any and all statements of facts or other recitals therein made as to the nonpayment of the money secured or as to the time, place, terms of sale and property to be sold having been duly published or as to any other act or thing having been duly done, by any trustee, shall be taken by any and all courts of law and equity as prima facie evidence that the said statements or recitals of facts do state facts, and are without question to be accepted."

[2] When it has been held that a purchaser in good faith and for value, and without actual notice, may rely upon recitals in the trustee's deed when such recitals are authorized by the terms of the trust deed under which the trustee acts, yet it must be held, we think, that before the semblance of absolute verity can be given to such ex parte declaration it should clearly appear that the party, whose right it is sought to thereby destroy, authorized the trustee to make the statement or recital. In the quotation from the trust deed, above given, we do not find that the grantor therein gave to the trustee the right to recite, as a fact, the necessary request to make a sale. A scrutiny of the quotation from the deed of trust shows that the trustee was authorized to recite the nonpayment of the money secured, or as to the

time, place, terms of sale and property to be sold having been duly published, or as to any other act or thing having been duly done by the trustee. We hardly think it should be said that the trust deed, under consideration, authorized the trustee by a recital to supply the essential element in his power of a request on the part of the beneficiary to make the sale. A very similar provision of a trust deed received a like restricted construction in the case of *Bemis v. Williams* by the Austin Court of Appeals, reported in 32 Tex. Civ. App. 393, 74 S. W. 332.

[3, 4] Moreover, it is perhaps not entirely inapt to observe that in no view of the case did the maker of the trust deed do more than to authorize recitals on the part of the trustee to be accepted as prima facie evidence. They were not made conclusive. As the recitals constitute but prima facie evidence, the power of the courts to ascertain the real truth, when necessary to the determination of the right of the litigant, was not taken away. In such case the recital could only bind the maker or beneficiary under the trust deed on the theory that, having authorized the recital, he would be estopped to disclaim its truth, and the appellants in this case presented no plea of estoppel, except, if at all, in so far as it may be said to be embodied in their general plea of a purchase in good faith which, aside from averments appropriate to that defense, is but a legal conclusion and not a statement of any fact necessary in a plea of estoppel which should always be specially presented. We conclude, therefore, that the appellants were not by the substitute trustee's deed relieved from the necessity, at the time of their purchase, of inquiring into and ascertaining whether, in fact, the substitute trustee had been empowered to make the sale by having been requested so to do. But, the appellants having made no inquiry upon this point, as shown in the record, they assumed that the trustee has such power at their peril and it appearing, as has already been shown, that the trustee was without power, his sale was void.

[6] Such being the state of appellants' title they are in no attitude to receive relief on the ground of being bona fide purchaser without notice. The general rule is thus stated in 39 Cyc. 1892:

"The rule which protects the bona fide purchaser of the legal title, for value, without notice of the equitable title of another, applies only to cases of purchase from a holder of the legal title who has power to convey. Therefore if a deed is void for want of legal capacity in the vendor to convey, want of notice in a purchaser from the purchaser is no defense. A purchaser under a power purchases at his peril, and if there is no subsisting power or authority to sell, no title is acquired by the purchaser."

In the case of *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815, it was held that the defense of an innocent purchaser does not apply to the purchase of the legal title from the holder who was without power to convey it. Of like effect are the following cases: *Hennessey v. Blair*, 107 Tex. 39, 173 S. W. 871, Ann. Cas. 1918C, 474; *Terry v. Cutler*, 14 Tex. Civ. App. 520, 39 S. W. 152; *Wall v. Lubbock*, 52 Tex. Civ. App. 405, 118 S. W. 886; *Green v. Hugo*, 81 Tex. 452, 17 S. W. 79, 26 Am. St. Rep. 824; *Waggoner v. Dodson*, 96 Tex. 422, 73 S. W. 517; *King v. Diffe*, 192 S. W. 262; *Vanhooose v. Fairchild*, 145 Ky. 700, 141 S. W. 75; *Pearce v. Heyman*, 153 S. W. 242, and other cases that might be cited.

Regardless of other questions, therefore, we conclude that the judgment below should be affirmed.

#### FT. WORTH & R. G. RY. CO. v. JONES. (No. 9070.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 29, 1919. On Motion for  
Rehearing, May 10, 1919.)

#### 1. CARRIERS ⇨219(1)—LIVE STOCK—BILL OF LADING — DESTINATION BEYOND ISSUING CARRIER'S LINE—DUTY OF CARRIERS.

Bill of lading, showing destination of live stock beyond issuing carrier's own line and name of consignee under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 716, would not of itself have bound such carrier to transport shipment beyond its own lines.

#### 2. CARRIERS ⇨228(3) — LIVE STOCK SHIPMENT—ACTION FOR DELAY—EVIDENCE.

In action against initial carrier for negligent delay in delivery of live stock shipment, where there was no allegation of negligence by connecting carrier, evidence tending to show that connecting carrier's failure to deliver shipment sooner was due to congestion of traffic, and not negligence on part of such carrier, was material to show delay by initial carrier, if any, was no proximate cause of loss, and to controvert plaintiff's contention of negligent delay by connecting carrier after receiving shipment from initial carrier.

#### 3. EVIDENCE ⇨320—EVIDENCE FOUNDED ON HEARSAY—RECORDS.

In action for delay in delivery of cattle shipment, testimony predicated upon correctness of records of sales of the cattle kept by person making sales and records of weight by person doing weighing was not objectionable as hearsay.

#### 4. APPEAL AND ERROR ⇨1050(1)—REVIEW—HARMLESS ERROR.

Admission of testimony as to telephone conversation, by witness to whom conversation had been related by one of the parties thereto, was not prejudicial to plaintiff, where only fact

testified to by such witness, not testified to by the party who had related conversation to him, was a fact alleged by petition, and as to that fact party stated he could not remember.

**5. CARRIERS ⇐230(1)—LIVE STOCK—DELAY—CONTRACT OF SHIPMENT—SUBMISSION TO JURY.**

In action for delay in delivery of live stock shipment, where there was no testimony of any contract by the carrier to transport the shipment to place of its destination, the court erred in submitting that issue to the jury and authorizing a recovery thereon.

**6. CARRIERS ⇐227(3)—LIVE STOCK SHIPMENT—PLEADING—VARIANCE.**

In action against initial carrier for negligent delay in delivery of live stock shipment, where petition did not allege negligence by connecting carrier, but predicated liability on negligence of initial carrier alone, plaintiff could not recover upon proof of connecting carrier's negligence, notwithstanding *Vernon's Sayles' Ann. Civ. St. 1914, arts. 731, 732.*

**7. CARRIERS ⇐228(1) — LIABILITY OF CONNECTING CARRIER—STATUTES.**

*Vernon's Sayles' Ann. Civ. St. 1914, art. 732*, providing that any connecting carrier of a through shipment may be held liable for negligence of any other connecting line, does not relieve party suing of the burden of alleging and proving the negligence of such other connecting line upon which the cause of action is based.

**On Motion for Rehearing.**

**8. APPEAL AND ERROR ⇐966(2) — REVIEW—PRESUMPTIONS.**

Where defendant's motion for continuance for absent witnesses was excepted to on ground that there is no pleading on which to predicate the testimony, that testimony was not material, and that no diligence was shown, and court overruled motion without showing basis of his ruling in his order, court's ruling is available as error, on appeal, notwithstanding inadmissibility of testimony under general denial, since it will be assumed that defendant would have amended pleaded if motion had been overruled on such ground.

**9. EVIDENCE ⇐20(2) — JUDICIAL NOTICE—CONNECTING CARRIERS.**

Court will not judicially know that a connecting carrier in handling through shipment acts as the agent and employé of carrier from whom it receives shipment, and not as an independent carrier.

Appeal from Hood County Court; W. L. Dean, Judge.

Action by O. B. Jones against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Andrews, Streetman, Burns & Logue, of Houston, J. L. Lockett, Jr., of Ft. Worth, and Estes & Estes, of Granbury, for appellant.

C. A. Wright, of Ft. Worth, for appellee.

**DUNKLIN, J.** The Ft. Worth & Rio Grande Railway Company has appealed from a judgment rendered against it in favor of C. B. Jones for damages to a shipment of 85 head of cattle from the station Boss to the stockyards in North Ft. Worth, the distance covered by such shipment being about 20 miles.

The cattle were consigned to the Cassidy Southwestern Commission Company in North Ft. Worth, but the defendant company's line did not extend to the point of destination, its nearest approach to that point was about 5 miles distant, where it connected with the Ft. Worth Belt Railway.

On September 5, 1917, the cattle were delivered to the defendant company at Boss, and were by it transported to the point of its connection with the Ft. Worth Belt Railway, at which point it delivered the cattle at about 10:10 a. m. of the same day the shipment was started from Boss. The proof showed that if the cattle had been unloaded by the Ft. Worth Belt Line at the stockyards in North Ft. Worth by noon of the same day, such delivery would have been in time for the sale of the cattle on the market of that day, but on account of congestion of traffic the cattle were not delivered to the consignee until late in the afternoon, too late for that day's market, and were held over until the following day, when they were sold.

The proof further showed that a few days prior to the shipment an order was placed with the defendant company for cars in which to load the cattle for about 4 a. m. of the morning of September 5th; and, according to the usual schedule of defendant's train handling such shipments, the cattle would have been loaded and started from Boss about 4:40 of that morning, and would have reached the point of connection with the Ft. Worth Belt Railway about 2 hours later. The proof further showed that from 45 minutes to 1 hour and 15 minutes was the usual time required for the Ft. Worth Belt Railway Company, after receiving such a shipment from the defendant company, to transport and deliver it at the stockyards in North Ft. Worth. The cattle did not leave Boss until 8 o'clock on the morning of September 5th.

[1] In plaintiff's petition it was alleged that the defendant contracted and agreed with the plaintiff to transport the cattle to North Ft. Worth, and that it owned and operated a line of railway extending from Boss to North Ft. Worth, but the testimony introduced was wholly insufficient to support that

allegation. The only proof offered to sustain it was testimony to the effect that cars were ordered for the shipment of plaintiff's cattle on the date they were shipped, and that they were consigned to the Cassidy Southwestern Commission Company in North Ft. Worth. No bill of lading or shipping contract was introduced in evidence. Even if a bill of lading had been issued the statute would have required it to show the destination of the cattle and the name of the consignee. *Vernon's Sayles' Tex. Civ. Stat. art. 716*. But such a bill of lading would not of itself have bound the defendant to transport the cattle beyond its own line.

It was alleged in plaintiff's petition that the shipment was negligently delayed, and that by reason thereof plaintiff missed the market of September 5th, and on account of such delay the cattle lost weight and the market was lower on the following day, and damages were claimed based upon those facts. But the petition contained no allegation of a negligent delay by the Ft. Worth Belt Railway Company; the entire delay of the shipment to North Ft. Worth and plaintiff's loss resulting therefrom all being charged to the defendant.

[2] Error has been assigned to the action of the court in overruling defendant's motion for a continuance, which was its first application, and was made for the purpose of obtaining the testimony of two witnesses residing in Ft. Worth. Interrogatories had been propounded to those witnesses in time to have procured their depositions, but their depositions were not taken on account of unavoidable contingencies in no manner due to negligence of the defendant company or of the notary in whose hands the interrogatories had been placed. The application for continuance was overruled by the court, and the ground upon which such ruling was made was specifically stated to be because the court was of the opinion that the testimony sought from those witnesses was immaterial to any issue in the case. The application was not overruled for lack of diligence on the part of the defendant to procure the testimony desired, nor do we think that there was any showing of such lack of diligence. The defendant expected to prove by those witnesses that the cause of the delay on the part of the Ft. Worth Belt Railway Company in failing to deliver the cattle in North Ft. Worth sooner than they were delivered was due to a congestion of traffic, and not to any negligence on the part of that company; and other evidence introduced showed that on account of the drought prevailing at that time there was a heavy rush of cattle shipments from the drought-stricken area in West Texas. We are of the opinion that the testimony for which the defendant sought a continuance was material because it tended to controvert the contention by

plaintiff that the negligent delay, if any, of the shipment in reaching the connection with the Ft. Worth Belt Line was the proximate cause of the loss complained of, and tended to controvert the further contention that there was a negligent delay of the shipment of cattle by the Ft. Worth Belt Railway Company after it received them from the defendant, and that the court erred in overruling the application.

[3] In order to prove the weight of the cattle when sold and the prices realized therefor, the account sales and other records kept by the consignee were introduced in evidence. The proof showed that the person who weighed the cattle made a record of such weights, and the one who sold the cattle made a record of such sales, and all of those transactions appeared to have been in accordance with the usual method of transacting business in the stockyards at North Ft. Worth, and there was no error in admitting testimony of several witnesses predicated upon the correctness of such records, over the objection urged by the defendant that the same were hearsay. 10 R. C. L. pp. 909, 1171, 1185, 909.

[4] The cars for the shipment in question were ordered by C. M. Calloway for plaintiff by conversation over the telephone with the defendant's train dispatcher. Plaintiff, Jones, was present at the time of the conversation, and immediately upon its conclusion Calloway repeated what the train dispatcher had said. Calloway was introduced as a witness to prove the statements so made by the train dispatcher, and plaintiff was also permitted to testify as to what Calloway told him. The defendant objected to such testimony by the plaintiff on the ground that it was hearsay. Calloway could not remember all that the dispatcher told him, but testified that he correctly reported it to Jones, and Jones detailed the same in his testimony. Even though it should be said that the objection so made was tenable, such error in the ruling was harmless, in view of the fact that the only portion of the conversation which Calloway could not remember was the date for which the cars were ordered, and the defendant's testimony was to the effect that they were ordered for September 5th, which is the date alleged in plaintiff's petition. And that was substantially the entire testimony of both Calloway and the plaintiff with respect to what the train dispatcher said on that occasion.

[5-7] Since there was no testimony of any contract by the defendant to ship the cattle to North Ft. Worth, the court erred in submitting that issue to the jury and authorizing a recovery thereon. And in view of the fact that plaintiff did not allege any negligence on the part of the Ft. Worth Belt Railway Company in handling the cattle after it

had received them from the defendant, but predicated liability upon the negligence of the defendant alone in delaying the shipment, the court should have limited plaintiff's right to a recovery to the issue of negligent delay by the defendant company alone. By article 732, Vernon's Sayles' Tex. Civ. Stats., it is provided, in effect, that any connecting carrier of a through shipment of freight may be held liable for damages resulting from the negligence of any other connecting line, but that article does not relieve the party suing of the burden of alleging and proving the negligence of such other connecting line upon which the cause of action is based.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

#### On Motion for Rehearing.

The statement in our original opinion, to the effect that the place of connection of appellant's line of railway with that of the Ft. Worth Belt Railway was 5 miles distant from the stockyards, the place of destination of the cattle, was an error. The distance between those two places was only 1 mile, and this finding is made to correct that error, which, however, could have no material bearing upon the conclusions we reached that the judgment of the trial court was erroneous.

Appellee now insists that under article 731, V. S. Tex. Civ. Stats., the Ft. Worth Belt Railway Company, the connecting carrier, became the agent of the appellant to carry the cattle from the place where it received them to their destination, and by reason of that fact appellant was responsible for the negligence of such agent as well as for its own. By that statute, it is declared that all common carriers, handling a through shipment of freight "on a contract for through carriage, recognized, acquiesced in or acted upon, by such carriers," shall "be deemed and held to be the agents of each other, the agent of the others and all the others the agent of each. \* \* \*". But, clearly, plaintiff could not invoke the benefits of that statute in the present suit, since he did not plead that he shipped his cattle on a contract for through shipment over the line of the appellant and its connecting line, the Ft. Worth Belt Railway Company. On the contrary, his allegations that appellant owned and operated a line from Boss to North Ft. Worth and entered into a contract with him to ship the cattle throughout the entire trip to North Ft. Worth negated any contract for shipment over two connecting lines, and also negated the fact that they were shipped over any railway except that of appellant.

It is insisted further that in order for appellant to urge as an excuse for unusual delay in the shipment the fact that there was an unprecedented rush of business which it

could not reasonably have anticipated, it was incumbent upon it to plead that fact specially, and that since the only answer filed by it was a general demurrer and a general denial, the testimony, to procure which a continuance was sought, would not have been admissible, and for that reason the trial court did not err in overruling that motion. The following are some of the authorities which are cited to support that contention: V. S. Civ. Stats. art. 6554; 10 Corpus Juris, p. 299; Tex. Cent. Ry. Co. v. Hannay-Frerichs, 130 S. W. 250; Dobie on Bailments and Carriers, 438.

Appellee filed three exceptions to the motion for continuance which were as follows:

"(1) There is no pleading upon which to predicate such testimony continuance is sought for.

"(2) Said testimony of said witnesses is not shown to be material, but, on the contrary, shows affirmatively that such testimony is immaterial.

"(3) No diligence is shown to secure said testimony, and shows wholly a want of diligence."

[8] The order overruling the motion is in general terms, and contains no recitals showing the basis of the ruling, but in the bill of exception to the ruling it is expressly stated that the reason the motion was overruled was that the testimony sought was immaterial. If the first exception to the motion was sufficient to present the contention now urged, and if that exception had been sustained, then it is reasonable to assume that appellant would have filed an amended answer containing such allegations as would have cured that objection. Under such circumstances, it would be unfair to appellant to deny it the right now to complain of the ruling, even though it could be said that the testimony would not have been admissible under its plea of general denial.

[9] Appellee insists further that it is a matter of common knowledge, of which this court should take judicial cognizance, that in handling such shipments the Ft. Worth Belt Railway Company does not act as an independent connecting line, but only as the agent and employé of the railway company from which it receives the shipment, and to whom alone it looks for compensation for its services. This court has held the very reverse of that contention, and the same is overruled. *T. & P. Ry. Co. v. Arnett*, 41 Tex. Civ. App. 403, 92 S. W. 57. And the decision last cited, together with that of our Supreme Court in *Hunter v. So. Pac. Ry. Co.*, 76 Tex. 195, 13 S. W. 190, supports the conclusion, reached by us on original hearing, to which we adhere, that the evidence introduced was sufficient to show prima facie that appellant entered into a contract with appellee to transport the cattle to their destination at the stockyards in North Ft. Worth.

Accordingly the motion for rehearing is overruled.

**SOUTHERN SURETY CO. v. CITIZENS'  
STATE BANK OF HEMPSTEAD.**  
(No. 7646.)

(Court of Civil Appeals of Texas. Galveston.  
March 14, 1919. Rehearing Denied  
April 8, 1919.)

**1. INSURANCE — 2 — CONTRACTS — CONSTRUCTION — FIDELITY OR GUARANTY BOND.**

Fidelity bonds issued by a surety company to a bank, in consideration of premiums paid, indemnifying the bank against defalcation of its cashier, are insurance contracts, though such bonds recite that the cashier is principal and the surety company surety, the bonds containing an express obligation running from the cashier to the surety company to reimburse the latter for any loss suffered.

**2. INSURANCE — 151(2) — FIDELITY INSURANCE — AGREEMENTS NOT PART OF CONTRACT.**

Under Rev. St. art. 4951, requiring insurance policies to be accompanied by copies of the application and a copy of all questions asked, a written agreement and representations not complying with these requirements, made by the president of a bank contemporaneously with the issue of a fidelity bond to the bank by a surety company, is not a good defense in an action for breach of the bond.

**3. INSURANCE — 390 — FIDELITY INSURANCE — ACTIONS — DEFENSES — REPRESENTATIONS BY INSURED.**

A surety company, upon being sued by a bank for breach of a fidelity bond, cannot, in view of Rev. St. art. 4948, interpose as a defense representations by the bank's president that the books of the cashier had been found correct, where it was not shown that the company ever notified the bank of refusal to be bound because thereof or set them up in defense at all until the filing of its amended answer, more than one year after commencement of suit.

**4. INSURANCE — 624(2) — FIDELITY INSURANCE — ACTION ON BOND — RIGHT TO MAINTAIN ACTION.**

A bank may maintain a suit against a surety company to recover upon fidelity bonds the amount of its cashier's defalcations, although the directors have already refunded the money to the bank, the bank still retaining legal title to the bonds, and the surety company claiming no defense under the bonds as against the directors, who are not complaining.

Appeal from District Court, Waller County; J. D. Harvey, Judge.

Action by the Citizens' State Bank of Hempstead against the Southern Surety Company and A. G. Tompkins. From a judgment for plaintiff, the Surety Company appeals. Affirmed.

John Speed Elliott, of Houston, Keet McDade, of Hempstead, and G. P. Dougherty, of Houston, for appellant.  
Sam'l Schwartz and Meek & Kahn, all of Houston, for appellee.

GRAVES, J. On November 12, 1909, the appellant surety company issued to the appellee bank a bond for the sum of \$5,000 guaranteeing the faithful performance by A. G. Tompkins of his duties as the bank's cashier, reciting upon the face of it that this bond was "in lieu, instead of, and as a substitute for" a prior and similar bond between and concerning the same parties, of like amount, and of date January 10, 1908. By what were termed "renewal certificates" the bond was kept in force until January 1, 1913.

Alleging that the conditions of both bonds had been breached, and that during the time they were in force the cashier had wrongfully procured and taken the total sum of \$6,507 of its funds, the bank brought this suit against the surety company and Tompkins upon the bonds, attaching copies thereof to its petition, asking judgment against the company for the amount of the bond, together with interest, a statutory penalty, and reasonable attorney's fees thereon, but against Tompkins only "for the difference between the amount found to have been embezzled by him and the \$5,000 due plaintiff by appellant surety company."

The evidence showed that the amount of the bank's moneys taken or abstracted by the cashier during the time the two bonds were in effect, that is, between January 10, 1908, and January 1, 1913, aggregated \$5,582, and that between January 1 and July 25, 1913, he took \$925 more.

In defense, after presenting the general issue through both demurrer and denial, the surety company specially pleaded: First, that contemporaneously with the original bond of January 10, 1908, there had been a written agreement between it and the bank, acting by the president, L. L. Mahan, in which it was stipulated that the books, accounts, securities, and cash of the bank to be in charge of and handled by the cashier should be examined and checked by its board of directors once a month and by a state bank examiner twice each year, which undertaking had not been carried out by the bank, and that, if it had been, the defalcations complained of would have been promptly discovered; second, that in January, 1909, 1910, 1912, and February, 1911, President Mahan made certificates representing that the books and accounts of the cashier had been examined and found correct, all moneys accounted for, and his duties performed in an acceptable manner; that these representations were made to and did in fact induce



the surety company to renew and keep the bond sued on in force, but that they were untrue and false in that no such examinations were made; third, that soon after discovery of the defalcations the directors paid into the bank all the money so taken, and consequently, at the time of the trial, no cause of action existed in the bank to recover the same. There was also a plea of four-years limitation interposed.

Among others, the bank specially excepted to these defensive matters upon the grounds: (1) That it was neither alleged that President Mahan was authorized to bind the bank in making the agreement set up, nor that it was attached to, written in, or otherwise in any manner made a part of the bond contract sued upon; (2) that the alleged refunding of the money to the bank by its directors was irrelevant and immaterial, and would not, if true, relieve the surety company of the obligations imposed upon it by the bond, in that it was not alleged that the bank had in any manner parted with the legal title to its claim under the bond. These two exceptions were sustained, and the defensive averments at which they were leveled stricken from the surety company's answer, against which action the first five assignments of error presented in this court are directed.

At the close of the trial a verdict was instructed in the bank's favor against Tompkins for \$500 and against the surety company for the full amount of the bond, \$5,000, with interest and a 12 per cent. penalty thereon; the question of whether or not it was also entitled, as against the surety company, to reasonable attorney's fees, and, if so, in what amount, being the sole issue submitted to the jury. On the return of the verdict otherwise responsive to the charge, finding attorney's fees to be due, and fixing \$1,000 as a reasonable sum therefor, judgment was accordingly entered against Tompkins for the \$500, and against the surety company for the aggregate amount of \$6,927.50. The surety company alone appeals.

Since the bond of 1909 was the real basis of the suit and of the claimed liability, being so in lieu of and in substitution for the former one of 1908 and well-nigh all the discrepancies occurring while it was in force, no point is made by either party upon any differences in purport and effect between the two, the latter being mainly, if not solely, relevant because of being the initial obligation and of the surety company's previously mentioned averments concerning the contemporaneous agreement as to examinations of the bank's books, accounts, etc.; so that the rights of the parties and the real meaning of their agreement may properly be said to mainly, if not wholly, depend upon a proper construction of the bond of 1909.

[1] In declaring upon its cause of action the bank alleged that, as between it and the surety company, the two bonds constituted contracts of indemnity and fidelity insurance. The trial court adopted that theory, held them subject to the same rules of construction as apply to other kinds of insurance, and, in so far as within their terms, to be controlled by the provisions of our statutes relating to insurance.

If this holding is correct, there can be little doubt that the judgment should be affirmed; indeed, we do not understand appellant to entertain a different view, its contention being, as stated at page 37 of its brief:

"We do not think the court will hold the contract under consideration to be a policy of insurance, and not a contract of indemnity, for the reason that the bond creates the relationship of principal and surety, as between Tompkins and the surety company, secondary liability for the misconduct of Tompkins, and this relationship, having been created by the express contract of the parties, should not and cannot be ignored."

This position is stated immediately after a concession that the Courts of Civil Appeals at El Paso and Ft. Worth, in the cases of *National Surety Co. v. Murphy-Walker Co.*, 174 S. W. 997, and *Western Indemnity Co. v. Free and Accepted Masons*, 198 S. W. 1092, have held fidelity bonds of the same general nature as those here involved to be policies of insurance; it is said, however, that the reasoning in those cases is unsound and the opinions in conflict with the holding of the Supreme Court in *Loneragan v. San Antonio Trust Co.*, 101 Tex. 77, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803. In the first place, it is thought appellant misapprehends the meaning and effect of this bond as between the bank and itself. It is quite true that the cashier, or "officer," is at the beginning therein referred to as principal and appellant, or, "the company," as surety, under the recitation that "we" are held and firmly bound to the bank in the penal sum of \$5,000, but the context of the entire instrument clearly shows, we think, that this was merely a matter of description, or of convenience in designation, and that the plain purpose and intent was to create a direct and primary obligation from the surety company to the bank to in that manner pay any loss the bank might sustain as a result of the cashier's unfaithfulness; the main provision of the bond was:

" \* \* \* The conditions of the above obligation are as follows:

"That whereas, the said officer is in the service of the bank, in the city of Hempstead, county of Waller, Texas, holding the position of cashier:

"Now, if the above-bounden officer shall well and faithfully perform all the duties of his

office or employment, and if the company shall hold the bank harmless against, and pay to it such pecuniary loss as it may sustain of money, or other valuable securities embezzled, wrongfully abstracted, or willfully misapplied by said officer in the course of his employment as such, and in the course of his employment in any other position in which he may be appointed, reappointed, elected or re-elected, or temporarily assigned, then this obligation is void; otherwise to be and remain in full force and effect."

There then follow a number of subsidiary undertakings between the company and the bank, more or less reciprocal, but beyond this first and formal recitation that Tompkins was principal and the company surety the bond does not impose any obligation whatever upon Tompkins to the bank; it does, however, bind him to the surety company just as directly as it is obligated to the bank, in the following concluding provision:

"And the officer doth hereby, for himself, his heirs, executors, and administrators, covenant and agree to and with the company that he will save, defend, and keep harmless the company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expense, direct or incidental, which the company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him therefor), or for, or by reason or in consequence, of the company having entered into the present bond."

It would seem, therefore, that both the purpose and effect of the cashier's joining as principal in the manner thus shown by the terms of this bond was the creating of an express obligation from him in turn to the surety company, and not the acknowledgment of merely a secondary liability from the latter to the bank, as is contended.

In further statement of the nature of and the conditions under which this contract was made, it may be said to be conceded that appellant is a corporation, chartered for the purpose and engaged in the business of writing and issuing for a consideration called a "premium" what are commonly called "surety or fidelity bonds," by the terms of which it undertakes to indemnify employers against any loss that may be sustained by reason of the dishonesty of employes.

The obligation of the surety company to the bank being, then, as we conceive it, a direct and primary agreement to pay, in the amount specified, any sums wrongfully taken or misapplied, our further conclusion is that the trial court did not err in holding the transaction to be an insurance contract; neither can we agree with appellant that the same determination by the Courts of Civil Appeals at El Paso and Ft. Worth in the two cases above referred to, which it evidently followed, conflicts with the decision

of our Supreme Court in *Loneragan v. San Antonio Trust Co.*, 101 Tex. 73, 104 S. W. 1061, 106 S. W. 878, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803. A very different question was there determined, as this court's review of the case in *Texas Fidelity & Bonding Co. v. Rosenberg Ind. School Dist.*, 196 S. W. discloses, where at page 367 it is said:

"The *Loneragan* Case, decided by our Supreme Court, is likewise plainly distinguishable from this one. In so far as the surety company was concerned, there was but a single question decided in that case also, which was as follows: 'We conclude that the changes made in the contract, without the consent of the American Surety Company, operated to discharge that company from liability upon the bond.'

"The contract provided: 'No alterations or extra work to be done except upon the price and additional time necessary to complete the same being agreed upon beforehand, and indorsed upon the contract.'

"The court found that a number of such material changes as to destroy the contract as made and to substitute a new one, for which the surety company had not contracted to be responsible, were in direct violation of this provision in the bond made before abandonment or completion of the work by the contractors, without the surety company's knowledge and consent, and, as above quotation from the opinion shows, upon this ground alone held it not bound. By way of argument in reaching that conclusion, different subsidiary propositions are discussed and decided, among them that there is no difference in the rights of a compensated and a voluntary surety; but the single conclusion stated, and the given foundation of fact upon which it rested, is all the case decides as affects the liability of the surety company."

Inasmuch, therefore, as the Supreme Court has not passed upon the particular question, so far as we are advised, and believing the prior determination of it by the two Courts of Civil Appeals in the cases cited to be sound, we are content to follow their holding without attempt to add anything of value by independent discussion.

As above indicated, it is thought this conclusion practically determines the merits of this appeal and renders detailed consideration of the various subsidiary and purely dependent questions raised, such as those concerning the recovery of interest, penalty, and attorney's fees, unnecessary. In each of these instances authority was drawn from some provision of the statute relating to insurance.

[2] Article 4951 of chapter 15, tit. 71, of our Revised Statutes, relating to insurance, which, having been passed in 1903, was in force at the time the bonds at issue here were executed and delivered, in part provides:

"*Policies of Insurance to be Accompanied by Copy of Questions, etc.*—Every contract or policy of insurance issued or contracted for in this state shall be accompanied by a written, photographic or printed copy of the applica-

tion for such insurance policy or contract, as well as a copy of all questions asked and answers given thereto."

It was not even alleged that the above-described contemporaneous agreement set up by the surety company, as the bank's special exception thereto pointed out, met any one of these requirements, and the undisputed proof showed that it in fact did not, neither of the bonds sued upon being accompanied by a written, photographic, or printed copy of any such agreement, nor of any of the questions alleged to have been asked of and answered by the bank's president in connection with and as part thereof. For a construction of this article, and a holding as to the effect of failure to comply with its provisions, see *N. L. Association v. Gomillion*, 178 S. W. 1050.

[3] In so far as the certificates and representations alleged to have been made by President Mahan were concerned, it was neither averred nor shown that the appellee was ever notified that appellant refused to be bound by the contract because of them, nor, indeed, did it ever set them up as a defense at all until the filing of its amended answer on October 22, 1917, when it had been notified of the loss on August 14, 1916, and sued therefor on September 20, 1916. In these circumstances, the plain provisions of article 4948, Revised Statutes, which was likewise a part of the act of 1903, barred the interposition of any defense based upon the misrepresentations claimed.

[4] The objection that no cause of action existed in the bank at the time of the trial to recover the amount of the cashier's defalcations, because of the charge that its directors had themselves already refunded the money to the bank, is not thought well taken, since it is neither alleged, nor did the facts show, that the legal title to the bonds had ever passed out of the bank; moreover, the surety company claimed no defense under the bonds as against the directors, not even making them parties to the suit; neither does it appear that they are in any way complaining. In the case of *Allison, Bailey & Co. v. Insurance Co.*, 87 Tex. at page 595, 30 S. W. 547, our Supreme Court says:

"It is a general rule applicable to all written contracts that he who has the legal title may maintain an action upon it, notwithstanding another may have the equitable right to the proceeds of it when collected."

That rule, having been applied by the Supreme Court to actions upon both life and fire insurance policies, is thought to fit the situation here.

The conclusions stated dispose of all matters assigned in this court as error. Believing that, under the pleadings and evi-

dence, the court below made proper disposition of the case, its judgment is in all things affirmed.

Affirmed.

## INDEPENDENT ORDER OF PURITANS v. LOCKHART. (No. 981.)

(Court of Civil Appeals of Texas. El Paso. May 22, 1919.)

### 1. INSURANCE ~~§~~807—BENEFIT INSURANCE—NOTICE OF CLAIM—STATUTES APPLICABLE.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, enacted in 1907, providing that stipulations limiting the time for giving notice of claim for damages to less than 90 days are void, and, like article 5713, as to agreements shortening the time for suit, being applicable to all contracts, applies to fraternal benefit associations, Vernon's Ann. Civ. St. 1914, art. 4830, enacted in 1913, providing that no insurance law thereafter enacted shall apply to them, being inapplicable as article 5714 is a prior existing statute and not an insurance law.

### 2. INSURANCE ~~§~~787—BENEFIT INSURANCE—"ACCIDENT"—MEANING.

Where plaintiff was injured by dust blowing in his eyes while driving his wagon around a street corner on a spring day, during a high wind, prevalent in West Texas at such times, the cause of his injury was an "accident," being "an unusual effect of a known cause," and he was entitled to recover upon a benefit certificate carrying an accident clause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

Appeal from County Court, Taylor County; E. M. Overshiner, Judge.

Action by Walter H. Lockhart against the Independent Order of Puritans. From a judgment for plaintiff, defendant appeals. Affirmed.

Kirby & King, of Abilene, for appellant.  
Dallas Scarborough, of Abilene, for appellee.

HARPER, C. J. This is an appeal from a judgment for \$125 in favor of appellee, Lockhart, against appellant, a fraternal benefit association, upon a benefit certificate carrying an accident clause.

The cause was filed in justice court for \$150. Judgment was there rendered for defendant. Appealed to the county court. Tried without a jury, and judgment rendered as above indicated, from which it has been brought here for review upon appeal.

The defense pleaded was general denial, and that plaintiff failed to give notice of the accident within seven days thereafter, as required by the terms of the policy.

[1] The court found as a fact that the pol-

icy provided that notice should be given as pleaded, and that the accident occurred March 22d, and that notice was not given until June 4th. By the first assignment it is contended that plaintiff cannot recover because the notice was not given as required by the terms of the policy. Article 5714, Vernon's Sayles' Civil Statutes of Texas, provides that—

"No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable; and any stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void." Enacted Acts 1907 (title 87, c. 3, applicable to general provisions of limitations).

Appellant contends that this statute does not apply to fraternal benefit associations by reason of article 4830, Vernon's Sayles' Ann. Civil Statutes, which reads:

"Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein." Acts 1913, c. 113.

This court held that article 5713, tit. 87, c. 3, which declares as to agreements to shorten the time within which suits may be brought, applied to fraternal benefit associations because it was a law of limitation applicable to all contracts and agreements, and not strictly a law of insurance to which alone the statute invoked applied, in *Trav. Ass'n v. Bosworth*, 156 S. W. 346, and we think the same reasoning applies to this case as to notice under article 5714.

There is an expression in the case of *United States Fidelity & Guar. Co. v. Pressler*, 185 S. W. 326, which might be construed to mean that this statute of limitation (5714) did not apply to this class of insurance associations, but it is not an express holding to that effect, but the question under consideration was reasonable notice. So we shall not recede from our former holding.

This statute of limitations was in force and effect when the statute invoked was passed, and the statute invoked provides that no law hereafter enacted shall apply to them, so

clearly this statute, being a prior one, does not apply to this class of insurance companies, unless it is an insurance law, and we are of the opinion that it is not such within the meaning of article 4830.

[2] By another assignment it is urged that—

"Because all the undisputed evidence in this case and in the record discloses that the cause of the injury was not an accident within the terms of the policy or within terms of law, in that the evidence shows the alleged results arose because of the dust from the street blowing in his eyes while he was driving his team in the usual course of his employment. The evidence further discloses that the day was not an unusual day for West Texas and the evidence disclosing that the normal condition of the weather of West Texas in the spring is high winds, accompanied with much dust."

"Accident" is defined to be "an event that takes place without one's foresight or expectation." "An event that is an unusual effect of a known cause, and therefore not expected." *Ruling Case Law*, vol. 14, § 418.

There is no statement of facts in this case, but the court has found:

"That plaintiff, while driving a wagon, turned the corner of a street during a very high wind, and that a gust of wind blew trash and dirt into the plaintiff's eyes, which resulted in plaintiff's total disability for more than 10 weeks, within the period of time of less than 12 months after the accident occurred.

"That in this country high winds during the months of March and April particularly are the rule instead of the exception, and frequently during the spring months the wind reaches a velocity of 25 to 45 miles an hour, and maintains that for 10 or 12 hours.

"That notwithstanding the prevalence of high winds during the spring months, citizens and people go about the streets, pursuing their usual avocation, without regard to the condition."

It is not the fact of "getting dust in plaintiff's eyes," as argued by appellant, that is the basis of this accident, but the "unusual effect of the known cause," and there is no finding that injury to the eyes was the usual and to be contemplated effect of blowing of sand into them; and, if there was any evidence to that effect, it is not before us in the absence of a statement of facts.

The assignments are therefore overruled, and cause affirmed.

**ENNIS-HANLY-BLACKBURN COFFEE  
CO. v. OLIN et al. (No. 18240.)**(Kansas City Court of Appeals. Missouri.  
May 28, 1919.)**1. PARTNERSHIP ⇨55—EVIDENCE AND RELATION—SUFFICIENCY.**

Evidence held sufficient to warrant jury finding that defendants held themselves out as partners with the other defendant, and that plaintiff dealt with them on the strength of such holding out.

**2. PARTNERSHIP ⇨84—RELATION—ESTOPPEL TO DENY.**

Where defendants held themselves out as partners with another, and plaintiff dealt with them on the strength of such holding out, they are estopped to deny that they were partners.

**3. PARTNERSHIP ⇨49—SUIT AGAINST FORMER MEMBERS—EVIDENCE.**

Billheads and letter heads of a partnership, where used so extensively and for so long a time by one who had ceased to be a member that defendant members must have known thereof, were admissible in suit involving question whether defendants held themselves out as partners with the one who had ceased to be a member.

**4. APPEAL AND ERROR ⇨802(4) — INSTRUCTIONS—ASSIGNMENT OF ERROR IN MOTION FOR NEW TRIAL—SUFFICIENCY.**

Reference to plaintiff's instructions, "The court erred in giving the instructions requested," in motion for new trial, is not a sufficient assignment of error upon which to base any point in the court on appeal with reference to instructions.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

"Not to be officially published."

Suit in justice court by the Ennis-Hanly-Blackburn Coffee Company against Emma Olin and others. Plaintiff recovered, and defendants appeal to the circuit court, where there was a judgment against defendants in favor of plaintiff, and Emma Olin and Louis Olin appeal. Affirmed.

Hal Lebrecht and L. A. Laughlin, both of Kansas City, for appellants.

Hutton, Davis, Nourse & Bell, of Kansas City, for respondent.

**BLAND, J.** This is an action on an account. The suit originated in a justice court. The suit was brought against these defendants and David Olin, as copartners trading as E. Olin & Sons, and Olin Produce Company. Trial was had in the justice court, plaintiff recovered, and defendants appealed. Upon a trial de novo in the circuit court there was a verdict and judgment against defendants and in favor of the plaintiff in the sum of \$283.18, and these defendants have ap-

pealed. The sole issue was whether or not the goods were purchased of these defendants as members of the firm of E. Olin & Sons; these defendants having in the justice court denied under oath such partnership.

[1, 2] We think that there was ample evidence from which the jury could say that these defendants held themselves out as partners with David Olin, and that plaintiff dealt with them on the strength of such holding out. In view of such holding out defendants are estopped to deny that they were partners. *Maxwell v. Sutton*, 191 S. W. 1083; *Short v. Thomas*, 178 Mo. App. 400, loc. cit. 415, 163 S. W. 252.

The evidence showing that defendants held themselves out as partners with David Olin is as follows: Plaintiff was engaged in the wholesale of coffee, roasters, spices, teas, and sundries, with its place of business in Kansas City, Mo. These defendants were engaged in the produce business, having a place of business at 111 East Lexington street, Independence, Mo., and at No. 17, City Market, in Kansas City, Mo. These defendants, together with defendant David Olin, became partners under the name of E. Olin & Sons about ten years before the trial in the circuit court, which was on June 8, 1918. This was testified to by Louis Olin: he being defendants' only witness and the only member of the Olin family to testify. According to defendants' evidence, about four years prior to the trial David Olin ceased to be a member of the firm of E. Olin & Sons, and opened up a place of business in St. Joseph, Mo., in 1913 or 1914, under the name of Olin Produce Company. The firm of E. Olin & Sons was originally composed of defendant Emma Olin and her two sons, Louis Olin and David Olin. However, plaintiff's evidence shows that in July, 1915, David Olin came into plaintiff's place of business and talked with plaintiff's agent about handling plaintiff's line of goods in St. Joseph, Mo., and, after a preliminary conversation in reference to the matter, defendant Louis Olin came in. Plaintiff's agent asked, "How do you pay your accounts?" and Louis Olin replied, "We discount all our bills." Plaintiff's agent then said, "That is satisfactory to me. \* \* \* We will render statement every 30 days over to the City Market; they are paid here at St. Joe; it don't matter." Thereafter plaintiff shipped various bills of goods to St. Joseph, Mo., on orders sent by David Olin upon bills or letter heads headed, "E. Olin & Sons, 17 City Market, Wholesale, 208 Edmond Street, St. Joseph, Mo.," and others headed, "Olin Produce Company, No. 17 City Market, 111 E. Lexington St., Independence, Mo., 208 Edmond Street, St. Joseph, Mo.," and still others headed, "E. Olin & Sons, 17 City Market, Kansas City, Mo."

It is the contention of these defendants that they were not interested in the Olin Produce Company of St. Joseph, Mo., that company being carried on exclusively by David Olin, and that, after the latter ceased to be a member of E. Olin & Sons, the latter firm was carried on by these defendants only at No. 17 City Market, Kansas City, Mo., and 111 East Lexington street, Independence, Mo. When plaintiff requested defendants to pay the bill sued upon, they denied liability, claiming that they had nothing to do with the St. Joseph business. This was the first that plaintiff knew that there was any claim that the St. Joseph business was not being carried on by the firm of E. Olin & Sons. When it is claimed that David Olin ceased to be a member of E. Olin & Sons there was no change in the name of the company nor in the manner in which the firm name appeared in the telephone and city directories. Some of the orders for the merchandise sued for were sent in to plaintiff from the office at 17 City Market, and some of the payments were made from that office. Louis Olin claimed that he was doing this business through his office as agent for his brother David Olin, who he claimed was running the Olin Produce Company in St. Joseph. Whether this was true was for the jury. The bills were made and charged on plaintiff's books to the Olin Produce Company of St. Joseph, and were sent by plaintiff to that company at St. Joseph for collection. It was plaintiff's understanding that E. Olin & Sons and Olin Produce Company was the same business, and that the goods were being sold to the firm of E. Olin & Sons. Plaintiff sent the first statement to the office at the City Market, but it was returned to plaintiff to be sent to St. Joseph in order that the bill might be checked up and thereafter the bills were sent directly to St. Joseph.

It seems plain from this evidence that defendants, as members of the firm of E. Olin & Sons, were holding themselves out as the owners of the business at St. Joseph at the time of these transactions. The conversation had by plaintiff's agent with Louis Olin at the time the St. Joseph office was opened, leading plaintiff to believe that E. Olin & Sons were to operate the St. Joseph business, and that credit was to be extended to it and the bills might be sent to defendants' office at the City Market, was evidence that Louis Olin was holding out that E. Olin & Sons were running the business of the Olin Produce Company at St. Joseph, Mo., and was a sufficient holding out to bind him. This, together with the fact that E. Olin & Sons permitted the use of their stationery headed "E. Olin & Sons," and permitted the use of the heading "Olin Produce Company" with the same address as the two stores of the

firm of E. Olin & Sons, by the office at St. Joseph, and the further fact that David Olin was once a member of the firm, but after it is claimed he withdrew no change was made in the name and advertising of the firm, was evidence showing that both defendants held themselves out as operating the business carried on at St. Joseph.

[3] Defendants make the point that the court erred in admitting Exhibits 1 to 8, inclusive. These were the orders already mentioned, and, in addition, letters written and sent by David Olin. From the heading of all of this stationery, it is shown that the orders and letters were written upon letter heads of E. Olin & Sons, but it is argued that these exhibits constituted nothing more than a declaration of David Olin that the St. Joseph business was that of E. Olin & Sons, and that these declarations of David Olin were not admissible against the other defendants in the absence of showing that they were made in the presence of these defendants. This objection could not be made as to defendant Louis Olin, because he held out David Olin as a member of the firm when Louis Olin, together with David Olin, made the arrangements for plaintiff to ship goods to the Olin Produce Company in St. Joseph. As to the defendant Emma Olin, and as to Louis Olin as well, the billheads and letter heads were admissible for the reason that they were used so extensively and for so long a time by David Olin in connection with the St. Joseph business that she and Louis must have known of their use. Louis Olin testified that the letter heads mentioned were those of E. Olin & Sons, but he claimed that they were used only for scratch paper at the Kansas City place of business, and that he did not know that they were being used in connection with the St. Joseph business, but he failed to account for the presence of the words "Olin Produce Co." as a part of the letter head on some of this stationery. As before stated, there was no change in the firm name or the firm's advertising after it is claimed David Olin ceased to be a member of the firm.

[4] Defendants complain of the giving by the court of plaintiff's instruction No. 3, but the only reference to plaintiff's instructions in the motion for a new trial, is "The court erred in giving the instructions requested." This was not a sufficient assignment of error upon which to base any point in this court. *Disinfecting & Mfg. Co. v. Bates Co.*, 273 Mo. 300, 201 S. W. 92; *Wynne v. Wagoner Undertaking Co.*, 274 Mo. 593, 204 S. W. 15; *State v. Dinkelkamp*, 207 S. W. 770; *Heller v. O. & A. R. Co.*, 209 S. W. 567; *Cedarland v. Thompson*, 209 S. W. 554.

The judgment is affirmed.  
All concur.

MCKINSEY et ux. v. GUTHRIE. (No. 2292.)

(Springfield Court of Appeals. Missouri.  
Feb. 25, 1919.)**1. TRESPASS  $\S$  40(5)—DESTRUCTION OF TREE—SUFFICIENCY OF PETITION—DAMAGES.**

In action for destruction by defendant of ornamental shade tree upon plaintiff's premises, petition held sufficient to state cause of action for single damages for common-law trespass.

**2. TRESPASS  $\S$  40(5)—DESTRUCTION OF TREE—SUFFICIENCY OF PETITION.**

In action for destruction of shade tree, petition, which failed to state that defendant had no right or interest in the tree, was insufficient to support a judgment for treble damages, under Rev. St. 1909,  $\S$  5448.

**3. TRESPASS  $\S$  52—DESTRUCTION OF TREE—TREBLE DAMAGES—SUFFICIENCY OF PETITION.**

Owner's measure of damages for destruction of a shade or ornamental tree is the difference in the market value of the premises on which the tree is growing with or without the tree, being the value of the tree because of its peculiar place and location on the premises.

**4. PLEADING  $\S$  11—EVIDENTIARY FACTS.**

In action for damages for destruction of shade and ornamental tree, the pleading of the location of the tree with reference to the premises and the beauty and ornament of such tree would be pleading the evidence.

Appeal from Circuit Court, Jasper County;  
Joseph D. Perkins, Judge.

Suit by John L. McKinsey and wife against O. B. Guthrie. Judgment for plaintiffs, and defendant appeals. Affirmed.

Owen & Davis, of Joplin, for appellant.  
H. S. Miller, of Joplin, for respondents.

BRADLEY, J. Plaintiffs, husband and wife, sued to recover damages for the destruction of an ornamental shade tree on their lot in the city of Joplin. The petition is bottomed on section 5448, R. S. 1909, and asks for treble damages. The cause was submitted to the court without a jury, and resulted in a judgment for single damages in the sum of \$150, and defendant appealed.

The petition is as follows:

"Plaintiffs for cause of action against defendant states: That on the — day of September, 1918, they were the owners of and lawfully possessed of the following described lot or tract of land in Jasper county, Mo., to wit: Lot numbered 89 in Moffett's subdivision in the city of Joplin, said lot being known as No. 220, Jackson avenue, Joplin, Mo. That on said day said defendant unlawfully, maliciously, and wantonly, and with force and arms, entered upon said premises of the plaintiffs, and did cut down and destroy a large sugar maple, ornamental shade tree, same being about 35 years old, and about 1½ feet in diameter, being of the value

of \$500, to the damage and injury of plaintiffs in the sum of \$500. Wherefore plaintiffs pray judgment for treble damages, to wit, the sum of \$1,500 as provided by the statute, and costs of suit."

The defendant answered by a general denial. Plaintiffs' evidence was that they were the owners of the lot, same being a residence lot, and that between the curb line and the sidewalk was an ornamental maple shade tree, 35 or 40 years old, reasonably sound and of good proportions, and that the defendant, a house mover, caused the tree to be cut down, so that he might pass up the street over which the tree and some of its branches extended with a house which he was moving. The record shows that plaintiffs' lot faced east, and that this tree was near the north-east corner, and leaned south and east, shading practically the whole front of the premises, and was the only tree in the front. The record further shows that defendant did not ask permission of the owners to cut and remove the tree, and said nothing to them about it. The evidence as to the damage to the premises by destruction of the tree ranged from \$200 to \$500. Defendant's evidence tended to show that the tree was old and rotten; that it was a benefit to the property to cut it down. Defendant testified that he did not authorize his men to cut the tree, but that it was cut while he was up town seeing some of the city authorities relative to the tree; but the men who cut the tree were in the employ of the defendant, and they testified that defendant authorized and directed them to cut down and remove the tree.

[1, 2] The only alleged error of consequence is that the petition shows that the suit was brought for the mere value of the tree, while the court permitted a recovery for the difference in the value of the premises before the tree was cut and afterwards. On examination of the petition it will be noted that the facts stated are sufficient to authorize recovery for damages done to the premises on account of the destruction of an ornamental shade tree, and will uphold recovery for common-law trespass. While plaintiffs asked for treble damages, the petition did not state the necessary element to support a treble damage judgment. The petition fails to state that the defendant had no right or interest in the tree, and hence would not support a judgment for treble damages. *Lumber Co. v. Craig*, 112 Mo. App. 454, 87 S. W. 41; *O'Bannon v. Railroad*, 111 Mo. App. 202, 85 S. W. 803; *King v. Sligo Furnace Co.*, 190 S. W. 368. According to these authorities last cited and the cases cited therein, while the petition may not support a judgment for treble damages in the absence of the allegation that the alleged trespasser had no interest in the property, yet a peti-

tion which has only that defect will support a judgment for single damages for common-law trespass. Defendant did not attack the petition by motion to make more certain or otherwise, and both sides tried the case on the theory that the measure of damages was the difference in the value of the lot before the tree was cut and afterwards. The only objections that the defendant made to the evidence tending to show the difference in value in the lot before the tree was cut and afterwards was that the court ought to hear evidence as to its value before the tree was cut and afterwards, and then say what the damages were; while plaintiffs sought to show their damages by witnesses who gave their estimate of damages based upon the value of the lot before the tree was cut and afterwards. The trial court held that there was no substantial difference in plaintiffs' and defendant's theory as to the proper way to arrive at the damages; and we agree. Also the record shows that defendant in making its case adopted the manner followed by plaintiffs in an endeavor to show that the lot was not damaged by cutting down the tree. To illustrate: Defendant asked one of his witnesses the following question:

"Q. I will ask you from your knowledge of that tree, and the manner in which it leaned, its decayed condition as you have described, its dead limbs as you have mentioned, would that tree, in your judgment, enhance the value of the property or would it be a detriment? A. I would consider it of no value in that shape if it had been on my lot."

Defendant, on being questioned by his attorneys, testified as follows:

"Q. What do you say, in your judgment, as to whether that tree did enhance the value of the property in the condition you saw it? A. If in the front of my property I would take it out. I would call it a detriment to the property."

The petition states that the tree was an ornamental shade tree, giving its size, etc. The most reasonable construction as we view the petition, and the theory adopted by both sides in the trial, is the cause was essentially to recover damages done to the lot by cutting down and removing the tree, and was not for the mere value of the actual timber in the tree. Cases are numerous which uphold suits for damages done to property by the destruction of trees of peculiar value because of their place and ornament in connection with the premises on which they are located. *McAntire v. Telephone Co.*, 75 Mo. App. 535; *White v. Stoner*, 18 Mo. App. 540; *Reinhoff v. Gas Co.*, 177 Mo. App. 417, 162 S. W. 761; *Reber v. Bell Telephone Co.*, of Missouri, 196 Mo. App. 69, 190 S. W. 612. In *White v. Stoner*, supra, 18 Mo. App. loc. cit. 551, it is said:

"The cutting of shade or ornamental trees may be an injury of far more consequence than the

mere marketable value of the timber. Trees in special situations or locations are not only a great ornament, but are sources of health and comfort to the owner. The market value of the lumber would be poor recompense indeed for the loss of a majestic elm that had shaded and sheltered the homestead for generations. The measure of damages in such a case is 'not necessarily and exclusively the value of the wood and timber removed, but the solid and permanent injury to the inheritance.'"

Further this same case quotes from *Van Deusen v. Young*, 29 Barb. (N. Y.) 9, as follows:

"It only remains to consider the objections to testimony. They are all substantially similar, to wit, that evidence of the comparative value of the premises with or without the wood and timber was improper: First, as furnishing no appropriate criterion of damage; and, second, as founded on merely speculative opinion of the witnesses. But I think it was the proper test of an injury to the inheritance. \* \* \* Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm, for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value for purposes of building or of fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cordwood, as to adopt the parallel rule in this case."

In *Jones v. Railroad*, 189 Mo. App. 6, 176 S. W. 465 an action for damages by fire to fruit trees, the court said:

"As to the destruction of fruit trees the following was stated by Judge Bond in *Shannon v. Hannibal & St. Joe Ry.*, 54 Mo. App. 223, 226: 'The true rule, as deduced from the authorities, is that in such actions the measure of damages depends upon the relation the trees or shrubs sued for bear to the soil. If their chief value exists when separated from the soil, then their value after removal may be shown as the measure of damages. If, on the other hand, their essential value arises from their connection with the soil, then the difference in value of the land before and after their removal is the measure of recovery of the owner. This is a sound principle, supported by safe legal principles, and establishes a method of distinction which can be practically applied.' We applied the rule in *Doty v. Railroad*, 136 Mo. App. 254 [116 S. W. 1126], and the Springfield Court of Appeals did likewise in *Miller v. Railway Company*, 180 Mo. App. 501 [167 S. W. 469]. And we stated the rule to be applicable to the destruction of shade or ornamental trees." *White v. Stoner*, 18 Mo. App. 540, 551.

[3, 4] The measure of damages in this character of cause where damages are sought for



the destruction of a tree used for shade or ornament is the difference in the market value of the premises on which the tree is growing with and without the tree. This, after all, it seems to us, is the value of the tree because of its peculiar place and location on the premises. A tree in the back yard, among others, though a beautiful ornament and shade, might be of less value to the premises than a tree in the front yard, and well located, though of less beauty and less valuable as cordwood. If a plaintiff pleaded the location with reference to the premises, and the beauty and ornament of the tree, such would essentially be pleading the evidence.

We find no error in the record, and the judgment below is, therefore affirmed.

STURGIS, P. J., and FARRINGTON, J., concur.

FOGLE et al. v. KASTER. (No. 18227.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

INSANE PERSONS §62—RESTORATION TO SANITY—JUDGMENT IN PERSONAM.

A judgment in rem rendered against the estate of an insane person while he was under guardianship cannot, in suit against him after he has been adjudged sane and his guardian has been discharged, be made the basis for a judgment in personam.

Error to Circuit Court, Schuyler County; N. M. Pettingill, Judge.

"Not to be officially published."

Suit by C. C. Fogle and another, composing the firm of Fogle & Fogle, against N. L. Kaster. Judgment against defendant by default, and he brings error. Reversed.

Lozler & Morris, of Carrollton, Nat M. Shelton, of Macon, and J. M. Jayne, of Memphis, for plaintiff in error.

Fogle & Fogle, of Lancaster, for defendants in error.

BLAND, J. Plaintiffs filed a petition in the circuit court of Schuyler county, Mo., alleging that defendant, N. L. Kaster, had been adjudged an insane person, and that John Sloop had been appointed and had become his duly qualified and acting guardian and curator; that, while said John Sloop was the guardian and curator of the defendant, plaintiffs obtained a judgment in the probate court against the estate; that thereafter the probate court adjudged defendant to be of sound mind and capable of managing his affairs, and his guardian and curator was ordered to make final settlement, which was done, and said guardian and curator was discharged; that said judgment obtained by plaintiffs was unpaid at the time of the filing of the petition herein; and that defendant is indebted to them in the amount thereof with interest from the date of its rendition. Defendant was duly served with summons, but, failing to appear, judgment was entered against him by default; thereafter defendant in due time brought the case here by writ of error.

We think that the petition fails to state a cause of action. It sues upon a judgment rendered by the probate court, which is a judgment in rem against the estate (Moody v. Peyton, 135 Mo. 482, loc. cit. 491, 36 S. W. 621, 58 Am. St. Rep. 604), and attempts to make this judgment a basis of judgment in personam against the defendant. This cannot be done. Johnson v. Kaster, 199 Mo. App. 501, loc. cit. 503, 204 S. W. 196. An allowance in the probate court against the estate of an insane person cannot be made a personal judgment against such person when restored to sanity. Johnson v. Kaster, supra; Brown v. Chadwick, 79 Mo. 587.

The judgment is reversed.

All concur.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BOWMAN et al. v. RAGSDALE et al. (No. 8.)

(Supreme Court of Arkansas. June 2, 1919.)

CANCELLATION OF INSTRUMENTS  $\Leftrightarrow$  59—RELIEF TO DEFENDANT—VALUE OF IMPROVEMENTS.

Where heirs prevailed in suit to cancel administrator's sale and conveyance of their intestate's homestead, decree against defendants for net amount of rents, after deducting repairs, for the years since the commencement of the action, will not be disturbed on the theory that defendants should not be charged with rents accruing from improvements made by them, where there was no evidence as to the rents and profits during the 10 years of defendants' occupation prior to the commencement of the action to furnish data to determine the extent, if any, to which defendants lacked compensation for improvements up to time of commencement of the action.

Appeal from Columbia Chancery Court; J. M. Barker, Chancellor.

Suit by Claude Ragsdale and others against O. M. Bowman and others. From decree for complainants, defendants appeal. Affirmed.

Mehaffy, Reid, Donham & Mehaffy, of Little Rock, for appellants.

S. W. Woods, of Marshall, for appellees.

MCCULLOCH, C. J. Appellees are the heirs at law of A. H. Ragsdale, who died intestate in the year 1900, the owner of a tract of land in Van Buren county containing 59 acres, which he occupied as his homestead. The administrator sold the homestead under order of the probate court in the year 1904, during the minority of the heirs, and W. J. Evans, who was the grantor of the several appellants, was the purchaser at the administrator's sale.

The present action was instituted in the year 1914 by appellees, one of whom was still an infant, to cancel the sale made by the administrator on the ground that the probate court had no jurisdiction to order it, and the chancery court on final hearing of the cause rendered a decree in favor of appellees canceling the sale and the conveyance made pursuant thereto by the administrator.

The correctness of that decree is not ques-

tioned on this appeal, but the court subsequently rendered a decree against appellants separately for the recovery of rents. Proof was taken on that subject, and the decree was for the net amount of rents of the lands occupied by each of appellants, after deducting repairs, for the years since the commencement of this action. No testimony was taken directed to the rents and profits of the lands during the 10 years the same were occupied by appellants prior to the commencement of this suit. Some of the appellants made lasting improvements on the premises, and the proof tends to show what the original cost of those improvements amounted to. Some of the improvements, however, were made after the commencement of this action. The court confined the recovery of rents to the period since the commencement of this action, and the evidence abundantly sustains the findings of the court as to the amount. Appellants enjoyed the use of the premises for 10 years before the commencement of this suit, and, as before stated, the evidence does not show what the rental value was during that time, nor does it show what the present value of the improvements is.

The force of the rule that infants cannot be improved out of their homesteads must be conceded (*McCoy & Trotter v. Arnett*, 47 Ark. 445, 2 S. W. 71; *McKinney v. McCullar*, 95 Ark. 164, 128 S. W. 1043), but it is contended that according to the evidence the lands had no substantial rental value until improvements were placed thereon by appellants, and that they should not be charged with rents accruing from these improvements.

The evidence as abstracted does not show the extent, if any, to which appellants lack compensation for their improvements up to the time of the commencement of this action, and they had no right to continue in occupancy during the pendency of the action and dispute the right of the owners to receive rents.

Under the proof adduced in the case, confined as it was entirely to the rents and profits of the premises since the commencement of the action, we cannot say that the finding of the chancellor is against the preponderance of the testimony.

The decree is therefore affirmed.

$\Leftrightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

## WEBB v. STATE. (No. 214.)

(Supreme Court of Arkansas. May 12, 1919.)

## 1. WITNESSES ⇨349—IMPEACHMENT—CROSS-EXAMINATION OF DEFENDANT.

In a prosecution for illegally disposing of alcoholic liquor, the prosecuting attorney was properly permitted on cross-examination to ask defendant if he had not tried to escape, and had not brought some saws into the jail and given them to other persons, etc., since a witness may be cross-examined as to his particular acts relevant to the impeachment of his character for truth, though disconnected with the charge.

## 2. INTOXICATING LIQUORS ⇨236(1)—ILLEGAL DISPOSITION—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain conviction for an illegal disposition of whisky, in that defendant and one acting with him gave it to persons for assistance in piloting his (defendant's) automobile, loaded with whisky.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Roy Webb was convicted of illegally disposing of alcoholic liquors, and he appeals. Affirmed.

The section of the statute under which the indictment in this case was returned reads as follows:

"After January 1, 1916, it shall be unlawful for any person, firm or corporation to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors within the state of Arkansas." Acts 1915, p. 98.

Eb Boles, a witness for the state, testified that he saw the defendant and a companion named Lexington in an automobile on the 24th day of December, 1918; that they asked how to go to Bradford, and that he asked them if he could go with them and show them the way; that they replied that he could, and he rode with them until their automobile broke down; that, while riding with them in the automobile, they gave him a drink of whisky out of a quart bottle, and that when he and his companion got ready to leave they gave them a pint apiece; that the defendant and Lexington were both in the car, but that he does not remember which one of them gave him the whisky; that the back end of the automobile was loaded, but he did not know what it was loaded with.

On cross-examination Boles testified that he showed the defendant and Lexington how to get along the road to Bradford, and that

they gave him some whisky, but he did not remember whether the defendant or Lexington actually handed him the whisky.

T. C. Plant, the sheriff of White county, testified that he arrested the defendant just north of Bradford, in White county, on Christmas day in 1918; that the defendant was in charge of an automobile which was filled with whisky; that it contained about 324 pints and 20 some odd quarts; that, at the time the defendant was arrested, Lexington had gone to Little Rock for repairs on the car.

Roy Webb, the defendant, testified for himself. He admitted that he was in the car, and that he had gone to St. Louis to drive the car back for Lexington. He stated that before they got to Bradford, in White county, they met some men who wanted to ride to town, and Lexington let them ride; that Lexington took out a quart of whisky, and he and the men drank together; the defendant did not drink; that, when the car broke down, Lexington took out two pints of whisky and gave each one of them a pint; that he did not have any interest in the whisky; that he had been driving into the state secondhand automobiles for Lexington for about three months, which had been purchased outside of the state; that he went to St. Louis with Lexington for the purpose of driving the car back.

On cross-examination he admitted that he tried to escape as soon as he was placed in jail; that he had some saws, which he brought to the jail and gave to the other prisoners. It was shown that when the car broke down the whisky was taken out of it and placed in a house near by, and that the defendant was placed in charge of the car and the whisky. The defendant admitted on cross-examination that some men came up there and took whisky away from the house while he was in charge of it, but that it was not his whisky.

The jury returned a verdict of guilty, and from the judgment rendered the defendant has appealed.

W. F. Terral, of Little Rock, for appellant. Gardner K. Oliphant, of Little Rock, amicus curiae.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above). [1] It is first earnestly insisted by counsel for the defendant that the court erred in permitting the prosecuting attorney to ask the defendant if he had not tried to escape, and if he had not brought some saws into the jail and given them to the other prisoners for the purpose of escaping. It appears from the record that the defendant was first arrested near Bradford, in White

county, and subsequently released from custody. He was arrested again at Little Rock, charged with the same crime, and carried to White county, and placed in the jail there. He was asked if he had not tried to escape, and answered that he had not. He was also asked if he had not carried saws into the jail and given them to the other prisoners. He replied that he had not; that he just carried the saws into the jail and laid them down, and they had picked them up. He was asked how many saws he brought into the jail, and he answered, "three." There was no error in the admission of this testimony. It is true, as contended by counsel for the defendant, that the court has uniformly held that the state cannot resort to the bad character of the accused as a circumstance from which to infer guilt. The reason is that such testimony is not evidence of the defendant's guilt, and that it might result in his being overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the offense with which he is charged.

The evidence objected to was not admitted for this purpose, and the decision of that point is not before us. The witness took the stand in his own behalf, and the questions were asked him on cross-examination. When he took the witness stand himself, he was subject to all the rules of examination and impeachment of any other witness. The court has frequently held that a witness may be cross-examined as to his particular acts or conduct that are relevant to the impeachment of his character for truth, although they are wholly disconnected with the cause on trial. Great latitude is allowed in the cross-examination of a witness touching his conduct and habits, so as to reflect light upon his credibility. *Rhea v. State*, 104 Ark. 162, 181, 147 S. W. 463; *Turner v. State*, 128 Ark. 565, 195 S. W. 5; *Ware v. State*, 91 Ark. 555, 121 S. W. 927; *McAlister v. State*, 99 Ark. 604, 139 S. W. 684.

[2] It is next insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. It is the contention of counsel for the defendant that the statute which we have copied above is directed against a gift of liquor as a subter-

fuge to evade the prohibition against selling it.

On the other hand, it is contended by the Attorney General that a gift of liquor, made solely as a matter of courtesy or act of hospitality, or the like, is within the prohibition of the statute. We do not deem it necessary to decide this question, for, if it be assumed that the defendant's construction of the statute is correct, still the evidence adduced by the state was sufficient to support a verdict of guilty.

It is the contention of the defendant that he was not interested in the sale or giving away of the liquor, and was only hired to drive the automobile back into the state.

On the part of the state it was shown that a considerable quantity of whisky in quart and pint bottles was in the automobile, and that the prosecuting witness and his companion were directing the operators of the automobile along the road until the automobile broke down. When they separated, they were each handed a pint bottle of whisky, and they had also been given some drinks out of a quart bottle. The jury might have inferred that the whisky was given them in exchange for their services in piloting the automobile to Bradford. The defendant was found in charge of the whisky, and admitted that people went into the house where it was stored and took away bottles while it was in his charge. He also admitted that his companion had been going out of the state for some months and buying secondhand automobiles, and that he had been driving them back into the state. He does not state whether all these secondhand automobiles contained whisky, as did the one in the instant case. Certainly the jury would have been warranted in finding Lexington—had he been on trial—guilty of the illegal traffic in whisky.

When all the surrounding circumstances are considered, the jury was justified in finding that the defendant was also interested in the giving away of the whisky, and consequently the jury was justified in finding him guilty under his own construction of the statute.

It follows that the judgment must be affirmed.

## HENDRIX v. LEWIS.

(Court of Appeals of Kentucky. June 13, 1919.)

1. DEEDS  $\Leftrightarrow$  118—INSUFFICIENCY OF PAROL EVIDENCE TO EXPLAIN DESCRIPTION.

Deed containing description, "Beginning at a big rock at B.'s mill seat, running up Wooten's creek so as to hold all the land owned by said W. on the side of the creek that said R. holds," was insufficient, in absence of evidence identifying any "big rock" or place where B.'s mill site was, or on which side of the creek R. held, or what land, if any, W. had on either side of creek.

2. TRESPASS  $\Leftrightarrow$  52—CONVERSION OF TIMBER—OWNER'S MEASURE OF DAMAGES.

Owner's measure of damages for timber cut from his land is the reasonable fair market value of timber at the time and place it was cut.

Appeal from Circuit Court, Leslie County.

Action by Larkin Lewis against John R. Hendrix. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Lewis & Lewis and Cleon K. Calvert, all of Hyden, for appellant.

J. B. Miniard and L. D. Lewis, both of Hyden, for appellee.

QUIN, J. The appellee, claiming to be the owner of certain property on the waters of Wooten creek of Cutshin and the middle fork of the Kentucky river, filed this suit, claiming that appellant had entered upon his land and removed therefrom and converted to his own use certain trees of the aggregate value of \$87.

The allegations of the petition as amended were denied by appellant, who in turn asserted ownership of the land from which the trees were removed. It is further alleged in the answer that the boundary or land claimed by appellant laps upon and interferes with the appellee's boundary as set out in the petition.

The case was submitted to a jury, who found in appellee's favor in the sum of \$40, and from this judgment appellant has appealed.

Appellee claimed: (1) Under what is known as the Hiram Wooten Patent No. 8361; (2) a deed from Wooten to Reuben Bailey; and (3) a deed from the latter to appellee. There is no contest about the patent, which contains 100 acres. The deed from Wooten to Bailey embraced 75 acres of the Wooten patent, the description in the deed being as follows:

"Beginning at a big rock at James Bailey's mill seat, running up Wooten's creek so as to hold all the land owned by said Hiram Wooten

on the side of the creek that said Reuben Bailey holds."

This statement appears in appellant's brief:

"The locality mentioned is one side or the other of Wooten's creek, we don't know which, and neither will the court."

And then counsel adds:

"There is nothing in evidence identifying any 'big rock' or the place where James Bailey's mill site was, or on which side of the creek Reuben Bailey held, or what land, if any, Hiram Wooten had on either side of the creek."

[1] With this statement we agree. Appellee has not shown title or right in himself, either by ownership or possession of the property from which he claims the trees were removed, and in the absence of this proof the court should have directed a verdict for appellant.

The question is raised as to whether the description in the deed from Wooten to Bailey is sufficient. The rule on this subject is thus stated in *Bates v. Harris*, 144 Ky. 399, 188 S. W. 276, 36 L. R. A. (N. S.) 154:

"That where the writing within itself, or by reference to other writings, contains sufficient data so that by the aid of parol evidence no question as to the intention of the parties can arise, it is sufficient. The most specific and precise description of the property requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties and their relations to each other and to the property, as they were when the negotiations took place and the writings made, are disclosed, if the meaning and application of the writing, read in the light of these circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement." *Wood on Statute of Frauds*, § 353; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Hyden v. Perkins et al.*, 119 Ky. 188, 83 S. W. 128, 26 Ky. Law Rep. 1099.

After referring to a number of other cases, the court then states:

"In all such cases parol evidence was admitted not to identify, but to designate, the subject-matter, already identified in the minds of the parties, in the language of the contract when read in the light of the facts."

The deed to Bailey conveyed 75 acres on the side of the creek on which Reuben Bailey holds, and from a map filed in the record, taking Cane branch as a dividing line, the major portion of the Wooten patent appears to be to the west of said branch; hence the 75 acres would not include the property in contest, as the location of the trees is to the east of the branch. There is not sufficient proof to enable the court to locate, with any degree of certainty or definiteness, the Woot-

en patent. The surveyor appointed by the court has explained the map in detail, and has indicated thereon the Wooten survey as contended by the appellee, and also according to the contention of the appellant, and he is in doubt as to which is correct. The map gives the location of the trees.

[2] Instruction 1, given by the court, is also complained of. If upon a retrial of this case the evidence is the same as on the first trial, the court will give a directed verdict for the appellant, but if the appellee, in addition to the evidence now in the record, introduced proof showing that the 75 acres conveyed by Wooten to Bailey, through whom he claims, embrace the land from which the trees were removed, the court will submit the case to the jury, and will modify instruction No. 1, given on the first trial, so that it will read as follows:

"If you believe from the evidence in this case that the timber sued for and described in the evidence or some portions of said timber was cut from the land embraced in the Hiram Wooten survey dated February 27, 1845, also from the land embraced in the deed from Hiram Wooten to Reuben Bailey, dated December 29, 1866, both of which were introduced in evidence, then you will find for the plaintiff, Larkin Lewis, the reasonable fair market value of such timber at the time and place it was cut, as you shall believe from the evidence was cut from the land embraced in said survey and deed, not to exceed \$87, the amount sued for, and unless you so believe you will find for the defendant."

For the reasons indicated, the judgment of the lower court is reversed, for further proceedings not inconsistent with this opinion.

#### NUNAN v. BENNETT.

(Court of Appeals of Kentucky. June 6, 1919.)

##### 1. LANDLORD AND TENANT §166(9)—DAMAGE BY WATER PIPES—LIABILITY OF TENANT.

Where upper tenant negligently causes water to flow into premises of tenant below, he, and not the landlord, is liable for the resulting damages, especially so where the plumbing in the upper apartment was in the upper tenant's exclusive control.

##### 2. NEGLIGENCE §59—"PROXIMATE CAUSE."

To warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of attending circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

##### 3. NEGLIGENCE §59—LIABILITY FOR REMOTE NEGLIGENCE—NATURAL AND PROBABLE CONSEQUENCES.

To fix liability for remote negligence, the injury must be one that under all the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence to flow from or be the natural and probable consequence of the first negligent act.

##### 4. NEGLIGENCE §56(1)—PROXIMATE CAUSE—PROXIMITY OF TIME OR SPACE.

Proximity in point of time or space is not an element of proximate cause of an injury.

##### 5. NEGLIGENCE §61(1)—PROXIMATE CAUSE—REMTENESS OF INJURY—INTERVENING ACTS.

One will not be excused on the ground of the remoteness of injury if his negligent act, combined with an intervening act for which he was not responsible, produced the injury, where such intervening act alone would not have sufficed to produce the injury.

##### 6. LANDLORD AND TENANT §166(9)—INJURY TO PREMISES FROM WATER—LIABILITY OF LANDLORD—PROXIMATE CAUSE.

Where landlord and tenant of ground floor, in part of basement of which the cut-off of the main water pipe was located, agreed that landlord might turn off water at night, and where that was done and tenant of apartment above, on finding water turned off, left faucets open, and when landlord had water turned on in morning it leaked through ceiling of first floor and damaged lower tenant's goods, the landlord's acts were not proximate cause of damage.

Appeal from Circuit Court, Clark County.

Action by Grace O. Bennett against John F. Nunan, and one Agee. Judgment for defendant Agee, dismissing the petition as to him, and judgment for plaintiff against defendant Nunan, and he appeals. Reversed, with directions to sustain defendant's motion for a peremptory instruction if the evidence upon another trial should be substantially the same as upon the first trial.

J. M. Benton, of Winchester, for appellant.

R. C. Oldham and Hays & Hays, both of Winchester, for appellee.

THOMAS, J. Appellant and defendant below, John F. Nunan, was the owner of a three-story business building in the city of Winchester, Ky., with a basement. The ground floor was occupied by appellee and plaintiff below as a millinery store. The second and third stories of the building were fitted up as apartments, and occupied by other tenants as dwellings, which fact was known by plaintiff at the time she rented the storeroom from defendant.

The main water pipes conducting water for all parts of the building entered the base-

ment, and separate pipes furnished each story with water. The cut-off of the main pipe furnishing water to the building was located in that part of the basement rented by plaintiff in connection with the store-room. In the rental contract plaintiff stipulated and bound herself to take care of the plumbing of the leased building, and to cut off the water "at any time it may become necessary to do so to prevent freezing," and to allow the tenants occupying the other two stories access to the basement for the purpose of cutting off the water from their apartments when it was necessary for any purpose to do so, and that if she should fail to do as agreed she would be liable for the damage to the plumbing occasioned by such failure.

A short while prior to February 3, 1917, plaintiff made complaint to defendant about some defects in the plumbing in the stories above her, because of which there had been a slight leakage in some part of the premises rented by her, and it was then suggested by the defendant that, inasmuch as the weather was extremely cold, it would be best to turn the water off throughout the building for the night, and we think the evidence is sufficient to show that plaintiff agreed to this. At any rate she knew that defendant was going to have it done, and consented thereto. Accordingly, between 5 and 7 o'clock defendant had his servant to go into the basement and turn the water off. The apartment on the second floor was occupied by a man by the name of Agee, who was not at home at the time, but returned about 10 o'clock that night, and, finding the water turned off, he left some of his faucets or other apertures of the pipes in his premises open, so as to permit the water when turned on to run out upon the floor. On the next morning between 8:30 and 9 o'clock, under instructions from defendant, his servant turned the water on throughout the building from the basement, and it ran out through the unclosed openings in the second story, and leaked through the floor and ceiling of the first story, and damaged the goods of plaintiff, to recover for which she filed this suit, and upon trial recovered a judgment for \$2,250, to reverse which defendant prosecutes this appeal.

Agee was made a defendant, but under the instructions of the court a verdict was returned in his favor, upon which judgment was rendered, dismissing the petition as to him, and that judgment is not here for review.

The negligence charged in the petition was that defendant had wrongfully and negligently gone into the basement and turned the water off, and in the same way caused it to be turned on the next morning, and the injury sued for was the proximate result of such negligence.

Defendant's answer denied the negligence, as well as the amount of damages claimed. A number of alleged errors are relied on to reverse the judgment, but we deem it unnecessary to notice, and we do not determine on this appeal any of them except the one complaining of the refusal of the court to direct a verdict in defendant's favor upon the ground that the negligence complained of, if any, was not the proximate cause of the damage sued for, i. e., that the injury to plaintiff's goods was too far removed from the acts of defendant complained of to make it the proximate result of such acts.

[1] It will no doubt be conceded that to entitle one to recover from another upon the ground of negligence the latter must have (1) failed to exercise the proper care in the discharge of some duty which he owed the former; (2) that damages must have resulted from such failure; and (3) that such damages must have been the proximate result of the negligent acts complained of. Unless each of these elements coexist there can be no recovery. Conceding then for the purposes of this case that the record presents facts sufficient to authorize a finding in favor of plaintiff on the first two essentials, it remains to be seen whether the third one under the testimony may be said to exist in this case.

At the outset it is admitted that the leakage complained of, and which produced the damages sued for, was not caused by any bursting of pipes or defective plumbing, so that the general principles of law as between landlord and tenant with reference to such matters have no application to the facts of this case. Nor is it insisted that it was any part of the duty of defendant to see to it that the upper tenants in his premises would keep the faucets and plumbing in their apartments closed so as to prevent any leaking upon the tenant below. On the contrary, the law is well settled that an upper tenant, who negligently causes water to flow upon his neighbor below, is liable for the damages produced, and especially so if the plumbing in his apartment was under his exclusive control, as was true with reference to the tenants on the second and third floors of defendant's building in this case. So that, if plaintiff's damage was produced by any such negligent act of a tenant above her, there could be no escape from the conclusion that such negligent act was the direct producing and immediate cause of the injury. But whether it was such an independent and intervening cause as to relieve the alleged negligence of defendant in turning on the water from being the proximate cause of the injury is the question to be determined.

[2] Courts have experienced great difficulty in defining with exact precision the term "proximate cause." This court in the city of Louisville v. Hart's Adm'r, 143 Ky.

171, 136 S. W. 212, 35 L. R. A. (N. S.) 207, approved the definition of Judge Cooley that proximate cause must "be the legitimate sequence of the thing amiss. In other words, the law always refers the injury to the proximate, not the remote, cause," and this definition was quoted with approval in the case of *Paducah Traction Co. v. Wetlauf*, 176 Ky. 82, 195 S. W. 99, L. R. A. 1917F, 353. But this definition, it must be conceded, is not very clarifying, since it is about as difficult to determine what is "the legitimate sequence" as it is to determine the definition of "proximate cause." And so in the last case referred to this court quoted with approval from the case of *Milwaukee & St. Paul R. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, this excerpt:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Some courts deny that the injury in order to be the proximate result of the negligence "ought to have been foreseen in the light of the attending circumstances" as contained in the above quotation, but most of the courts, including our own, incorporate that element in the definition. The confusion seems to have grown out of the failure to distinguish between an injury directly produced by the negligence complained of and one which is indirectly or remotely produced. If the injury is the direct result of the alleged negligence, the latter may be said in all cases to be the proximate cause of the injury, although it may not have been foreseen in the light of the attending circumstances. If, however, the injury is only the indirect or remote result of the alleged negligence, then it must have been foreseen or anticipated in the light of the circumstances. *L. & N. R. R. Co. v. Wright*, 183 Ky. 634, 210 S. W. 184.

[3] Further illustrating the position of this court with reference to the true scope and meaning of the term "proximate cause" in the case of *Gosney v. L. & N. R. R. Co.*, 169 Ky. 323, 183 S. W. 538, L. R. A. 1916E, 458, quoting from *Sydnor v. Arnold*, 122 Ky. 562, 92 S. W. 289, we said:

"The weight of authority seems to be against holding a defendant liable for all the conse-

quences of his wrongful acts when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur, and the rule is well settled that to fix liability upon a person for remote negligence the injury complained of must be one that under all the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence to flow from or be the natural and probable consequence of the first negligent or wrongful act. These views are fully supported and illustrated in the following authorities: *Shearman & Redfield on Negligence*, § 28; *Southern Ry. Co. v. Webb* [116 Ga. 152] 42 S. E. 395, 59 L. R. A. 109; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Bransom v. Labrot*, 81 Ky. 638, 5 Ky. Law Rep. 827, 50 Am. Rep. 193; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432, 6 Ky. Law Rep. 484; *Davis v. Chicago, Milwaukee & St. Paul R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; *Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728; *Dickson v. Omaha & St. L. Ry. Co.* [124 Mo. 140] 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; *Western Ry. v. Mutch* [97 Ala. 194] 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Gonsales v. City of Galveston* [84 Tex. 3] 19 S. W. 284, 81 Am. St. Rep. 17; *Reid v. Evansville R. Co.* [10 Ind. App. 385] 85 N. E. 703, 33 Am. St. Rep. 391; *Huber v. La Crosse City Ry. Co.* [92 Wis. 636] 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940; *Burger v. Missouri Pacific Ry. Co.* [112 Mo. 238] 20 S. W. 439, 34 Am. St. Rep. 379; *Am. & Eng. Ency. of Law*, vol. 16; *Gilson v. Delaware & Hudson Canal Co.* [65 Vt. 213] 26 Atl. 70, 86 Am. St. Rep. 802; *Watson, Damages for Personal Injuries*, §§ 23, 58."

Other cases bearing upon the question are *Louisville Home Telephone Co. v. Gasper*, 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. (N. S.) 548; *City of Lawrenceburg v. Lay*, 149 Ky. 490, 149 S. W. 862, 42 L. R. A. (N. S.) 480, Ann. Cas. 1914A, 1194; *Paducah Light & Power Co. v. Parkman's Adm'r*, 156 Ky. 197, 160 S. W. 931, 52 L. R. A. (N. S.) 506; *Stephens v. Stephens*, 172 Ky. 780, 189 S. W. 1143; and *I. C. R. R. Co. v. Skinner's Adm'r*, 177 Ky. 62, 177 S. W. 552.

[4, 5] All the authorities agree that proximity in point of time or space does not enter into the case or become an element of the definition or affect the plaintiff's right to recover. Such matters are of no importance except as they may afford evidence for or against proximity of causation. Nor will the defendant be excused on the ground of remoteness of injury if his act, combined with an intervening one for which he was not responsible, produced the injury, provided such intervening act alone would not have sufficed to produce the injury.

This qualification is stated in *Shearman & Redfield on Negligence*, § 39, in this language:



"It is also agreed that if the negligence of the defendant concurs with the other cause of the injury, in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force which, concurring with his own negligence, produced the damage."

[6] Applying this definition together with the qualifications referred to, we find that the act of defendant in both turning off and turning on the water upon the occasion complained of could not, and as a matter of fact did not, produce the injury complained of, except for the independent, wrongful, and negligent act of the tenant, Agee, in leaving the faucets in his apartment above plaintiff in such condition as to permit the overflow of plaintiff's premises and the consequent damage to her goods. This, as we have seen, was in itself a negligent act on the part of Agee, and under the foregoing definition of proximate cause, as approved by the court, before defendant can be held liable for the damages sued for, he must have, in the exercise of ordinary prudence, anticipated, foreseen, or contemplated the probability of the happening of such negligent act when he ordered and procured the water turned on the next morning, after turning it off the night before. We are convinced that he was not required to anticipate or foresee any such thing. The safe, usual, and natural condition in which the water pipes and faucets are maintained is for them to be kept closed so as to prevent damages almost certain to occur if they are left open, and we cannot conceive how it can be insisted that prudence requires one to anticipate and foresee, not only that another would or might act contrary to the usual and ordinary course, but that he, in order to do so, would commit a positive act of negligence toward a third person resulting in the latter's injury, and but for which he would not have been injured. On the contrary, prudence would more likely foresee and anticipate that all persons will act so as to preserve the usual and safe conditions and so as not to incur responsibility to another because of negligence. This being true, it results that the alleged acts of negligence of defendant cannot be said to be under the facts of this case, the proximate cause of the damages sued for.

We therefore conclude that the court should have sustained defendant's motion for a peremptory instruction, and, having failed to do so, the judgment is reversed, with directions to sustain the motion if the evidence upon another trial is substantially the same as upon the first one.

# HARDIN v. HORN. FLETCHER v. JOHNSON. DEMPSEY v. CASSADY.

(Court of Appeals of Kentucky. June 3, 1919.)

## 1. ELECTIONS §270—CONTEST—STATUTE—VALIDITY.

Acts 1916, c. 13, § 11, providing that in contest over nomination or election of an officer, where the nomination or election shall be declared void, the candidate who has received the next highest number of votes and who has not violated the provisions of the act shall be declared nominated or elected, is in contravention of the Constitution and void.

## 2. OFFICERS §55(1)—DISQUALIFICATION FOR OFFICE—VACANCY.

When an election for an office results in the selection of one who is ineligible or who by failure to comply with the election laws had forfeited his right to qualify to hold the office, the result is a vacancy.

## 3. ELECTIONS §156—PRIMARY ELECTIONS—NOMINATION CERTIFICATE—DUTY OF ELECTION COMMISSIONERS—INJUNCTION.

The board of election commissioners must give a certificate of nomination to the candidate at a primary election who received a majority or plurality of the votes cast as appears from the tabulated returns when the candidate shall have filed a post election statement of his expenditures as provided by Acts 1916, c. 13, § 4, and if the board should refuse to grant such certificate, its members may be required by mandatory injunction to do so; the board having no discretion.

## 4. ELECTIONS §172, 179—NOMINATION—CERTIFICATE—PRINTING OF NAMES—OFFICIAL DUTY—CONTEST.

When a nomination certificate has been seasonably filed with the clerk of the county court or other officer, it is the duty of such officer, which he may be compelled by mandatory injunction to perform, to cause the nominee's name as it appears from the certificate to be printed for the election, and neither commissioners nor clerk can refuse to so act except in obedience to a court judgment in an election contest declaring the certificate invalid or the nomination void.

## 5. ELECTIONS §172—NOMINATION—PRINTING OF NAMES UPON BALLOT—LEGALITY—DUTY OF OFFICERS.

The name of one who holds a certificate of nomination which has not been adjudged invalid is not illegally printed upon the ballot when it is done by officers of the law in performance of their statutory duties, who have no discretion in the matter, and may be compelled by injunction to act.

## 6. ELECTIONS §305(6)—ELECTION CONTEST—REVIEW—UNNECESSARY QUESTIONS.

Upon an appeal of an election contest case, where appellants are not entitled to the offices in controversy, in any event, it is unnecessary

to consider various grounds of counter contest presented against them.

**7. ELECTIONS §273 — RIGHT TO CONTEST — RIGHT TO OFFICE.**

Although contestants are not entitled to the offices they seek through an election contest, they are entitled to contest the election of defendants on the ground of violation of the Corrupt Practices Act.

**8. ELECTIONS §230, 231—VALIDITY—ILLEGAL EXPENDITURES — BRIBERY — CORRUPT PRACTICES.**

Prior to Corrupt Practices Act there was no warrant for adjudging an election void for failure of candidates elected to file statements of expenditures or on account of illegal use of money in election, unless there was such bribery in the conduct of the election that neither party could be adjudged to have been fairly elected in view of Ky. St. § 1506a, subsec. 12.

**9. ELECTIONS §151 — CONTEST OF NOMINATION—TIME OF FILING CONTEST.**

Acts 1916, c. 13, § 4, relating to contest of nominations and declaring that the same shall be declared void for violation of the act, relates to the nomination, and not to the final election, and in view of Ky. St. § 1550, subsecs. 27, 28, providing for the time of instituting contest and their disposal, if advantage is not taken of the violation of the Corrupt Practices Act in the time prescribed for impeachment of the nomination, there is no machinery of law by which it can be done thereafter.

**10. ELECTIONS §153, 228—VALIDITY—CORRUPT PRACTICES ACT—VIOLATIONS OF LAW IN SECURING NOMINATION.**

The statute providing for declaring a nomination void on account of violations of the Corrupt Practices Act means violations of the act in securing the nomination, and the authority it confers to adjudge an election void therefor means violation of the act in securing the election, and not infractions of the law committed in securing the nomination.

**11. ELECTIONS §237—CONTESTS—PLEADINGS — MOTION FOR SPECIFIC DECLARATION — WAIVER.**

Where the allegations in petitions for contest of nominations and elections set forth the grounds of contest too generally and indefinitely, and contestants moved for more specific declarations thereof, which motions were never passed upon, and contestees did not seek the judgment of the court thereon, the ground of the motion was waived.

**12. ELECTIONS §295(1) — CONTEST — VIOLATION OF CORRUPT PRACTICES ACT—WITNESSES—EVASIVENESS.**

In a contest of a nomination and election to public office, evasiveness and want of candor on part of a witness held to create a strong suspicion that the contestees or one of them furnished money to the witness, and that it was used on his behalf or at least with his knowledge for corrupt purposes in violation of election laws, but was insufficient in the absence of affirmative evidence.

**13. ELECTIONS §231—VALIDITY—VIOLATION OF CORRUPT PRACTICES ACT—USE OF MONEY BY CANDIDATE.**

The use of money either directly or indirectly by a candidate in the promotion of his elections, except for legitimate purposes, would forfeit his election under the Corrupt Practices Act, but to have that effect its use must have been by the candidate or in his behalf and with his knowledge.

**14. ELECTIONS' §231 — CONTEST — CORRUPT PRACTICES ACT—PROMISE OF DEPUTYSHIP.**

That defendant in an election contest previous to the election had promised a deputyship to a voter is not a ground for adjudging his election void under the Corrupt Practices Act.

**Appeal from Circuit Court, Martin County.**

Suits by B. F. Hardin against James Horn, also by J. O. Fletcher against U. G. Johnson, and also by L. A. Dempsey against John S. Cassady. From a judgment for the defendants dismissing each of the actions, each of the plaintiffs have appealed. Judgment in each case affirmed.

C. B. Wheeler, of Ashland, and Jas. M. Finlay, of Inez, for appellants.

Clyde L. Miller, of Louisa, and A. J. Kirk, of Paintsville, for appellees.

**HURT, J.** These actions were prepared, heard, and determined together in the trial court, and from the judgment rendered in each an appeal has been taken. The style of each action embraces two suits between the same parties in both of which the plaintiff below relied upon the same cause of action, made the same averments, and the defense consisted of the same denials and the same grounds of counter contest. The only difference in the suits is that one of them was filed on the 17th day of November, 1917, and the other between the same parties on the 11th day of December, 1917. The court in each case consolidated the two actions between the same parties, and tried them together, although the latter action was filed after the time allowed by law for making a contest of an election. The appellants were plaintiffs in the actions below, and the appellees were the defendants.

The history of the litigation is that at the regular primary election held in 1917 in Martin county Hardin and Horn were candidates for the nomination of the Republican party for sheriff, Fletcher and Johnson were candidates for the nomination of the same party for superintendent of schools, and Dempsey and Cassady were candidates for the nomination of the same party for clerk of the county court. The election resulted in Horn, Johnson, and Cassady receiving a majority of the votes cast at the election for the nominations for which they were candidates respectively. Each of the appel-

lants, Hardin, Fletcher, and Dempsey, instituted two suits, exactly alike, in causes of action against his late opponent, contesting his right to the nomination upon the ground that his late opponent had violated the provisions of the Corrupt Practices Act in obtaining his nomination. One of the suits each of the appellees instituted on the ——— day of August, and the others were instituted on September 1st. The circuit court dismissed each of the suits brought on the day of August, presumably upon the mistaken ground that they were prematurely brought. Each of the appellees filed an answer in the action against him which was instituted on the 1st day of September. The issues were made up in these actions and a large volume of proof taken, but, before their submission and trial, were dismissed, upon the motions of the plaintiffs, respectively, without prejudice to a future action. In due time after the primary election a certificate of nomination was granted to each of the appellees for the office for which he had been nominated at the primary election. These certificates being filed with the clerk of the county court, their names were regularly printed upon the ballots, which were used at the regular election in November, 1917, as the candidates of the Republican party for the offices of sheriff, superintendent of schools, and clerk of the county court, respectively. The names of the appellants were also printed upon the ballots, as independent candidates, for the same offices, respectively, for the nominations to which, they had been defeated in the primary election. The regular November election resulted in each of the appellees receiving a majority of the votes cast for his election to the office for which he was a candidate. Thereafter each of the appellants instituted two suits against his successful opponent, at the times heretofore stated, contesting the election of his opponent to the office to which he had been elected. After the preparation of these actions, and on final submission, the court adjudged that appellants had failed to manifest any right to relief, and dismissed their actions, and from the judgments the present appeals were prosecuted. The grounds of contest relied upon by each of the appellants were:

(1) His opponent, and his supporters with his knowledge, expended more than \$1,000 in aid of his election, much of which was used to corrupt and influence voters to vote for his opponent, and his opponent intentionally and corruptly omitted from the statement of his expenditures filed previous to the election and the one filed thereafter sums of money spent by him and his friends, and included in the statements sums of money which he corruptly and falsely reported as being expended for one purpose when they were expended for another, and for which reasons his election was void.

(2) His opponent was guilty of the same

wrongful acts in the expenditure of money preceding and at the primary election, and in failing corruptly and intentionally to include his expenditures in the statements filed by him preceding and after the primary election, and for such reasons his nomination was void.

(3) His opponent's nomination being void, his name was illegally upon the ballot, and the votes received by him were void, and should not be counted, and appellant, having complied with all the requirements of the Corrupt Practices Act, and being the only candidate for the office who had received any legal votes, was entitled to be adjudged to be declared elected to the office.

The existence of the above-stated grounds were denied by each of the appellees in the suits against them respectively, and they also preferred various grounds of counter contest against their adversaries, among which they alleged that each of the appellants had committed the same violation of the Corrupt Practices Act which the appellants charged against them.

[1, 2] (a) The contention that appellants are entitled to be adjudged to have right to the offices in the event it should appear that the appellees have forfeited their rights to same by violations of the Corrupt Practices Act will be first considered.

Section 11 of chapter 13 of Session Acts 1916, usually called the Corrupt Practices Act, provides as follows:

"In any contest over the nomination or election of any officer mentioned in this act, it may be alleged in the pleadings that the provisions of this act have been violated by the candidate or by others in his behalf with his knowledge, and if it so appears upon the trial of said contest, then said nomination or election shall be declared void, and it is hereby provided that the candidate who has received the next highest number of votes and who has not violated the provisions of this act shall be declared nominated or elected unless it also appears that one of the parties to the contest received a plurality of the votes cast and did not violate the provisions of this act."

Until the enactment of the above statute it had been held continuously by this court that, although the candidate who received a majority or plurality of the legal votes cast at an election for an office should be ineligible to hold the office or should be guilty of some act which would work a forfeiture of the right to qualify or hold the office, an opposing candidate who received neither a majority nor a plurality of the legal votes cast was not elected to the office nor entitled to hold it, although he was eligible, and had not forfeited his right to hold such office. *Howes v. Perry*, 92 Ky. 260, 17 S. W. 575, 13 Ky. Law Rep. 483, 36 Am. St. Rep. 591; *Grinstead v. Scott*, 82 Ky. 88; *Stevens v. Wyatt*, 16 B. Mon. 542. In the late case of *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303, L. R. A. 1918E, 581, the portion of the above

statute which provides for declaring one elected to an office who has received neither a majority nor a plurality of the legal votes cast was held to be in contravention of the Constitution and void, and the former doctrine adhered to that one cannot be entitled to an office by reason of an election at which he received neither a majority nor plurality of the legal votes cast, although the candidate who received a majority or plurality of the legal votes was ineligible or had forfeited his right to hold the office by violations of the Corrupt Practices Act. When an election for an office results in the selection by a majority or plurality of the legal voters of an individual who is ineligible or who, by failure to comply with the law regulating elections, had forfeited his right to qualify and hold the office, the result is a vacancy in the office.

[3] It is insisted that the votes cast for appellees in the November election at which they were selected for the offices by receiving a majority of the votes cast were not legal votes, because of the violations of the Corrupt Practices Act by the appellees before and at the primary election, and for that reason they had no right to have their names printed upon the ballots to be used at the November election, and hence that the votes cast for them should be ignored and disregarded in a computation of the legal votes cast at the November election. In support of this contention the cases of *Edwards v. Loy*, 113 Ky. 746, 68 S. W. 1091, 24 Ky. Law Rep. 545, and others are relied upon, but we do not think that they have any bearing upon the question in hand. The law in force at the time of *Edwards v. Loy*, supra, provided that, if a voter desired to vote for one whose name was not upon the ballot, he should write it thereon at the proper place, and then make a cross-mark in the square opposite the name. Loy's name was not upon the official ballot, and certain clerks of the election, without being requested to do so by the voters, wrote Loy's name under the device of the candidate of the Democratic party, as though he was a nominee of that party, and several hundred voters stamped these ballots under the device at the head of the column, and it was held that the votes should not be counted for Loy nor affect the result of the election because the voter had failed to comply with the requirements of the law so as to legally vote for a candidate under such circumstances, as the clerk was without authority to write Loy's name on the ballot, and the voter, to vote for a candidate not upon the ballot, must write his name thereon, or request that it be written thereon, and stamp the square at the end of the name. A distinction is drawn between the failure of a voter to comply with the requirements of the law in preparing his ballot, voting upon and depositing it, and the derelictions, faults, or mistakes of the officers in charge of the election. In

the first instance the voter must suffer the penalty of losing his vote, in other words, it is not a legal vote, but in the latter instance he does not. *Bates v. Crumbaugh*, 114 Ky. 464, 71 S. W. 75, 24 Ky. Law Rep. 1205. If the name of a candidate is illegally printed upon the ballot, is put upon it by some one having no authority to do so, and contrary to law, it is held that votes cannot be counted as having been cast for him. *King v. McMahan*, 179 Ky. 536, 200 S. W. 956; *Parish v. Powers*, 127 Ky. 169, 105 S. W. 391. Such, however, is not the situation here. Under the provisions of the Statutes which govern primary elections and control the manner of making nominations, the board of election commissioners must give a certificate of nomination to the candidate at the primary election who received a majority or a plurality of the votes cast as appears from a tabulation of the returns, and when the candidate shall have filed a post-election statement of his expenditures as provided by section 4, chapter 13, Session Acts 1916, and if the board of election commissioners should refuse to grant such certificate, the members of it may be required by mandatory injunction to assemble and issue the certificate. The members of the board nor the board itself has any judicial discretion in the matter. *Ward v. Howard*, 177 Ky. 38, 197 S. W. 506; *Lay v. Rose*, 177 Ky. 306, 197 S. W. 921; *Hays v. Combs*, 177 Ky. 355, 197 S. W. 788; *Sparkman v. Saylor*, 180 Ky. 263, 202 S. W. 649.

[4] When the certificate shall have been seasonably filed with the clerk of the county court or other officer designated by statute according to the nature of the office, not only is it the duty, but he may also be required by mandatory injunction, to cause the name of the nominee as it appears from the certificate to be printed upon the ballot for the election at which such office is to be filled by election. Neither the election commissioners nor the clerk can refuse to perform the above-prescribed duties, except in obedience to the judgment of the court when an opposing candidate to the one shown to have been nominated upon the face of the returns shall have instituted a contest and succeeded in having the apparent result changed or the certificate, if issued, declared invalid, or the nomination adjudged to be void.

[5] While the Corrupt Practices Act provides that in a contest over a nomination, if it appears that the successful candidate has violated the provisions of the act, the court shall adjudge the nomination to be void, it does not declare the nomination to be void on account of violations of the act which may have been committed ipso facto, but, a violation of the act appearing to a contest proceeding, the court shall declare the nomination to be void. Hence, if the act has been violated in securing a nomination, the nomination does not become void until it has been so adjudged in a contest proceeding, and if it is

never impeached by such a proceeding, it is prima facie valid, and the name of the nominee is legally printed upon the ballot. Hence it follows that the name of one who holds a certificate of nomination which has not been adjudged invalid is not illegally printed upon the ballot when it is done by the officers of the law whose duty it is, according to provisions of the statute, to do so, and who have no discretion in the matter, and may be compelled by injunction to perform the duties if they shall refuse.

In *McKinney v. Barker*, supra, it was held that the successful candidate, by his failure to file a pre-election statement of his expenditures, forfeited his right to hold the office when elected, and his election was void because of that fact. The votes which were cast for him, however, were held to be legal votes, as the voters themselves, being eligible to vote, had not neglected any duty which was incumbent upon them in any manner of casting their votes. In the instant cases the eligibility of the voters for the appellees is not questioned, nor is it contended that any of them voted in a manner contrary to that provided by law for the exercise for their rights of suffrage.

[6, 7] Since the appellants are not in any event entitled to the offices in controversy, it is unnecessary to consider the various grounds of counter contest preferred against them by the appellees, nor their alleged compliance, or failure to comply with the provisions of the Corrupt Practices Act. The appellants are, however, entitled to contest the election of the appellees, although they would not be entitled to the offices if the elections should be adjudged to be void. *Grinstead v. Scott*, 82 Ky. 88; *McKinney v. Barker*, 180 Ky. 523, 208 S. W. 303, L. R. A. 1918E, 531.

[8] (b) Whether a violation of or a failure to comply with the requirements of the Corrupt Practices Act by a candidate for a nomination at a primary election is available as a ground of contest of his election at the final election when he had received a certificate of nomination and filed same with the officer provided by law for that purpose, and his name printed upon the ballots to be used at the election in the regular way, and when his nomination, nor the certificate thereof, was ever set aside nor held invalid previous to the election, presents a question not heretofore decided. To a decision of this question it is necessary to consider the terms of the statute, and to ascertain the intentions of the Legislature upon that subject, as previous to the enactment of the Corrupt Practices Act there was no warrant for adjudging an election to be void on account of a failure to file statements of expenditures, or for other requirements of the act, nor on account of the illegal use of money in the election, unless there was such bribery in the conduct of the election that neither party could be adjudged

to have been fairly elected. Section 1596a, subsec. 12, Ky. Stats.

[9, 10] It will be observed that the statute (section 11, c. 18, Session Acts 1916) provides that "in any contest" for the nomination or election of any officer mentioned in the act, "if it appears on the trial of said contest" that a candidate has violated the provisions of the Corrupt Practices Act, or any one has done so in behalf of the candidate and with his knowledge, "then said nomination or election shall be declared void." As a matter of course the act does not contemplate that in a contest of a nomination a violation of the provisions of the act in the final election should render the nomination void because the things which might occur in the final election have not then occurred; and it will be observed that the statute does not in express terms nor by necessary implication provide that a violation by the candidate of the provisions of the act in securing his nomination shall render his election to the office void where his name has been legally printed upon the ballot. The act by all of its sections distinguishes the sums of money which a candidate for any nomination may expend in securing his nomination from the sums which he may lawfully expend in promoting his election thereafter to the office for which he was nominated.

The acts relating to primary elections do not provide for any one other than a candidate for a nomination making a contest over a nomination. Section 1550, subsecs. 27, 28, Ky. Stats. In contests over nominations the statutes require the contestee to answer in not less than three nor more than ten days the grounds of contest contained in the notice; the judge of the circuit court must forthwith proceed and dispose of the contest; the parties may have five days each for the introduction or taking of their evidence in chief, and one day each thereafter to offer evidence in rebuttal; and these periods are fixed as the limit of the time wherein proof can be taken, unless the ends of justice require an extension of time and it is granted by the court. The evident intention of the Legislature, in accordance with the public policy of the state upon that subject, was to provide by law for a speedy determination and adjustment of controversies and disturbances over nominations, as well as contests of final elections, and there is not much doubt of the wisdom of the policy which contemplates that an end of such controversy should be speedily made. It was held in *Sparkman v. Saylor*, 180 Ky. 263, 202 S. W. 649, that a defeated candidate at an election could not question the validity of an election on account of any violation of the Corrupt Practices Act by the successful candidate, except by way of a contest filed in the time and manner prescribed by law. It would follow from analogy that a defeated candidate for nomination should not be permitted to question

the validity of the nomination on account of violations of, or failure to comply with, the Corrupt Practices Act by his opponent, except by a contest filed in the time and in the manner provided by law. The statute provides the necessary means to have redress for any grievances arising from an infraction of the law occurring in primary elections, and prescribes the time and manner in which the validity of a nomination may be impeached, and, if advantage is not taken of the time and manner prescribed by law for the impeachment of the nomination, it would follow that there is no machinery of the law by which it can be done thereafter. This is in accordance with the law, which applies to a redress of a grievance upon every other subject, and there seems to be no reason why it should not be also applicable to relief sought on account of violations of the Corrupt Practices Act and failure to comply with such acts as may occur at primary elections. Hence it is concluded that the Statutes, supra, providing, for declaring a nomination to be void on account of violations of the Corrupt Practices Act, mean violations of that act in securing the nomination; and the authority it confers to adjudge an election to be void on account of the violations of the Corrupt Practices Act means violation of the act in securing the election, and not of those infractions of the law committed in securing the nomination, as it will be observed that the statute limits the power of the court in adjudging a nomination or election to be void to such violations of the Corrupt Practices Act as appear in the contest, and these violations that appear in a contest of the election do not include those which may have occurred in securing the nomination. Having arrived at this conclusion, it will be unnecessary to consider the large volumes of evidence taken by the parties in the contest of the nomination in the suits filed on September 1st and which has since been filed as evidence in these actions, and this conclusion arises aside from the fact that the suits impeaching the nominations filed on September 1st were instituted long after the time had expired within which suits contesting nominations could be maintained. *Ward v. Howard*, 177 Ky. 38, 197 S. W. 506.

[11] (c) The allegations of the petitions in setting forth the grounds of contest are very general and indefinite, and although the contestees made motions to require the contestants to make a more specific declaration of their grounds of contest, the motions were never passed upon, and the contestees did not seek the judgment of the court upon the motions, and hence waived the grounds of the motions.

[12-14] The evidence touching violations of the Corrupt Practices Act in securing the nominations at and before and following the primary election having been eliminated, there is only left for consideration the evi-

dence having relation to violations and failure to comply with the Corrupt Practices Act touching the final election. This evidence entirely fails to prove any violation of the Corrupt Practices Act by either of the contestees or by any person in behalf of either of the contestees, with the knowledge of such contestee, in aid of their elections, at the final elections in November, 1917, or a failure of either of the contestees to file proper pre-election and post-election statements of expenditures. Copies of neither the pre-election nor post-election statements filed by contestees are in the record, and there is no evidence showing that either of them made any expenditures not shown in the statements, or that expenditures were made and reported in the statements as having been made for one purpose which were made for another; neither does it appear from any source what the expenditures were as shown by the statements, except the gross sum shown by the post-election statements, the largest of which was that of Johnson, and which was less than \$130. The deposition of contestee Horn was taken by contestants, and exhibits a strong case of evasiveness and want of candor and a memory of events extremely faulty. The deposition of an ex-sheriff who was a partisan of the contestees was also taken by contestants, and he details a remarkable circumstance of some one whom he does not remember handing to him a package of money upon the street, or else he found it lying upon his office table, marked with the name of a polling place thereon, and that he took and used the money, promoting the election of the contestees, giving it to any one desiring it, but he did not count the money, and does not remember to whom he gave it, and has no idea how much money there was or from what source it came to him, and has no memory of any person who was present when he received it, but does remember that neither of the contestees had any connection with it, and yet he unhesitatingly spent the money, the ownership of which he did not know, for contestees. The lack of memory exhibited by this witness as to persons, times, and places is strangely remarkable in view of the fact that apparently his friends permit him to go at large unaccompanied, and doubtless dependent upon his own memory as to where his home is when he desires to return to it, as well as the proper times at which he should take his victuals. Such evasiveness and want of candor necessarily creates a strong suspicion that the contestees or one of them furnished the money and that it was used in his behalf, or at least with his knowledge, for corrupt purposes, but, in the absence of some affirmative evidence connecting the contestees with a knowledge of it, it is insufficient to bring home to them any violation of the law, and the burden of proving the grounds of contest rests upon the appellants. The use of money either directly or indirectly by a can-

didate in the promotion of his election, except for legitimate purposes, would forfeit his election under the Corrupt Practices Act. The use of it, however, to have that effect, would have to be by the candidate, or in his behalf and with his knowledge. *Graham v. Alliston*, 180 Ky. 687, 203 S. W. 563; *Van Meter v. Burns*, 176 Ky. 153, 195 S. W. 470.

The admission by Horn that previous to the election he had promised a deputyship to a voter is not a ground for adjudging his election void, under the Corrupt Practices Act. *Graham v. Alliston*, supra; *Van Meter v. Burns*, supra.

The judgment in each of the cases is therefore affirmed.

#### WOLFE et al. v. BAILLY et al.

(Court of Appeals of Kentucky. May 30, 1919.)

#### 1. HIGHWAYS §77(7) — CLOSING OF PUBLIC ROAD—USE AS PRIVATE PASSWAY—PLEADING.

The failure of owners, excepting to closing of public road, to allege a prescriptive right to use of the road as a private passway will not preclude court, in closing of road, from giving owners the right to use as much of the road as a private passway as is necessary to ingress and egress to their premises.

#### 2. HIGHWAYS §77(5)—CLOSING OF PUBLIC ROADS—BURDEN OF PROOF.

In proceeding to close public road, where closing of the road is excepted to by owners, claiming the need thereof for ingress and egress to their premises, the burden of proof, under Civ. Code Prac. § 526, was on the owners.

#### 3. HIGHWAYS §77(9) — CLOSING PUBLIC ROAD—DECISIONS APPEALABLE — ORDER OF COUNTY COURT.

Under Ky. St. 1909, § 4303, an appeal from county to circuit court may be taken from order closing public road, notwithstanding that no such right of appeal is given by Laws 1914, c. 80.

#### 4. HIGHWAYS §77(9) — CLOSING PUBLIC ROAD—APPEAL FROM COUNTY TO CIRCUIT COURT—TIME FOR TAKING.

An appeal from order of county court closing public road may be taken to the circuit court within 60 days, under Ky. St. 1909, § 4303; the requirement that appeal be taken within 30 days having reference to private passways.

#### 5. APPEAL AND ERROR §907(2)—REVIEW—PRESUMPTIONS.

In the absence of sufficient evidence in the record to enable appellate court to determine whether trial court acted properly, appellate court will presume that the judgment is correct.

Appeal from Circuit Court, Grant County.

Petition by Louis Wolfe and others to close a public road, to which William Bailey

and others filed exceptions. From judgment closing the road as a public road, but giving exceptors the use thereof as a private passway, the petitioners appeal. Affirmed.

C. C. Adams, of Williamstown, for appellants.

J. J. Blackburn, of Williamstown, for appellees.

QUIN, J. Appellants filed their petition in the Grant county court, asking that 1,400 feet of the Crooked Creek dirt road in Grant county be closed, because the said road was paralleled by a turnpike road and the dirt road was no longer needed for use, and the new road served every purpose for which the original roadway was established and designed.

Notice of the application for the closing of the road was duly advertised by printed notices and newspaper publication. Its discontinuance was approved by the county road engineer, and by the viewers appointed by the court.

Exceptions were filed by appellees to the closing of the road, and upon a trial it was adjudged that the section of the dirt road in question be closed and discontinued. Appellees appealed from this judgment to the circuit court, and executed a supersedeas bond on the appeal.

The grounds of the appellees' exceptions were that the road sought to be closed was their only outlet to travel to church, school, store, postoffice, and that the lands owned by the appellees would be inaccessible if the road was ordered closed, and would impair the value of their land. To these exceptions appellants filed an answer or response, denying the grounds above referred to, and alleging, among other things, the road had not been used for nine years; that it had been fastened up for at least two years, and that the exceptors had other ways of ingress and egress, and they would not suffer any inconvenience from the closing of the road.

In the circuit court certain motions filed by the petitioners were overruled, a trial was had, and the court entered a judgment sustaining the judgment of the county court closing and discontinuing the dirt road for the distance above referred to, as a public road of Grant county; but inasmuch as the appellees had no way of reaching the other public roads of the county, it was adjudged that appellees were entitled to the uninterrupted use of said dirt road as a private passway for themselves and those claiming under them, from the point where they entered the old road, indicated by a gate, to its intersection with the Grant and Pendleton county turnpike at the end of said old road. By said judgment appellants were given the

right to erect and maintain a gate over and across said road at its intersection with said turnpike for the convenience and benefit of the appellees and those claiming under them. From this judgment the present appeal has been prosecuted.

[1, 2] It is urged there was no prescriptive right of a private passway pleaded by appellees, and therefore the court had no right to hear any testimony on this point, but it is alleged in the petition that it was a public road. If so appellees were certainly entitled to use it as such, and appellants would seemingly have no cause to complain because it was closed to the public; the use of only so much of it granted appellees as would give them the right of ingress and egress to their premises. Besides, in the absence of the evidence, we do not know what testimony was given. Nor do we think the court erred on the question of the burden of proof; the burden of the whole action being on the party who would be defeated if no evidence was given on either side. Civil Code, § 526; Barrall, etc., v. Quick, 111 Ky. 22, 63 S. W. 33, 23 Ky. Law Rep. 421.

[3] The main contention of the appellant is that there was no right of appeal to the circuit court. It being contended that the act of March 23, 1914, especially what is now section 4356s of the Kentucky Statutes, repealed so much of the old law as allowed appeals in these cases. But in making this point counsel has doubtless overlooked the case of Gratzner v. Gertsen et al., 181 Ky. 626, 205 S. W. 782, wherein this question is discussed at length, and the court holds that while an appeal is not expressly given by the act of 1914, an appeal is allowed by section 4303 of the Statutes (Edition of 1909), which was in force when the act of 1914 was passed. And while section 89 of the act of 1914 attempts to repeal many sections of the 1909 Statutes, including section 4303, this court has held in two instances that, being violative of section 51 of the Constitution, it did not operate as a repeal of any of the sections therein named, because the title to the act of 1914 did not purport to repeal any of said sections. See Exall v. Holland, 166 Ky. 315, 179 S. W. 241; Fitzpatrick v. McGinnis, 174 Ky. 600, 192 S. W. 651.

[4] The point is also made that the appeal was not taken in time. By reference to the same section, to wit, 4303 (Stats. of 1909) it will be found that this point is without merit. The section relied upon by counsel for appellant, to the effect that an appeal must be taken in 30 days, refers to private passways. The exceptors had 60 days under section 4303 within which to take their appeal, and it was taken within that time.

[5] It is stated in the judgment of the circuit court that the court heard certain

evidence, but there is no transcript of this evidence before us. In the absence of sufficient evidence in the record to enable the court to determine whether the trial court acted properly, this court will presume that the judgment is correct, and will be affirmed. We should have before us the entire record upon which the lower court based its conclusions; otherwise we cannot intelligently review the action of the lower court. *Shelby v. Johnson*, 158 Ky. 585, 163 S. W. 679; *Myers v. Saltry*, 163 Ky. 481, 173 S. W. 1138, Ann. Cas. 1916E, 1134.

Wherefore the judgment is affirmed.

GREENE, Auditor, v. FEDERAL COAL CO.

(Court of Appeals of Kentucky. June 10, 1919.)

1. TAXATION ⚡535—REFUNDING TAX PAID.

Ky. St. § 162, does not authorize the return by the state auditor of a tax improperly assessed against or paid by an individual taxpayer; the primary object of the statute being to authorize the auditor to refund to officers who collected taxes due the state and paid more into the treasury than was in fact due from them.

2. TAXATION ⚡535 — REFUND OF TAXES PAID.

The tax imposed by Ky. St. Supp. 1918, § 4019a9, for recording mortgages is a tax upon the indebtedness and not the land, and the one paying such a tax is not entitled to a refund on the ground that he did not have title to the land, and the mortgage was subsequently canceled, although such person really believed he owned the land at the time the mortgage was executed.

3. TAXATION ⚡538 — RECOVERY OF EXCESS PAID.

Where one voluntarily pays taxes to the county clerk, who pays it to the state auditor, he cannot recover such money from the state auditor, although he paid such money under a mistake of law and fact, and although such money was not due.

Appeal from Circuit Court, Franklin County.

Proceeding in mandamus by the Federal Coal Company against Robert L. Greene, Auditor. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Charles H. Morris, Atty. Gen., and D. M. Howerton, Asst. Atty. Gen., for appellant.

Thomas B. McGreagor, of Frankfort, and N. R. Patterson, of Pineville, for appellee.

SETTLE, J. This appeal brings to us for review a judgment of the Franklin circuit court granting the appellee, Federal Coal Company, a writ of mandamus directing the



appellant, Robert L. Greene, as auditor of public accounts of the state of Kentucky, to draw his warrant on the treasurer of the state in appellee's favor for \$2,700 alleged to have been paid by the latter under a mistake of law and fact to the clerk of the Bell county court as a tax due the state for the recording in his office of a mortgage on real estate executed by appellee to secure a loan of \$1,350,000 made it by the Chattanooga Savings Bank of Chattanooga, Tenn. The circuit court overruled a demurrer filed by appellant to the petition, and the latter's refusal to plead further resulted in the judgment appealed from.

The facts are that some time prior to September, 1917, appellee purchased of one C. M. Preston, trustee in bankruptcy of the Continental Coal Corporation, 16,000 acres of land in Bell county, and received of him a deed to same; and on the 15th of September, 1917, appellee borrowed of the Chattanooga Savings Bank the \$1,350,000 mentioned, and then executed to it the mortgage on the 16,000 acres of Bell county land to secure its payment, which mortgage was on the same day duly acknowledged by the mortgagor, lodged for record in the office of the clerk of the Bell county court, and in due course recorded therein. Upon lodging the mortgage in his office for record, appellee paid W. C. Bingham, clerk of the Bell county court, his fee for recording the instrument and in addition \$2,700; the latter sum being the total amount of a tax of 20 cents upon each \$100 of the \$1,350,000 indebtedness secured by the mortgage in question, which tax was imposed in behalf of the state of Kentucky by the Revenue Act of 1917 (chapter 11). Subsequent to September 24, 1917, suit was instituted in the United States District Court for the Eastern District of Kentucky by S. Thruston Ballard and others against the Continental Coal Corporation, C. M. Preston, its trustee in bankruptcy, the appellee, Federal Coal Company, and the Chattanooga Savings Bank, seeking a cancellation of the deed from Preston, trustee, conveying to the appellee the 16,000 acres of Bell county land, and also the cancellation of the mortgage from the latter executed to the Chattanooga Savings Bank. Thereafter a decree was rendered in that action by the federal court canceling the deed, also the mortgage, in question, and appointing one J. M. Gilbert special commissioner of the court to enter upon the record of the office of the clerk of the Bell county court such cancellations, which was accordingly done by the commissioner.

The present action to recover of the appellant, Robert L. Greene, auditor of public accounts for the state of Kentucky, the \$2,700 tax paid by appellee to the clerk of the Bell county court upon the recording of the mortgage made by it to the Chattanooga Savings Bank was instituted in the Franklin

circuit court March 20, 1919; the grounds alleged in the petition for its recovery being that, as appellee did not acquire any title to the lands conveyed it by the deed from Preston, trustee, or in fact own them when it executed and caused to be recorded the mortgage, it was not liable for the tax paid the clerk of the Bell county court upon the recording of the mortgage, and is therefore entitled to recover it of the appellant auditor, to whom it was paid by the clerk, and, further, that the payment of the tax was made under a mistake both of law and fact on its part.

[1] It is insisted by appellee that the recovery of the tax was authorized by Kentucky Statutes, § 162, which provides:

"When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. \* \* \*

Under the decision of this court the recovery of the tax cannot be sustained upon the ground indicated. In *German Security Bank v. Coulter*, Auditor, 112 Ky. 582, 66 S. W. 425, 23 Ky. Law Rep. 1888, it was held that the primary object of the statute supra was to authorize the auditor to refund to officers who collected taxes due the state and paid more into the treasury than was in fact due from them, and that it was not intended to authorize the return by the auditor of a tax improperly assessed against or paid by the individual taxpayer. In *County v. Bosworth*, Auditor, 160 Ky. 312, 169 S. W. 742, in interpreting this statute, we in part said:

"We do not believe that the Legislature ever intended to enact a law that would permit any person who thought he had been required to pay a greater amount of taxes than he thought to be due, or to pay taxes on property that he considered exempt, or even to pay taxes to the sheriff or collecting officer of a county, through mistake, to appear before the auditor of public accounts and require him to take up the \* \* \* merits of the claim; and then if it appeared to him that the tax had been improperly paid to draw his warrant on the treasurer for the amount appearing to him to be due the claimant."

The same construction has been given the statute in the following cases later decided: *Bosworth v. Metropolitan Life Ins. Co.*, 162 Ky. 344, 172 S. W. 661; *Louisville Gas & Electric Co. v. Bosworth*, 169 Ky. 824, 185 S. W. 125.

[2] The tax paid by appellee was imposed by section 4019a9, Kentucky Statutes, which provides in part:

"A tax of twenty cents (\$.20) is hereby imposed upon each one hundred dollars (\$100.00) or fraction thereof of indebtedness which is or may be, in any contingency secured by any mortgage of property in this state, which mortgage shall be lodged for record after this act goes into

effect where the indebtedness does not mature within five years. \* \* \*

The word "mortgage" is thus defined in a previous paragraph of the same section as follows:

"The word 'mortgage' as used in this section shall include any instrument creating or evidencing a lien of any kind upon property given or taken as security for debt and shall include vendors' liens and executors' contracts for the sale of property under which the vendee is entitled to the possession thereof. \* \* \*

It is admitted in this case that the mortgage secured an indebtedness of \$1,850,000, which did not mature within five years; that the mortgage was a recordable instrument, was duly recorded in the proper office, and that appellee paid the clerk the tax. It will be observed that the tax is not imposed upon the mortgage by the statute, but upon the indebtedness secured by the mortgage. The instrument constituting the mortgage evidences the indebtedness and enables the clerk to know the amount of the indebtedness and the amount of tax to be collected upon the indebtedness, the thing taxed.

It is appellee's contention that the tax was paid under a mistake of law or fact. But the mistake consisted of its belief that it owned the title to the land when it did not. It is not claimed that there was any mistake as to its indebtedness to the bank; for the money was admittedly borrowed by it of the bank, and it was not relieved of the indebtedness by its loss of the land by the decree of the federal court. There was no mistake about the execution of the mortgage or the recording of same, and no duty rested upon the county clerk to ascertain whether appellee's title to the lands covered by the mortgage was good or bad; nor was he under any duty to pass on the sufficiency of the security afforded by the mortgage. The duty of the clerk went no further than to know that there was an indebtedness on property evidenced by the mortgage, that such indebtedness would not mature within five years, and to collect the tax due on the amount of such indebtedness and record the mortgage. Manifestly the facts here shown give appellee no right to the return of the tax paid by it. If the right to recover of the auditor the tax received by him through the county clerk could arise from or because of appellee's loss of the lands embraced in the mortgage, or the consequent destruction of the security it had given its creditor by the mortgage, it could on the same grounds recover of the county clerk the fees it paid him for recording both the deed from Preston, trustee, to it and the mortgage it executed to the Chattanooga Savings Bank. Indeed, a recovery back of the tax in this case would authorize its recovery in every instance where the mortgagor or maker of the lien happened to be deceived or mistaken as to his title to the

property mortgaged; and to permit such procedure would involve the auditor in almost constant litigation and amount to an abuse of the law. It is the duty of one giving a mortgage or other lien on his property to know that his title to the property is good, and if by his laches or any misfortune or accident he loses the property after giving the mortgage and paying the tax due upon recording it, he cannot make the state the victim of his misfortune. The appellee is not in the attitude of one of whom a tax has been illegally collected. It was legally liable for it when paid, and the fact that the discovery has since been made that its payment might have been avoided will not authorize its recovery.

[3] For another reason appellee cannot recover the tax. It was voluntarily paid the clerk and by him paid to the auditor. No rule of law is better settled than that which refuses the recovery of money that has been voluntarily paid into the treasury of the state, although the payer may not, in fact, have owed it. In approval of the rule *supra* we, in *L. & N. R. R. Co. v. Comlth.*, 89 Ky. 531, 12 S. W. 1064, 11 Ky. Law Rep. 734, said:

"Considerations of public policy require this rule, and the taxpayer cannot complain with grace because he has, by his own neglect, missed the opportunity afforded him by law for his protection."

In *Smith's Modern Law of Municipal Corporations*, vol. 1, § 244, "compulsion" as applied to a tax payment is defined as follows:

"It is, however, upon the whole well settled that the payment must be made under direct and immediate compulsion, and under such circumstances that the person called on to pay the tax can save himself or his property only by paying the illegal demand. The stringent application of this rule often results in hardship in individual cases; but, for the reason already stated, the general beneficence of the rule is undoubted."

The rule has been time and again approved in this jurisdiction, as an examination of the following authorities will show: *City of Louisville v. Becker*, 189 Ky. 17, 129 S. W. 311, 28 L. R. A. (N. S.) 1045; *L. & N. R. R. Co. v. Hopkins County*, 87 Ky. 605, 9 S. W. 497, 10 Ky. Law Rep. 497; *Brands v. City of Louisville*, 111 Ky. 56, 68 S. W. 2, 23 Ky. Law Rep. 442; *City of Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220—and is as strongly indorsed in numerous other jurisdictions. *Baltimore v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 145; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76. We also find that in *Cooley on Taxation*, volume 2, pp. 495-1502, the soundness of the rule is strongly commended.

It is patent in the instant case that the county clerk could not have coerced payment of this tax. Its payment was purely a vol-

untary matter with the appellee, as it had the choice to pay the tax and have the mortgage recorded or to decline to do so. The tax has been turned over to the auditor of the state, gone into the general funds of the state, and has doubtless been appropriated and disbursed as the law required. Under the circumstances thus presented the courts cannot be occupied in undoing the arrangements of parties which they have voluntarily made. So under the rule announced no escape is possible from the conclusion that appellee is not entitled to recover back the tax sued for. Hence the action of the circuit court in overruling appellant's demurrer to the petition was error.

For the reasons indicated, the judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the petition and dismiss the action.

# SAUER et al. v. TAYLOR'S EX'R et al.

(Court of Appeals of Kentucky. June 6, 1919.)

## 1. WILLS §440—CONSTRUCTION—INTENTION OF TESTATOR.

The intention of testator must be effectuated, if it can be gathered from the language of the instrument, when there are no latent ambiguities.

## 2. WILLS §470—INTENTION OF TESTATOR—CONSTRUCTION OF ALL PARTS.

In ascertaining the intention of a testator, the entire will may be looked to, and every part of it read and considered with the whole.

## 3. WILLS §488—PAROL EVIDENCE—INTENTION OF TESTATOR.

Where a will is in plain and unambiguous language, parol evidence is not admissible to show an intention different from that expressed.

## 4. WILLS §441—CONSTRUCTION OF AMBIGUOUS WILL—MOTIVES.

Where a clause or a term in a will is ambiguous, the motives reasonably supposed to have actuated the testator, the purpose of the will, the relations between testator and devisees and the nature and extent of the property may be called in to assist the language in ascertaining the intent.

## 5. EXECUTORS AND ADMINISTRATORS §129(1) — POWERS OF ADMINISTRATOR—SALE OF REALTY.

An administrator cannot sell, and has no duty to control, the real estate of the intestate.

## 6. EXECUTORS AND ADMINISTRATORS §121(2) —ADMINISTRATOR WITH THE WILL ANNEXED—SALE OF REAL ESTATE—STATUTE.

Under Ky. St. §3892, clothing an administrator with the will annexed with the powers of an executor, he may sell and convey real estate, if so authorized by the terms of the will.

## 7. WILLS §461—CONSTRUCTION—SUBSTITUTION OF WORDS.

When it is necessary to effectuate testator's intention, words may be substituted for words used, and so, where it clearly appears that he has used the word "administrator" in the sense of "executor," the court will so construe the will.

## 8. EXECUTORS AND ADMINISTRATORS §14—APPOINTMENT OF EXECUTOR.

A will bequeathing testator's entire estate to a daughter, and asking the court to appoint his brother "administrator" and guardian without bond, with power of attorney to sell and handle the property, manifested testator's intention to nominate his brother as executor, so that his appointment by the court as executor was proper.

## 9. EXECUTORS AND ADMINISTRATORS §138(1) —SALE BY EXECUTOR—INTENTION OF TESTATOR.

Where a will bequeathed testator's entire estate to a daughter, and asked the court to appoint his brother administrator and guardian without bond, and to give him power of attorney to sell and handle the property, and named administrator was appointed executor, he was authorized by will to sell and convey real estate.

## 10. WILLS §450 — CONSTRUCTION — INTENTION OF TESTATOR—MEANING OF PART OF WILL.

In construing a will, each item should be upheld, if consistent with testator's fair intention.

## Appeal from Circuit Court, Bourbon County.

Action by Duncan Taylor's executor and others against John Sauer and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Talbott & Whitley, of Paris, for appellants Sauer and Brammack.

Denis Dundon, of Paris, for appellants Caldwell and Whaley.

George Batterton, of Paris, for appellees.

HURT, J. The last will and testament of Duncan Taylor, deceased, was probated in the county court of Bourbon, on July 12, 1918. The entire instrument is as follows:

"I hereby bequeath my entire estate, both real and personal, to my daughter, Sara Winifred Taylor Chapple. I ask the court to appoint my brother, William M. Taylor, administrator of my estate, without bond, also to appoint William M. Taylor guardian for my daughter without bond, and to give him power of attorney to sell and handle said property.

"This is my last and only will.

"August 5, 1918.

Duncan Taylor.

"Witnesses:

"George R. Bell.

"Mrs. Winnie D. Ford."

When the will was probated, the county court was of the opinion that the term "ad-

ministrator," as used in the will, was used in the sense of "executor," and was so meant and intended by the testator, and permitted Wm. M. Taylor to qualify as executor of the will and to proceed to execute its provisions. The testator, at the time of his death, was the owner of an undivided one-third in certain lands, of which his brothers, Wm. M. and L. W. Taylor, were the owners of the other undivided interests. Since assuming the duties of executor, Wm. M. Taylor, as executor and in his own right, and in conjunction with his brother, who owns the other undivided interests in the lands, has entered into executory contracts of sale of the lands, by which they have sold the lands to the appellants, who have refused to accept deeds for or to pay the prices agreed for same, in accordance with the contracts. The circuit court adjudged that appellees had tendered deeds to appellants in accordance with the contracts, and that appellants should pay the prices agreed upon for a conveyance of the lands.

The vendees appeal, and insist that William M. Taylor, as executor of Duncan Taylor, is not authorized to sell and convey the undivided interest in the lands owned by the testator, and in fact that the will did not nominate him as an executor, and that his appointment as such was not authorized. Hence two issues are presented by the record here for decision: (1) Does the will nominate William M. Taylor as its executor, and was the action of the county court, in appointing him as executor and permitting him to qualify as such, authorized and valid? (2) Does the will empower an executor of it, or an administrator of it with the will annexed, to make a valid sale and conveyance of testator's interest in the lands? They will be considered in their order, and, first, should the term "administrator," as used in the will, be construed to be "executor," and to have been used by the testator in the sense of executor, and to have been so meant and intended by him?

[1] This question, we think, should be answered in the affirmative. The instrument was evidently drafted by a layman, who was unacquainted with legal terms, and whose knowledge did not fully comprehend the definite lines upon which the power of a personal representative must be acquired, and must proceed, in the matters connected with the administration of an estate, and did not differentiate between an administrator and an executor. As has been said so many times, by this court and other courts, and so often declared by text-writers, the intention of a testator must be effectuated, if it can be gathered from the language of the instrument, when there are no latent ambiguities. This intention must prevail in all cases, unless the intention is one contrary to law, and other rules of construction must give way, if they lead to a result contrary

to the manifest intention of the testator. *Watkins v. Bennett*, 170 Ky. 469, 186 S. W. 182; *Carroll v. Cave Hill Cemetery Co.*, 172 Ky. 204, 189 S. W. 186; *Anderson v. Hall's Adm'r*, 80 Ky. 91; *Patrick v. Patrick*, 135 Ky. 307, 122 S. W. 159; *Bayless v. Prescott*, 79 Ky. 252; *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 396, 8 Ky. Law Rep. 193; *Cook v. Hart*, 135 Ky. 650, 117 S. W. 357, and many others.

[2] In ascertaining the intentions of a testator, the entire will may be looked to, and every portion of it read and considered with the whole. *Duncan v. Berry's Adm'r*, 142 Ky. 178, 183 S. W. 1148; *Gray v. Garnett*, 148 Ky. 34, 146 S. W. 18; *Hanna v. Prewitt*, 153 Ky. 310, 155 S. W. 726; *Watkins v. Bennett*, *supra*.

[3] Where the will is in plain and unambiguous language, the intention must be ascertained from the language of the will itself, and parol or other extrinsic evidence is not admissible to show an intention which is different from that expressed in the will. *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. 345, 15 Ky. Law Rep. 294; *Long v. Duvall*, 6 B. Mon. 219; *Mudd v. Mullican*, 12 S. W. 263, 11 Ky. Law Rep. 417; *Carroll v. Cave Hill Cemetery Co.*, *supra*.

[4] But where a clause in a will is ambiguous, or a term used is ambiguous, "the motives which can reasonably be supposed to have actuated the testator, the purpose of making the will, the relations between the testator and the devisees, and the nature and extent of the property may be called in to assist the language in ascertaining the intentions of the testator." *Carroll v. Cave Hill Cemetery Co.*, *supra*; *Watkins v. Bennett*, *supra*; *Henry's Ex'r v. Henry's Ex'r*, 81 Ky. 342; *Levy's Ex'r v. Leeds*, 151 Ky. 56, 151 S. W. 1. The testator in the instant will first devises to his daughter the entire estate, then he nominates his brother as "administrator" of the estate, and appoints him guardian for his daughter, and requests that he be permitted to qualify in each position "without bond," and then requests the court to give his brother authority to "sell and handle" the property.

[5, 6] It is a matter of common knowledge that an administrator cannot sell, and has no duty to control, the real estate of the decedent. While he can do so, it is very unusual and uncommon for a testator, or any other person expecting to die, to request the appointment by a court of any particular person as his administrator. No obligation would rest upon the court to grant such a request, and in fact the statute provides the order of precedence among persons as to who shall have a right to the office of administrator. While an administrator with the will annexed is clothed with the powers of an executor, and may sell and convey real estate, if authorized by the terms of the

will to do so (section 3882, Ky. Stats.), it is very clear that the testator did not have in mind the mere nomination of an administrator of his estate, because such person would not and could not be authorized to sell and convey the real estate by any court, and an administrator appointed by the court under the statute would have the same powers as one nominated by the testator. The manifest intention of the testator was to nominate a personal representative, who would be clothed with the powers delegated to him by the will, among which was the power to sell and dispose of all his property, including the real property. He was doing the usual thing, when a testator desires a particular person for the executor of his will; that is, he was nominating him in his will; and, if it should be construed that he was intending his brother to be an administrator, he was doing an unusual and altogether a fruitless thing. It is very clear that it was the testator's intention to nominate William M. Taylor, as the executor of his will—that is, the person to be clothed with the powers to execute the will.

[7, 8] In the construction of a will, when it becomes necessary to effectuate the intention of the testator, words and sometimes sentences may be transposed, words may be cast away, and phrases discarded, or the language used in the will may be changed and words may be substituted for others. *Cecil v. Cecil*, 161 Ky. 419, 170 S. W. 973; *Dockery's Ex'r v. Dockery*, 170 Ky. 194, 185 S. W. 849; *Hunt v. Johnson*, 10 B. Mon. 344; *Aulick v. Wallace*, 12 Bush, 533; *Barclay v. Dupuy*, 6 B. Mon. 93. It may be added that there is no warrant for changing the language, or discarding phrases or sentences or words, or transposing words or sentences, or substituting words for words used, except to carry out the purpose and intention of the testator. In the instant case, that the testator used the word "administrator" in the sense of "executor," and meant and intended thereby an executor, seems beyond doubt, and hence the county court was correct in so construing the will.

[9, 10] (b) Whether the will gives authority to the executor of it to sell and convey the real estate, it will be observed that the sole devisee is an infant. The executor was appointed in the will, the guardian of the devisee. The evident purpose of the testator was to dispose of and administer the estate with a minimum of costs and litigation. He has the greatest confidence in the judgment and integrity of the executor nominated by him, as he requested that the court should permit him to qualify without the giving of security for the execution of the trusts. The devisee of the property un-

der the will would have inherited it under the laws of descent. We must necessarily conclude that the testator had purposes and intentions in the execution of his will, and things which he desired to be done, which would not otherwise be accomplished. If the power to sell and convey the property was not given to the executor by the will, the only thing accomplished by the testator by making a will was to appoint a guardian for his daughter. A meaning should not be denied to the greater portion of the will, or in fact to any part of it, unless it is necessary to do so, and only because a construction in accordance with the intentions of the testator cannot be otherwise had. *Patrick v. Patrick*, 126 Ky. 307, 122 S. W. 159; *Duncan v. Berry's Adm'r*, 142 Ky. 178, 133 S. W. 1148; *Baird v. Rowan*, 1 A. K. Marsh. 217; *Morse v. Cross*, 17 B. Mon. 740; *Augustus v. Seabolt*, 3 Metc. 159. Each item of a will ought to be upheld, if consistent with the fair intentment of the testator.

The will requests the court to give the executor "power of attorney to sell and handle the property." In light of the fact that the county court was without authority to decree a sale of the real estate, and the circuit court could only do so by a decree to be obtained by a suit, wherein certain necessary and essential facts must be shown, and which can be done as well without an executor of the estate as with one, if it is held that the executor may not sell and convey the property, the will accomplished nothing except to name a guardian for the daughter of testator, and the remainder of the will is futile. The testator manifestly intended to clothe the executor with the power to sell, and his request of the court to give him that power probably meant only to permit the executor to qualify as such. It will be observed that the will requests the court to permit the executor to qualify "without bond." This is the popular expression upon that subject, and is universally held to mean, that he may be permitted to qualify without giving surety in his bond, as the statute explicitly requires the execution of bond in every instance of the qualification of an executor. We conclude that the executor is empowered by the will to sell the lands of decedent at his discretion, and the power to sell includes all the powers necessary to make the sale effectual, and in the instant case, the right to the possession of the proceeds being in the executor, "to handle the property" as expressed in the will, the right and power to convey is included in the power to sell. *Preuser v. Terry's Ex'r*, 16 S. W. 133, 13 Ky. Law Rep. 25; *Marrett v. Babb's Ex'r*, 91 Ky. 88, 15 S. W. 4.

The judgment is therefore affirmed.

## FISH et al. v. FISH et al.

(Court of Appeals of Kentucky. June 13, 1919.)

1. CURTESY  $\S$ 12(1/2) — ADVERSE POSSESSION.

Surviving husband's possession of deceased wife's realty as a tenant by the curtesy was insufficient to give him title thereto by adverse possession; his possession being that of a life tenant, which is not adverse to remaindermen.

2. HUSBAND AND WIFE  $\S$ 29(6)—ANTENUPTIAL AGREEMENT.

Antenuptial agreement between 64 year old husband, who owed certain obligations to his children by his first wife, with 22 year old wife, giving wife upon husband's death dower upon one-third of the home place, and a child's share in the rest of the property, in the event that a child should be born to them, but in case no child shall be born merely a child's share in the property instead of dower therein, was not inequitable or unjust.

3. HUSBAND AND WIFE  $\S$ 29(9)—ANTENUPTIAL AGREEMENT—FRAUD—SUFFICIENCY OF EVIDENCE.

In action involving question of whether antenuptial agreement was invalid because of husband's misrepresentations as to extent of his property as claimed by wife, evidence of fraud held not sufficient to authorize an annulment of the agreement.

4. HUSBAND AND WIFE  $\S$ 31(4)—ANTENUPTIAL AGREEMENT — CONSTRUCTION — "ENDOWED."

Antenuptial agreement of 64 year old husband with 22 year old wife, providing that wife shall be "endowed with one-third of the home place" of husband, and as to other property shall take a child's part, together with husband's children by his first wife, gave wife merely a life estate in one-third of the home place, and not an absolute estate therein; the word "endowed" having been used in its technical sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Endow.]

5. APPEAL AND ERROR  $\S$ 169 — REVIEW — QUESTIONS NOT ADJUDICATED BELOW.

The Court of Appeals, being a court of review and not of original jurisdiction, will not pass on questions not raised or adjudicated below.

Appeal from Circuit Court, Rockcastle County.

Suit by Lycurgis Fish and another against Vollicy Fish and others. From judgment rendered, plaintiffs appeal. Affirmed.

J. B. Adamson, of Frankfort, and Bethurum & Lewis, of Mt. Vernon, for appellants.

C. C. Williams and J. W. Brown, both of Mt. Vernon, and Hobson & Hobson, of Frankfort, for appellees.

CLAY, C. This is a contest over the division of the estate of A. T. Fish, who died in-

testate and a resident of Rockcastle county in the year 1913. The contest is between his second wife and widow, Vollicy Fish, and their daughter, Samantha Adams, on the one hand, and the issue of his first marriage on the other hand.

By his first wife, Samantha Fish, A. T. Fish had several children. On June 13, 1890, when he was 64 years of age, he married Vollicy Menifee, who was then 22 years of age, and one daughter, Samantha Adams, was born of this marriage. On the day prior to the marriage he and Vollicy Menifee entered into the following antenuptial contract:

"Know all men by these presents that we, the undersigned A. T. Fish and Vollicy Menifee, have this day entered into a marriage contract, by the terms of which it is agreed that in the event there be an heir, or heirs, born to us, and in the event that the same be living at the death of the father, A. T. Fish, and the mother also be living, then the mother shall be endowed with one-third of the home place of the father and husband. And all other property belonging to the husband at the time of his death shall be sold, and the wife, instead of dower in said property, shall take a child's part. But in the event of the husband's death without heir or heirs by the said Vollicy, his wife, then she is to take of all of his property owned by him at the time of his death, in lieu of dower, a child's part of said property."

Claiming that A. T. Fish was the owner of a tract of land consisting of 209 acres at the time of his death, Vollicy Fish and her daughter, Samantha Adams, asserted an interest therein, as well as in certain personal property left by the deceased. Their claim to an interest in the entire tract of land was resisted by his issue of the first marriage on the ground that 109 acres thereof belonged to his first wife. Thereupon Vollicy Fish insisted that if this was true, the antenuptial agreement was obtained by fraud. The further claim was made that, even if the antenuptial agreement was valid, it gave her an absolute interest in one-third of the home place, and not merely a life interest therein. She further sought to have the descendants of the first marriage of A. T. Fish charged with certain advancements.

On final hearing the chancellor upheld the antenuptial agreement, and further held that the 109 acres of land in contest were conveyed to the first wife of A. T. Fish by her father, and belonged to her children and grandchildren, and that neither Vollicy Fish nor her daughter was entitled to any interest therein. It was further adjudged that Vollicy Fish was entitled to a life interest in 31 1/2 acres, that being one-third of the adjoining tract, and the claim that the issue of the first marriage should be charged with certain advancements was rejected. From that judgment this appeal is prosecuted.

[1] 1. The evidence fully supports the chan-

cellor's finding that the 109 acres of land belonged to Samantha Fish, the first wife of the deceased, and the claim of title by adverse possession on the part of A. T. Fish cannot, of course, be sustained. On the death of the first wife, A. T. Fish, as tenant by the curtesy, was entitled to a life interest in her land, and, being a life tenant, his possession of the land was not adverse to the remaindermen. *Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575.

[2, 3] 2. But it is insisted that the antenuptial agreement should be set aside because Volley Fish claims that A. T. Fish was guilty of fraud in representing to her that the 109 acres belonging to his first wife was a part of the home place. Taking into consideration the ages of the parties and the fact that A. T. Fish owed certain obligations to his children by his first wife, it cannot be said that the provision which he made for Volley Fish was, under all the circumstances, inequitable or unjust. So it remains to determine whether the evidence is sufficient to show that he represented the home place as being larger than it actually was. The testimony of Mrs. Fish on this question is as follows: A. T. Fish said the farm was his—belonged to him; that he owned that 200 acres of land; that it was the land he lived on; before they were married he claimed he owned 200 acres. She further stated that she and Mr. Fish rode around the place, and he showed her where the lines were, and claimed all the time that he had about 200 acres. As a matter of fact, he did have more than 200 acres of land aside from that belonging to his first wife. The excess over the land owned by him at the time of his death was conveyed by him by deeds in which Volley Fish united. These tracts aggregated at least 150 acres, and Mrs. Fish admits that these tracts of land came off the boundary that Mr. Fish showed her when they rode around it. Taking into consideration these circumstances, it is clear that A. T. Fish did have 200 acres of land at the time of the alleged conversation, and it is by no means clear that he represented to her that the land owned by his first wife was a part of the home place. We therefore agree with the chancellor that the evidence of fraud was not sufficient to authorize an annulment of the antenuptial agreement.

[4] 3. Another contention of Mrs. Fish is that the chancellor erred in not adjudging her an absolute estate in one-third of the home place instead of a life estate. It may be conceded that the word "endowed" is not always used in the technical sense of "dower," but frequently has a more comprehensive meaning. After all, however, its meaning is a matter of construction, and depends on the object in view and the connection in which it is used. It is clear from the contract in question that A. T. Fish desired to make a suitable provi-

sion for his prospective wife, and at the same time be just to his children by his first wife. The purpose of the contract was to limit her dower and distributable share, and not to enlarge her rights. To this end she was "endowed" with one-third of the home farm, and not with one-third of all his lands. In view of these considerations, we conclude that the word "endowed," as employed in the contract, was used in its technical sense, and should not be construed as vesting an absolute estate.

4. The chancellor did not err in refusing to charge the children of A. T. Fish by his first wife with certain sums as advancements. Considering the large amount of property that A. T. Fish had and the size of the sums paid to his children, it is evident that the gifts were such as any father might ordinarily make to his children, without any view to a settlement in life.

[5] 5. Another error relied on was the failure of the court to require Julia Proctor to pay into court the sum of \$600, the unpaid consideration for a tract of land conveyed to her by A. T. Fish. It does not appear that this question was ever raised by any pleading in the case, or was ever passed on by the chancellor. Since this is a court of review and not of original jurisdiction, it is not our practice to pass on questions not raised or adjudicated below.

Judgment affirmed.

### HOLTON et al. v. JACKSON.

(Court of Appeals of Kentucky. June 3, 1919.)

#### 1. LANDLORD AND TENANT §63(3)—TITLE OF LANDLORD—ESTOPPEL TO DENY.

The possession of the tenant is the possession of the landlord, and the tenant is estopped to deny title in the landlord until the expiration of the term, or until vacating the premises and surrendering them to the landlord.

#### 2. LANDLORD AND TENANT §63(1)—POSSESSION OF TENANT—PRESUMPTIONS.

Possession of tenant is presumed to be amicable, and in harmony with the title of the landlord, until the contrary is shown by clear and convincing evidence.

#### 3. LANDLORD AND TENANT §63(6)—TITLE OF LANDLORD—ESTOPPEL TO DENY.

The duration of estoppel of tenant to deny title of landlord is not limited to the expiration of the lease.

#### 4. LANDLORD AND TENANT §64 — ENTRY UNDER TENANT—ADVERSE HOLDING.

One who enters under a tenant must be regarded as subservient, and not adverse to the landlord, to the same extent as the tenant.

**5. LANDLORD AND TENANT** ⚡64—**TENANT'S WIFE—ESTOPPEL TO DENY TITLE OF LANDLORD.**

The presumption is that the husband is the head of the household, and that he obtains and holds premises, not only for his own use, but for the use and benefit of his wife and family, and her possession must be considered as amicable to the landlord, so long as she remains a member of the household of the husband and tenant.

**6. LANDLORD AND TENANT** ⚡64—**TENANT'S WIFE—ESTOPPEL TO DENY TITLE OF LANDLORD.**

Wife, who entered premises with her husband by reason of the marriage relation, was, during the time she held possession with her husband, estopped to deny the landlord's title, or to claim or hold otherwise than in subservency to the leasehold.

**7. LANDLORD AND TENANT** ⚡64—**DISSEISIN—WHAT CONSTITUTES.**

Refusal of wife to pay rent or surrender premises did not amount to a disseisin or assertion of paramount title, where after refusal wife continued on the premises as the wife of her husband, who at all times acknowledged himself to be tenant of his mother.

**8. HUSBAND AND WIFE** ⚡69½ — **ADVERSE POSSESSION—DISSEISIN.**

Refusal of wife to pay rent or surrender possession on demand of landlady's agent, together with denial of right of landlady to possession and assertion of ownership, amounted to a disseisin sufficient to start the statute of limitation running, where, before refusal, the tenant, wife's husband, had deserted her, and she was in sole possession.

**9. LANDLORD AND TENANT** ⚡66(2) — **DISSEISIN—KNOWLEDGE OF LANDLORD.**

A disseisin can be worked by a tenant against his landlord only by bringing his disclaimer and hostile holding to the knowledge of the landlord.

**10. LIMITATION OF ACTIONS** ⚡118(2)—**STOPPING RUNNING OF STATUTE—BRINGING OF ACTION.**

Even though one claiming title by adverse possession brings his action prematurely, yet, if the holder of the legal title delays the filing of his answer and counterclaim until after the lapse of 15 years from the entry of the adverse claimant, the answer and counterclaim will be treated as the commencement of the action for recovery of property from the adverse claimant, and a plea of limitations will prevail.

**11. ACTION** ⚡62 — **PREMATURE COMMENCEMENT—ANSWER—RELATION BACK.**

An action to quiet title by one claiming title by adverse possession, instituted before the expiration of the statutory period, is premature, and must be dismissed, if the legal title holder traverses the petition, no matter how long the answer may be delayed.

**12. APPEAL AND ERROR** ⚡85(1)—**ERRONEOUS DECISIONS—HARMLESS ERROR.**

That trial court erred in sustaining plaintiff's right to property in question by adverse

possession is not prejudicial error, where appellants could not have sustained a cause of action for the property at the time they first asserted their claim, and judgment will be affirmed.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Mrs. Clem C. Jackson against Lucy J. Holton and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. L. McDonald and Helm & Helm, all of Louisville, for appellants.

Tyler Barnett and Dodd & Dodd, all of Louisville, for appellees.

**SAMPSON, J.** This action was instituted by Mrs. Clem C. Jackson in the Jefferson circuit court against W. A. Mills and Lucy J. Holton, to quiet her title to a certain lot and house at No. 853 Fifth street, in the city of Louisville, which she claimed by adverse possession. The litigation came about in this way:

Judge Wm. L. Jackson died March 25, 1890, leaving a widow, Sarah E. Jackson, and a daughter Mrs. Lucy J. Holton, and two sons Alex H. and William L. Jackson. By his will Judge Jackson left about \$30,000 to his widow, Sarah E. Jackson. A part of this was from life insurance policies, which was shortly thereafter collected. By consent of the members of the family, Alex H. Jackson, who resided in Louisville, undertook to manage the estate of his mother, and on July 3, 1891, purchased for his mother Sarah E. Jackson the house and lot in question, which it was agreed Alex and his wife should use as a residence, and Mrs. Sarah E. Jackson was to use as a winter home; Alex agreeing to pay the taxes and keep the property in repair as consideration for the use of the premises. The property cost \$4,800, of which \$1,800 was paid cash by Mrs. Sarah E. Jackson and the remaining \$3,000 was raised by a mortgage on the property to a building and loan association. The house and lot was deeded to Sarah E. Jackson, and this deed was duly recorded in the office of the clerk of the Jefferson County court. Shortly after the purchase of the property Alex and his wife, Clem C. Jackson, moved into the property, and for several succeeding years Mrs. Sarah E. Jackson spent her winters in the house with them until about 1896, when there was a disagreement between Mrs. Sarah E. Jackson and her daughter-in-law, Mrs. Clem C. Jackson, after which time Mrs. Sarah E. Jackson ceased to go to the home, and when in Louisville she would stay with friends or at a hotel. Her son Alex, however, continued to manage her property and look after her investments. Part of her time she spent at Riverside near Chicago, with her daughter, Mrs. Holton.



She spent perhaps some four to six months of each year with her son Alex in Louisville, from the purchase of the property in 1891 up to 1896. For some years Alex H. Jackson was a member of the partnership firm of Jackson & Mueller, which firm was engaged in real estate business; but Alex began to drink and to dissipate to such an extent that he was unfit for business, and his mother took the management of her property and business from him and placed it with his partner, Arthur E. Mueller. When this was done, Mueller, for Mrs. Sarah E. Jackson, entered into a written rent contract with Alex H. Jackson, whereby Mrs. Sarah E. Jackson leased the house in controversy to her son, Alex H. Jackson, for a term of three years, from and after June 1, 1898, at a rental of \$35 per month; Mrs. Jackson covenanting to keep her tenant, Alex H. Jackson, in quiet possession of said premises for the said term of three years. At this time Alex H. Jackson and his wife, Clem C. Jackson, were living together as man and wife.

The dissipation of Alex had lost him his partnership in the firm of Jackson & Mueller, but he was employed upon a salary basis of \$75 per month by the firm of Jackson & Mueller, and out of this \$75 Alex was required to pay \$35 per month rent to his mother for the use of the house, under his lease contract. Alex went from bad to worse, and finally, after holding his job on the salary basis and paying his rent for about four months, he left Louisville for the purpose of taking treatment for the liquor habit. His wife, Clem C. Jackson, remained in the house. He went to a small resort near French Lick, Ind., and stayed there for a short time, and returned to Louisville in no better condition than when he went away. Shortly after his return to Louisville, Alex decided to go to Chicago in an attempt to break away from his old habits and to sober up. He has remained there most of the time since. His rents being unpaid, Mrs. Sarah E. Jackson's agent, Mueller, called on Mrs. Clem C. Jackson on December 8, 1898, at the residence on Fifth street, and asked her to pay the rents. At the time Mrs. Clem C. Jackson was in bed, suffering from a broken limb. She protested she did not have the money with which to pay the rent, and, as she says, asked Mueller to provide some money from the partnership firm of Jackson & Mueller for current expenses of the house. She also testifies that she then claimed the house as her own, and that when Mueller demanded possession, and asked her to vacate the house, she refused; and she further testified that Mueller asked her what she would take to vacate the house, and she told him \$6,000, and that she would not leave it unless paid that sum.

Mueller testifies that Mrs. Clem C. Jackson called him on the phone and asked him to

come to her house to see her, and that when he reached the house she asked him to furnish money for her current expenses; that she did not claim the house as her property, but that she did say she would not move out or give possession; that she then claimed that her husband, Alex H. Jackson, was only temporarily absent. Alex went away April 13, 1899, saying he would soon return, but has never lived with appellee since. She did not pay the rents. In October, 1899, Sarah E. Jackson took her affairs out of the hands of Mueller and placed them with the Fidelity Trust Company as her agent, and the Fidelity Trust Company, through its agent, Middees, undertook to get Mrs. Clem C. Jackson to vacate the premises, but she declined, and asserted ownership of the property in herself.

On April 2, 1900, Sarah C. Jackson instituted an action in ejectment against Clem C. Jackson for the possession of the house and lot in question. To this action in ejectment Mrs. Clem C. Jackson filed the following answer:

"The defendant denies that the plaintiff, Sarah E. Jackson, is the owner of the house and lot described in the petition. She denies that the plaintiff is the owner in fee simple of the property, or by reason thereof plaintiff consented to allow defendant and her husband to keep the same, rent free. She denies that she and her husband have separated, although said husband is temporarily absent from this city."

This is the whole of the answer, and there is no prayer to it, but it is verified by the affidavit of the appellee, Clemmie Jackson, dated September 29, 1900, and it was filed in open court January 19, 1901. No further steps were taken in the ejectment proceedings until after the institution of the foreclosure proceeding to which we later advert. In August, 1900, appellee Clem C. Jackson visited her husband in Chicago, and made an effort to induce him to return to their home in Louisville. She made a similar attempt in the summer of 1901, but without success.

The mortgage executed upon the Fifth street property to a building and loan association, at the time it was purchased in 1901, had never been satisfied, although some interest had been paid upon it. On October 11, 1901, the building and loan association instituted its action against Mrs. Sarah E. Jackson to foreclose its mortgage on the house and lot in controversy and, as there was no defense to the suit, judgment was entered directing a sale of the property to satisfy the mortgage debt. About the same time the ejectment suit instituted by Mrs. Sarah E. Jackson was dismissed without prejudice. In May, 1902, the property was sold, at which sale appellant W. A. Mills, for Sarah E. Jackson, became the purchaser at the price of \$3,050, and very soon thereafter a deed was executed to Mills by the master in chancery. The money with which this

judgment was satisfied, as well as the \$1,800 which was paid at the time of the purchase of the property, was provided and paid by Mrs. Sarah E. Jackson, and this is not controverted.

After the deed was made to Mills, a writ of possession was issued on April 15, 1902, in Mills' favor and against Mrs. Sarah E. Jackson, for the property which he had purchased. The officer took the writ and called on Mrs. Clem C. Jackson at the residence on Fifth street for the purpose of executing the same, but Mrs. Clem C. Jackson refused to give up possession, telling the officer that her name was not Sarah E. Jackson, the person named in the writ, and therefore without force as to her. Mrs. Clem C. Jackson was not a party to the action to foreclose the mortgage, but after the officer had visited the house, for the purpose of delivering the possession to the purchaser, Mills, and had returned the writ, showing the fact that Mrs. Clem C. Jackson was in the possession of the premises, the name of Clem C. Jackson by some means appeared in the writ, and this matter was brought to the attention of the chancellor, and the whole proceeding was delayed, pending an investigation, which ended in a quashal of the writ as against Clem C. Jackson on May 15, 1902. Nothing further was done to oust Mrs. Clem C. Jackson from the premises in question until after she, as plaintiff, instituted this action on May 28, 1914, to quiet her title and to be adjudged the absolute owner of the entire property. Her claim can be sustained, if at all, upon 15 years' adverse possession. In bringing her action she fixed December 8, 1898, as the date from which her adverse holding and claim dates. At that time she was living with her husband as a member of his household, and he was then the tenant of Mrs. Sarah E. Jackson.

On November 14, 1914, Mrs. Holton and Mills filed their answer and counterclaim, in which they asserted title to the property under Mrs. Sarah E. Jackson, and denied the title and ownership of appellee, Clem C. Jackson, and by way of estoppel averred that she entered possession of the property as the wife of Alex H. Jackson, who was the tenant of Sarah E. Jackson, and that appellee and her said husband held the premises as tenants from 1891 up to April 13, 1899, when Alex left appellee, and that appellee thereafter held and claimed under the written lease contract which was then in existence. An estoppel against appellee, Clem C. Jackson, was also pleaded in connection with the answer she filed in the ejectment suit commenced by Sarah E. Jackson, and which answer is copied above.

[1-3] The possession of a tenant is the possession of the landlord. One who enters as a tenant under another is estopped to deny the title of the one under whom he enters until the expiration of the term of the ten-

ancy, or the tenant vacates the premises and surrenders same to the landlord. The possession obtained by a tenant is presumed to be amicable, and in harmony with the title of the landlord, until the contrary is shown by clear and convincing evidence. The general rule is that a person, once a tenant, is presumed to remain such so long as he holds possession of the lands demised. The duration of the estoppel is not limited to the expiration of the lease. 16 R. C. L. 653.

[4] One who enters under a tenant is and must be regarded as subservient, and not adverse to the landlord to the same extent as the tenant. Where the husband holds lands as a tenant, which his wife occupies with him as a home, and the wife's claim to the possession or interest in the land is under her husband an estoppel against the husband will extend to her. 16 R. C. L. 671; notes, 30 L. R. A. (N. S.) 1102.

[5] The wife of a tenant, who enters as wife and by reason of the marriage relation between her and the tenant, holds subject to the tenancy, and cannot deny the title of the landlord, so long as her husband continues to be tenant and she resides with him as wife. The presumption is that the husband is the head of the household, and that he obtained and holds the premises, not only for his own use, but for the use and benefit of his wife and family, and her possession must be considered as amicable to the landlord so long as she remains a member of the household of the husband and tenant. In *Tiffany on Landlord and Tenant*, p. 489, it is said:

"A tenant's wife, who lives upon the land with her husband, and whose entry thereon is by reason of her husband's right of possession, would seem to be within the rule of preclusion or estoppel."

In 2 *Corpus Juris*, 102, the text is:

"Where the husband is in possession as head of the family, recognition of the title of the true owner by him will conclude his wife after his death. This is true, notwithstanding the facts that the husband is a drunkard and that the wife supports the family by her industry."

The same text, on page 104, says:

"The taking of a lease by a husband, who in the eye of the law is the head of the family, is binding upon the wife in so far as it operates as a recognition of the title of the true owner."

In *Underhill on Landlord and Tenant*, § 564, the rule is stated as follows:

"The estoppel which is binding on the tenant applies with equal force to every person who by reason of privity with him enters upon possession of the demised land during the term of the lease, for where the relationship of landlord and tenant is once established the estoppel attaches to all persons who succeed to the possession of the premises, through or under the tenant. They are all bound by the implied obligation of the original tenant to acquiesce in the title of his landlord to the same extent

as though it were their own. Where the relationship of landlord and tenant is once established, it attaches to all who may succeed to the possession under the tenant."

See, also, Taylor's Landlord and Tenant, § 629; Jones on Landlord and Tenant, § 682.

[6] Let us apply these principles to the facts of this case. The husband, Alex H. Jackson, was the tenant of his mother, Sarah E. Jackson, from the purchase of the house and lot in 1891 up to the time he abandoned his wife and the premises on April 13, 1899, because he entered under an arrangement with his mother to hold for her, and which acknowledged her as owner and landlady, and on June 1, 1898, executed and delivered to her agent the written lease in evidence, whereby he undertook and agreed to pay to his mother \$35 per month rent for the use of the house and lot for the term of three years and to surrender possession thereof at the end of the term. This lease expired on the 1st day of June, 1901. He was living in the house under it at the time he deserted his wife on April 13, 1899. His wife entered with him by reason of the marriage relation, and not by reason of any contract relation which she had with the owner, Sarah E. Jackson. She manifests no right whatever to the property, except by adverse possession, and since she entered and held possession of the premises with her husband as tenant from 1891 up to April 13, 1899, she was estopped to that date to deny the title of Mrs. Sarah E. Jackson, or to claim or hold the lands otherwise than in subseignior to the leasehold.

[7, 8] This being true, her refusal to pay the rent or surrender the premises to Mueller on December 8, 1898, did not amount to a disseisin or an assertion of paramount title in her, because after that time she continued on the premises as the wife of the tenant, Alex H. Jackson, and he all the time acknowledged himself to be the tenant of his mother, Sarah E. Jackson. The Fidelity Trust Company became the agent of Mrs. Sarah E. Jackson in October, 1899, and took charge of the property in question. It sent its agent, Mr. Meddes, to call upon Mrs. Clem C. Jackson, then in possession of the house, and demand the rents, and, in case she refused to pay rents, to demand possession of the premises. This the agent did on October 31, 1899, and Mrs. Clem C. Jackson specifically denied the right of Mrs. Sarah E. Jackson to the possession and asserted ownership of the property in herself. This assertion of title and denial of the right of Mrs. Jackson was made to her agent, and therefore made to Mrs. Sarah E. Jackson. She was bound to take notice of the claim of Mrs. Clem C. Jackson, which amounted to a disseisin sufficient to start the statute of limitations running, because before that time Alex H. Jackson, the tenant, had deserted his wife, and she was in the sole possession of the

property. So situated, she could renounce the title of her landlord by bringing knowledge to her of such adverse claim, and thus set the statute of limitations running in favor of the claimant, and this she did on October 31, 1899. But to do so it was incumbent upon her to do some act which amounted to notice, or bring actual knowledge to the owner, Sarah E. Jackson.

The general rule is stated to be that a tenant cannot deny the title of the landlord until he surrenders the possession. There are several exceptions to this rule, one of them being that, when a tenant openly disclaims to hold under the lease and thereby became a trespasser, and his possession adverse, the relation of landlord and tenant is dissolved, and a right of action immediately inures to the landlord, and if he, with full knowledge of the facts, sleeps on his rights and allows the statutory period to elapse, his right of action is barred. *Willison v. Watkins*, 3 Pet. 43, 7 L. Ed. 596; this court in *Ogden v. Walker's Heirs*, 6 Dana, 420, stated the rule as follows:

"Although it is a sound and well-settled rule of law that a quasi tenant shall not dispute the title of this landlord, as long as the contract subsists and is recognized between them, nevertheless, if the landlord shall have been notified by such a tenant that he has renounced the contract, and will not continue to hold under him longer, but will hold against him, and the tenant shall, after such a virtual eviction, continue in adverse possession in fact for 20 years, he may be protected in that possession by the statute of limitations."

Again in the case of *South v. Marcum*, 58 S. W. 527, 22 Ky. Law Rep. 641, the court said:

"While the rule is that a tenant cannot ordinarily set up an adverse possession, and will be prima facie deemed to continue in that character so long as he remains in the occupation of the land, it is well settled that a tenant, who has openly disavowed the title of the landlord and notoriously held adversely to him by clear and positive claim on the part of the tenant with the knowledge of the landlord, will be protected by the statute of limitation after the lapse of the statutory period. *Angell on Limitations*, § 444. This rule was declared, after a full investigation of the subject, by the United States Supreme Court, in *Willison v. Watkins*, supra, and was approved by this court in *Sabastian v. Ford*, 6 Dana, 438, and *Whipple v. Earick*, 93 Ky. 121 [19 S. W. 237, 14 Ky. Law Rep. 85]."

[9] A disseisin can be worked by a tenant against his landlord only by bringing his disclaimer and hostile holding to the knowledge of the landlord. This rule is well stated in 2 *Corpus Juris*, p. 78, where it is said:

"If the owner has actual knowledge that the possession is adverse to his title, the occupancy need not be open, visible, and notorious, and within this rule actual knowledge of the agent

will be implied to his principal. Notoriety is important only where the adverse character of the possession is to be brought home to the owner by presumption, because no other person has any legal interest in the question or right to be informed by notoriety or otherwise."

Mrs. Jackson seems to have recognized this rule and to have been acquainted with the facts, because on April 3, 1900, she instituted a suit in ejectment against appellee for the recovery of the property in question, alleging that appellee, Clem C. Jackson, was setting up claim to the property. Appellee, Clem C. Jackson, had not been in the adverse possession of the property on Fifth street for as much as 15 years at the time of the commencement of this action on May 28, 1914, but appellants did not file their answer, setting up claim to the premises, until November 14, 1914, which date was something more than 15 years from the time the statute of limitations began to run in favor of appellee, Clem C. Jackson. The commencement of the suit in May was only a continuation of the assertion of title in appellee, and did not operate to stop the running of the statute in favor of appellee, and as appellants did not answer and assert title to the property until November 14, 1914, which was more than 15 years after the statute of limitations began to run in favor of appellee on October 31, 1899, her title was perfected in her before it was challenged by appellants, Mrs. Holton et al. In other words, had the action been commenced by Mrs. Holton et al. on November 14, 1914, the date the answer and counterclaim was filed to recover the property, it would have been barred by the statute of limitations, because more than 15 years had elapsed at that time since the renunciation of the tenancy and the disseisin by Mrs. Clem C. Jackson on October 31, 1899. 2 Corpus Juris, 109; Miller v. Gist, 91 Tex. 335, 43 S. W. 263.

[10] The bringing of the action by Mrs. Clem C. Jackson before the full period of 15 years had elapsed by which her title by adverse possession was perfected did not stop the running of the statute in her favor, and as appellants did not assert title to the property in themselves until November following, and more than 15 years after their right to the property first accrued, their right of action was completely barred, and they could not, therefore, recover.

Where one who claims title to land by adverse possession brings an action to be adjudged the owner of the property and quieted in his possession, before the expiration of the statutory period from his entry, such action does not stop the running of the statutes in his favor, because it is but a reassertion of his claim to the property; but the rule is different where the legal title holder brings the action against one claiming title by adverse possession, for the commencement of the action in such case will

stop the running of the statutes in favor of the claimant by adverse possession. So it follows that, even though one claiming title by adverse possession should bring his action prematurely, yet if the defendant who holds the legal title delays the filing of his answer and counterclaim, whereby he asserts title in himself to the land in controversy until after the lapse of 15 years from the entry of the adverse claimant, his answer and counterclaim will be treated as the commencement of the action by him for the recovery of the property from the adverse claimant, and a plea of limitation by the adverse claimant will prevail.

[11] If, however, one claiming title by adverse possession alone institutes his action prematurely seeking to be adjudged the owner of the land and to have his title quieted, his cause will fail and his action must necessarily be dismissed, if the legal title holder traverse the allegations of the petition; and no matter how long the answer may be delayed it will relate to the time of the filing of the petition, and the issue will be as to whether the plaintiff had held and claimed the lands adversely as much as 15 years next before the filing of the petition, and not for 15 years next before the filing of the answer traversing the allegations of the petition.

Ordinarily a suit of this kind is commenced by the legal title holder against the claimant in possession, and the statute of limitations is presented by the answer, but in this case the plaintiff claims title by adverse possession only, and brought her action to quiet title 14 years and 7 months after the disseisin, and the statute of limitations began to run in her favor. She was calculating the time from December 8, 1898, when she first refused to pay rents, and, so estimated, the full period of 15 years had transpired when she sued. Had the appellants, Mrs. Holton et al., claiming to be the owners through Mrs. Sarah E. Jackson, commenced this action on November 14, 1914, the day they filed their answer, a plea of the 15-year statute of limitations would have barred and tolled their right of recovery, and under the well-established rule, announced in the foregoing cases, appellant's right to the property was barred and tolled at the time they undertook to assert it by their answer and counterclaim in November, 1914.

[12] Plaintiff's cause should have been dismissed, because prematurely commenced, her claim being based upon adverse possession, and the 15-year period not having fully expired; but as appellants on November 14, 1914, made their answer a counterclaim and prayed to be adjudged the owners of the property in controversy and entitled to possession thereof, the plea of limitation presented by the reply was a good estoppel. The trial court erred in its findings of fact and of law. However, the final conclusion reach-

ed, sustaining Mrs. Clem C. Jackson's right to the property by adverse possession, is not prejudicial error, for the reason that appellants could not have maintained a cause of action to recover the property at the time they first asserted their claim by their answer and counterclaim; limitation having then barred them.

No error to the prejudice of the substantial rights of appellants appearing, the judgment is affirmed.

## LOWTHER-KAUFMAN OIL & COAL CO. v. GUNNELL.

(Court of Appeals of Kentucky. June 6, 1919.)

### 1. SPECIFIC PERFORMANCE ⇨95—ACTIONS— RIGHT TO.

The general rule is that in a suit to obtain specific performance of a contract for the purchase of land, the vendor must show performance or ability, readiness, and willingness on his part, and be able to convey a good and indefeasible title.

### 2. VENDOR AND PURCHASER ⇨172 — CON- TRACTS—RIGHT TO INTEREST.

As a general rule, where a contract of sale is silent as to interest, it is not demandable so long as the purchaser is not in default.

### 3. VENDOR AND PURCHASER ⇨172 — PER- FORMANCE—INTEREST.

Where a purchaser refused to carry out the agreement, because third persons were asserting title to the land and claiming to be in possession, the vendor, who filed a petition for specific performance and made such third persons parties, is not entitled to interest from the date of the filing of the petition, even though his title was found good, but to interest only from the time the judgment in his favor against such third persons was affirmed by the highest appellate court, to which the case was appealed.

Appeal from Circuit Court, Floyd County.

Suit by A. J. Gunnell against the Lowther-Kaufman Oil & Coal Company. From the judgment, defendant appeals. Reversed, with directions.

John D. Smith, B. F. Combs, and Harkins & Harkins, all of Prestonsburg, for appellant.

A. J. May and May & May, all of Prestonsburg, for appellee.

QUIN, J. March 3, 1905, appellee and his wife entered into an agreement with N. B. Armstrong, in which they agreed to convey to the latter 57 acres of land in Floyd county for the sum of \$10 per acre. This contract was assigned by Armstrong to the appellant.

It is provided in the agreement that the purchase price is to be paid one month after date, but before the consideration could be demanded by the vendor the number of

acres in the boundary was to be determined by actual survey, under the direction of and at the expense of vendor, who was to furnish an abstract showing title in him, and thereupon convey or tender to the vendee a general warranty deed. Vendor further covenanted that he was seized in fee simple of the land, was in actual possession thereof, had full right, power, and authority to convey same, and the land was free of all liens and incumbrances.

The purchase price not being paid, appellee filed this suit June 6, 1907, in which he attempts to state facts sufficient to entitle him to specific performance of the contract.

Appellant filed its answer, admitting the contract, and that it was ready, willing, and able to pay the purchase price as soon as appellee could comply with his part of the agreement, further alleging that Jasper Johnson and others were claiming to be the owners of the land and in possession of same. This answer was made a cross-petition against the Johnson heirs, but so much of the pleading as was made a cross-petition against the Johnsons was stricken from the record because of the failure of the appellant, on motion of the Johnson heirs, to give bond for costs; it being a nonresident.

Thereafter appellee amended his petition making the Johnsons defendants, alleging they were asserting title to the property and claiming to be in possession of the land, and were casting a cloud upon his title. As between the parties to this appeal no other pleadings were filed. A judgment was entered in favor of appellee against the Johnson heirs, quieting appellee's title to the land, adjudging costs against the Johnsons and appellee was given a lien against the land to secure the purchase price, with interest from June 6, 1907, and a sale of the property was ordered to satisfy such lien. An appeal from this judgment was taken by the Johnson heirs and the judgment affirmed. 177 Ky. 361, 197 S. W. 790.

After the return of the case appellant, on June 12, 1918, was granted an appeal by the clerk of this court. It was not a party to the former appeal.

It is stated in the brief of counsel that appellant is not seeking a reversal of the judgment in its entirety, but only from so much thereof as adjudged interest from the day the suit was filed; appellant's contention being that the purchase price was not due until appellee surveyed the land, tendered a deed, furnished an abstract of title, and could convey a good and sufficient title.

[1] Without entering into a discussion as to the state of the pleadings, and whether they entitle the appellee to the relief sought, we will direct our attention to the sole question raised by this appeal, i. e., the period for which interest should be calculated. The

general rule is that in a suit to obtain specific performance of a contract the plaintiff must show performance or ability, readiness, and willingness to perform his part of the contract. He must be able to convey a good and indefeasible title, unless the vendee assume the risk as to the title. 36 Cyc. 693, 694; Jarman v. Davis, 4 T. B. Mon. 115; Bartlett v. Blanton, etc., 4 J. J. Marsh. 426; Tomlin v. McChord's Representatives, 5 J. J. Marsh. 135.

[2, 3] An examination of the record discloses the fact that at the time the petition was filed appellee was not entitled to the relief sought against appellant. There is nothing here to indicate that the vendee's failure to pay was frivolous or in bad faith; on the contrary, the reasons asserted by appellant for his failure to pay the purchase price was in effect admitted in appellee's amended petition, and it appears further the Johnson heirs were claiming to be in possession of the land in controversy, and were asserting title thereto by deed, title bond, and adverse possession. And even had the petition alleged facts showing a full and complete performance on the part of the vendor, we think it would have been error to allow interest on the purchase price from the date the petition was filed. As said in 39 Cyc. 1569:

"As a general rule where a contract of sale is silent as to interest, it is not demandable so long as the purchaser is not in default."

And on the next page it is stated:

"In the absence of an express agreement to pay interest, if there is a delay in the performance of a contract, due to no fault of the purchaser, he is not liable for interest on the purchase money during such delay, unless he is in possession of the property sold."

In the present case the purchaser was not in possession of the property in question, nor does the contract contain any provision as to the payment of interest.

In Hart v. Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715, a suit to compel the specific execution of a contract, the court holds that if the payment of the purchase price is prevented by the act of the vendor he is not entitled to interest on the purchase price until he makes a valid tender.

In Meagher v. Puckett, 42 S. W. 737, 19 Ky. Law Rep. 879, in which the calculation of interest was involved, the court thus states:

"As appellee remained in possession of the land for this time and did not complete the contract of sale by making deed nor surrendering possession, he cannot claim interest for this time."

In a controversy over the payment of interest the court, in Hatcher v. Fitzpatrick, etc., 101 S. W. 933, 31 Ky. Law Rep. 120, says:

"If appellee Hatcher had not taken possession of the land under the title bond, the vendors could not require him to pay interest on the purchase money whilst they were in default in their obligation to tender a good deed."

In re Howell's Estate, 224 Pa. 415, 73 Atl. 445, the vendee refused to accept a deed because the vendor could not make a title clear of incumbrances because of a public road over and along the property to be conveyed, and the court says:

"When the vendor in articles of agreement for sale of land is to give vendee a deed 'clear of incumbrances,' and the contract provides for immediate possession of the land by the vendee as part of the benefit for the consideration to be paid, if no interest is stipulated for in the meantime by the vendee, none is payable until after the incumbrance is removed by the vendor and deed tendered."

In Falle, etc., v. Crawford, 30 App. Div. 536, 52 N. Y. Supp. 353, the court in passing upon a similar question says:

"We therefore, conclude that the plaintiffs on the trial proved that a good and marketable title to the premises mentioned in the complaint was tendered to the purchaser, and that, under the position he takes in the answer, judgment should be affirmed, but inasmuch as there was an open and debatable question when the suit was brought respecting the title, it is not equitable to charge interest upon the bid to the defendant, and in that respect the judgment should be modified, and, as so modified, affirmed, without costs."

In Wainwright v. Read, etc., 1 Desaus. (S. C.) 573, the court held that the vendor was not entitled to interest until a certain survey was made; the main question involved in this case being the diminution in the quantity of land to be conveyed.

McCarty v. Helbing, 73 Or. 356, 144 Pac. 499. The vendor in this case being unable to give a good title at the time stipulated in the contract, the time for payment was extended, and it was held the purchaser was not liable for interest during the period of delay, and that he had a good right to refuse to pay said interest.

In the present case appellant has been ready, willing, and anxious at all times to take the property at the contract price, but delayed payment only because of the inability of appellee to convey such a title as was provided for in the contract. Appellant is only complaining because interest was allowed from the day the petition was filed. The contention is meritorious, and the lower court erred in adjudging interest from that date.

Wherefore the judgment is reversed, with instructions to enter a judgment against appellant in the sum of \$570, the purchase price of the property, with interest from such date subsequent to the decision by this court,

on the appeal of the Johnson Heirs v. Gunnell, 177 Ky. 361, 197 S. W. 790, as appellee shall tender to appellant a deed in conformity with the contract sued on.

### BAILEY, et al. v. BAILEY et al.

(Court of Appeals of Kentucky. May 30, 1919.)

#### 1. WILLS ⇐153—VALIDITY—"UNDUE INFLUENCE."

Undue influence is such influence as destroys free agency and constrains testatrix to do against her will what she would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated at the time of the execution of the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

#### 2. WILLS ⇐155(4) — UNDUE INFLUENCE — KINDNESS.

Acts of kindness, attention, or appeals to the feelings, or understanding, not destroying free agency, do not constitute undue influence.

#### 3. WILLS ⇐155(2)—UNDUE INFLUENCE—ADVICE—SUGGESTIONS.

Advice or suggestions appealing to the understanding and not destroying free agency do not constitute undue influence.

#### 4. WILLS ⇐166(7)—UNDUE INFLUENCE—EVIDENCE—OPPORTUNITY.

To set aside a will for undue influence, it is not sufficient to show that there was an opportunity to exercise undue influence, but evidence must be adduced to show that such influence was in fact exercised.

#### 5. WILLS ⇐55(5)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In contest of will executed by testatrix after having for several years suffered from tuberculosis, evidence as to mental incapacity held unconvincing.

#### 6. WILLS ⇐50—TESTAMENTARY CAPACITY—MENTAL CAPACITY.

Testatrix, to have capacity to make will, must have sufficient mental capacity to take a survey of her property, to know its value, to know the objects of her bounty and her duty to them, and to dispose of her property according to a fixed purpose of her own.

#### 7. WILLS ⇐81—RIGHT OF DISPOSITION.

Property may be disposed of by testator according to his desire, and the opinion of a jury as to what might be a just and proper division will not be substituted therefor.

Appeal from Circuit Court, Larue County.

Suit by Arthur Bailey and others against Turner Bailey, administrator, and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

Chas. T. Creal, of Elizabethtown, guardian ad litem for Ted and John Bailey.

Ohas. Williams, L. B. Handley, and E. W. Creal, all of Hedgensville, for appellants.

Otis M. Mather, of Hedgensville, and H. L. James, of Elizabethtown, for appellees.

QUIN, J. Bettie Bailey by her will dated February 8, 1916, and duly admitted for probate in the Larue county court, left her entire estate, of an estimated value of from \$4,000 to \$7,000, to her three youngest children, Turner, Ted, and John, with a provision that they pay to her four oldest children, Arthur Bailey, Dick Bailey, Lela Bernard, and Joe Bailey, \$800 each. There was a further provision that her youngest child was to have the crops from the farm for the year 1916.

Suit was filed by one of the older children, contesting the will on the grounds of undue influence and mental incapacity, and upon a trial the jury found that the will so admitted to probate was not the will of Bettie Bailey.

The signature to the will appears as "Bettie Elizabeth Bailey," to which reference will later be made. The will also contained the following pencil notation: "B. Carter see to this."

From the judgment setting aside the will this appeal has been prosecuted.

The evidence on behalf of the contestants may be summed up as follows: At the time testatrix signed the will she said to one of the witnesses, "Brother Brown, I am nervous this morning; I don't know whether I can hardly write my name or not."

John Bailey, one of the favored devisees, sent for Rev. A. L. Brown to witness the will, and when he reached the house he found Turner Bailey and G. B. (Bee) Carter there. Testatrix stated that she wanted Carter to see that the will was carried out. Carter, Turner Bailey, and John Bailey remained with testatrix after the will was signed.

Testatrix asked the Rev. Brown how to spell her name. She had told Carter on a previous day that she wanted him to sign her will; the evidence is not clear as to the order in which the names were signed to the will, nor just when the notation above referred to was made.

Testatrix had made a will some 9 or 10 years previously, in which she divided her property equally among her children, with the exception of John, who, being the youngest child, was given more than the others. The older children, all of whom testify for contestant, did not know of the last will until after the mother's death, though most of them lived in the immediate neighborhood and were on friendly terms with her, and had lived in the house with her at different times prior to the making of the will, and

she had made the remark, both before and after the date of the will, that she wanted her farm divided equally among her children.

The mother had suffered with tuberculosis for several years, and during the last few months of her life the least thing would excite her; she was trembly. B. Carter was at the house sometimes two or three times a day, and seemed to have some influence with testatrix, and when it was suggested that her children had better run her business instead of listening to B. Carter, she said she was afraid she might make B. mad; that he might do her some damage.

The mother did not put her foot to the ground after Christmas, 1915, except in the following summer she was carried to the yard to enable her to get fresh air. In February, 1916, she was "awful forgetful," and frequently called her daughter by the name of Lydia, a deceased aunt; also called her sons, especially Arthur, by the name of Wilbur, a son who had died about 8 years before. Her memory had been failing for about a year before her death. The contesting children, in their judgment, think the mother did not have sufficient mental capacity to make a will, and never saw her name written Bettie Elizabeth Bailey.

All the children were present at a family reunion Christmas, 1915, and the mother said she was proud to see them all so big and healthy, and wanted them all to be good children and to meet her in Heaven.

Joe Bailey, one of the contestants, states that in February, 1916, his mother was not capable of doing any kind of business. B. Carter could get her to do most anything he wanted, and Bee would go with the younger boys to New Haven to get whisky.

Briefly stated, the above is the substance of the testimony of the four older children.

The will was written by a deputy county clerk from a memorandum handed him by Turner and John Bailey, which memo. seems to have been in the handwriting of the testatrix. His first draft was returned because it did not suit the mother, and he made certain changes in it.

The testimony of the remaining witnesses, six in number, consisted mainly of statements made to them that Arthur was her favorite son. No one of these witnesses attempts to testify as to any mental incapacity or undue influence.

[1] Undue influence is any influence obtained over the mind of the testatrix to such an extent as to destroy her free agency and to constrain her to do against her will what she would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated upon her mind at the time of the making or execution of the will. *Watson's Ex'r v. Watson*, 137 Ky. 25, 121 S. W. 626; *Brent v. Fleming*, 165 Ky.

356, 176 S. W. 1134; *Jones v. Beckley*, 173 Ky. 831, 191 S. W. 627; *Talbott, Ex'r, et al. v. Giltner*, 179 Ky. 571, 200 S. W. 913; *Robinson v. Davenport, Ex'r*, 179 Ky. 598, 201 S. W. 28; *Schrodt's Ex'r, etc., v. Schrodt, etc.*, 181 Ky. 174, 203 S. W. 1051.

[2, 3] Mere general or reasonable influence over the testatrix is not sufficient to invalidate a will. To have this effect the influence must be undue; that is, not right or not proper. Acts of kindness, attention, advice, suggestions, or appeals to the feelings or understanding, not destroying free agency, must not be mistaken for undue influence.

[4] Measured by this definition, we find nothing in this record indicative or suggestive of undue influence exerted over the mind of testatrix. As said in *Childers' Ex'r v. Cartwright*, 136 Ky. 498, 124 S. W. 802:

"It is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised. The law permits the owner of property, who is of sound mind and disposing memory, to transmit his property by last will and testament in such a manner as pleases him, and juries are not permitted to make for him a will that accords with their ideas of justice and propriety; nor are they permitted to suspect away the right of the testator to dispose of his property in accordance with his own will and desire."

[5] The evidence as to mental incapacity is equally as unsatisfactory and unconvincing.

[6] The test of mental capacity sufficient to make a will is that the testatrix have sufficient mental capacity to take a survey of her property, to know its value, to know the objects of her bounty and her duty to them, and to dispose of her property according to a fixed purpose of her own. *Meuth v. Meuth*, 157 Ky. 793, 164 S. W. 63; *Robinson v. Davenport, Ex'r*, supra.

In *Wise, etc., v. Foote, etc.*, 81 Ky. 10, the court says:

"Testable capacity does not rise to that high degree of understanding and ability necessary to render a person capable of making a contract where the parties deal at arm's length, but exists where the testator has mind and memory enough to understand that he is selecting the persons whom he wishes to have his property, and to know his property, and the natural objects of his bounty, and his duties to them and the persons upon whom his property is bestowed by the testamentary paper which he signs."

Great stress is placed upon the fact that testatrix at times addressed her son Arthur as Wilbur, a deceased son. These names are phonetically similar, and we do not think it strange the mother should have confused them. Indeed this is not an unusual occurrence. Few people there are who have not made a like mistake, and what mother with a plurality of children has not called one



child by another's name, especially when her thoughts at times must naturally have turned to her deceased son. It is a singular coincidence that Mrs. Bernard, the oldest child, in her testimony on behalf of the contestants, falls into the same error and when her attention was called to the fact she says: "I just made a mistake; I meant Arthur; I didn't know I said Wilbur."

In referring to a similar point in *Schrodt v. Schrodt*, supra, the court says:

"Very frequently the person to whom we are talking, as well as the subject under discussion, is not sufficiently interesting to hold our attention. Hence if the mere fact that we permitted our minds to wander from the subject under discussion were sufficient to show mental incapacity, it would be an easy matter to establish such incapacity."

The point is made that testatrix was known as Bettie Bailey, and transacted business in that name, and that her name is not Bettie Elizabeth Bailey. When it came to the signing of so important an instrument as a will, it was no more than natural she would turn to those present, as she did, and ask them how to sign her name. The witnesses were seemingly as much in doubt on the point as she was, so she finally signed both names.

Many of our present day proper names are the result of contractions and corruptions of the original. Bettie is the diminutive of Elizabeth, and the use of the two names shows rather the exercise of caution and propriety than of mental incapacity. It was her evident desire and determination that she affix her proper name, and to remove all doubts she used both her Christian name of Elizabeth and the contraction Bettie; the latter being the name by which she was generally known.

B. Carter, of whom complaint is made, was as companionable and friendly with the older children as the younger ones. As their father's friend he was interested in their welfare. Both he and his wife were frequent visitors at the Bailey home, and his desire seems to have been to render the family such advice and assistance as he could. His efforts would appear more deserving of approbation than reprehension, and we find nothing to indicate that he ever exercised any influence over testatrix. The older children were married, the younger ones single. There had been some feeling between the mother and some of the older children about a hog deal. Contestant was anxious to get his mother to deed him 1½ acres of her place a few months before the execution of the will. Her mentality was such at that time that he was then willing to accept her deed, and about this time he did in fact make a trade with her for a cow. This conduct is

rather inconsistent with his present claims of incapacity on her part.

[7] Under our statutes citizens of the requisite mental ability are privileged to dispose of property by will according to their desires, and the opinion of a jury as to what might be a just and proper division will not be substituted for the will of the testatrix.

The evidence as to the want of mental capacity is furnished by nonexpert witnesses, and we have written time and again that where the facts relied upon are insufficient to show mental incapacity, the opinion of nonexpert witnesses based thereon are likewise insufficient for that purpose. See *Schrodt v. Schrodt*, supra, and cases therein cited.

Many witnesses, neighbors, bankers, farmers, merchants, a preacher, the family physician, who had been such for 30 years, and friends of many years' acquaintance, testifying for contestees, state that testatrix was a woman of more than the average intelligence and ability, and in their judgment there had been no impairment of her mental faculties.

If the evidence upon another trial be substantially the same as on the first trial, the lower court will direct the jury to return a verdict sustaining the will.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

#### HUFF et al. v. WOOSLEY et al.

(Court of Appeals of Kentucky. June 6, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1002—VERDICT ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

Where the evidence is conflicting and the jury's verdict not flagrantly against the weight of the evidence, a reversal on such ground cannot be ordered.

#### 2. WILLS $\S$ 324(3)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to authorize a submission to the jury of the issue of undue influence over testator.

#### 3. WILLS $\S$ 155(1)—VALIDITY—"UNDUE INFLUENCE"—DESTRUCTION OF FREE AGENCY.

Undue influence is that which destroys testator's free agency and constrains him to do what he would otherwise refuse to do.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

#### 4. WILLS $\S$ 155(1)—VALIDITY—REASONABLE INFLUENCE—UNDUE INFLUENCE.

General and reasonable influence over the testator is not sufficient to invalidate a will.

**Appeal from Circuit Court, Edmonson County.**

Suit by Joseph L. Woosley and others against T. C. Huff and others. Judgment for plaintiffs, and defendants appeal. Judgment reversed.

M. M. Logan, of Louisville, Sims, Rodes & Sims, of Bowling Green, and B. M. Vincent, of Brownsville, for appellants.

Logan & McCombs, of Brownsville, John H. Gilliam, of Scottsville, and James Lowe, of Sunfish, for appellees.

QUIN, J. Thos. J. Woosley was a resident of Edmonson county, and accumulated an estate of approximately \$15,000. He was a bachelor.

Jane Huff, a sister, shortly after her husband's death in 1890, moved to one of said Woosley's farms, taking her five children with her. She kept house for said Woosley until her death in 1912. They lived together as one family, the brother, the sister, and the five children; the brother assuming the place of a father. Shortly after the sister moved to the farm she became an invalid. The brother seems to have been unusually attentive to his sister, and after her death he continued to reside on the farm with his sister's children. He had charge and management of the farm; the work being done in the main by his nephews.

All of the children married and moved away from the farm, with the exception of one, Jesse Huff, who remained on the farm after his marriage, and his uncle continued his residence there with Jesse and his family until the uncle's death December 25, 1916.

While visiting the state fair at Louisville in September, 1916, the uncle suffered a stroke of paralysis; was brought to the town of Caneyville that day, which was Friday, and remained in the hotel in the latter place until the following Tuesday, when he was removed to his home, about eight miles distant. He recovered from this paralytic stroke to such an extent as to be able to walk about the room, and a few times to be out of the room. October 19, 1916, he executed his will, which was written by Mr. Robt. Porter, cashier of a Caneyville Bank, witnessed by said Porter, George Hobson Woosley, a second cousin, and Drs. R. L. Glasscock and C. C. Threlkel.

His entire property, with the exception of \$500 each, given to two nephews, Sam and Walton Woosley, was left in equal parts to the children of his deceased sister, with whom he had made his home.

From the order admitting the will to probate his other nieces and nephews, 40-odd in number, filed suit, contesting the will on the ground of undue influence and mental incapacity; a verdict of the jury found against

the will, and this appeal is prosecuted to reverse that judgment.

Testator for a time had been president of a bank at Caneyville, and appears to have been a very good business man.

[1] As to his mental incapacity there are a number of witnesses, including four physicians, who testified that in their judgment the testator did not have sufficient mental capacity to enable him to know the natural objects of his bounty, his obligation to them, the character and value of his estate, and to dispose of it according to a fixed purpose of his own. Most of the witnesses, it is true, are interested relatives who would be benefited by the setting aside of the will. Only one of the physicians had seen the testator about the time of the paralytic stroke referred to, and that was Dr. Deweese.

For the contestees several witnesses, including those not interested, testified that in their judgment the testator had sufficient mentality to make a will, the two physicians who witnessed the will testifying in behalf of the contestees. The evidence on this point is conflicting, and, the verdict not being flagrantly against the weight of the evidence, a reversal on this ground cannot be ordered.

[2] Appellant contends there was not sufficient proof to authorize the court to submit an instruction on undue influence. It is true that undue influence, like fraud, can seldom, if ever, be proved by direct evidence, and in order to determine whether or not undue influence was exerted in procuring the execution of a will, it is necessary in determining that question that the jury take into consideration all the existing and surrounding circumstances. We do not think the evidence on this question is of sufficient probative value to have authorized such an instruction. That the bulk of the property was left to the children of testator's deceased sister, or that the will was signed at the house of one of the favored children, is no evidence of undue influence, the testator lived there, this was his home, he had reared these children, and from the testimony of a number of witnesses it is manifest it had been his intention for years to leave the property just as he did in his will. He had really been a father to these nephews and this niece, and we find nothing unnatural in the provisions of the will, or anything inconsistent with the obligations of the testator to the different members of his family because the nieces and nephews not included in the will have not been the same to him as the children of his deceased sister.

Some time before the will was executed, the exact date not being shown, it is stated by one witness that testator said the Huff boys were the vexation of his life, and on another occasion he said these boys thought they owned the plantation. The claim was also made that certain of the Huff children

would not allow the other nieces and nephews to see the uncle. This happened two or three times, and was due to the fact that the physicians thought it best for the uncle not to have too much company, although one of the witnesses admitted that on the day she complained of not being able to see the testator, when her uncle was later brought out on the porch, she did not undertake to converse with him, but listened to the conversation between testator and a friend.

Bennett Woosley, a brother of Sam and Walton Woosley, states that about two weeks before the execution of the will he had a talk with Jesse Huff, and Jesse said they were going to have the uncle make a will, and told him if he would help them they would give him an equal share with his brothers. On cross-examination this witness admitted he told a certain person that if they would pay him something he would help them, says he did not mention his price, but that he "was aiming to read the other man, and him not to read me." This alleged conversation is denied by Jesse Huff, and we can find no connection between it and the making of his will.

Except for the fact that Jesse telephoned or sent for some of the witnesses, as requested by his uncle, we find no proof he had aught to do with the execution of the will.

[3] Undue influence is any influence obtained over the mind of the testator to such an extent as to destroy his free agency and to constrain him to go against his will what he would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated upon his mind at the time of the making or execution of the will.

[4] Mere general or reasonable influence over the testator is not sufficient to invalidate a will. To have this effect, the influence must be undue; that is, not right or not proper. See *Bailey Adm'r et al. v. Bailey et al.*, 184 Ky. 455, 212 S. W. 595, and the authorities therein cited.

In said last-named case quoting from *Childers' Ex'r v. Cartwright*, 136 Ky. 498, 124 S. W. 802, we said:

"It is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised. The law permits the owner of property, who is of sound mind and disposing memory, to transmit his property by last will and testament in such a manner as pleases him, and juries are not permitted to make for him a will that accords with their ideas of justice and propriety; nor are they permitted to suspect away the right of the testator to dispose of his property in accordance with his own will and desire."

In *Watson v. Watson's Heirs*, 2 B. Mon. 74, it is said:

"Nor is there any sufficient ground for apprehending that the will was procured by duress or extraneous influence, either sinister or controlling. It does not appear that either of the devisees ever suggested such a disposition of the testator's estate as that made by this will, or that either of them ever knew, before his death, that he had published such a testament. Their conduct on two or three occasions may have been somewhat unfilial, and he may possibly have been, in some degree, stimulated thereby to make the contract for his maintenance for the year 1840. But this deduction, if even authorized, would tend to repel rather than to fortify a presumption that, almost immediately after making such a contract, the testator was persuaded by his helpless condition and by threats of desertion to make a different and far more comprehensive disposition of his estate by will. On the contrary, there is some reason for presuming that the will is such as he had long intended to make, and substantially such as the protracted and peculiar services of the two devisees might have entitled them reasonably to expect."

After a careful review of the evidence on the question of undue influence, we are satisfied the evidence on this point was not sufficient to have authorized the submission of this issue to the jury and the court erred in so doing.

Wherefore the judgment of the lower court is reversed for further proceedings consistent with this opinion.

## MEISBERG v. BRYANT.

(Court of Appeals of Kentucky. June 6, 1919.)

## 1. DEEDS ⇨28—LANGUAGE OF INSTRUMENT—SUFFICIENCY TO OPERATE AS A CONVEYANCE.

A deed reciting that grantors "have sold and hereby convey, with clause of general warranty, unto K. T. B., wife of J. D. B., and her heirs forever," followed by a description of the property, is sufficient to convey title of the grantors, although the usual habendum and tenendum clauses are lacking.

## 2. DEEDS ⇨123, 124(2) — ESTATES CREATED—FEE SIMPLE—"HEIRS."

The word "heir" carrying in its legal meaning the idea of a person upon whom the descent is cast according to the laws of inheritance when the ancestor dies intestate, the use of the term in a deed as to a certain person "and his heirs" imports that the title conveyed is a fee simple.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

## 3. DEEDS ⇨109—EVIDENCE—PRESUMPTION—USE OF TERM "HEIRS."

When the term "heirs" is used in a deed, it will be presumed that the grantor knew and understood the legal meaning of the term, and intended it in that sense, unless the deed shows the contrary.

## 4. DEEDS ⇨123—HEIRS—MEANING—LIMITATION OR PURCHASE.

Although the term "heirs," or "heirs of the body," is generally held to be a term of limitation, where it appears from the instrument, construed in the light of all facts properly shown, that the grantor used the term in the sense of "children," it will be construed to mean "children," and not "heirs," and hence a term of purchase; but, if the intent appears to be otherwise, it will be treated as a word of limitation.

## 5. DEEDS ⇨124(1) — ESTATE CREATED—CONVEYANCE TO WIFE—"HEIRS FOREVER"—FEE SIMPLE.

Where a husband, who had purchased land, caused a conveyance of it by others to be made to his wife and her "heirs forever," there was nothing in the deed to indicate that the term "her heirs forever" was used in the sense of "children," or otherwise than the legal meaning, and hence she took a fee simple, and not a life estate, merely, with remainder to her children, and a conveyance by the wife to another conveyed a fee simple.

Appeal from Circuit Court, Mercer County.

Action by Kate T. Bryant against C. T. Meisberg. From a judgment for plaintiff, defendant appeals. Affirmed.

C. B. Rankin, of Harrodsburg, for appellant.

J. F. Vanarsdall, of Harrodsburg, for appellee.

HURT, J. In accordance with a contract, reduced to writing and subscribed by the parties thereto, the appellee, Kate T. Bryant, sold to the appellant, C. T. Meisberg, a certain body of real estate, and tendered to him a properly executed deed, containing a clause of general warranty, which purported to convey to him the title to the land; but he refused to accept the deed, or to pay the purchase price, the ground of his refusal being that the appellee was unable to make him a legal title to the property. The circuit court adjudged that the tendered deed conveyed the title of the property to appellant, and rendered a judgment against him in favor of appellee for the price which he had agreed to pay for the land, and he has appealed.

The only question which is involved is the ability of appellee to convey the legal title to the property. It appears from the answer of appellant that on February 10, 1879, the appellee was a married woman, and the wife of J. D. Bryant. She was at that time the mother of two children, and since has become the mother of three other children. The five children were the fruits of her marriage with her husband, J. D. Bryant, who is now dead. The purchase of the land in controversy was made by the husband, who also paid the purchase price to the vendors, and caused the deed to be made under which the appellee claims title to the lands. The lands were conveyed to her by the executors of E. W. Roach, deceased, on the date above mentioned, and that the deed executed by them conveyed a good title is not questioned. The contention of the appellant is that the conveyance by the executors of Roach did not vest appellee with a fee-simple title, but conveyed to her a life estate only, and the fee in remainder to her children. The deed, so far as is necessary to be quoted, is as follows:

"In consideration of \* \* \* the undersigned, G. S. Taylor and Vance Wilson, as executors of E. W. Roach, \* \* \* have sold, and hereby convey with clause of general warranty, unto Kate T. Bryant, wife of J. D. Bryant, and her heirs forever, a certain house and lot in Harrodsburg, Kentucky, at," etc.

After the description of the property, then follows certain stipulations relating to the rights of certain then tenants of the property, and in relation to the immediate possession of the property, which have no bearing upon the present controversy, and are therefore unnecessary to be quoted.

[1] It will be observed that the deed was very informal as to the manner of its preparation. The premises did not begin, as usual, with the formal statement of the parties to the conveyance, but began with a statement of the consideration, and then gave a definite recitation of the parties constituting the

grantor and the grantees and clear operative words of grant, together with a description of the property. The usual habendum and tenendum were entirely lacking, and the covenants in regard to title precede the words of grant in the premises and qualify them. The deed, however, taken as a whole, is clearly sufficient in operative terms to convey the title of the grantors to the grantee or grantees. It clearly states the names of the parties to the deed, the consideration for its execution, its purpose to convey the title to the grantee, a certain description of the property intended to be conveyed, and a covenant of general warranty of title. There is no repugnancy between any of the clauses of the deed.

[2] The contention insisted upon by the appellant is that, the lands having been purchased by the husband of appellee and the purchase price paid by him, he intended thereby to make a provision for his wife, and also his children then born, and such as might be thereafter born, and hence that the word "heirs," in the granting clause of the deed, was used in the sense of "children," which is a term of purchase, and for that reason that the appellee has only a life estate in the land with a remainder in fee to her children.

The word "heir" has a legal meaning, and as such means the person upon whom the descent is cast, according to the laws of inheritance when the ancestor dies intestate. *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330, 13 Ky. Law Rep. 339; *Underwood v. Magruder*, 87 S. W. 1076, 27 Ky. Law Rep. 1165. When the term "heirs" is used in a deed or will, as to a certain person "and his heirs," it as a rule by its own force imports that a fee-simple estate is conveyed—that is, the entire estate is vested in the grantee or devisee, and no present or future interest in another, and the term "his heirs" merely means that the estate is one capable of inheritance, and in the event of the death of the devisee or grantee, being at the time the owner of the property and intestate, that it will pass to his legal heirs by the laws of descent, or, in other words, it means that the title conveyed is a fee simple.

[3] When the term is used, it will be presumed that the testator or grantor knew and understood the legal meaning of the term, and intended it in that sense, unless there is something in the will or deed which will show that it was used in some other and different sense from its legal significance. *Clay v. Clay*, 2 Duv. 295; *Pritchard v. James*, 93 Ky. 306, 20 S. W. 216, 14 Ky. Law Rep. 243; *Scott v. Noel*, 45 S. W. 517, 20 Ky. Law Rep. 188; *Underwood v. Magruder*, supra; *Fischer v. Stoepfer*, 152 Ky. 317, 153 S. W. 420; *Williamson v. Williamson*, 18 B. Mon. 371; *Allan v. Van Meter*, 1 Metc. 277; *Hall v. Moore*, 105 S. W. 414, 32 Ky. Law Rep. 56;

*Barke v. Consolidated Coal Co.*, 148 Ky. 573, 147 S. W. 15; *McCauley v. Buckner*, 87 Ky. 191, 8 S. W. 196, 10 Ky. Law Rep. 90; *Sanders v. Big Sandy Co.*, 149 Ky. 11, 147 S. W. 750; *Lee v. Lee*, 7 B. Mon. 607. The meaning of the term "heirs" in a deed or will, however, is always one of intention, as a deed, like a will, must be construed with the intention of the grantor held in view as the pedestal to guide in the construction.

[4] Hence, although it is consistently held that the term "heirs" is a term of limitation, and not one of purchase, and, where there is nothing in the instrument which shows to the contrary, the term must be construed as one of limitation and given its legal meaning, yet where, from the context or provisions of the instrument, construed in the light of all the facts properly shown, it appears that the grantor did not use the term in its legal signification; but used it in the sense of "children," it will be construed to mean "children" and not "heirs," and will be held to be a term of purchase, as "children" is. *Tucker v. Tucker*, 78 Ky. 503; *Harper v. Wilson*, 2 A. K. Marsh. 465; *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 619, 11 Ky. Law Rep. 251; *Turner v. Johnson*, 160 Ky. 611, 169 S. W. 988; *Feltman v. Butts*, 8 Bush, 120; *American National Bank v. Madison*, 144 Ky. 152, 137 S. W. 1076, 38 L. R. A. (N. S.) 597; *Hunt v. Hunt*, 154 Ky. 679, 159 S. W. 528; *Duncan v. Medley*, 160 Ky. 684, 170 S. W. 31; *Blue v. Travis*, 152 Ky. 700, 154 S. W. 15; *Cecil v. Cecil*, 161 Ky. 419, 170 S. W. 973; *Cook v. Hart*, 135 Ky. 650, 117 S. W. 357; *Tanner v. Ellis*, 127 S. W. 995.

Upon the contrary, however, although the term "children" is one of purchase, and not of limitation, and as a rule, where there is a conveyance to one and her children, or to one and his children, the children take an interest as joint tenants or remaindermen under the conveyance as purchaser—but, if it is apparent, from the conveyance, the term "children" was used in the sense of "heirs," and was intended by the grantor to bear that signification, it will be construed to have that meaning, in order to give effect to the intention of the grantor. *Virginia I. C. & C. Co. v. Dye*, 146 Ky. 519, 142 S. W. 1057; *Duncan v. Medley*, supra; *Miller v. Carlisle*, 90 Ky. 205, 14 S. W. 75, 12 Ky. Law Rep. 66; *Williams v. Duncan*, supra; *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75, 17 Ky. Law Rep. 880; *Moran v. Dillehay*, 8 Bush, 434; *Dicken v. Dicken*, 151 Ky. 438, 152 S. W. 258, 43 L. R. A. (N. S.) 276; *Lachland v. Downing*, 11 B. Mon. 82. The term, "heirs of the body," or "heirs begotten of the body," and similar expressions in a deed or will, are terms of limitation, as they create an ancient estate tail, which our statute converts into a fee simple. This effect, however, will not be had, if it appears from the deed or will that the terms were used and intended by the testator

or grantor to have a meaning different from their legal meaning. *McCauley v. Buckner*, 87 Ky. 191, 8 S. W. 196, 10 Ky. Law Rep. 89; *Pelphrey v. Williams*, 142 Ky. 485, 134 S. W. 884.

It is also true, as contended, that a conveyance to a woman and her children, where a contrary intention is not manifest from the instrument of conveyance, vests the title in the mother and her children as joint tenants (*Turner v. Patterson*, 5 Dana, 295; *Cessna v. Cessna*, 4 Bush, 516; *Powell v. Powell*, 5 Bush, 620, 96 Am. Dec. 372; *Bell v. Kinneer*, 101 Ky. 271, 40 S. W. 686, 19 Ky. Law Rep. 545, 72 Am. St. Rep. 410), except where a husband conveys or causes a conveyance to be made to his wife and children, in which instance, as the usual rule a life estate is vested in the wife, and the remainder in fee in the children (*Fletcher v. Tyler*, 92 Ky. 145, 17 S. W. 282, 18 Ky. Law Rep. 421, 36 Am. St. Rep. 584; *Smith v. Upton*, 13 S. W. 721, 12 Ky. Law Rep. 28; *Davis v. Hardin*, 80 Ky. 672; *Koenig v. Kraft*, 87 Ky. 95, 7 S. W. 622, 9 Ky. Law Rep. 945, 12 Am. St. Rep. 463; *Frank v. Unz*, 91 Ky. 621, 16 S. W. 712, 13 Ky. Law Rep. 226; *Weaver v. Weaver*, 92 Ky. 491, 18 S. W. 228, 18 Ky. Law Rep. 699, 36 Am. St. Rep. 604; *Poland v. Chism*, 64 S. W. 833, 23 Ky. Law Rep. 1072; *Dicken v. Dicken*, supra; *Righter v. Forrester*, 1 Bush, 278; *Jarvis v. Quigley*, 10 B. Mon. 104; *McFarland v. Hatchett*, 118 Ky. 423, 80 S. W. 1185, 26 Ky. Law Rep. 276). An examination of the cases supporting the latter doctrine will, however, show that it is applied where the conveyance is to the wife and the grantor's children, or the children of the wife by the grantor, and where the term "children" is used in describing a part of the grantees, or else the term "heirs," or "heirs of the body," or other similar expressions including the term "heirs," are used, and it is manifest from the instrument of conveyance, considered in the light of the attendant facts, that the grantor, in using the terms mentioned, used them in the sense of "children," and intended that they should have such signification. A grantor, in conveying or causing a conveyance of property to be made to his wife, does not necessarily make or intend to make his children parties to the conveyance, and if he does not do so, his deed should not be construed to have a different meaning from that which he intended, and if the deed is plain and unambiguous, search need not be made further than its own terms, to determine its meaning.

[5] In the instant case the grantors conveyed to the grantee and "heirs forever." It is presumed that the husband, who caused the conveyance to be made, understood the meaning of the terms used, and intended them to be understood in their usual legal signification, in the absence of anything in

the deed showing to the contrary. There is nothing in the deed to indicate that the term "her heirs forever" was used in the sense of children, or in any other sense than their usual legal meaning, and their import, together with the other terms of conveyance, is to create a fee-simple title in the appellee. The judgment is therefore affirmed.

#### BICKEL v. HENRY BICKEL CO. et al.

(Court of Appeals of Kentucky. June 6, 1919.)

#### 1. CORPORATIONS ⇨152—ACTION TO COMPEL DECLARATION OF DIVIDENDS—DISCLOSURE OF FINANCIAL CONDITION—PLEADING.

In suit by stockholder of corporation to compel declaration of dividends out of alleged surplus, petition not alleging denial of access to company's books, or that he was ignorant of facts disclosed thereby, or that they do not truthfully exhibit the company's affairs, did not authorize a judgment for a disclosure of the financial condition and affairs of the company as demanded in petition.

#### 2. PLEADING ⇨8(3)—CONCLUSION.

In suit by stockholder of corporation to compel declaration of dividends out of surplus, allegation of petition that stated amount was wrongfully charged off to depreciation is a mere conclusion of the pleader.

#### 3. CORPORATIONS ⇨152 — DECLARATION OF DIVIDENDS—AUTHORITY OF COURT TO COMPEL.

While court's authority to grant relief to stockholder of corporation by compelling declaration of dividends out of unused surplus is clear, such action is only justified on clear and satisfactory proof of company's ability to pay substantial dividends after making reasonable provision for present obligations and anticipated needs for reasonable time in the future.

#### 4. CORPORATIONS ⇨152 — DECLARATION OF DIVIDENDS—SUIT TO COMPEL—DEMAND.

Bill to compel declaration of dividends out of unused surplus of corporation must allege a demand on directors and that they have refused the relief complainant seeks in court.

#### 5. APPEAL AND ERROR ⇨917(1) — REVIEW — PRESUMPTIONS—DEMURRER.

On review of judgment sustaining demurrer to petition asking equitable relief; appellate court must take allegation of petition as true.

#### 6. CORPORATIONS ⇨152 — DECLARATION OF DIVIDENDS—SUIT TO COMPEL—SUFFICIENCY OF PETITION.

Petition by stockholder of corporation to compel declaration of dividends out of unused surplus held insufficient to authorize relief; the only facts pleaded being net earnings and dividends for five years, and pleader's conclusion that company had no need for an accumulated "book value" surplus, and an amount

wrongfully charged off to depreciation, especially where petition showed that in prosperous years plaintiff had been paid on his investment 80 per cent. in cash dividends and received a 100 per cent. stock dividend.

Appeal from Circuit Court, Jefferson County, Chancery Branch.

Petition by Jacob Bickel against the Henry Bickel Company and others. Demurrer to petition was sustained, and suit dismissed, and plaintiff appeals. Affirmed.

Edwards, Ogden & Peak, of Louisville, for appellant.

William Furlong, of Louisville, for appellees.

CLARKE, J. A demurrer was sustained to appellant's petition, and, following his refusal to plead further, the petition was dismissed, from which judgment he is appealing.

After setting out the number of shares of the capital stock of the Henry Bickel Company owned by himself and the other stockholders, all of whom are made defendants, the plaintiff alleges in substance that on July 23, 1914, a stock dividend of 100 per cent. was declared, increasing the capital stock from \$60,000 to \$120,000, and doubling the amount of stock theretofore owned by each stockholder; that dividends were declared and paid on the stock until 1912, but that, including 1912 and since, no dividends have been declared, except the stock dividend in 1914, although the earnings in such years, except 1914, have been very large; that the corporation owns and uses in its business as a general contractor a great amount of machinery, such as wagons, scrapers, traction engines, steam shovels, dump cars, cranes, derricks, etc., and also large numbers of horses and mules, the values of which are not stated; that from 1910 to 1913, inclusive, a total of \$85,000 was wrongfully charged off to depreciation of equipment; that the net earnings, after the deductions made for depreciation and in excess of dividends declared, were as follows: In 1910, \$10,246.78; in 1911, \$15,325.36; in 1912, \$33,917.69; in 1913, \$19,673.64; in 1914, \$30.21; and in 1915, \$4,122.94; that the stock has a present book value of \$162.34 per share; that the excess above \$100, the par value, represents the accumulated profits and undivided earnings of the company; that the corporation, through its directors, has failed and refused to distribute to its stockholders any part of this accumulated profits, aggregating \$79,930.94, in addition to the \$85,000 wrongfully charged off to depreciation; that the business and affairs of the corporation have been successfully prosecuted, and that the withholding of dividends from the stockholders is not necessary for the success of the business, or the preservation or improvement of its property, or for any other purpose, and

is oppressive and unjust to the minority stockholders, especially to plaintiff; that the profits are unused, and are withheld through and by the domination, control, and power of Henry Bickel over his codirectors, for the sole purpose of endeavoring to reduce the value of the stock, so that he might become the purchaser thereof, especially plaintiff's stock. The prayer asks that the defendants be required (1) to make a full and complete disclosure of the financial condition and affairs of the company; (2) to show what disposition was made of the \$85,000 charged off to depreciation; and (3) to declare a dividend of so much of the profits as may be consistent with the best interests of the company and its stockholders.

[1, 2] There is no allegation in the petition that plaintiff has been denied access to the company's books, or that he is in ignorance of any fact disclosed thereby, or that they do not truthfully exhibit the company's affairs and condition; so there is no fact alleged that would authorize a judgment for a disclosure of the financial condition and affairs of the company, the first item of relief asked. Nor is there anything that could be shown about the \$85,000 charged off to depreciation that the mere statement does not disclose, and the allegation that it was wrongfully made is but the conclusion of the pleader, to support which no facts are alleged; but, even if it were wrongful, to correct the wrong and restore the amount to the books would not increase the company's assets, as the increase on the books would still be in the equipment, and there is certainly nothing in connection with this item of bookkeeping justifying the interference of the courts in the management of the corporation's affairs.

[3] So the only question which we need give serious consideration is whether or not the petition alleges facts which show an oppressive withholding of justified dividends; and while the authority of the courts, upon a proper showing by a stockholder, to grant such relief, is conceded by appellees, it is obvious that such action is only justified upon clear and satisfactory proof of the company's ability to pay a substantial dividend on its capital stock after making reasonable provision for its present obligations and anticipated needs for a reasonable time in the future. Not only so, but there must be no room left for doubt even of the necessity for judicial interference, in order to have a dividend declared, because it is not only the special province of the boards of directors, where doubt exists as to the advisability of declaring dividends, upon a consideration of the company's resources, its present and future needs, in view of present and contemplated undertakings and improvements, to determine the matter, but also the duty of the court to refrain from interfering with directors' management if there is any doubt of the necessity thereof.

In fact, the very discretion their office confers upon them to administer the company's affairs in such a manner as will in their judgment promote its welfare and insure its continued existence, with such distributions of profits to its stockholders as is consistent with this primary purpose, would seem to necessitate that even the directors should resolve a doubt as to the propriety of declaring a dividend at any time against such action.

Therefore it is necessary, even before the courts could attempt to decide whether or not a failure to declare dividends was such an abuse of the directors' discretion as to be oppressive and unjustified, that a complaining stockholder would have to present concretely, at least, the facts as to the company's resources, its obligations, and its needs for another year at least. It is equally clear that no opinion or mere conclusion of the complaining stockholder could be accorded any weight whatever in overriding the opinion and conclusions of the board of directors on such a matter; and even further still the stockholder ought not to be allowed to secure a court's interference in any event, until he has exhausted his own power as a stockholder within the corporation to secure the adoption by the directors of the policy which he believes to be just and right.

[4] Therefore it seems to us one of the first essentials of a good bill in equity for coercive relief of the kind sought is an allegation that the petitioner has made demand upon the directors and that they have refused the relief he seeks of the courts.

[5, 6] Measured by these requirements, plaintiff's petition, taking all of its allegations as true, as we must upon this inquiry, falls far short of manifesting a right to the relief he seeks, or any relief. To begin with, there is no allegation that he has ever requested of the directors that a dividend should be declared, or even suggested to them the propriety of such action; and construing the pleading most strongly against the pleader, may we not assume that possibly such a request might have rendered unnecessary an application to the courts? But, waiving this question, it does not appear, except inferentially, that the company has any cash on hand, and we are not informed what are the company's present contracts, or what sum will be required for their completion, or whether it has outstanding indebtedness.

In fact, the only facts pleaded are the net earnings and dividends for the years 1910 to 1915, inclusive, to which are added the pleader's conclusion or opinion that the company

has no need for an accumulated "book value" surplus alleged to be about \$30,000, and \$85,000 alleged to have been wrongfully charged off to depreciation of equipment, which plaintiff asserts as the basis for dividends wrongfully withheld, without an allegation of any kind as to the real value of the stock or the equipment, or as to what amount should have been charged off for depreciation of equipment. So far as appears, the company's entire assets may be equipment, and it may owe more than the equipment is worth at its present market value, unless we may assume the allegations that the profits, represented by book value in excess of par, are unused and not needed by the company, mean the company has such excess in cash and has no debts or unfinished contracts on hand, which clearly would be unwarranted in construing a pleading on demurrer.

The company is shown to have earned large sums and declared large dividends up until 1914, during which year and the succeeding year its earnings on a capital stock of \$120,000 were only \$30.21, and \$4,122.94, respectively, and in neither of which years was there any charge off for depreciation. So, unless we could order the directors to declare a dividend from the "book value" surplus accumulated during a period when dividends were declared ranging from 30 per cent. in 1910 and 50 per cent. in 1911 in cash to 100 per cent. in stock in 1914 for 1912 and 1913, or from \$85,000 alleged to have been wrongfully charged off to depreciation in equipment, we must look to the \$4,153.15 earned in 1914 and 1915. This sum, if available and all used for the purpose, would yield a dividend of less than 3½ per cent. on the capital stock of \$120,000. From the few facts pleaded, it is quite apparent that the company had a hard time in 1914 making ends meet, and that in 1915 it did not do so very much more. So it would seem a stockholder, who in the years of large earnings (1900-1912) had received in cash, dividends amounting to 80 per cent., and a stock dividend (1912-1914) of 100 per cent. on his original investment, has but little equity behind his claim that in the hard years (1914-1915), when the company is not much more than existing, the directors shall, in order to declare dividends, go back through the books and restore the equipment account by the amount charged off to depreciation, and add thereto the accumulated "book value" surplus, consisting of we know not what.

Clearly the court did not err in sustaining a demurrer to plaintiff's petition.

Wherefore the judgment is affirmed.



## MILLIKEN v. HANER et al. (two cases).

(Court of Appeals of Kentucky. June 13, 1919.)

## 1. INSURANCE ⇨121—LIFE INSURANCE—VALIDITY OF ASSIGNMENT—PUBLIC POLICY.

Assignment of life policy to assignee having no insurable interest in life of insured is void, being against public policy.

## 2. ESTOPPEL ⇨102 — INVALIDITY OF VOID CONTRACT.

One cannot estop himself to deny the validity of a void contract.

## 3. ESTOPPEL ⇨102—PREJUDICE—LIFE INSURANCE—INVALID ASSIGNMENT.

Where assignee of life policies was allowed to collect all that he had paid under the assignments, with interest, the beneficiary, by consenting to assignment, was not estopped from denying the validity of the assignment upon the ground that assignee had no insurable interest in life of insured, since such assignment was void as against public policy, and assignee had not acted thereon to his prejudice.

## 4. ESTOPPEL ⇨58—PREJUDICE.

Prejudice to adverse party is an essential element of estoppel.

## 5. INTEREST ⇨53—EFFECT OF APPEAL.

In action between the beneficiary and the assignee of life policy, where judgment was rendered for beneficiary, and for assignee for amount paid under assignment, with interest, and both parties appealed therefrom, assignee was not entitled to interest for the time following rendition of judgment.

Appeal from Circuit Court, Simpson County.

Separate suits by J. H. Haner against John J. Milliken and the Metropolitan Life Insurance Company, and by J. H. Haner against John J. Milliken and the Equitable Life Insurance Company. From the judgment rendered, the first-named defendant appeals, and plaintiff cross-appeals. Judgment on original appeal affirmed, but reversed on cross-appeal, with directions.

C. B. Moore, of Franklin, for appellant. George C. Harris and Whitesides & Bradshaw, all of Franklin, for appellees.

THOMAS, J. Henry E. Haner procured to be issued on his life two policies each for the sum of \$1,000. One of them was issued by the Equitable Life Assurance Society of the United States, and the other by the Metropolitan Life Insurance Company of New York. The plaintiff and appellee, J. H. Haner, the father of the insured, was made the beneficiary in each of the policies, the

first one of which was issued in 1906, and the last one in 1909. About September 1, 1911, the insured, having become afflicted with tuberculosis, concluded to go West in search of health. He was without the necessary funds to make the trip, and to procure them he, on the 8th day of that month, agreed to and did assign the two policies with the consent of the beneficiary to the appellant and defendant below, J. J. Milliken, and the assignments were afterwards reduced to writing and duly acknowledged before a notary public by both the insured and the beneficiary, and with the consent of the two companies they were attached to the policies. The consideration for the assignment of the policy issued by the Equitable Company was \$209.42 and for the assignment of the one issued by the Metropolitan was \$150, the defendant and assignee agreeing to pay the annual premiums on each of the policies accruing thereafter, which he did.

Near December 1, 1916 (the exact date not being shown), the insured died intestate and leaving no widow or children. Proof of his death was made and furnished to each of the insurance companies, both of which acknowledged the liability and a willingness to pay, but did not know whom they should pay, since both defendant Milliken and plaintiff Haner (the beneficiary) claimed the right to collect the policies. While matters were in this condition plaintiff, the beneficiary, filed these two suits, one against defendant Milliken and the Metropolitan Company, and the other against him and the Equitable Company, seeking to recover the amount of the policies and alleging that Milliken claimed to own them, which plaintiff denied, and he was called on to answer and set up the facts with reference to his claim, which he did by relying upon the assignment to him as heretofore shown, and insisted upon his right to collect the entire amount of each policy. A demurrer was filed and sustained to his answer, and he amended it, in which he set up the consideration paid by him for each assignment and the amount of premiums which he afterwards paid to each of the companies and when paid, and insisted upon his right to collect the amount of money with interest which he had thus paid out, even though the assignments should be adjudged invalid.

A reply denying want of knowledge or information sufficient to form a belief as to the amounts paid by defendant completed the issues and upon trial the court adjudged the assignments invalid as being against public policy (the defendant having no manner of insurable interest in the life of insured, but gave judgment in favor of defendant for the sums he had paid for the assignments and in the way of premiums, with interest thereon from the respective dates of payment, and

to reverse that judgment defendant prosecutes this appeal.

A cross-appeal has been asked by and granted to the plaintiff in which he seeks a correction of an alleged error of the court in allowing defendant interest on the sums he paid after 60 days from the date of the proof of the death of the insured; it being the time when the payment of the policies became due and, as insisted, would have been made but for the claim of defendant.

On the main question presented by the appeal it is admitted that the defendant had no such insurable interest in the life of Henry E. Haner as would entitle him to have taken out the policies originally in his favor. It is further admitted that under the law as approved by this court and many others, and as also announced by all the text-writers, one who has no such insurable interest in the life of another cannot take out a policy on the latter's life payable to himself, since such transactions are wagering contracts and against public policy. *Griffin's Adm'r v. Equitable Assurance Society*, 119 Ky. 856, 84 S. W. 1164, 27 Ky. Law Rep. 313; *Bromley v. Washington Life Ins. Co.*, 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, 18 Ky. Law Rep. 1029; *Baldwin v. Haydon*, 70 S. W. 300, 24 Ky. Law Rep. 900; *Wrather v. Stacey*, 82 S. W. 420, 26 Ky. Law Rep. 683; *Lee v. Mutual Life Ins. Co.*, 82 S. W. 258, 26 Ky. Law Rep. 577; *Barbour v. Larue*, 106 Ky. 546, 51 S. W. 5, 21 Ky. Law Rep. 94; *Basye v. Adams*, 81 Ky. 368; *Lockett v. Lockett*, 80 S. W. 1152, 26 Ky. Law Rep. 300; *Scott v. Scott*, 77 S. W. 1122, 25 Ky. Law Rep. 1356; *Adams v. Reed*, 38 S. W. 420, 18 Ky. Law Rep. 853, 35 L. R. A. 692; *Bramblett v. Hargis*, 123 Ky. 141, 94 S. W. 20, 29 Ky. Law Rep. 610; *Hess v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 36 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1112, 128 Am. St. Rep. 343; *Western & Southern Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 875, Ann. Cas. 1917C, 271; *Western & Southern Life Ins. Co. v. Nagel*, 180 Ky. 476, 203 S. W. 192; and many other cases which could be cited.

But, while admitting this general and universally applied principle of law, defendant's counsel insists that there is a sound distinction between procuring the issuance of a policy in which the beneficiary has no insurable interest in the life of the insured and the assignment of a policy to one without insurable interest if the original beneficiary was one to whom the policy could be made payable within the rule requiring him to have an insurable interest. This alleged distinction is attempted to be maintained upon the theory that the policy, being valid when issued, is

after that a mere chose in action and assignable as such. The courts in a few of the states adopt the distinction contended for, among them the Court of Appeals of New York, and we are cited to the case of *Steinbeck v. Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 418, 70 Am. St. Rep. 424, in support of this contention.

[1] The opinion in that case seems to place the Court of Appeals of that state in line with the limited number recognizing the distinction contended for, but, after a careful reading of it, we are by no means convinced of the soundness of its reasoning in support of such distinction. In fact, we fail to find any reason in it which would relieve the assignment of a policy to one without an insurable interest in the life of the insured from being a wagering contract any less than the procuring of the policy originally by and for the benefit of one without such interest would be.

The underlying reason for the rule forbidding the issuance of such policies is that the stranger beneficiary is thereby given a financial interest in the quick termination of the insured's life, and to that extent has a motive to bring about that result; and, since such conditions might possibly encourage crime, the rule has been invoked to prevent them from arising. We are unable to see why the same reason would not exist with reference to the assignment of a policy to one who was without legal interest in the life of the insured. We find no satisfactory reason for any difference between the two cases anywhere stated in the *Steinbeck Case* relied on, and the same is true with reference to the cases from other courts recognizing the distinction. But in the opinion rendered in that case the court referred to a number of cases denying the validity of an assignment of an insurance policy to one having no insurable interest in the life of the insured, among which are the cases of *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, and *Basye v. Adams*, supra, from this court.

The rule as announced by this court in the *Basye Case* has been approved by us in many subsequent cases, among which are *Hess v. Segenfelder*, supra; *Irons v. United States Life Ins. Co. of New York*, 128 Ky. 640, 108 S. W. 904, 38 Ky. Law Rep. 46, 129 Am. St. Rep. 318; *Schlamp v. Berner's Adm'r*, 51 S. W. 312, 21 Ky. Law Rep. 324; *New York Life Ins. Co. v. Brown's Adm'r*, 139 Ky. 711, 66 S. W. 613, 23 Ky. Law Rep. 2070; *Western & Southern Life Ins. Co. v. Nagel* and *Western & Southern Life Ins. Co. v. Webster*, supra.

In stating the rule against issuing wagering policies and applying it to the assignment of policies as well as to their original issue, this court in the *Basye Case*, quoting from the Supreme Court of the United States in the *Warnock Case*, said:

"Such policies have a tendency to create a desire for the event [the death of the insured]. They are therefore, independently of any statute on the subject, condemned as being against public policy. The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name."

And in that case, in answering the contention of counsel in urging the distinction between the assignment of a policy and the original procurement of it, as is also urged by defendant's counsel here, the court said:

"Counsel for appellant have cited authorities sustaining the opposite doctrine as respects the assignment of policies of life insurance. But we are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid, because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is issued, should not be also applied to an assignment of a policy where the assignee has no such insurable interest."

There has been no departure from or modification of the rule as laid down by this court in that case. On the contrary, we have steadily adhered to it, and it is now too late to call it in question were we convinced of its unsoundness, which we are not.

[2-4] But it is insisted that in some way not altogether clear to us plaintiff is estopped to rely upon the invalidity of the assignment of the two policies involved, but this contention cannot be upheld for at least two reasons:

(a) That the contracts of assignment, being against our public policy, are each void, and one cannot estop himself to deny the validity of a void contract. A. & E. Ency. of Law (2d Ed.) vol. 11, p. 23; 10 R. C. L. 861; and *Bohon's Assignee v. Brown*, 101 Ky. 354, 41 S. W. 273, 19 Ky. Law Rep. 540, 38 L. R. A. 503, 72 Am. St. Rep. 420. The text in the volume of R. C. L., in stating the general rule upon this point, says:

"It is generally considered that, as between the parties to a contract, validity cannot be given to it by estoppel if it is prohibited by law or is against public policy."

A great many cases are cited in the note and there seems to be no dissent from the general rule.

(b) That plaintiff is not shown to have been guilty of any conduct that would create an estoppel as against him in favor of defendant. He is seeking to recover no part of the insurance except the excess over and above the amounts defendant has paid with interest. If the act of subscribing the written assignment of the policies may be urged as one constituting an estoppel, then, in order for it to have that effect, the defendant must have acted on it to his prejudice, which is an essential element of an estoppel. He cannot in this case be considered to have acted upon the faith of the assignment in a way to prejudice his rights, since no one can be considered to be prejudiced when he is allowed to collect all he has paid out together with interest. A still further objection to the alleged estoppel urged is that in the cases referred to from this court the same or similar facts existed, and in neither of them was it held that they created an estoppel for the benefit of the assignee of the policy.

Upon the question raised by the cross-appeal defendant under the judgment will draw interest on the amount adjudged him until the money is distributed after having been paid by the insurance companies. It is because of his contention that it has not been paid long since. Plaintiff has never raised any objection to its payment, and we are at a loss to know upon what theory defendant can obstruct the payment of his claim and still continue to draw interest on it. He not only did so by litigating the matter below but has actually prevented the payment of the money by the insurance companies by superseding the judgment appealed from and which ordered such payment.

[5] We therefore conclude that under the most lenient view of the case defendant should not collect interest after the rendition of the judgment appealed from, and, since the judgment does not so confine his right, it is to that extent erroneous.

Wherefore the judgment on the original appeal is affirmed, but reversed on the cross-appeal, with directions to modify it as herein indicated.

HICKS et al. v. FAUST et al.

(App. No. 10675; Mo. No. 4496.)

(Supreme Court of Texas. March 26 and May 14, 1919. Dissenting Opinion, May 16, 1919.)

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by R. B. Spencer & Co. against J. G. Brown and others. Judgment giving plaintiff less relief than demanded was reversed and rendered by the Court of Civil Appeals (198 S. W. 1179), and H. C. Hicks and others, trustees of Bosque Presbyterian Church, U. S. A., bring error, C. G. Faust and others being defendants in error. Application for writ of error refused.

Chandler & Pannill, of Stephenville, for plaintiffs in error.

Lattimore, Bouldin & Lattimore, of Ft. Worth, for defendants in error.

PER CURIAM. Writ of error refused and motion for rehearing denied.

HAWKINS, J. (dissenting). Out of 561 cases in which, during our present term, this court has disposed of applications for the writ of error, this case is one of the five in which I have felt duty bound to dissent from the action of this court upon such application, two of the five being cases in which I thought the writ ought to have been refused on the merits instead of the petitions for that writ being dismissed, as they were, for want of jurisdiction in this court.

The judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District (Spencer v. Brown, 198 S. W. 1179), foreclosing the asserted materialman's statutory lien upon the church's "rock building," although approved by a majority of this court, appears to me to be seriously erroneous; hence my dissent, heretofore, to the order of this court refusing the writ of error, and my present dissent from its order denying a rehearing.

My threefold reasons for such dissent are as follows:

First. When the material for repair of said rock building was furnished to and used by Brown for that purpose he was not the statutory "owner" of that building, nor did he own the land on which it stood. When carefully analyzed his status as to the church, and also as to the materialmen, was merely and simply that of a "contractor." R. S. arts. 5621-5623.

Second. No statutory "notice" of the furnishing of said material—and, indeed, no notice whatsoever—has been shown to have been given by said materialmen to the church trustees prior to payment to Brown by said church trustees of the full contract price for making said repairs, which payment they made long before the claim of lien was filed in the county clerk's office.

Third. The decision of the Court of Civil Appeals in the present case is in conflict with several prior decisions of this court, and with several prior decisions of various Courts of Civil Appeals.

Said judgment of foreclosure involves what I consider material and grave misconceptions of the facts and of the law of this case in these particulars:

(a) With regard to the legal effect of R. S. art. 2873, relating to "consent" of the State Board of Education to sales of school property within its operation; (b) with regard to the proper construction and legal effect of a certain "consent" resolution by said State Board as related to an antecedent contract by the school trustees for sale of property belonging to the independent school district, and formerly used for public free school purposes; (c) as to whether statutory "notices" of the furnishing of said material were given prior to full payment by the "owner" of the contract price for said repairs.

Those misconceptions concerning article 2873 and those concerning said resolution are material, particularly, in all respects in which that statute and that resolution were applied by the Court of Civil Appeals to Brown's previously executed contract with the school trustees, by the terms of which he was to acquire said building only as personalty from the independent school district and remove it from the land.

That the judgment and opinion of the Court of Civil Appeals do involve such misconceptions concerning article 2873, and concerning said resolution, is more apparent when said contract is considered in connection with Brown's subsequent written contract with the trustees of said church, whereby, conditionally, he agreed to complete and fit up said rock building and to turn it over to said church for its use, and with the still later contract between the church trustees and the school trustees whereby the latter agreed to convey to the former the tract of land upon which said rock building stood, both of said contracts having been executed prior to the inception of what may be termed the repair period, during which said material was furnished for and used in repairing said rock building, and both contracts having been carried later into full effect and completely performed. Those misconceptions concerning the giving of statutory notices are material in that said judgment fastens a materialman's lien upon said rock building in the hands of its present legal and equitable owners, although, seasonably and without statutory "notice," they paid their contractor in full for repairing that building.

The logical consequence of that judgment of foreclosure is, under the facts, to overturn a long line of what have been regarded generally as well-settled decisions of this court and of various Courts of Civil Appeals of this state construing and applying our materialman's statutes—a consequence which, I feel sure, was not intended in this instance by the Court of Civil Appeals or by my Associates. Such, as I understand it, is this case in outline.

The essential facts are these: Spencer & Co., as materialmen, sought in this action a personal judgment against Brown for a debt incurred by him for building material supplied by them to him for repairing said rock building, and against Brown and the Bosque Presbyterian Church, U. S. A., a corporation, and its trustees, Hicks, Howard, and Knight, as "owners" of said building, for foreclosure of an alleged constitutional and statutory materialman's lien upon that building and the 2½ acres upon which it stands, in the town of Lingleville, which, it seems, comprises, or is within, the Lingleville independent school district. Said school district formerly

owned a tract of land containing 10 acres, and embracing a smaller tract of  $2\frac{1}{2}$  acres upon which said rock building stood. Without previous consent of either the State Board of Education or the county commissioners' court for any sale or disposition of any of said property, the trustees of said district, on August 8, 1914, entered into a written contract with Brown, a building contractor, by the terms of which he was to erect, for said district, an "addition" to a school building standing on another tract of land, in consideration of which addition he was to receive, among other things, said rock building, which he was to remove from the land. If Brown made said addition to the other building, that fact, and the times when he began and completed it, are not satisfactorily shown by the record, and said rock building was never physically severed from the land, nor was it ever conveyed, by deed, to Brown.

However, in August, 1914, after the 8th day of that month, yet prior to the beginning of said repair period, said church, through its trustees, entered into two contracts relative to the ownership of said rock building, one being with Brown and the other with said school trustees. That contract with Brown was conditioned that if the church could acquire from said school district said smaller tract of land, Brown, for a stipulated consideration, would repair that rock building and turn it over to the church for its use. Said other contract was one whereby said school trustees agreed to convey said smaller tract of land to said church trustees. Both of these contracts were fully performed.

On September 28, 1914, the repairs on said rock building having been practically completed, that building was turned over by Brown to, and was accepted by, the church trustees, who thereupon, and on or about that day, paid to Brown the unpaid residue of the entire contract price for making said repairs. Not until long afterward did the materialmen give to said church trustees any character of "notice" concerning the material used by Brown in making said repairs.

On October 19, 1914, the State Board of Education, which had never consented to any trade or sale or contract affecting disposition of said 10 acres or any part thereof, or of said rock building, adopted the following resolution, which, it seems, all parties and the Court of Civil Appeals have treated as embracing said smaller tract of  $2\frac{1}{2}$  acres upon which stood said rock building:

"Resolved by the State Board of Education of Texas that permission is hereby granted to the board of school trustees of Lingleville independent school district to sell to the highest bidder, for the purpose of investing the proceeds in more convenient and desirable school property, the following described property: 'All or any part of a ten-acre tract of land known as the old school ground, for the purpose of investing the proceeds in more desirable school property.'"

Subsequently the trustees of said school district executed and delivered to the trustees of said church a deed to said  $2\frac{1}{2}$  acres of land, impliedly including said rock building. Said deed bears date of October 31, 1914, and, presumably, was delivered then. From and after that date, admittedly, and even under the averments of plaintiff's amended petition, the full

equitable and legal title to said smaller tract and to said rock building thereon has been in the trustees of said church. On November 27, 1914, said claim of lien was filed, apparently against said church trustees and against Brown. Certain additional facts relative to the giving of "notice" will be stated below in their proper connection.

Upon the trial of the case, without a jury, the district court rendered a personal judgment against Brown for the value of said building material, with interest, but did not establish or foreclose any lien. In that judgment I find no error. Said Court of Civil Appeals affirmed said personal judgment, but rendered judgment against all defendants, establishing and foreclosing, in favor of said materialmen, their alleged statutory lien against said rock building only, and ordering it sold in satisfaction of said personal judgment.

Of that judgment the foreclosure feature, which, alone, is drawn in question here, is, I think, demonstrably erroneous, for reasons herein stated. The purpose of the petition for the writ of error was to obtain from this court, under circumstances permissive of oral argument, a full review of that judgment of foreclosure and a written opinion on the law of the case. To that much, at least, petitioners for said writ are, I think, entitled on the record in this case.

That what is known as the "rock building" had been so far demolished, prior to said repair period, as that it no longer constituted a "building," within the meaning of articles 5621-5623, is contended by plaintiffs in error; but that contention, involving an issue of fact only, is without merit here, the Court of Civil Appeals having treated the structure as constituting a "building," and there being in the record supporting evidence.

To secure payment for material furnished for the repair of "any building or improvement" under or by virtue of a contract with the "owner" or with his "contractor," our statutes provide for a lien thereon and on the lot or lots of land necessarily connected therewith. When such contract is with such "owner" the materialman is not required to give him "notice" of the furnishing of the material; but when such contract is with such "contractor" the materialman is required to give to the "owner" or his agent written notice of each such item as it is furnished. R. S. arts. 5621-5623.

Upon the issue of ownership, what was the relation of Brown, and what was the relation of the church trustees, to the rock building, at the beginning of and throughout said repair period, covering, as herein defined, the furnishing of said material and the making of said repairs? That question goes to the heart of this whole controversy.

Was Brown such statutory "owner" of that building during said period of time? If so, said materialmen are entitled to have the lien asserted by them foreclosed on that building; but if, at the beginning of and during said period, Brown was not, at any time, such owner of that building, said materialmen clearly are not entitled to any lien in the premises.

Under what, if any, title, or by what, if any, right or tenure, may it fairly be said that at any moment during said repair period, and within contemplation of articles 5621-5623, Brown was the "owner" of the rock building?

None; or, at least, my search for it has been in vain.

If said rock building should be treated as continuously a part of the realty, then clearly said claim of lien against Brown as "owner" should not be upheld, because under that assumption the legal "owner" of said building down to October 31, 1914, the date of said deed to the church, was the school district, and afterward was the church, neither of which was a party to the agreement between the materialmen and Brown, under which said material was furnished to Brown. As to the school district, no claim of lien against it was filed; and, as a side-light, it may be added that R. S. arts. 2844, 2845, inhibit the fixing of a lien upon a public school building for erecting it. Such is the general policy of our law concerning such liens on such public school property.

But what were the nature and status of that which the Court of Civil Appeals treated as the "inchoate" or "equitable" title of Brown in and to said rock building, as related to the entire issue of ownership of that building during said repair period? That is the crux of the theory upon which the Court of Civil Appeals decided this case.

Under the facts, that matter has two distinct phases: First, as made up by said written contract between Brown and the school trustees and said subsequent "consent" resolution of the State Board of Education, and any and all things done in furtherance and fulfillment of that contract; and, second, as made up by all the facts shown in the record, and, more particularly, as affected by said contract, between the church trustees and the school trustees, and said deed. That first phase, upon which, principally, rests said decision of the Court of Civil Appeals, appears to have received at its hands extended, though erroneous, consideration and treatment; but the other phase, which I consider of great and even controlling importance, seems to have received but scant consideration and treatment, the Court of Civil Appeals having disposed of the case on the theory that Brown was the owner of said rock building.

The theory of that court appears to have been that under the facts, and particularly by virtue of said contract between Brown and the school trustees, there was a constructive "severance" of that building from the realty, taking said building, in the absence of a deed thereto from the school trustees to Brown, out of the operation of the rigid rules of law for determining the ownership of the legal title to real property, and that by virtue of that contract, and from its very inception, Brown became and was, throughout said repair period, the statutory "owner" of that building; citing 11 R. O. L. 1066; 19 Cyc. 1070; Johnson v. Philadelphia Mortgage & Trust Co., 129 Ala. 515, 30 South. 15, 87 Am. St. Rep. 75.

It must, I think, be conceded that abstractly, and as related to the mere matter of the sale of property, the general doctrine of "severance" so announced, and the authorities therein cited by said Court of Civil Appeals, are, indeed, applicable ordinarily to transactions between or among parties all of whom are acting in the unrestricted, unconditional, and untrammelled exercise of all rights of ownership and sale of property, when such contracts are fully executed subsequently; but in my opinion, neither that

principle nor those authorities are applicable in this state to such a contract for the sale of a building owned by an independent school district (whose powers of disposition of school property seem to be narrowly and quite rigidly restricted by law), and especially so when such contract is not shown to have been fully executed. R. S. art. 2873, which was held by the Court of Civil Appeals to be applicable (and perhaps correctly so), is as follows:

"Any houses or lands held in trust by any city or town for public free school purposes may be sold for the purpose of investing in more convenient and desirable school property, with the consent of the State Board of Education, by the board of trustees of such city or town; and in such case the president of the school board shall execute his deed to the purchaser for the same, reciting the resolution of the State Board of Education giving consent thereto and the resolution of the board of trustees authorizing such sale."

Under that statute the following questions suggest themselves:

Is a trade or sale of school property, by trustees of an independent school district, made prior to and in the absence of such "consent" of the State Board of Education, void, or merely voidable? As to that feature, is said statute mandatory or merely directory? Does the power of the trustees to sell such property exist in operative form, vitality, and force, independently of such action by the State Board of Education, and continuously, so that article 2873 justly and fairly may be treated, construed, and applied in practice as affecting simply and merely the manner of exercising an already existing power of sale, resting, for authority, in operative vigor, wholly "in the law," in contradistinction to conferring or making operative that conditionally granted power itself? See *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768; *Parks v. West*, 102 Tex. 19, 111 S. W. 726; *Thompson v. Bank*, 211 S. W. 977, and *Davis, Receiver, v. Allison*, 211 S. W. 980 (both decided by this court recently). In brief, is such action by the State Board of Education a condition precedent to the exercise by the school board of an independent school district of a qualified statutory right, power, and authority to sell such property? Concretely, under the law and the facts of this case, the following questions are presented for determination: Was said August contract between the school trustees and Brown, whereby alone, if at all, he was to acquire said rock building, null and void ab initio, because in contravention of article 2873, supra, and consequently not the subject of subsequent ratification by the State Board of Education, or was that contract merely irregular, and, at the worst, merely voidable, and, therefore, susceptible of such ratification? And if it should be held that such contract was in law susceptible of such ratification, was the phraseology of said October resolution of that board such as to make it in law a ratification of said first August contract, retroactively perfecting, in Brown, as of a date prior to the beginning of said repair period, during which said material was furnished to him, statutory ownership of said rock building? And if said "consent" resolution did, indeed, have such ratifying and curative effect, did it not, also, and simultaneously, ratify and confirm, as well, said

two antecedent but later August contracts, which also were of dates prior to said repair period, and constituted a three-cornered agreement, to which Brown and the church trustees and the school trustees were parties, by the terms of which the church was to acquire, and by which, in connection with said subsequently adopted "consent" resolution and said later deed thereunder, the church ultimately, and before the filing of said claim of lien, did admittedly acquire, the full equitable and legal title to said smaller tract of land, including the rock building?

Upon these somewhat complex questions there seems to be no direct previous decision of this court or of any of our Courts of Civil Appeals. But see *Crouch v. Posey*, 69 S. W. 1001. The wide operation of said article 2873 upon a vast amount of school property in this state, and the novelty and complexity of those questions, together entitle them, or most of them, it seems to me, to very thorough consideration, and final and formal decision, by this court in a written opinion.

Conceding for present purposes that the Court of Civil Appeals was right, as probably it was, in holding that the provisions of said statute relative to making in such deed recitals of the two required resolutions concerning the sale of such property are directory only, and not mandatory, and that failure to incorporate such resolutions in the deed to the land did not nullify such conveyance, there remains the vital question as to the legal effect of the statutory provision that such sale may be made "with the consent of the State Board of Education."

The entire power and authority of local school boards within the operation of article 2873 (including, perhaps, all independent school district boards) appears to rest on that statute. Another fact, which I consider of significant importance in this case, is that, along with that grant of power, the statute expressly couples the clear and specific provision, in the nature of a restriction or limitation upon that granted power, that such sale shall be "with the consent" of said State Board. That, I think, not only plainly negatives the idea that such local board may dispose of such school property purely at its own discretion, but requires, by necessary implication, that "consent" of said State Board shall be essential to the validity of any attempted sale of such school property, and as well to the validity and enforceability of any contract by such local board, involving disposition of title to, or ownership of, any such property.

In discussing a power created by an individual the Supreme Court of Tennessee said:

"The general rule of law unquestionably is that where a special power of sale is given, to be exercised only upon the happening of a certain event, made a condition precedent, it can be executed only in the mode, at the time, and upon the conditions prescribed in the instrument creating it, and the purchaser must at his peril ascertain whether the contingency upon which the sale is authorized exists. \* \* \* But the rule only applies where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, such as majority or marriage of some one named, which may be ascertained by any one with equal certainty." *Matthews v. Capshaw*,

109 Tenn. 480, 72 S. W. 964, 97 Am. St. Rep. 854. See, also, *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453; 21 R. C. L. 782; *Towles v. Fisher*, 77 N. C. 437; *Goebel v. Thieme*, 85 Wis. 286, 55 N. W. 706.

Article 2873, in conferring power to sell, does not leave to the local school boards within its operation final discretion, but, on the contrary, expressly confers on said State Board of Education ultimate discretion to determine whether the proposed sale is advisable; and whether or not such requisite consent of the State Board to the proposed sale has or has not been given by resolution is a fact easily susceptible of definite ascertainment by the prospective purchaser of the school property.

"Where the consent, request, or approval of any person is required to the execution of a power of sale or exchange, it constitutes a limitation upon the power, which, like every other condition, must be strictly complied with." 31 Cyc. 1063, note 47, citing numerous cases.

I cannot now see any good reason for not applying this same rule of construction to such statutory powers as that here under review. That seems to have been the conclusion of Mr. Endlich, as reflected in his work on Interpretation of Statutes, §§ 352-3, wherein it is said: "Powers delegated to subordinate local authorities are strictly construed, and any reasonable doubts as to the existence of a particular power resolved against the same (citing *Paine v. Spratley*, 5 Kan. 525). \* \* \* As to statutes generally, conferring powers, it may be said to be the result of the vast number of decisions upon the questions arising under such enactments that a purely statutory authority or right must be pursued in strict compliance with the terms of the statute;" citing *Bish. Wr. L.* 119.

From its context, article 2873 certainly contemplates, at least, that such "consent," in the form of a resolution, shall be given prior to such sale. Supporting that view, and emphasizing that legal effect of the statute, are the quoted provisions that such deed shall embody both the resolution of said State Board giving "consent" to such sale and the resolution of the local school board authorizing such sale. The cardinal and controlling rule of statutory construction is to ascertain and give effect to the legislative will. Obviously, it seems to me, article 2873 was designed rigorously to safeguard, restrict, and limit the disposition of school property falling within its terms, and to make formal consent thereto by the State Board of Education, given in advance, an absolute necessity—a condition precedent—to any valid and enforceable disposition, or contract for disposition, of any such school building or land. I believe that said statute should be so construed and applied, in practice, so long as it remains on our statute book. Its public policy is not the subject of judicial concern. "Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it." *Schlaudecker v. Marshall*, 72 Pa. 200. The contrary view as to the effect of that statute defeats, I think, its contemplated purpose and legal effect. To say that, despite the strong, unambiguous, and inelastic provisions of article 2873, local school authorities within its operation may, without prior consent, approval, or knowledge of the State Board of Education, sell or convey school land, or trade or sell a building standing

on such land, severing it from the land, or even validly and bindingly contract for the disposition of such property, renders such statute practically nugatory, and mocks the law as the Legislature, whether wisely or unwisely, solemnly has written it.

Much reason, and many eminent authorities, may be adduced in support of the view that, for lack of such antecedent consent of the State Board of Education, said contract between the school trustees and Brown, whereby he was to acquire said rock building, was absolutely void from its very inception, and consequently was not susceptible of ratification by said State Board. In construing Pas. Dig. art. 1052, this court, through Roberts, C. J., said:

"Although this statute is permissive in its terms, yet it is the only mode expressly pointed out in the general laws of the state by which the county court can divest the county of its title to its real estate. No special law, as applicable to this particular case, has been referred to. The general doctrine is that, as the county court is the agent of the county in its corporate capacity, it must conform to the mode prescribed for its action in the exercise of the powers confided to it. The prescribing of a mode of exercising a power by such subordinate agencies of the government has often been held to be a restriction to that mode;" citing authorities. *Ferguson v. Halsell*, 47 Tex. 421.

Certain attorneys, pursuant to employment by the mayor of the city of Bryan, rendered him an opinion concerning the validity of an election of municipal officers, of which the city council subsequently availed themselves. In a suit by the attorneys against the city for the value of their said services this court, through Gould, J., said:

"The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter—the source of all the power of the mayor or council over the subject—having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such contract. \* \* \* If municipal corporations can be held liable on an implied contract where the charter has withheld the authority to make an express contract, it is easy to evade and render useless such restrictions in their charters. The claim of plaintiffs, that the city of Bryan was bound to pay them because of their employment by the mayor and because of the use made of their opinion by the common council, cannot be maintained. They were bound to know of the limitations on the authority of these officials, and their services were rendered at their own hazard. *Zottman v. San Francisco*, 20 Cal. 106 [81 Am. Dec. 96]; *Bladen v. Philadelphia*, 60 Pa. 464; *City of Leavenworth v. Rankin*, 2 Kan. 357; 1 Dill. on Mun. Corp. § 373." *City of Bryan v. Page*, 51 Tex. 533, 32 Am. Rep. 637. See, also, *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 263; *Allen v. Franks*, 166 S. W. 384; *Head v. Ins. Co.*, 2 Cranch, 127, 2 L. Ed. 229.

In *Matagorda County Drainage Dist. No. 1 v. Gaines & Corbett*, 140 S. W. 370, which was a suit by attorneys on a contract with the county commissioners' court which had not been ap-

proved by the county judge, our Court of Civil Appeals at San Antonio said:

"By the provisions of section 51 of the drainage act of 1907, the commissioners are empowered to employ counsel to represent the district 'upon such terms and for such fees as may be agreed upon by them and approved by the county judge.' It was clearly the intent of the Legislature to require as an essential the approval of the chief officer of the county; the official watchman of the county treasury undoubtedly by this requirement was made to safeguard and protect the fund that was raised by taxation of the inhabitants of a district, and to render more difficult the making of contracts which might squander a fund raised for the public good. The authority to contract for the services of attorneys is given by section 51 alone to drainage commissioners, and to that we must look to ascertain the mode of exercising the power. The law requires the approval of the county judge of contracts made by drainage commissioners for legal services. \* \* \* It is the rule, stated by Dillon in his work on *Municipal Corporations* (5th Ed.) § 783, and fortified by numerous authorities, that when the mode of contracting is specially and plainly prescribed and limited that mode is exclusive, and must be pursued, or the contract will not bind the corporation. The rule is a salutary one, upholding the legislative checks and restraints put upon the officers of municipal corporations, and strictly construing the powers conferred upon them in the disbursement of public funds. To hold that a contract made in a different mode from the exclusive one prescribed by the Legislature can be enforced would be to nullify and destroy the law, and to set up judicial discretion or judicial pleasure instead thereof. \* \* \* The authorities cited, as well as various others, hold that, where the power of contracting is limited to a certain mode, the officers of a municipal corporation cannot, in a different mode, make a valid contract; nor can they by any subsequent approval or conduct vitalize such contract, nor would the law imply such contract. Appellees were bound in making the contract to see that it conformed to the law, and the facts clearly show that they not only knew that the contract was not binding without the approval of the county judge, but that they used various means to obtain his approval, and endeavored to obtain a ratification of the contract by the new board of commissioners. As said by the Court of Appeals of New York in *Smith v. City of Newburgh*, 77 N. Y. 131: 'An absolute excess of authority by the officers of a corporation in violation of law cannot be upheld; and, when the officers of such a body fail to pursue the strict requirements of a statutory enactment under which they are acting, the corporation is not bound in such cases, the statute must be strictly followed, and a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done no subsequent act can make the contract effective.' See, also, *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144." In that case this court refused a writ of error.

*Crouch v. Posey*, 69 S. W. 1001, decided in 1902 by our Court of Civil Appeals at Dallas, involved the validity of a sale of school land owned by and in the city of Alvarado, without



approval of the county commissioners' court, under article 3990, now R. S. art. 2846. In the present case that statute has been held inapplicable, and perhaps properly so. Nevertheless it and article 2873, supra, are very similar, as related to the here involved issue of statutory construction, in that there sales by school trustees of such property were to be by consent of the county commissioners' court. There it was held by Judge Poindexter in the district court that the purchaser "took no title" by his deed from said trustees, "as they had no power to sell as trustees, except by order of the commissioners' court;" and it was held on appeal that "no title passed by the deed from the trustees," and that the purchaser thereunder "is in the position of a naked trespasser," wherefore the school trustees recovered the land, although the purchaser had paid to them in full the entire agreed purchase price.

In *Bates v. Leonard*, 99 Mich. 296, 59 N. W. 311, a husband devised to his wife all his real estate, directing that if its rents and profits should prove insufficient for her support she might, under direction of the judge of probate, sell and convey a portion of the land sufficient for her support. Held: "The provision was such a one as could not be disregarded, and that the sale without the direction of the probate judge must be treated as void. *Richardson v. Crooker*, 7 Gray [Mass.] 190; *Kissam v. Dierkes*, 49 N. Y. 605; *Powles v. Jordan*, 62 Md. 499." See, also, *Kerbow v. Woodbridge*, 184 S. W. 746, and cases therein cited. Numerous other supporting decisions from this and other courts might be cited.

But whatever was the status of said contract between Brown and the school trustees during said repair period, and even if it be conceded for present purposes that said contract was not void, nevertheless it was, to say the least, not only irregular, but flatly violative of both the spirit and the letter of article 2873, and, consequently, as between Brown and the school district, was voidable and nonenforceable from its inception. And that, be it remembered, unquestionably was its status throughout said entire repair period. Not until long after that period ended, and after said repairs had been made, accepted, and fully paid for by the trustees of the church, did the State Board of Education adopt any resolution whatever relating to said rock building or the land upon which it stood. Unless said "consent" resolution of October 19th related back to and validated, as of August 8th, Brown's contract of that date with the school trustees, that contract was never valid. On the other hand, that "consent" resolution, even if it did have that validating effect, and because of the two intervening contracts relative to ownership of said rock building, came too late to affect materially the present issue as to who was the statutory "owner" of said rock building during said repair period.

The opinion of the Court of Civil Appeals frankly concedes the irregularity of said contract between the school trustees and Brown, and its insufficiency originally to constitute him such statutory "owner" of said rock building, but plants its decision that he was such "owner" thereof during said repair period squarely and avowedly on the propositions (a) that said subsequently adopted resolution of the State

Board amounted in law to a valid ratification of said prior contract between the local school board and their contractor Brown; and (b) that, in the light of such validation, such contract must now be held to have been valid from its inception because it has been fully performed.

Relative to the status, during said repair period, of said contract between Brown and the school trustees, and to such assumed validation of that contract, the Court of Civil Appeals said:

"This resolution of the State Board of Education constituted sufficient authority to the board of trustees to pass title to the school building to Brown, but in this connection it will be noted that this resolution was adopted subsequent to the date of the contract between the school board and Brown. Since said consent of the State Board did not exist at the time of the contract with Brown, appellees contend he did not obtain the title to the building, and was therefore not the owner thereof, so as to enable him to fix a lien thereon for materials furnished. We do not think that a deed to a house or land executed by the board of trustees of an independent school district without the previously obtained consent of the State Board of Education would be such an absolute nullity as would preclude the application of the principles of ratification. Undoubtedly, however, it would be lacking in an essential necessary to its complete validity, viz. the consent of the State Board to the sale; but, if such consent be subsequently obtained, then we are of opinion and hold that it would operate as a ratification of an act done without authority. In the instant case the consent of the State Board of Education given in October, authorizing the board of trustees of the Langleville school district to sell all or any part of the land, was sufficient to validate the contract of sale theretofore made between the board of trustees and Brown; it operated retroactively, and made the contract with Brown as effective as though it had been authorized previous to its making. It may be conceded that, at the time the material was furnished to Brown by appellants, Brown's title to the house was lacking in complete validity because of the failure to obtain the previous consent of the State Board of Education; but he at least had an inchoate right or title to the property, which was afterwards perfected, and he should be considered the owner of the building at the time the material was furnished, within the constitutional and statutory provisions relating to materialmen's liens. *Cameron & Co. v. Trueheart*, 165 S. W. 58; *Schultze v. Brewing Co.*, 2 Tex. Civ. App. 236, 21 S. W. 163. \* \* \* Here Brown's title was perfected by the resolution of the State Board passed subsequent to the furnishing of the material, and he, too, should be regarded as the owner of the building at the time the material was furnished, within the meaning of the statute, and it is so held."

Parenthetically there are involved in said quoted portion of said opinion certain features which should receive mention in advance of a discussion of its ratification features. They are these: Brown's contract with the school trustees, whereby he was to acquire ownership of said rock building, is declared by the Court of Civil Appeals to have been "performed by Brown," and that declared fact is treated as

material in support of that contract's validity as a basis of ownership of that building in Brown during said repair period. But, as I understand what seems to be the uncontradicted evidence, that contract, even if it be considered and treated as not vitiated or in any wise affected by lack of antecedent "consent" of said State Board, was never carried into full effect by actual severance of said building from the land, or by deed from the school trustees to Brown, made after said adoption of said "consent" resolution. Moreover, as affecting the equities of Brown in that building during said repair period, the Court of Civil Appeals did not specifically find when he completed, or even when he began, the "addition" by which he was to earn said rock building; the evidence does not show that he ever finished or even began that work; and upon that feature the trial court made no finding of fact.

It follows, logically, as an independent proposition, and even under the stated theory of ratification, upon which the Court of Civil Appeals decided this case, and in so far as this record goes, that Brown has not been shown to have been, at any time during said repair period, even the equitable owner of the building which said judgment orders sold to satisfy said personal judgment against him. At most, under the facts, and on the ratification theory, he had formerly acquired certain rights under a valid contract for the acquisition of said rock building, which has not been shown to have ripened into even equitable ownership, and such of those rights as affect here the issue of ownership had been transferred by him in writing to said church trustees.

In contrast, both later contracts, under which the church acquired, prior to the beginning of said repair period, at least all of Brown's former equities, if any he had, in the rock building, were ultimately performed in all respects. Consequently, as affecting the issue of ownership, and in all matters of subsequent performance of contracts carrying mere equities in contradistinction to the legal title, the decided advantage rests, in this case, not with Brown, but with the church and its trustees. In brief, in estimating equities in the rock building as they existed when said material was furnished to Brown, those of the church undeniably were superior to those of Brown; yet the lien was foreclosed on the theory that Brown then owned that building.

One in possession of land or of a building, under even a written contract whereby, conditionally, he is to acquire title to it, is not, prior to full performance by him of all the conditions, the "owner" of such property in contemplation of articles 5621-5623, and cannot subject the property to a lien in contravention of the rights of holders of the legal title or of even superior equities in the property. *Association v. Perkins*, 80 Tex. 62, 15 S. W. 633; *Faber v. Muir*, 27 Tex. Civ. App. 27, 64 S. W. 938; *Rollin v. Cross*, 45 N. Y. 766; *Jones on Liens*, 1243-5-7-8-9.

In *Association v. Perkins*, the opinion being by Chief Justice Stayton, this court held that under the terms of the written contract there presented the association was not the statutory "owner" of land of which it had possession, for which it had paid \$10,000, but for which a residue of \$14,000 of the purchase price had not been paid, and for that reason denied an

asserted statutory lien upon the property to secure payment for building material furnished said association while it held such possession. There this court said:

"Under the statutes of this state no person other than the owner or proprietor, his agent, trustee, contractor, or contractors, can make contracts fixing liens on lands, houses, buildings, fixtures, or improvements such as are asserted in this case. *Sayles' Civ. Stats.* art. 3146; *Gen. Laws 1889*, p. 110. \* \* \* It seems to be well settled that a person in possession of land under a written contract to purchase is not, within the meaning of such statutes as those under which the persons claiming liens assert rights, the owner of the land or of the improvements he may place upon it, and for this reason cannot fix a lien on either. *McGinnis v. Purrrington*, 43 Conn. 143; *Scales v. Griffin*, 2 Douglas (Mich.) 54; *Hayes v. Fessenden*, 106 Mass. 228; *Wagar v. Briscoe*, 38 Mich. 587; *Hickox v. Greenwood*, 94 Ill. 266; *Wilkins v. Litchfield*, 69 Iowa, 465 [29 N. W. 447]; *Walker v. Burt*, 57 Ga. 21."

Said opinion also declared: "If the association had acquired an interest in the property, that interest might be incumbered by it with liens which ought to be enforced to the extent of the interest; but under the contract all the right or interest other than a possessory right limited to a fixed period passed it ever acquired was the right to pay the sum stipulated within the time prescribed, and thus become entitled to a conveyance of the fee; but this right could not be kept in existence even for the protection of persons with whom it had made contracts, in violation of the agreement which conferred all the right it had."

In the present case, as in that, the party in possession, against whom as owner the same character of lien is asserted, is not shown to have owned unconditionally, or even to have equitably earned, any absolute interest, resting upon either a legal or an equitable title, in or to said rock building.

In the *Faber Case* our Court of Civil Appeals at San Antonio, construing old article 3294, now article 5621, supra, held that Muir, who had possession of the land under a written contract to purchase, was not the statutory "owner" of it. That court, through Neill, J., in denying the asserted lien upon the property, said:

"A person in possession of land under a written contract to purchase is not, within the meaning of the statute quoted, the owner of the land or the improvements he may place upon it, and for this reason can fix a lien upon neither. *Association v. Perkins*, 80 Tex. 67, 15 S. W. 633; *Smith v. Huckaby*, 4 Tex. Civ. App. 80, 23 S. W. 397; *Penfield v. Harris* [7 Tex. Civ. App. 659], 27 S. W. 763; *Thaxter v. Williams*, 14 Pick. [Mass.] 49; *Lamb v. Cannon*, 38 N. J. Law, 362; *Guy v. Carriere*, 5 Cal. 511; *Johnson v. Pike*, 35 Me. 291; *Courtemanche v. Railway Co.* [170 Mass. 50], 48 N. E. 937, 64 Am. St. Rep. 275; *Steel v. Mining Co.* [4 Idaho, 505] 42 Pac. 585 [95 Am. St. Rep. 144]. Thus it is seen that Muir was the owner neither of the building nor of the land upon which it was erected, and that, in contemplation of the statute, McKell was the owner." In that case, also, writ of error was refused by this court. See, also, *Eardley v. Burt*, 182 S. W. 721.

Reverting, in due order, to the subject of ratification, it seems to me that the logic of the Court of Civil Appeals as to the validating effect of said consent resolution disproves its own final conclusions as to the ownership of the rock building. At the very outset, and assuming for the moment that the legal effect of said "consent" resolution actually was to ratify, validate, and make fully operative a prior contract of the local school board for the disposition of school property from the date of such contract, it seems to me to follow, logically, under the facts of this case, that the most important real and practical and controlling effect of such "consent" resolution in this particular instance was to ratify, validate, and confirm, not only Brown's contract with the school trustees, but also said two later August contracts (comprising the three-cornered agreement whereunder the church was to acquire said rock building, and said smaller tract of land), thereby vesting and confirming in said church, as of a date prior to said repair period, all rights and equities theretofore acquired by Brown, and, upon the whole, such rights and equities in said rock building as constituted said church, during said repair period, the equitable owner of that building.

In trying out definitely the legal effect of said "consent" resolution upon the issue of ownership during said repair period, let us test the correctness of the above-quoted views and reasoning of the Court of Civil Appeals on ratification—first, as related to said prior contract between Brown and the school trustees; and, second, as related to said two later August contracts. The major premise of that court is that said contract between the local school board and Brown was one which said State Board legally might ratify; and its minor premise is that such ratification was the purpose, or, at least, the legal effect, of said October "consent" resolution of the State Board.

Now, even though it were conceded, for present purposes, that said major premise is sound, said minor premise obviously is faulty, and the conclusion and decision of that court upon that point necessarily is erroneous, because (a) said resolution on its face makes no mention of or reference to said previous contract; (b) it contains no apt words of ratification; (c) it deals with the entire 10 acres, including the rock building, whereas said contract dealt with said building treated as severed constructively, and to be removed by Brown, actually, from the land; and (d) the phraseology of said resolution does not indicate, and this entire record does not show or suggest, that said State Board had ever heard of said contract; and (e) the terms of said resolution are purely prospective in their signification, carrying permission rather than approval, and stipulating that the sale thereby authorized should be to the highest bidder. As a whole said resolution plainly is utterly inconsistent with the very idea of ratifying said prior contract of trade or sale of only a portion of the property, but it is entirely consistent with the conception of a future sale of the entire property or any part of it. As between individuals having unrestricted power to dispose of property, an ordinary power of attorney from an owner thereof authorizing another to sell the same or any part thereof to the highest bidder clearly would not amount in law to a ratification by

the donor of a contract for sale of the property previously executed by the donee of the power. To my mind the whole theory of ratification of sale in this case seems utterly and patently untenable.

Consequently, in my opinion, and even wholly without regard to what may have been the legal effect, upon the question of ownership of said rock building, of said two later contracts which involved that question, Brown did not have or hold in or to said rock building, at any time during said repair period, any such title or right or equity as constituted him "owner" of that building within contemplation of articles 5621-5623.

Next in order will be a direct consideration of the effect of said two later August contracts upon the issue of ownership of said rock building during said repair period. In general terms that feature of the case has been treated hereinabove, but only incidentally.

In working out logically a correct conclusion and judgment upon the issues which this case presents, those two later contracts are, I think, of prime importance, and should be given controlling effect. Already the principal purposes and stipulations of each have been stated. Their joint effect upon the issue of ownership of the rock building, when construed and applied in the light of all the other facts of this case, and particularly of said earlier contract between Brown and the school trustees, and said later "consent" resolution and said still later deed, is what I shall next attempt to gauge.

Those two contracts were made at about the same time, and shortly after date of Brown's contract with the school trustees whereby he was to acquire said rock building. They were interrelated and interdependent, the first being conditioned upon execution of the second; hence they were drawn to become unconditionally operative simultaneously only. At least in so far as Brown and the church trustees and the materialmen were concerned, and (except in so far as the matter may have been affected at their inception by want of consent of the State Board of Education), also in so far as the church trustees were concerned, said two contracts did become finally operative, simultaneously, when the contract between the two sets of trustees was executed. In the sense stated, they became operative, and in full effect, prior to the beginning of said repair period, and so continued throughout that period down to the subsequent adoption of said consent resolution and the execution and delivery of said deed; whereby, under the facts, the superior equitable title to said rock building, and the legal title to said two and one-half acres of land on which it stood, merged on October 31, 1914, and then became perfect in said church trustees. Thus, in connection with the facts that Brown duly made upon the rock building the stipulated repairs, and the church trustees promptly paid him therefor the stipulated consideration, said two contracts ultimately were fully performed, differing in that respect from said earlier contract between Brown and the school trustees.

Upon the whole the net legal effect of all the stated transactions down to the inception of said repair period was, at least, to transfer to the church trustees, prior to that time, all such legal and equitable rights, titles, and interests in said rock building as Brown, under any rational theory or application of the law to the

facts of this case, may have acquired under his contract with the school district. Thereafter the materialmen were not justified in furnishing material to Brown as "owner" of the rock building, and doing so furnished them no valid basis for such statutory lien.

In any event, neither the stated doctrine of severance, nor the stated doctrine of ratification, as declared by the Court of Civil Appeals, nor both conjointly, support the conclusion of the Court of Civil Appeals that Brown was the statutory owner of the rock building.

If, prior to the adoption of said consent resolution, there had been, in contemplation of law, a severance of that building from the land, that building was not embraced by the terms of that resolution. On the other hand, if there had not been such severance, and said resolution really had any retroactive effect, it confirmed in the church trustees all such equitable title, if any, as Brown had acquired in said rock building, and such confirmation was as of a date prior to said repair period.

In other words, even assuming that Brown's contract with the school trustees was not void, but was susceptible of ratification by the State Board of Education, and that said board's "consent" resolution related back to and made Brown's contract with the school trustees in all respects valid and binding from its inception, and that, as a legal consequence, Brown acquired an interest, or equity, or an inchoate title, or a qualified ownership, in said rock building, all as was held by the Court of Civil Appeals, it is nevertheless true (a) that by virtue of said swiftly following contracts between Brown and the church trustees and between the latter and the school trustees, whatever interest, or title, or equity, or ownership, if any, in said rock building, Brown had acquired passed to said church before any of said material was furnished by Spencer & Co. In brief, Brown was not the statutory owner of the rock building when said material for its repair was furnished.

Those conclusions of mine are, I think, consistent with, and really result from, a fair application of the legal principles announced in the opinion of the Court of Civil Appeals. In so saying I do not wish to be understood as holding that, as a matter of either equity or law, any or all of said three August contracts concerning said independent school district property were valid or enforceable, either when made, or later upon and by reason of the adoption by said State Board of Education of its said "consent" resolution. I am merely undertaking consistently to apply to all the facts of this case the philosophy of the Court of Civil Appeals, the result of that effort being my conclusion that, even under their views concerning the law of "severance" and of "ratification," erroneous though I believe them to be, in great part, the church, rather than Brown, was the owner of the superior equitable title to said rock building prior to and during all of said repair period.

If it be said that for lack of antecedent consent of said State Board said contract between said school trustees, and also the thereon conditioned contract between the church and Brown, were invalid and nonenforceable, and that consequently they did not carry to the church all such equities and inchoate title and ownership, if any, as Brown had in and to and of said rock

building, my reply is that by the same test, and for identical reasons, Brown's prior contract with the school trustees, being likewise "tarnished with the same stick," carried to him no equities in, or inchoate title to, or ownership of, said rock building. Upon either horn of the dilemma, from a legal or from an equitable standpoint, and in any event, Brown was not at any time the statutory "owner" of the rock building, but as to the church, and also as to the materialmen, was the church's "contractor." Consequently, at least in so far as said claim of lien rests upon the proposition that Brown was such owner, said asserted lien should fall to the ground.

But it has been suggested here that only the school trustees are in position to attack the validity of said attempted disposition of said rock building to Brown, and that, although now holding both the equitable and the legal title to that building and to the land upon which it stands, said church and its trustees, under the facts stated, and particularly because they once recognized and dealt with Brown as in some sense the equitable owner of said rock building, are now estopped to defeat said claim of lien thereon by asserting that Brown never became the "owner" thereof within the meaning of articles 5621-5623. I do not consider them as being so affected, under the general law of estoppel and our established practice, as applied to the pleadings and facts shown in the record before us. In cases of this character estoppel must be pleaded specifically. *Insurance Co. v. Hutchins*, 53 Tex. 61, 37 Am. Rep. 750. See, also, other cases cited in note 43, p. 1231, 2 *Vernon's Sayles' Civ. Stat.*

It is true that, as has been suggested here, and upon the ground of estoppel, various transactions, involving mortgages and pretended sales of homesteads, corporate stock notes, and other classes of contracts apparently in contravention of our Constitution or statutes, or both, have been upheld by the courts of this state as being enforceable as to third parties without notice; but in each instance, presumably at least, there has been in the pleadings, as a basis for such decision, a formal and specific plea of estoppel. In this case the materialmen filed no plea of estoppel, and I see no reason why this court should file and sustain such a plea for them as against said church trustees.

Moreover, I have difficulty in trying to perceive how, if at all, the facts of this case would support such a plea if made, or, more particularly, how, as a basis for estoppel, the materialmen were placed in any worse position by reason of the fact that in a sense, and for a limited period of time, but only anterior to the period of time during which said material was furnished, the church trustees dealt with Brown upon the theory that he then owned some interest or equity in said rock building—that interest or equity, if any he had, now being shown to have passed to the church trustees prior to the furnishing of said building material.

Faust, the member of the firm of Spencer & Co. who made the affidavit to said claim of lien, and who seems to have handled practically the whole matter for that firm, testified, in substance, that when he loaded the lumber out he "was dealing with both the church trustees and Brown," and that "those fellows" (meaning the church trustees) told me Brown was their contractor" the first I knew of it, when they

came for those shingles (September 1st). \* \* \* I supposed probably he had a contract with them." Even Faust's affidavit to said claim of lien avers expressly that the material covered by the attached account was "furnished to J. G. Brown, a contractor." Treatment by the materialmen of Brown as owner of the building seems to have crept into the foreground of this case incidentally only, and entirely as an afterthought.

Next in order comes the second general division of this case, wherein said claim of lien rests upon the alternative, and, apparently, the main contention of the materialmen, to the effect that said material was furnished to Brown as the statutory "contractor" of the church trustees, and that due and seasonable "notice" of the furnishing of said material was given to said church trustees as owners of said rock building. Was such notice so given? If yes, the record before us fails to show it. On the contrary, the record is to the effect that the required notice was not given to the church trustees as such material was furnished, and that in reality no character of notice concerning said material was given to them, or to any one else, until long after they had finished paying their contractor, Brown, the entire contract price for making said repairs; and that even such notice as was given them, even then, was not in pursuance of any statutory requirement, and, therefore, as related to the asserted lien, was of no legal consequence whatever, in any event.

Concerning "notice" the only allegations of plaintiff's amended original petition were as follows:

"Plaintiffs further allege that within ninety days after said indebtedness accrued they delivered written notices to each of the defendants containing each and every item of material furnished, showing the amount due and unpaid, as required by article 5623, Revised Statutes of Texas 1911, and that within the time specified by law plaintiffs delivered to the clerk of the county court of Erath county, Texas, a sworn account of all the materials so furnished, the amount due and unpaid, and did all things required of them by the Constitution and statutes of the state of Texas to fix and establish their materialman's lien and give notice thereof to all persons dealing with said property. \* \* \* Plaintiffs further allege that at the time said deed was executed and delivered, and at the time the defendants Bosque Presbyterian Church, U. S. A., R. A. Hicks, T. A. Howard, and J. D. Knight, trustees of said church, paid the defendant Brown for construction and repair of said building. They had notice of plaintiffs' lien." Assuming error in punctuation, I read the last two sentences as one.

Except in so far as it wrapped up a conclusion of the pleader neither said petition nor said claim of lien alleged or showed that any statutory notice of the furnishing of said material was given to the church trustees. Nowhere did either state or show, expressly or otherwise, that the materialmen gave to the church trustees any character of notice relative to said material, from time to time, when and as the various items thereof were so furnished. Consequently, except as stating a mere conclusion of the pleader, said petition did not

even present a case for establishment and foreclosure of such statutory lien upon the rock building upon the theory that it was owned by the church or its trustees during said repair period. On the contrary said petition alleged that "at the time said contract (referring to the contract between Brown and the materialmen for said material) was entered into and said material furnished the defendant J. G. Brown was the owner of the building referred to herein upon which the material described herein was used," and, in substance, that Brown then owned said building by virtue of his said contract with said school trustees. In another paragraph said petition expressly alleged present ownership of said building by defendants in error.

Said claim of lien is somewhat peculiar in regard to allegations of ownership of the building and of the land on which the lien is claimed, and also in regard to the giving of notices of the furnishing of said material. It sets out an itemized statement of the dates of delivery and character and value of the several items of material furnished, beginning with September 1, 1914, and ending with only one item, of the value of \$5.40, on October 1, 1914. Then follows the affidavit, as follows:

"C. G. Faust, affiant, makes oath and says that the foregoing is a true and correct account of the material furnished to J. G. Brown, a contractor, by R. B. Spencer & Co., a firm composed of R. S. Spencer and C. G. Faust, dealers in lumber and other building material; and that the prices therefor, as set forth in the foregoing account, are just and reasonable, and that the same is unpaid, as stated, \$159.92, and there are no just or lawful offsets, payments, or credits to be allowed on the same; that said material was furnished to said J. G. Brown to be used in the repair and reconstruction of one building or house to be used as a churchhouse, which building or house affiant is informed and believes is owned by R. S. Hicks, T. A. Howard, and J. D. Knight, as trustees of the Bosque Presbyterian Church, U. S. A., of Lingleville, Tex., in Erath county; and that said material was furnished to the said J. G. Brown under and by virtue of his contract of purchase between said J. G. Brown and said R. B. Spencer & Co. Affiant further states that R. B. Spencer & Co. have furnished the trustees of Bosque Presbyterian Church, U. S. A., an exact copy of the foregoing list of items and prices and amount due, as required by article 3296 (5623), Revised Statutes of the State of Texas. Affiant further states that the house or building herein referred to, and the land upon which it is situated, are described more particularly as follows: [Description of said two and one-half acres tract.] By virtue of the laws of the state of Texas and the premises here set out, R. B. Spencer & Co. claim materialman's lien upon said described land, together with the said bonds or building situated thereon. Affiant further alleges upon oath that, during a portion of the time during which the above material was being furnished to said J. G. Brown, he is informed and believes that J. G. Brown was possessed of such contracts and title to said land that he might claim to have been the owner of some equitable or colorable title to same, which said title was

capable of being enforced. Wherefore R. B. Spencer & Co. have delivered copy of foregoing statement of items, prices, and amount to said J. G. Brown, and they claim lien upon said land and house whether the title be in Brown or the church or both of them."

That document, which was offered in evidence, does, indeed, aver, in substance, that a copy of the embodied statement of account had been furnished to said church trustees "as required by article 3296 (5623)"; but no such notice is required by that or any other statute of this state. Actual notice of the filing of a claim of such lien is not required by law, constructive notice of the filing thereof in the county clerk's office being imported under our registration laws. No witness, not even Faust, who was on the stand, gave any testimony showing, or tending to show, that said materialmen ever gave, or attempted to give, to the church trustees, or to Brown, or to any one, any written notice whatsoever of each, or of any, item of such material as it was furnished. Faust testified: "I filed this account with the clerk on the 27th of November, 1914, and I mailed to each of these defendants a carbon copy of that account." As above indicated, the only written "notice" of any kind, at any time, to anybody, which this record discloses, was the notice mentioned in said claim of lien and in the following quotation from the trial court's "conclusions of fact and law," which notice, as there shown, was given long after the church trustees had paid Brown in full for said repairs, and which, even then, was merely a single copy of the "written notice and itemized statement of account" which that court found to have been filed in the county clerk's office, said account being further identified by that court as the one attached to plaintiff's amended petition.

Concerning the giving of statutory notices, and the fixing of the asserted lien, the "conclusions of fact" filed by the trial court are these and none other:

"I further find that the said Brown was an independent contractor; that said church paid him in full in accordance with its contract with him on September 28, 1914. I further find that on November 27, 1914, the plaintiffs served a written notice and itemized statement of account, a copy of which is attached to their amended petition, on the trustees of said church; and on the 27th day of November, 1914, filed with the clerk of the county court of Erath county, Tex., the itemized account and affidavit set forth in said amended petition, \* \* \* which notice was served on said trustees approximately sixty days after they had paid the said Brown in full for his work on said church." Said findings of fact by the trial court amount primarily to an express finding that on November 27, 1914, the materialmen did serve on the church trustees a written notice of said statement of account and claim of lien supported by affidavit, which were filed on that day in the county clerk's office; and, secondarily, to an implied finding that no written notice of the character and value of each item of said material was ever given by the materialmen to any one as such items were furnished. This record is destitute of evidence to the contrary. Oral notices were given to the church trustees on and after October 27th; but

oral notices are valueless under articles 5621-5623, and they came too late. *Texas Glass & Paint Co. v. Crowds*, 108 Tex. 351, 193 S. W. 1072, and c. c. The judgment of the trial court denying a lien was therefore consistent with its "conclusions of fact" and with the uncontroverted evidence; nevertheless that portion of said judgment has been finally overturned, and the asserted lien established and foreclosed, even in the absence of statutory notice. However, the Court of Civil Appeals declares: "Appellants filed their account for record, and gave the notice required by law, in order to fix a materialman's lien upon the church building and the ground upon which it was situate, such account being filed and notice given within the time and in the manner required by law."

\* \* \* The material was furnished to Brown by appellants during the month of September. \* \* \* The date of the completion of the repairs upon the rock building by Brown is not definitely shown, but it was some time in the month of September, about the 29th day thereof, when it was completed and turned over to the church." No other conclusion or finding of fact concerning the giving of any "notice" is found in said opinion.

How, then, is the quoted conclusion that "such account" was "filed," and that "notice" was given within the time and in the manner required by law, to be here construed and applied? Ordinarily, let it be conceded, such language, in a suit to establish and foreclose such statutory lien, would be understood and held by this court to mean that thereby the Court of Civil Appeals meant to hold that in any event the materialmen duly and seasonably gave to the "owner" of the property written notice of each and every item of material when and as it was furnished, and afterward filed their account and claim of lien, supported by affidavit, all in manner and form and at and within the times prescribed by law; and ordinarily such conclusions of fact would bind this court. But is this court at liberty, in this case, so to construe and apply that conclusion of fact? I think not, for these reasons: (a) The quoted language does not explicitly so state the facts, only general terms being employed. (b) When so construed, such conclusion would be at once in conflict with the fair effect of the explicit above-quoted conclusions of fact made and filed by the district court, and in conflict with the well-established rule of practice that in support of the judgment of a trial court in a cause tried without a jury appellate courts will presume that, except as otherwise expressly stated in such judgment itself or in such filed "conclusions" of the trial court, all questions of fact were resolved by the trial court to such effect as to support the judgment rendered by the trial court. (c) Such conclusion of the Court of Civil Appeals, if so construed, would be wholly unsupported by any evidence in the record before this court. (d) Moreover, the disposition of this case was not grounded by the Court of Civil Appeals upon the theory that the church was the owner of the rock building, and Brown merely a contractor; under which theory, but not otherwise, it would be material to inquire whether statutory notices of the furnishing of the material were given duly and seasonably to the church trustees. On

the contrary, the decision of that court rests avowedly upon its conclusion of fact that during said repair period Brown, rather than the church or the school district, was the owner of said rock building. Under the latter theory, any and all notices to the church trustees were wholly unnecessary and immaterial, as, indeed, were all notices to Brown. Why should Brown, if he owned the rock building, have, from time to time, "written notice" of the delivery of said material to himself? Our statute makes no such vain requirement; nor under articles 5621-5623, and our general registration laws, is it necessary to give any actual notice of the filing of such claim of lien. Really, in the light of this record, the phraseology of the quoted conclusion of the Court of Civil Appeals can hardly be treated as meaning that statutory notices were given to the school trustees as owners, unless it be assumed that for the moment the writer thereof may have been under the impression that the "notice" required by articles 5621-5623 is merely one to the effect that the sworn account and claim of lien supporting the affidavit had been filed in the clerk's office. However, that impression, if it existed, may have been suggested by, and certainly was in harmony with, the only averments concerning written notice set out in said claim of lien, or in plaintiff's pleadings, or in the evidence.

Under all the law and facts and circumstances, it is clear that the quoted conclusions of fact by the Court of Civil Appeals concerning "notice," whether intended as relating to notice to Brown as "owner," or as related to said church trustees as "owner," should be treated in this court as wholly negligible and unimportant.

Inherent, therefore, in this case, as disclosed by the record as a whole, is this somewhat obscured but absolutely uncontroverted fact: Said materialmen did not give said church trustees, either within the time or in the manner provided by law, notice of the furnishing of any of said material for repairs on said rock building. Inevitably the legal effect of that demonstrated fact is theoretically, and should be practically, to destroy said claim of lien, in so far as it rests upon the contention that said church or its trustees owned that building throughout or during said repair period. And, just as certainly, that legal consequence would result had the church or its trustees owned and held undisputed possession of said building and land throughout said entire period of time, under a duly authorized executed and recorded deed to them from said school trustees, carrying unquestionably a perfect fee-simple title to both building and land.

An acute phase of this matter of "notice" is presented by said judgment of foreclosure ordering said rock building sold to satisfy said personal judgment against Brown, thereby practically compelling said church to pay again for said material, although seasonably, and without having received even a pretense of any statutory notice of the furnishing of any of said material, and long prior to the filing of said claim of lien said church trustees paid Brown, their contractor, the entire contract price for making said repairs on that building, including the value of said material.

Is such double burden saddled by the laws of

Texas upon owners of buildings and lands? Clearly not; and, so far as I know, nobody contends, abstractly, that they are; what I have treated as errors in the disposition of this case having resulted in great part from what I consider a misapprehension of the material facts of the case.

In providing for a materialman's lien to secure payment for material furnished to a contractor to be used in repairing any house or building, etc., our statute declares, in a restrictive proviso: "In no case shall the owner be compelled to pay a greater sum for or on account of labor performed or material, machinery, fixtures and tools, furnished as provided in this chapter than the price or sum stipulated in the original contract between such owner and the original contractor or builder of such house, building, fixtures, improvements or repairs." Article 5623.

The evident intent of our law is that in the absence of such written notice to such "owner," duly given prior to payment, by the "owner" to the "contractor," of the full contract price between them for the repairs, the property is relieved, absolutely, of any statutory lien to which otherwise it may have been liable. To the effects indicated, unquestionably, are the previous decisions of this court and of various Courts of Civil Appeals. *Horan v. Frank*, 51 Tex. 404; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500; *Dudley v. Jones*, 77 Tex. 69, 14 S. W. 335; *Johnson v. Improvement Co.*, 83 Tex. 505, 31 S. W. 503; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. 1112, 56 S. W. 193; *Nichols v. Dixon*, 99 Tex. 263, 89 S. W. 765; *Loneragan v. Trust Co.*, 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 129 Am. St. Rep. 803; *Texas Glass & Paint Co. v. Crowder*, 108 Tex. 346, 193 S. W. 1072; *Riter v. Mfg. Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758; *Brick & Tile Co. v. Stratton*, 53 S. W. 703; *Herring v. Kroeger*, 23 Tex. Civ. App. 672, 57 S. W. 980; *Baumgarten v. Mauer*, 60 S. W. 451; *Faber v. Muir*, 27 Tex. Civ. App. 27, 64 S. W. 938; *Nichols v. Dixon*, 85 S. W. 1051; *Beilharz v. Illingsworth*, 62 Tex. Civ. App. 647, 132 S. W. 106; *Texas Glass & Paint Co. v. Iron Co.*, 147 S. W. 620; *Builders Co. v. Construction Co.*, 150 S. W. 770; *Wilkerson v. Satterfield*, 167 S. W. 275.

In *Horan v. Frank*, supra, this court upheld, as to a subcontractor, the legislative construction given by the act of August 7, 1876, to section 37 of article 16 of our Constitution, relating to liens for labor and material; but held that, as against the homesteader, the subcontractor's rights might be protected by fixing upon the homesteader, through proper notice, a personal liability "not to exceed the amount then due by the property owner to the principal contractor."

In *Fullenwider v. Longmoor*, supra, plaintiffs asserted a statutory materialman's lien under act of March 28, 1835, old articles 3164-3178, which required "ten days' notice in writing before the filing of the lien, as herein required," and declared that "thereafter said owner, owners, or agent shall be authorized to retain in his hands the amount claimed until the same has been settled or determined not to be due." Under our present statutes the form of, and the time for giving, statutory notices in like in-



stances has been changed; but its legal effect, when duly given, is just the same. Such notice merely impounds the unpaid contract price, or the unpaid portion thereof, if any, for the construction or repair work, including materials. That such was the effect of that former law that cited decision expressly held. Therein this court said:

"The lien acquired is, however, in all cases subordinate and never superior to the terms of the contract. No original indebtedness is created by establishing the lien. The debt of the owner of the property as fixed by the contract cannot be modified, changed, or enlarged by the proceedings fixing the lien. These proceedings do no more than establish a lien against the property for such amount as is unpaid and is payable by the terms of the contract when the proceedings are commenced. From the time of the service of the notice upon the owner of the property he can make no further payment to the contractor without incurring liability for the lien debt, if proper steps shall be taken to establish it, to the extent of his indebtedness under the contract when the notice is served. If the owner of the property is indebted to the contractor the service of the notice, if followed by the acts required to fix the lien, secures the fund as does a writ of garnishment in an ordinary case, except that a pro rata distribution may become necessary by the terms of the statute between different lienholders and the process of collecting the money is different. The petition in this case was insufficient because it contained no allegation that the owner of the improved property owed the contractors anything at the date of or at any time subsequent to the service of the notice of their claim. The contract made part of plaintiff's petition showed that the larger part of the debt had been paid by the execution of a negotiable promissory note not then due. The contract disclosing this was recorded. The owner of the property is not required to pay for the improvement twice in order to protect those who may acquire liens. The law does not deny him the privilege of paying for the work in advance with cash or property, and who would hold him liable as a debtor must show he was in fact such when the right against him was acquired."

In *Dudley v. Jones*, supra, which seems to have arisen under said act of 1885, this court said:

"The owners of the property were not liable to the subcontractor for any amount paid to the contractor before being served with notice of the subcontractor's claim. By establishing his claim as a mechanic's lien, the subcontractor's right related back to the date of his notice to the owners, and became a lien upon the property for any amount then due or subsequently accruing in favor of the contractors, not exceeding the subcontractor's demand, there being no other mechanic's lien against the property. The right of protection through the instrumentality of a mechanic's lien is subject to the right of the owners of the property not to be compelled to pay a greater price for the improvement than they had contracted to do, unless such result was occasioned by their making payments after notice of the claim was given to them."

*Berry v. McAdams*, supra, involved construc-

tion and application of section 8 of the act of 1889, which was substantially the same as old article 3296, and as our present article 5623, supra, in connection with that provision of old article 3308, now article 5635, which declares: "But no owner or proprietor shall in any case be required to pay, nor his property be liable for, any money that he may have paid to the contractor before the fixing of the lien or before he has received written notice of the existence of the debt." In that case this court said: "It will be observed that the law requires all who may furnish material to any person other than the owner to notify the latter of the character and value of the material so furnished so that he may protect himself by reserving out of the price to be paid by him the value of material placed into such improvement." The certificate from the Court of Civil Appeals showed that Housewright, Swaze & Co. seasonably had actual knowledge that Berry, their contractor, owed McAdams, the lumber dealer, for such material; nevertheless this court held: "McAdams did not fix his lien nor give the written notice before payment was made by Housewright, Swaze & Co. to Berry, the contractor, and is not entitled to enforce a lien upon their property for material furnished to a subcontractor."

In *Lonergan v. Trust Co.*, supra, which arose under contracts made in 1899, this court held: "The proceeding prescribed by the statute by which a materialman is permitted to fix a lien for material furnished by him and used in the erection of an improvement does not create a debt against the owner of the property, but operates as a writ of garnishment would, and appropriates so much of the money in the hands of the owner as is then due and payable, or may become due and payable, to the contractor to the extent necessary to satisfy that claim. *Fullenwider v. Longmoor*, 78 Tex. 490, 11 S. W. 500." In clearness and force that statement of the law, which I consider applicable to this case, is incomparably fine.

In *Texas Co. v. Crowdus*, supra, wherein the claimants of the lien failed to serve the owner of the property with any written notice of their claim against his contractor, this court held: "This was an essential thing for them to do as fixed by the statute in order for them to secure a lien upon the building and lot. Having defaulted in the service of said written notice of their claims, they did not acquire a lien on said property"; citing several of the above-cited decisions of this court.

Third. As to the existence in this case of conflict in decisions, my views already hereinabove have been indicated sufficiently. Our statute provides that the appellate jurisdiction of this court shall extend to "all questions of law" arising in cases within the appellate jurisdiction of Courts of Civil Appeals "in which one of the Courts of Civil Appeals holds differently from a prior decision of its own or of another Court of Civil Appeals \* \* \* upon any such question of law." Acts 1917, c. 75 (Vernon's Ann. Civ. St. Supp. 1918, art. 1521). Under our Constitution and laws one of the prime functions of our Supreme Court is to iron out such conflicts in decisions, and that power and authority carries a corresponding duty. In its discharge the initial step is the granting of the



writ of error. That being denied, the judgment of the Court of Civil Appeals must be enforced.

And thus, although our statute, in providing for a materialman's lien, for material furnished to a "contractor," expressly restricts its operation to "the material furnished at the time or subsequent to the giving of the written notice above provided for" (article 5623), and although said proviso of that very article expressly ingrafts upon that limitation the added restriction that "in no case shall the owner be compelled to pay a greater sum for or on account of \* \* \* material \* \* \* furnished as provided in this chapter than the price or sum stipulated in the original contract between such owner and the original contractor," and although prior to receipt of any written notice whatsoever concerning material which went into said repairs on said rock building said church trustees seasonably paid their contractor the entire contract price for said repairs thereon, *including said material*, and despite said oft-repeated decisions of our Supreme Court and of other high appellate courts of this state, and by said final action of this court in this case, said church, or its trustees, are now required to pay a *second time* for said material, or to lose their church building by sale of it under said judgment of foreclosure and removal of the building from the land.

The sum of money involved in this instance is small; nevertheless this case involves the judicial divestiture of fundamental property rights which the people, through their Constitution and laws, have confided to the final keeping and protection of their Supreme Court. Even in such a case should be exemplified the thought of Hammond to the effect that of law it should be acknowledged that the very least is not beneath her care nor the greatest exempt from her power.

The foregoing is intended as a reflex of merely my own individual views in the premises. They are expressed herein to make my own attitude in this case and the supporting reasons plain, and under a strong conviction that the granting of the writ of error would have resulted, probably, in a more accurate ascertainment and in better protection of substantial rights of litigants, and in appropriate preservation of the harmony of our jurisprudence, and in real conservation of the time of this court.

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STATE NAT. BANK OF SAN ANTONIO v.  
EAST COAST OIL CO., S. A. (App. No.  
11074; Motion No. 4466.)

(Supreme Court of Texas. May 21, 1919.)

On Application for Writ of Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by the State National Bank of San Antonio against the East Coast Oil Company and others. Plaintiff dismissed as to one of the unnamed defendants, and the other two unnamed defendants defaulted. Judgment

in favor of plaintiff against the Oil Company was affirmed by the Court of Civil Appeals (208 S. W. 190), and plaintiff makes application for a writ of error. Application denied, and motion for rehearing overruled without written opinion.

J. L. Browne and A. J. Parker, both of San Antonio, for applicant.

Templeton, Brooks, Napier & Ogden, of San Antonio, for defendant in error.

**PER CURIAM.** Application for writ of error denied, and motion for rehearing overruled.

**HAWKINS, J. (dissenting).** That for all purposes, and although never actually presented for payment, a draft drawn payable "at sight" and put into circulation becomes due and payable at expiration of three days of grace thereafter, and consequently, in all instances, any subsequent purchaser of such draft, no matter how he may acquire it, takes it after maturity, and therefore subject to all equities existing between the original parties, is, in legal effect, the decision of this court in refusing in this case the bank's application for a writ of error, and in overruling its motion for a rehearing, all without a written opinion.

The draft here in controversy on the Oil Company of Houston, Tex., dated Tampico, Mexico, June 20, 1915, drawn payable "at sight," was purchased in San Antonio, Tex., by the bank on January 20, 1916, in due course of business, for a valuable consideration, without knowledge or notice of any existing defense against it, and before it had been presented to the drawee for payment.

Clearly the bank is entitled to a judgment against the oil company for, not merely a small part, but all, of the amount called for on the face of said draft, unless the draft had matured before the bank bought it. That proposition does not conflict with the theory which controlled the disposition of this case in all the courts.

As to the far greater portion of the amount of the draft, a defensive plea of the drawee was sustained, in the trial court, pursuant to a peremptory instruction to the jury, which seems to have been given upon the theory that, under the facts stated, said draft had matured, as a matter of law, prior to the purchase thereof by the bank; and upon that point of law this case turns.

Plaintiff in error, the bank, contends that the case should have been submitted to the jury on the issue as to whether, under all the facts and circumstances, a reasonable time for presentation of the draft for payment had elapsed maturing the paper prior to acquisition thereof by the bank.

The following special charge was requested by the bank, and refused by the court:

"The jury is instructed that the draft sued upon by plaintiff is good in the hands of the plaintiff provided that, when plaintiff purchased the same, it had not been in circulation for an unreasonable length of time, and you are therefore instructed to determine the following question: Had the draft at the time of purchase of same been in circulation an unreasonable length of time? You will answer this question 'Yes' or 'No.' In determining this question you are instructed that reasonable time is such time as would be taken by a man of ordinary business prudence under like circumstances, and in determining this question you will take into consideration the form of the draft, location of parties, mail and transportation facilities, and business conditions existing in the countries where issued and where payable."

The record before us discloses the fact that there was evidence tending to show that Tampico is on the east coast of the Gulf of Mexico and several hundred miles from Texas; that at the time of the issuance of said draft and continuously after purchase of said draft by plaintiff in error there existed in the republic of Mexico seriously disturbed political conditions resulting in an impairment of facilities for getting drafts out of Mexico, and particularly in disturbance and delay of the mails, and that during the existence of said conditions it was not unusual for such commercial paper to remain in circulation without presentation for payment as long as this particular draft had remained unrepresented for payment. The revolutionary conditions existing in Mexico during the period involved is matter of public history of which the courts will take judicial notice.

The views of the trial court upon the issue as to whether the draft had matured prior to purchase thereof by the bank, under which that issue was treated as being purely one of law, to be determined by the court, without the aid of the jury, prevailed in the Court of Civil Appeals and in this court. However, the decision of the intermediate appellate court thereon (208 S. W. 190) declaredly was so rendered out of deference to the hereinafter mentioned Texas decisions.

In the opinion of the Court of Civil Appeals in this case, Associate Justice Swearingen said:

"The second and fourth assignments urge that the sight draft for purposes of transfer did not become overdue until the lapse of a reasonable time after the execution and delivery of the sight draft. As stated in our discussion of the first assignment, the courts of many states sustain appellant's proposition; but the appellate courts of Texas fix the date of maturity of the sight draft as of the date of execution. If the question were an open one in this state, the writer hereof is of the opinion that a demand or sight draft should be past due only after presentation for payment. Such seems to express the intention of the parties. The liability of the drawer is not matured until

after presentation to the drawee, and prior to presentation the drawee has no liability. It therefore seems more reasonable to fix the date of maturity of the sight draft after presentation for payment, at which time the liability of all parties connected with the draft, such as drawer, drawee, payee, and indorsers become certain. It may be that, if this question had been presented upon facts similar to those of this case, our courts would have qualified the rule as herein suggested. However, in deference to the decisions of our appellate courts, we hold that the sight draft was past due when purchased by the appellant more than six months after the sight draft was drawn."

Logically the decision in the present case is applicable, in principle, to drafts payable "on demand," making much, if not all, such paper mature absolutely, for even purposes of transfer, immediately upon original delivery thereof, without presentation for payment; since, as to time of maturity, the distinction between sight drafts and demand drafts is that the former are, but the latter are not, entitled to three days of grace. R. S. art. 593; *Brown v. Chancellor*, 61 Tex. 437; *Banking Co. v. Bank* (Civ. App.) 165 S. W. 922.

Likewise the rule so laid down in the case now before us may be deemed applicable, for various, if not all, purposes of transfer (as well as for purposes of suit and of limitation), to all demand notes not bearing interest, and, perhaps, to all demand notes. The effect is to render all affected commercial paper practically nonnegotiable.

If the rule in this state for determining, for such purposes of transfer, the time of maturity of drafts drawn payable upon other than a fixed date, or even of demand notes, is as has been so held in the present case, it seems never to have been expressly so declared by this court heretofore; and it seems not to have been the law in England, or in Canada, or in most of the American states. The decision in this case seems to be in plain contravention of the common law, which is in force in this state except as modified by our Constitution or statutes. *Brown v. Chancellor*, 61 Tex. 443; *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; *White v. White*, 108 Tex. 582, 196 S. W. 508, L. R. A. 1918A, 339.

However, this court has, indeed, held heretofore that for purposes of filing and maintaining suit thereon, and also for purposes of limitation, a promissory note drawn payable "on demand" is due from the moment of its delivery, without presentation or demand for payment. *Cook v. Cook*, 19 Tex. 434; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Pitschki v. Anderson*, 49 Tex. 1; *Swift v. Trotti*, 52 Tex. 498; *Brown v. Chancellor*, 61 Tex. 437; *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806. See, also, *Schraum v. Nolte*, 1 White & W. Civ. Cas. Ct. App. §

1156; *Banking Co. v. Bank* (Civ. App.) 165 S. W. 922; *Pollard v. Allen* (Civ. App.) 171 S. W. 530; *Sam v. Ludtke* (Civ. App.) 203 S. W. 98.

The rule for determining, for purposes of suit and for purposes of limitation, the time of maturity of demand notes, and apparently of demand drafts and of sight drafts, having been thus seemingly settled in this state by said former decisions of this court, it would, indeed, seem somewhat incongruous, and possibly impracticable, now to declare and enforce another rule for determining, for all or any of the purposes of transfer, the time of maturity of such commercial paper; and upon that view of the matter I concurred originally with my Associates, in refusing the writ of error.

However, upon further and more careful consideration of the subject, including a more careful study of said former decisions of this court, and particularly inasmuch as the present case involves no direct issue as to when suit might be filed and limitation begin to run, but rather the rights of an indorsee of a draft, claiming to be an innocent purchaser, I do not now believe that said former decisions apply with controlling force to the facts of this case.

Moreover, and aside from that question, such careful, though incomplete, investigation of the subject as I have been able thus far to make has impressed my mind with the idea that said decision in this case may be, and probably is, erroneous in principle, and that certainly it is contrary to the great weight of authority elsewhere, as reflected by decisions of courts and by standard text-books.

*Cook v. Cook*, 19 Tex. 434, wherein this court declared that "an account or note payable on demand is payable immediately," was a suit for money loaned under a contract for repayment on demand, and not involving rights of an indorsee claiming to be an innocent purchaser.

The above-cited later Texas cases on the general subject, upon which the Court of Civil Appeals grounded its decision in this case, seem to have been decided in reliance mainly on *Cook v. Cook*, supra. It is a significant fact that not one of them involved, as this case does, the rights of an indorsee claiming protection as an innocent purchaser for value before maturity. But in some of the Texas cases wherein were directly involved the rights of indorsees of sight paper or demand paper this court has adhered to what I may term the rule of reasonable time in which to present the paper for payment, during which period the paper is not to be treated as overdue.

*Jordan v. Wheeler*, 20 Tex. 699, was a suit by an indorsee against an indorser on a sight draft, in which the defendant resisted on the ground that the bill had not been

presented for acceptance, and on the ground that it had not been presented to the drawees within a reasonable time. Therein this court said:

"With respect to the time when a bill payable at sight should be presented for acceptance, in the absence of any determinate usage of trade, fixing a definite time, the only rule is that it must be presented within a reasonable time. *Chit. on Bills*, 247; *Story on Bills*, § 231. And what will be a reasonable time must depend upon all the circumstances of each case. *Id.* 'If' (says *Story*) 'the bill is kept in circulation, and not held by any one holder, through whose hands it passes, an unreasonable time, it seems difficult to assign any particular time in which it ought to be presented for acceptance; in respect to foreign bills, the conveniences, if not the necessities, of trade seem to require that a very liberal allowance of time, both for the transmission and presentation of bills, should be allowed to every successive holder.' *Id.*; [*Gowan v. Jackson*] 20 Johns. [N. Y.] 176; [*Robinson v. Ames*, 20 Johns. (N. Y.)] 146; [*Stetson v. Mass. Mutual Fire Ins. Co.*] 4 Mass. 336 [3 Am. Dec. 217]. In the case of a foreign bill payable at sight, it has been decided that it is no laches to put it into circulation before acceptance, and keep it in circulation without acceptance, as long as the convenience of successive holders may require; and it has even been held that, if a bill drawn at three days' sight were kept out in that way for a year, this would not be laches. *Chit. on Bills*, 275."

In *Chambers v. Hill*, 26 Tex. 473, this court said:

"The material question in the case is whether the bill was duly presented for payment. No time of payment being specified, the bill was payable on demand. *Bytes on Bills*, 165. And, as respects the time when presentment for payment must be made, the rule is that it must be within a reasonable time after the bill has been received, depending on distance and other circumstances; otherwise the drawer and indorsers will be discharged. *Id.* 163; *Chit. on Bills*, 354, 369, 379; *Story on Bills*, § 325. What is a reasonable time, when there is no determinate usage of trade, must depend upon all the circumstances of each particular case (*Id.* 231); and when the facts have been ascertained, or are not disputed, the reasonableness of the time is a question of law; but when the facts are contested, the question of law becomes mixed with fact, and is for the decision of the jury. *Chit. on Bills*, 369, 379; *Bytes on Bills*, 163. As respects the rule of law, *Chitty* says there is no better settled general rule than that the presentment must be made within a reasonable time, which must be accommodated to other business affairs of life."

*Nichols v. Blackmore*, 27 Tex. 587, was a suit by an indorsee upon a sight draft drawn in Freestone county on merchants in Galveston. Therein this court said:

"The only question presented is, whether the holder of the draft used proper diligence in presenting it to the drawees for payment, or was he guilty of laches whereby he lost his recourse upon the drawer. It is well settled that in the

case of a draft drawn at sight, or so many days after sight, the holder must present it for payment within a reasonable time. And in determining the question of reasonable time the courts will consider all the circumstances by which the question of diligence can be affected, as, for instance, the distance between the place of residence of the drawer and the place of residence of the drawee, the mail facilities of the country, etc. The general usage of the country in respect to such paper will also enter into the consideration of the question. It is also to be remarked that the idea of reasonable time is opposed to the idea of great diligence or promptitude. The question is one of a large class which frequently produce great embarrassment, from the extreme difficulty in many cases of drawing a line by which reasonable time can be separated from laches."

In this connection the following excerpt from *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310, is interesting:

"An allegation of the petition that the debt became due on the 5th day of December, demand of payment having been made on that day, would not have the effect to prevent the draft from becoming payable until that time; but, the undertaking being payable on demand, it became due on the 23d of June, the date of acceptance, or as soon thereafter as demand for payment could reasonably have been made. 1 *Daniel on Negotiable Instruments*, 542, § 605; *Cook v. Cook*, 19 Tex. 437." (Italics mine.)

There the draft seems to have been accepted. And in *Banking Co. v. Bank* (Civ. App.) 165 S. W. 925, one of our Courts of Civil Appeals said:

"A bill payable on demand is due, and action thereon may be brought at once. \* \* \* The bill is payable on the day of its date, or within a reasonable time." (Italics mine.)

In searching for the proper rule for ascertaining the time of maturity of demand paper, the decisions in the adjudicated cases and the text-books also, with marked contrariety of views, draw or discuss various distinctions between notes and checks or drafts, and between notes bearing interest and other notes, and between purposes of suit and limitation and purposes of transfer, and as to the latter purposes still further distinctions as among various parties to the transactions, such as payee and maker, indorsee and maker, and indorsee and indorser.

English decisions upon the general question, and more particularly where the note bears interest, are not entirely uniform, and the effect of several of them has been variously understood in England and in America. *Barough v. White*, 4 B. & C. 325, 107 Eng. Rep. Reprint, 1080, 10 E. O. L. 600, 2 C. & P. 8, 12 E. O. L. 4, 6 Dowl. & R. 379, 3 L. J. K. B. 227; *Norton v. Ellam*, 2 Mees. & Wel. Exch. 461; *Cook v. Cook*, 19 Tex. 434; *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Wethey v. Andrews*, 3 Hill (N. Y.) 582,

citing *Dowl. & R. 379*; *Herrick v. Woolverton*, 41 N. Y. 581, 1 Am. Rep. 465, and English cases cited; *Carll v. Brown*, 2 Mich. 401; *Dennett v. Wyman*, 13 Vt. 485; *Atlantic Co. v. Tredick*, 5 R. I. 171; *Selwin's N. P.* (3d Ed.) 352; *Chartered Mercantile Bank v. Dickson*, L. R. 8 P. O. 574.

It is true, also, that various English courts have held that, under certain circumstances, and for purposes of suit, and for purposes of limitation, demand notes not bearing interest mature upon original delivery. *Herrick v. Woolverton*, supra, and cases cited. Whether the interest feature was material or not has involved much divergence in conclusions of various English and American judges.

Nevertheless even in England a different rule seems to have been applied, for purposes of transfer, and particularly as affecting the rights of one claiming to be an innocent purchaser in determining the time of maturity of commercial paper drawn payable on demand. *Heywood v. Watson*, 4 Bing. 496, 13 E. C. L. 605; *Nash v. De Freville*, 2 Q. B. 72; *Glasscock v. Balls*, 24 Q. B. D. 13; *Brooks v. Mitchell*, 9 Mees. & Wel. 15; *Cripps v. Davis*, 12 Mees. & Wel. 159.

So also as to the Canadian case, *Bank v. Electric Co.*, 24 Ont. L. Rep. 57, which rests upon a construction and application of section 182 of the local Bills of Exchange Act, which declared, in substance, that a demand note is not to be deemed overdue when negotiated simply because a reasonable time for presenting it for payment had elapsed. See, also, *Thorne v. Scovill*, 4 N. Bruns. 558.

In *Norton v. Ellam*, supra, decided in 1837, and cited approvingly by this court in *Cook v. Cook*, supra, it was indeed held, through Parke, B., that on a demand note bearing interest limitation runs from the date of the note. The stipulation for interest was there declared immaterial, except that thereby the debt increases from day to day. That case was declared to be "quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shown before the action is brought." But in that case the issue, limitation, involved only the original parties to the obligation, and not, as does the present case, the rights of an indorsee claiming to have been an innocent purchaser. In this connection it is interesting to note that in deciding several later cases, which, like the present case, involved rights of indorsees, Baron Parke declined to apply the rule so enunciated by him previously in *Norton v. Ellam*, in which only the original parties to the note were concerned. It seems to me that the stated difference in the status of the parties to the transactions, and that only, accounts for the distinction made in the two lines of decisions in both England and the United States, and thus largely reconciles what at first

blush appears to be a serious conflict in decisions.

One such later case was *Brooks v. Mitchell*, supra, decided in 1841. The issues were whether the demand note, with interest, dated December 24, 1824, was indorsed by Evans to Royle before the bankruptcy of Evans in August, 1836, and, if so, whether the defendant gave therefor to Royle a valuable consideration, without knowledge that Royle had given no value to Evans. Therein the court held that the note, which had run more than 13 years before the indorsement to Royle, and on which no interest had been paid for years, was not then overdue. Parke, B., for the court, all concurring, said:

"If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security."

He added:

"It is quite unlike a check, which is intended to be presented speedily."

In another such later case, *Cripps v. Davis*, supra, decided in 1843, which was an action by indorsees against the maker of several promissory notes, one due at three months and the others on demand, the court held a plea of payment bad for not showing distinctly that the notes were overdue when indorsed to plaintiffs. Baron Parke said:

"But may not a bill or note payable on demand be indorsed over; there being nothing on the face of it to show that it is overdue? The reason why a party who takes an overdue bill or note takes it with all equities is because on the face of it it carries suspicion; that does not apply to the case of a bill or note payable on demand."

Even in *Heywood v. Watson*, decided in 1828 (prior to *Norton v. Ellam*), plaintiffs sued as indorsees of a demand note dated February 10, 1824, and indorsed by the payee to plaintiffs before June, 1826; the precise date of such indorsement not being shown. It was held that plaintiffs were entitled to recover. The court, through Parke, J., said:

"The action is brought on a note payable to order, and indorsed to the plaintiffs, who have a clear right to sue. It has been urged that they should have inquired into the circumstances attending the making of the note; but they had no notice of those circumstances, nor any ground of suspicion to put them on inquiry; for, though the note was made in 1824, it was payable on demand, and therefore could not be esteemed overdue till demand had been made."

In *Glasscock v. Balls* (1889) Lord Esher said:

"In this case the plaintiff sues the maker of a promissory note payable on demand as in-

dorsee. It was admitted that the plaintiff was indorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases show that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. Under such circumstances *prima facie* the indorsee for value without notice is entitled to recover on the note."

In *Nash v. De Freville* (1900), under somewhat complicated facts, the equities of indorsees were upheld as being superior to those of the maker of demand notes, into whose hands the notes had returned under circumstances which were held to show no payment by him at that time of any fresh consideration for them. It was held that at the time of his reacquisition of the notes sued on by the indorsees they had matured, not because they were demand notes and therefore mature from date of delivery, but because of a prior demand by the payee for payment, and payment to him by the maker in the form of renewal notes, the old notes being left in payee's hands, prior to the indorsement. The notes had been delivered under an agreement that they were not to be negotiated, and the three original notes had been taken up from the indorsees by the payee, with his worthless check, fraudulently given to the indorsees by the payee, than whom, it was held, the maker had no higher rights as against the indorsees. The conclusion was that in so receiving back the notes the maker did not give fresh value for them, and, even if he did, the notes, as to him, and because of such demand and payment, were then overdue, and, under the circumstances, the indorsees were entitled to recover. That case involved a discussion of several provisions of the Bills of Exchange Act of 1882 (45 & 46 Vict. c. 61).

Possibly the above-cited and other English decisions on facts more analogous to those which the record in this case presents were overlooked by this court in preparing the opinion in *Cook v. Cook*, or possibly they were not considered pertinent to the issue then under treatment by this court.

Whatever may have been the rule of the common law as between the original parties to demand paper, the fair effect of the English decisions, excepting, perhaps, those governed by the Bills of Exchange Act of 1882 (*Edwards v. Walters*, [1896] 2 Ch. 157), prior to which "the law merchant formed part of the common law of England," appears to be "that a note payable on demand is not to be considered as overdue at the time of its delivery so as to deprive a subsequent purchaser of the protection given by the law merchant to bona fide purchasers of negotiable notes before maturity." Note to Bank v. Electric Co., 24 Ont. L. Rep. 57, set out in

Ann. Cas. 1912A, 475 et seq. Said note declares also that the authorities "almost unanimously" are to that effect, and undertakes to support the statement by citation of 5 above-mentioned English cases, and of 25 cases from 16 American States, and of *Mitchell v. Catchings* (C. C.) 23 Fed. 710, and of *Paine v. Railroad Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, 30 L. Ed. 193. A complementary rule, as stated in the same note, is:

"But a promissory note payable on demand is, as a general rule, held to be overdue so as to subject any one taking it to all defenses to which it would be open in the hands of the payee, unless it is transferred within a reasonable time after its date."

In support of that statement said note cites 27 cases from 14 American States. To the same effect are 7 Cyc. p. 972, and cases cited in note 18, and 8 Corpus Juris, 408, and cases cited in note 90.

What is a reasonable time, under all the facts and circumstances of the case, is sometimes a question of law for the court, and sometimes a question of fact for the jury, under a proper charge of the court. *Jordan v. Wheeler*, 20 Tex. 699; *Chambers v. Hill*, 26 Tex. 473; *Nichols v. Blackmore*, 27 Tex. 587; 7 Cyc. 975, and cases cited in note 25; 8 C. J. 408, note 93 and page 1070, note 67.

In support of the foregoing general conclusions I quote from various decisions, and cite additional authorities, as follows:

Upon the subject here under consideration the Supreme Court of the United States has said:

"The rule, as to ordinary negotiable paper, payable on demand, is that it is not due, without demand, until after the lapse of a reasonable time within which to make demand; and what the length of that reasonable time is may vary according to the circumstances of particular cases, and must be governed very largely by the intentions of the parties, as manifested in the character of the paper itself and the purposes for which it is known to have been created and put in circulation." *Morgan v. United States*, 113 U. S. 501, 5 Sup. Ct. 598, 28 L. Ed. 1044.

"In this country a promissory note payable on demand has always been held to be overdue, so as to subject any one taking it to all defenses to which it would be open in the hands of the payee, unless transferred within a reasonable time after its date; and what is reasonable time is a question of law, depending upon all the circumstances of the particular case." *Paine v. Railroad Co.*, 118 U. S. 160, 6 Sup. Ct. 1023, 30 L. Ed. 193.

"In the case of a bill, note, or check payable on demand, no exact day of payment is fixed in the instrument. The general rule is that it must be presented for payment within a reasonable time, having in view ordinary business usages and the purposes which paper of that class is intended to subserve. The term 'overdue,' as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning; and the failure

to keep these distinctions in mind has perhaps led to some misapprehension regarding the present case. Sometimes it is used in reference to a right of action against a drawer or indorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor. It is in this last connection that the term 'overdue' is considered in the present case. That in this case a bill may be said to be overdue, although it has never been in fact presented to the drawee for payment, is recognized everywhere throughout the books, and will be apparent, we think, on a moment's reflection. Suppose a draft has been held by the payee five years, without ever having been presented to the drawee for payment, and is then indorsed to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue or dishonored, so as to charge it in the hands of the indorsee with any defenses which the drawer had against it in the hands of the payee, although, when he took it, it had never been presented for payment. The retention of a demand draft so long a time without presentment, when no defense exists against it, is so unusual and contrary to business usages that this circumstance would be held to charge the indorsee with notice when he purchased the draft that it was dishonored. The lapse of time would in such case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid. The cases are almost innumerable in which it has been held that paper payable on demand had been outstanding so long when transferred as to be deemed overdue and dishonored, so as to subject it, in the hands of the purchaser, to any defenses which the maker or drawer had against it in the hands of the payee; and in none of these cases is the question whether or not the paper had been before the transfer presented for payment to the maker or drawee referred to as at all material. \* \* \*

That in determining whether an indorsee took a demand note or bill as dishonored and overdue paper, subject to all equities or defenses, the test is the length of time it has been outstanding, and not whether it has in fact been presented for payment, may be illustrated in another way. Suppose a draft had in fact been presented for payment, and payment refused, on the very day it was issued; it would then be overdue as to the drawer, so that an action would then lie against him. But suppose, immediately after such presentation, and on the same day, the holder should indorse the draft to another, who took it in good faith, for value, without notice of this actual dishonor; clearly such indorsee would not take it as overdue paper, subject to the equities or defenses against it in the hands of the former holder, because, a rea-

reasonable time for its presentation not having expired, there was nothing to put him upon inquiry, or to charge him with notice of such equities. *Himmelman v. Hotelling*, 40 Cal. 111 [6 Am. Rep. 600]. In fact, in determining whether an indorsee takes such paper as overdue paper, subject to such defenses or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is: Had the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defense to it? In view of the well-known fact that bills of exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travelers to be carried with them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject. But in this case we think that the fact that this draft was, *without any explanation of the reason*, found outstanding nearly five months after its date, fully justified the trial court in holding it overdue and dishonored when Jordan took it, so as to charge it in his hands, or the hands of those who hold under him, with any defense or set-off which the drawer had against it in the hands of Edison." *La Due v. Bank*, 31 Minn. 33, 16 N. W. 426. (Italics mine.) See, also, *Brophy v. Wilson*, 45 Mont. 489, 124 Pac. 510.

"In England it has been held, and such is the general current of authorities, that a negotiable note, payable on demand, does not become overdue by mere lapse of time, so as to let in the maker to an equitable defense at the suit of the indorsee. *Barrough v. White*, 4 B. & C. 335; *s. c.*, 10 E. C. L. R. 345. Something more than lapse of time must be brought to the knowledge of the indorser to charge him with the equities of the original parties. The obvious policy of this rule is to make this species of paper at all times a safe circulating medium, and placing it upon the same footing of other negotiable paper before maturity. In the case of *Brooks et al. v. Mitchell*, 9 Mees. & Wels. 14, it was held that a note payable on demand, with interest, made in 1824, and indorsed to the defendant in 1838, and upon which no interest had been paid for three years immediately preceding the indorsement, was not subject to an equitable defense as between the original parties. It was urged in that case that the nonpayment of interest for three years was sufficient to put the indorsee upon inquiry. But *Parke, B.*, expressing the opinion of the court, said: 'I cannot assent to the arguments urged in behalf of the plaintiffs. If a promissory note payable on demand is after a certain time to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument; but a promissory note, payable on demand, is intended to be a continuing security.' In this country the rule is somewhat modified, and the general doctrine is that a promissory note payable on demand, unless indorsed within a reasonable time, is considered overdue and dishonored. [Citing cases.] And what that reasonable time is, is a question for the determination of the court upon the facts of each particular case." *Carll v. Brown*, 2 Mich. 401.

"In the late case of *Barrough v. White* (6

*Dowl. & Ry.* 379) all the judges concurred expressly in saying that such a note cannot be considered as dishonored till it is demanded and payment refused; and they put themselves on its being a continuing note upon its face. When I say all the judges, I speak particularly of the report in *Dowl. & Ry.* The same case is reported in 4 *Barn. & Cress.* 825, where *Little-dale, J.*, alone, is made expressly to declare that as the true rule, though I think what *Bayley* and *Holroyd, JJ.*, are there made to say comes pretty much to the same thing." *Wethey v. Andrews*, 3 *Hill* (N. Y.) 582.

"Chancellor Kent says: 'But it has been a question, when a note payable on demand is to be deemed a note out of time, so as to subject the indorsee, upon a subsequent negotiation of it, to the operation of the rule. When the facts and circumstances are ascertained, the reasonableness of time is a matter of law, and every case will depend upon its special circumstances.' \* \* \* In *Wethey v. Andrews*, 3 *Hill* [N. Y.] 582, Justice Cowen refers to the English authorities and cases; and appears to ground what he says upon what he presumes to be the law in England. He says: 'The cases furnish no principle for fixing the time with exactness, when a negotiable note payable on demand shall be deemed dishonored, so as to let in a defense against one to whom it has been negotiated.' \* \* \* We are aware that, as a general rule, where all the facts are entirely undisputed, what is a reasonable time seems to be a question of law [citing cases]; but in a case like the present, involving various considerations, and particularly the laws of a sister state, it appears to us that this question should have been submitted to the jury under proper instructions from the court." *Barbour v. Fullerton*, 36 Pa. 105.

"When a note, payable on demand, is to be deemed out of time, so as to subject the holder to the operation of this rule, is a question of law, to be determined by the circumstances of each case. There is no certain rule on the subject, nor is there any certain rule prescribing the precise time in which it must be presented for payment. Circumstances must control this also. 3 *Kent's Com.* 91." *Stewart v. Smith*, 23 *Ill.* 397.

"The second point raised presents a question often brought to the consideration of the court, and upon which no very well-defined and precise rule of a general character has been adopted. The general doctrine is sufficiently well settled, that as to a promissory note payable on demand payment is to be demanded in a reasonable time; and, if not demanded within such time, it is deemed overdue and dishonored. But what is a reasonable time, within which such demand must be made, can be said to have been ruled only in reference to particular cases, as they have occurred. The question has arisen in two classes of cases; the one as to what was a reasonable time to make such demand in order to charge an indorser; and the other, like that in the case before us, as to the length of time in which a note, payable on demand and remaining unpaid, would be held to be dishonored and subject to those grounds of defense which would have been open to the maker in a suit by the payee. \* \* \* Without attempting to prescribe any precise limit beyond which such a note must be held

to be dishonored, the court are of the opinion that the term of one month, as stated in the instruction to the jury, was sufficiently restricted in point of time, and that, if the note was transferred to the plaintiff within that period, it was not a dishonored note." *Ranger v. Cary*, 1 Metc. (Mass.) 369.

"In this state, a note, payable on demand, may be sued immediately. To decide that, on such a note, when made payable to bearer, or the order of the payee, such a defense can avail the maker, unless it is indorsed immediately, would destroy its negotiability. From the case of *Barough v. White*, 4 Barn. & Cress. 325, it is very clear the note would not be considered as overdue in England. In that case *Littledale, J.*, thought such a note could not be considered as overdue, unless some evidence was given that payment had been demanded and refused. The rule as settled in Massachusetts appears to be the true and rational one, that, as it relates to the negotiability of notes payable on demand, and in questions between the indorsee and indorser and between the indorsee and maker, they are to be considered as payable in a reasonable time, and what is a reasonable time is a question of law, to be decided by the court, on the facts which may be found by the jury." *Dennett v. Wyman*, 13 Vt. 485.

"The note, against the misapplication of which our aid is invoked in this cause, is payable on demand with interest, and was received for value by the defendants, *Tredick, Stokes & Co.*, as they aver and admit in their answer, about 13 months after its issue and date. In England, it would seem, such a note, indicating, it is said, on its face, a permanent loan or credit, is not deemed to be overdue during the period of legal limitation without some evidence that payment has been demanded and refused. *Byles on Bills*, 181, 164, 165. This is not, however, the law of this country; but such a note is here held to be overdue when it has run a reasonable time from its issue or date; so that, if it be negotiated after that time, the maker is let into proof of any equities in defense to an action of the indorsee upon it of which he might have availed himself against the original payee." *Atlantic Co. v. Tredick*, 5 R. I. 171.

"The length of time that a note may remain due before this suspicion of its soundness attaches to it depends upon circumstances not very clearly defined. But it would be doing violence to the decisions on this point, in this state and elsewhere, if we were to say that as between mercantile men, not shown to be residing at a great distance from each other, and with no impediments to easy and frequent communication disclosed in the case, this note was not overdue and dishonored at a period as early at least as that at which it was negotiated. From the 14th of December to the 1st of the following August is such a length of time for a note of this description to remain due that the purchaser might well have been put upon his inquiry as to the circumstances of its origin and its history, and be adjudged to have taken it with a full knowledge of them, and with all the disadvantages and risks attending the purchase of dishonored paper. *Franklin v. March*, 6 N. H. 364 [25 Am. Dec. 462]; *Emerson v. Crocker*, 5 N. H. 159, and cases there cited." *Carlton v. Bailey*, 27 N. H. 230.

"The authorities are agreed that a demand note falls due within a reasonable time after its making. What is a reasonable time depends upon all the facts and circumstances surrounding the running of such time. If the length of time the note had been outstanding, taken in connection with all the other facts and circumstances, would justify a reasonable presumption in the mind of the indorsee at the time of the indorsement that payment upon the note had been refused, or would be refused if demand were made, then the indorsee takes the note as dishonored; otherwise not. 'The demand must be made in a reasonable time, and that will depend upon the circumstances of the case and the situation of the parties.' *Loose v. Dunkin*, 7 Johns. [N. Y.] 70, 5 Am. Dec. 245." *Bank v. Mining Co.*, 17 Colo. App. 452, 68 Pac. 981. See, also, *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268.

"The rule in this country is that a note payable on demand is overdue for the purposes of negotiation unless it is negotiated within a reasonable time; and what constitutes such reasonableness of time cannot be determined by any fixed and exact rule, but must depend upon the circumstances of each case. 1 *Paras. Notes & Bills*, 375-379; *Herrick v. Woolverton*, 41 N. Y. 581 [1 Am. Rep. 461]; *Carll v. Brown*, 2 Mich. 401; \* \* \* 1 *Daniel, Neg. Inst.* §§ 607, 608. Whether what is reasonable time is a question of law for the court or a question of fact for the jury is a matter which has been a good deal controverted; but undoubtedly the better view is that it is a mixed question of law and fact, and that, except where the facts are few, simple, and undisputed, in which case the court shall decide, it should be left to be decided by the jury under the direction of the court, upon the particular circumstances of the case. 1 *Daniel, Neg. Inst.* § 612; 1 *Paras. Notes & Bills*, 269; *Wyman v. Adams*, 12 Cush. [Mass.] 210, 214. We think the question of reasonable time in the case at bar is a question for the jury under instructions from the court." *Bacon v. Harris*, 15 R. I. 599, 10 Atl. 647.

For compilations of cases involving various periods of time, running from one day to six years or more, see *Tiedeman on Com. Paper*, § 296; *Ann. Cas.* 1912A, note page 476; 7 *Cyc.* 850, note 98.

Under an Arkansas statute on the subject of reasonable time, and on an issue as to whether plaintiff was the holder "in due course" of a demand note, the question was held to be one for the jury. In *re Philpott's Estate*, 169 Iowa, 555, 151 N. W. 825, *Ann. Cas.* 1917B, 839. See, also, *Kerby v. Wade*, 101 Ark. 543, 142 S. W. 1121, and authorities there cited.

"A reasonable time must elapse before mere nonpayment dishonors the bill or note. What this time is has not been, and cannot be, fixed by any definite and precise rule. One day's delay of paper on demand certainly would not dishonor it; five years certainly would. And in each case how many days, or weeks, or months are requisite for this effect must depend upon the test whether so long a time has elapsed that it must be inferred from the particular



circumstances and the general conduct of business men, both of which should be considered, that the paper in question must have been intended to be paid within this period, and, if not paid, must have been refused." Parsons on Notes & Bills, 263, 264, quoted approvingly in Daniel on Neg. Insts. (5th Ed.) p. 776, note 67.

The same note quotes at length from *La Due v. Bank*, 31 Minn. 33, 16 N. W. 426, supra, which, as above shown, makes important distinctions in the rules, based upon the relations of parties to the transactions.

For an interesting discussion involving such distinctions, see, also, the three opinions in *Herrick v. Woolverton*, supra, in which two judges dissented without writing.

"All the text-writers and the adjudicated cases tell us that a bill payable at sight, or at a fixed time after sight, or on demand, and a note payable on demand, must be presented for acceptance or payment, as the case may be, 'within a reasonable time.' But in determining what is reasonable time we are left a riddle which it is difficult to solve. \* \* \* And an eminent jurist has said in respect to the time within which it is necessary to present for payment a note payable on demand in order to charge an indorser that 'it depends upon so many circumstances to determine what is a reasonable time in a particular case that one decision goes but little way in establishing a precedent for another.'" Daniel on Negotiable Instruments (5th Ed.) § 604.

"What is reasonable time must depend upon the circumstances, and in many cases upon the time, the mode, and the place of receiving the bills, upon the relations of the parties between whom the question arises." *Id.* § 606.

"It was formerly held that a bill or note payable on demand, or at sight, was never overdue, so as to let in the equities, until there had been a demand. But the better and more modern rule is that the demand must be made within a reasonable time after the date of the note, in order to claim the rights of a bona fide holder. And if the bill or note is transferred within a reasonable time, the transferee is not charged with constructive notice of the actual dishonor of the paper. It has been held that what is reasonable time in this connection is a question for the court to determine. It has also been held to be a question of fact for the jury, and also a mixed question of fact and law. Probably, under varying circumstances, each of these propositions will find application." Tiedeman on Commercial Paper, § 296.

See, also, Tiedeman on Bills and Notes, § 108.

"Note payable on demand is regarded by the best writers as a continuing security, especially if given for a loan or payable 'with interest,' and the rules of the last two paragraphs do not apply; but it will be a question for the jury on all the facts whether the presentment was reasonable or not. (Sharswood's Byles, 388.) The authorities, however, are in irreconcilable conflict, and the question, when it arises in any particular state, should be examined in the light of the decisions of that state." Morse, Banks and Banking (5th Ed.) § 259.

It is declared in *Sam v. Ludtke* (Civ. App.) 203 S. W. 98, by our Court of Civil Appeals for the First Supreme Judicial District:

"It is stated in Cyc. vol. 7, pp. 847, 848, that while some courts hold that a demand is necessary to start the running of the statute of limitation against a demand obligation, or at least that the payee must have a reasonable time to make demand before the statute becomes operative, most of the courts have held that paper payable on demand is due immediately, and the statute of limitation begins to run from the date of the paper."

The question there before the court was one of limitation, so it was not necessary or appropriate for that court to quote further; but in the present case it is pertinent to observe that the same volume (pages 849 and 850), under the heading of "Maturity for Purposes of Transfer," says also:

"In some cases it has been held that paper payable on demand is not overdue for the purpose of transfer, so as to make the transferee a purchaser after maturity, until after a demand has been made [note 95, citing the English cases, *Barough v. White and Brooks v. Mitchell*, supra], and some have held that it is overdue immediately after it is issued. Most of the courts, however, hold that it is not overdue for the purpose of transfer until after the lapse of a reasonable time, and that it is then overdue [note 97, citing numerous cases]. What is a reasonable time depends upon circumstances of the particular case, such as the form of the instrument, local usages, the interest of the parties, etc., and ordinarily is a question of law for the court."

The quoted text is followed by a note citing several cases holding that the issue as to whether a reasonable time has elapsed is a question of law for the court, and several cases holding that said question was one for the jury.

In England, in Canada, and in various American states, the question here involved, and others akin to it, seem to be controlled at present by statutes which clear up various questions which long have vexed the courts of two continents and have caused much annoyance in the commercial world.

As related to the time of maturity of demand paper and the rights of an indorsee, the distinction between checks or drafts and promissory notes is one to which numerous decisions and some text-writers have adverted, but that distinction seems not to have been fully worked out and applied generally. It is a distinction worthy of careful consideration which I have not been able thus far to complete.

Upon the whole, and in view of the status of the question as it existed at common law, and as reflected by the decisions of American courts, and particularly in view of our statute adopting the common law (R. S. art. 5492, 2 Gam. Laws, 177; Act Jan. 20, 1840), I am not content finally to refuse the writ of

error now here sought, thereby peremptorily denying the indorsee relief in great measure.

Alternatively, I am of the opinion that the motion and also the writ of error should be granted, and the cause set down for oral argument, and that, thereafter, this court should definitely and fully declare, in a written opinion, the law of this case. Not uniformly, yet in numerous instances in this court, many of them being recent, wherein the controlling issues unquestionably were of much less general importance and in much less confusion, like considerations have resulted in the granting of the writ of error.

**INTERNATIONAL TRAVELERS' ASS'N v. BRANUM. (No. 2724.)**

(Supreme Court of Texas. June 4, 1919.)

**1. INSURANCE — § 618—ACCIDENT INSURANCE — VENUE—STIPULATIONS.**

Stipulations between an accident insurer and its policy holder for exclusive venue in the county of the insurer's residence do not control, under Rev. St. 1911, art. 1830, §§ 24, 29, and cannot be enforced.

**2. EVIDENCE — § 126(2), 271(16), 317(8) — HEARSAY — RES GESTÆ — SELF-SERVING STATEMENTS.**

In suit on an accident policy, testimony as to statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, held inadmissible as hearsay, while the statements were self-serving and no part of the res gestæ.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by Anna C. Branum against the International Travelers' Association. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which affirmed (169 S. W. 389), and defendant brings error. Judgments of the trial court and the Court of Civil Appeals reversed, and judgment rendered for defendant.

Eldson & Eldson, of Hamilton, and Seay & Seay, of Dallas, for plaintiff in error.

Langford & Chesley and H. E. Chesley, all of Hamilton, for defendant in error.

GREENWOOD, J. Defendant in error sued plaintiff in error to recover \$5,000, besides 12 per cent. penalty and \$1,000 attorney's fees, upon a policy insuring Calvin C. Branum against accidental death in the sum of \$5,000. Defendant in error was the wife of Calvin C. Branum and the beneficiary in

the policy. Plaintiff in error was and is a mutual assessment accident insurance company, organized under chapter 5, of title 71, of the Revised Statutes of Texas.

Defendant in error alleged the issuance of the insurance policy to Calvin C. Branum, and that while it was in force—

"the said Calvin C. Branum was the involuntary witness of an accidental fire in the city of Hot Springs, Ark., in which a helpless man was accidentally burned to death; that thereby the said Calvin C. Branum, who was of an excitable temperament, was greatly shocked, excited, and unnerved, so that a blood vessel in his head was ruptured, and death ensued as the proximate result thereof; \* \* \* that at the time the said Calvin C. Branum witnessed said fire, or shortly thereafter, being in or near his room at the Great Northern Hotel in said city, he accidentally fell, his body striking the floor with great force, and thereby a blood vessel in his head was ruptured, and as the direct result thereof he died as before set out; that the death of the said Calvin C. Branum was the direct result of both the great excitement caused by the accidental fire and the burning of the helpless man and his accidental fall."

Plaintiff in error filed a plea of privilege to be sued in Dallas county, averring that the policy sued on, and the application therefor, and its by-laws stipulated that all causes of action on the policy should be brought in Dallas county, where its home office was located. The plea of privilege omitted to state that none of the exceptions existed in this case to exclusive venue in the county of plaintiff in error's residence. The facts averred in the plea were admitted, and the plea was overruled.

The evidence showed that Calvin C. Branum was a man 40 years of age, in robust health, and of a sympathetic, excitable, and emotional nature. On May 27, 1913, Calvin C. Branum was registered as a guest at the Great Northern Hotel at Hot Springs, having been assigned to room 344. About 2:30 p. m., on May 27, 1913, Calvin C. Branum stated to one with whom he had business that he was going to his room to write some letters before train time, which was 5:30 p. m. About 3 p. m. on that day, a building burned across the street from the Great Northern Hotel, and in view of room 344, in which a paralytic was suffocated. About 8 or 4 o'clock in the afternoon of May 27, 1913, Calvin C. Branum called at the office of Dr. McCray, of Malvern, Ark., which is about 22 miles from Hot Springs, and complained of lassitude, headache, and impaired vision. About 6:30 o'clock and about 9:20 o'clock in the afternoon of May 28, 1913, Dr. J. C. Wallis was called to see Calvin C. Branum at Arkadelphia, Ark., which is 23 miles from Malvern, and found him nervous and restless and suffering from pains in the head. On May

80, 1918, Dr. W. C. Lackey found Mr. Branum at the Terminal Hotel in Ft. Worth, with apoplexy or hemorrhage of the brain, from which he died about 11 o'clock that night, shortly after reaching his home at Walnut Springs.

Over the objection of plaintiff in error, defendant in error was permitted to testify that her husband told her on May 29th or May 30th that he saw a helpless man being burned to death at Hot Springs, and that in coming from the bathroom he had fallen, and remembered nothing further until he came to himself on the bed in his room, and Mr. Branum's trained nurse at the Terminal Hotel at Ft. Worth was also permitted to testify, over the objection of plaintiff in error, that about May 30th, Mr. Branum had stated to her that he had started from his room into the bathroom, when he saw a man being burned, and that when he regained consciousness he was on the floor and did not know how he got on the bed. The objection to the introduction of all this testimony was that it was hearsay and self-serving.

The issuance of the policy was proven, and that it was in force; but the above is all the evidence to prove that the death of the insured was an accidental death, save that Dr. Lackey testified that Mr. Branum mentioned nothing about a fall to him, though he did mention seeing a man burn to death at Hot Springs, and save the opinion of medical experts that shock and fright, together with a fall, or shock and fright alone, might produce a rupture of a blood vessel and cause death, and save the opinion of medical experts that Mr. Branum's death was so caused, on the hypothesis that he died from a ruptured blood vessel three days after having suffered such a shock, fright, and fall.

It is the contention of defendant in error that the venue of this suit lay in the county of her residence, under article 4744, R. S., which provides that:

"Suits on policies may be instituted and prosecuted against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policy holder or beneficiary instituting such suit resides."

Article 4744 was section 33 of the act approved March 23, 1909, authorizing the incorporation, and providing for the regulation, of life, health, and accident insurance companies, of a very different character from that to which plaintiff in error belongs, and the article clearly relates only to the corporations authorized and regulated by that act. Hence article 4744 has no application to this suit.

Plaintiff in error contends that the venue lay exclusively in Dallas county, under the

stipulations of the application, by-laws, and policy, as held in the case of *International Travelers' Ass'n v. Votaw*, 197 S. W. 239. Plaintiff in error is a corporation organized "for the purpose of transacting the business of accident insurance, upon the co-operative or mutual assessment plan, without capital stock." Article 4794, R. S. At the time its creation was authorized, and since, section 29 of article 1830, R. S., provided that suits against accident insurance companies might be commenced in the county in which the persons insured or any of them resided at the time of their death or injury, while section 24 authorized suit against any private corporation to be commenced in any county in which the cause of action or a part thereof arose, or in which such corporation had an agency or representative, or in which its principal office was situated. Plaintiff in error being an accident insurance company, though doing business on a co-operative or mutual assessment plan, without capital stock, section 29 applied to it, and, being a private corporation, section 24 likewise applied to it.

So the real question presented by plaintiff in error's plea of privilege, which did not negative the exceptions of sections 29 and 24, is whether a statute giving a plaintiff the right to sue in several counties can be overridden by a contract undertaking to deprive him of that right. In the early case of *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174, it is announced in an opinion by Chief Justice Shaw that—

"The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience."

In the recent case of *Nashau River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N. E. 678, L. R. A. 1916D, 691, the court say with reference to the *Nute* Case:

"That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts, by reason of the binding decisions of the United States Supreme Court in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, and *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148. The same rule prevails generally in all states where the question has arisen."

The note on pages 696 to 702 in L. R. A. 1916D fully supports the court's statement. The Supreme Court of the United States concluded that there was no sound principle on which agreements like that before us could be upheld, saying:

"Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his

life, or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, 18 N. Y. 1287, be tried in any other manner than by a jury of 12 men, although he consent in open court to be tried by a jury of 11 men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Insurance Co. v. Morse*, 20 Wall. 451, 22 L. Ed. 385.

The United States Circuit Court of Appeals of the Sixth Circuit, in *Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 510, 27 C. C. A. 214, per Judge Lurton, said:

"Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy, and should not be enforced."

[1] We are convinced that it is utterly against public policy to permit bargaining in this state about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses. *Eaton v. International Travelers' Ass'n of Dallas*, 136 S. W. 817. It follows that the stipulation for exclusive venue in Dallas county will not be enforced, and that the court did not err in overruling the plea asserting the privilege to be sued in that county alone.

[2] The assignments of error must be sustained which complain of the admission in evidence of the statements of the insured to his wife and to his trained nurse about having seen the burning man and about having fallen, two or three days previously, over the objection that such statements were hearsay and self-serving. The testimony was just as plainly an effort to prove the cause of the death by a self-serving narrative long after the event, in no sense *res gestæ*, as was that mentioned and held inadmissible in *Galveston v. Barbour*, 62 Tex. 175, 50 Am. Rep. 519, wherein Judge Stayton said:

"There is no direct proof as to how the child received the injury of which it died, but it is contended that he received a wound on his foot from a projecting iron bolt in the sidewalk on one of the streets of the city of Galveston.

"John M. Barbour, the father, and one of the plaintiffs, testified, over the objections of the appellant, that 'next morning he [the father] told him [the son] to come and show the object that had hurt him. From what he said, witness examined a bolt in the curbing of the

sidewalk on the west side of Eighteenth street, between Post Office and Market street, being the first bolt in the curbing next to the alley, and between the alley and Hibbert's store, and found two drops of blood right by the bolt.' \* \* \*

"The testimony of the father necessarily had upon the jury all the effect which his statement that his son told him he was injured by the bolt which he examined could have had, if made. The evident intention and purpose, which by the course pursued was fully accomplished, was to get before the jury the declaration of the child as to the manner in which he was injured. If the father, under the circumstances, could not legally have been permitted to narrate before the jury what his son had told him, then his testimony, which was intended to have, and must have had, with the jury, the same effect, ought not to have been admitted. Parties cannot do by indirection what they could not do directly.

"The father testified to matters which occurred the next day after the child was hurt, and the matters to which he testified could in no sense be termed *res gestæ*. This testimony was, in effect, a narration of what his son told him as to the cause of the injury which he received the day before, and should have been in so far excluded."

No one would claim that the statement to the trained nurse would be admissible, if it would be inadmissible had it been made to an attending physician. That similar statements, to a mother and to an attending physician, were objectionable, was determined in the case of *Hicks v. G., H. & S. A. Ry. Co.*, 71 S. W. 824, when it is said:

"The declaration of the deceased, made to his mother after they arrived at Columbus, some time after the alleged accident, as to where and to what extent he was injured, and also the statements made by the deceased and his mother to Dr. Harrison as to how the injury occurred, and the character and extent of same, were not admissible in evidence. The declaration of the deceased that he was hurt; and his statement as to the location of the injury, made at the time it occurred, being *res gestæ*, were admitted in evidence by the court. \* \* \*

The offered testimony as to the statements made by the deceased and the plaintiff to Dr. Harrison was hearsay, and inadmissible for any purpose."

The opinion of this court on writ of error in that case approves the above holding. *Hicks v. G., H. & S. A. Ry. Co.*, 72 S. W. 837.

After excluding the incompetent evidence to statements of the insured, there is no evidence on which to base a finding that his death was accidental, and counsel for defendant in error frankly admits in this court that no further evidence can be adduced on another trial.

In view of this admission, and our conclusions as to the effect of the competent evidence, it is ordered that the judgments of the district court and of the Court of Civil Ap-

peals be reversed, and that judgment be here rendered for plaintiff in error.

HAWKINS, J., disqualified and not sitting.

**CITY OF DALLAS v. SHOWS.**  
(No. 65-2814.)

(Commission of Appeals of Texas, Section A.  
June 11, 1919.)

**1. PLEADING  $\Leftrightarrow$ 223—GENERAL DEMURRED—  
SPECIAL EXCEPTIONS.**

The trial court having sustained general demurrer to petition, special exceptions thereto should not have been considered.

**2. APPEAL AND ERROR  $\Leftrightarrow$ 1040(1)—REVIEW—  
HARMLESS ERROR.**

The consideration of special exceptions to petition after court had sustained general demurrer thereto was harmless, where the special exceptions were but expository of the general demurrer.

**3. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 742(4)—AC-  
TION FOR INJURIES—CLAIM OF DAMAGES—  
PLEADING.**

In action against city for personal injuries and for damages to property, the giving of notice of claim of damages required by City of Dallas Charter, art. 14, § 11, must be affirmatively alleged by plaintiff, being a condition precedent to the right of action.

**4. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 723½ —  
TORTS—ACTION FOR INJURIES—NOTICE OF  
INJURY—VALIDITY OF CHARTER PROVISION.**

City of Dallas Charter, art. 14, § 11, requiring written notice of injury as a condition precedent to a suit against a city for such injury, is valid.

**5. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 741(1)—AC-  
TION FOR INJURIES—NOTICE OF INJURY—  
NEGLIGENCE OF CITY.**

A written notice to a city of an injury required by City of Dallas Charter, art. 14, § 11, is a condition precedent to an action for such injury, though the injury was the result of an act of the city itself.

**6. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 741(1)—No-  
TICE OF INJURY—CONSTRUCTION OF CHARTER  
PROVISION.**

The requirement of notice of injury as a condition precedent to an action under City of Dallas Charter, art. 14, § 11, is in derogation of common right, and will be construed with reasonable strictness, and not extended by implication beyond its own terms or held to apply to such damages as are not within its clear intent.

**7. MUNICIPAL CORPORATIONS  $\Leftrightarrow$ 741(1)—No-  
TICE OF INJURY—CONSTRUCTION OF CHARTER  
—"DAMAGES OF ANY KIND"—"PERSON IN-  
JURED."**

City of Dallas Charter, art. 14, § 11, requiring actual knowledge or written notice to

city of defect in public street, highway, or grounds or public works of city causing damage to "person or property" at least 24 hours prior to injury, and requiring "person injured" to give notice of injury before city shall be liable for "damages of any kind," construed to require notice of injury only in case of personal injury, and not in case of injury to property.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Suit by F. F. Shows against the City of Dallas. Judgment for defendant reversed by Court of Civil Appeals (172 S. W. 1137), and defendant brings error. Judgment of Court of Civil Appeals affirmed.

C. F. O'Donnell, G. C. Adams, and M. S. Church, all of Dallas, for plaintiff in error.

Parks & Hall, of Dallas, for defendant in error.

SONFIELD, P. J. F. F. Shows, plaintiff, sued the city of Dallas, a municipal corporation, defendant, for the recovery of damages for personal injuries alleged to have been sustained by plaintiff and his wife and for injuries to their real property, alleging that such injuries resulted from the negligent, careless, and defective construction and maintenance of a sewer by defendant.

The trial court sustained a general demurrer and two special exceptions to plaintiff's petition, the general demurrer being sustained on the grounds set out in the special exceptions, in substance, that the petition did not allege that notice of the defective condition of said sewer and notice of the resultant injury to person and property had been given to the defendant in the manner and within the time prescribed by its charter. Plaintiff declining to amend, judgment was rendered for defendant.

On appeal the Court of Civil Appeals reversed the judgment of the district court and remanded the cause for a new trial, holding that, the defective condition of the sewer being brought about by defendant's own act, no notice of either the defect or resulting injury was necessary in order to maintain suit. 172 S. W. 1137.

[1, 2] The trial court having sustained the general demurrer, the special exceptions should not have been considered. *Everett v. Henry*, 67 Tex. 402, 3 S. W. 566; *Bigham Bros. v. Port Arthur Channel & Dock Co.*, 100 Tex. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 686. This, however, is immaterial in this instance, as the two special exceptions were but expository of the general demurrer, statements of the grounds upon which same was urged.

Section 11, art. 14, of the charter of the city of Dallas reads as follows:

"Before the city of Dallas shall be liable for damages of any kind the person injured, or

some one in his behalf, shall give the mayor or city secretary notice in writing of such injury within thirty days after the same has been received, stating specifically in such notice when, where, and how the injury occurred and the extent thereof. The city of Dallas shall never be liable on account of any damage or injury to person or property arising from or occasioned by any defect in any public street, highway or grounds or any public work of the city, unless the specific defect causing the damage or injury shall have been actually known to the mayor or city engineer by personal inspection for a period of at least twenty-four hours prior to the occurrence of the injury or damage, unless the attention of the mayor or city engineer shall have been called thereto by notice thereof in writing at least twenty-four hours prior to the occurrence of the injury or damage and proper diligence has not been used to rectify the defect after actually known or called to the attention of the mayor or city engineer as aforesaid."

Defendant admits that it was unnecessary to give notice of the defect causing the injury where same was caused by the act of defendant itself, and concedes that the special exception to plaintiff's petition for failure to allege notice of the defective condition causing the injury should not have been sustained. It, however, insists that the charter requires notice of an injury both to person and property; and, such notice not being alleged, the petition was subject to general demurrer.

Charter provisions, such as the one under discussion, requiring notice of an injury within a given time, as a condition precedent to the right to maintain an action for such injury, have been uniformly upheld. "Such requirements are enacted in furtherance of the public policy, and their object and purpose is to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit." *McQuillin, Municipal Corporations*, § 2715; *City of Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704.

[3] Being a condition precedent to the right of action, it is incumbent on the plaintiff to affirmatively allege the giving of the prescribed notice. *Dillon, Municipal Corporations* (5th Ed.) § 1613.

[4, 5] The provision in defendant's charter requiring notice of the injury as a condition precedent to a suit for such injury is valid. It is wholly immaterial that the injury was the result of the act of the city itself. *City of Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693, does not hold otherwise. In that case, the court had under consideration a charter provision to the effect that the city should not be liable to any person for damages caused from the defective condition of streets, ways, crossings, etc., unless same remained in such

condition ten days after special notice in writing given to the mayor or street commissioner. The court held such notice unnecessary when the defect was caused by the action of the city itself. The question therein involved was notice of the defect, not of an injury the result of such defect.

It remains to determine what character of injuries are within the requirement of the charter provision. Does it contemplate injuries to the person only, or does it include injuries to property?

[6, 7] The portion of the section dealing with notice of the defect follows that with reference to notice of the injury. Notice of the defect is by express language made a condition precedent to a recovery for injury to person or property. In the provision for notice of the injury, no specific mention is made of injury to property. The phrase in this provision "damages of any kind," considered alone, would, of course, be sufficiently broad to include damages to either person or property. The notice provided for is to be given by "the person injured." In a sense, a person is injured when his property is injured. We believe, however, that a proper construction of the provision, read in its entirety, and in view of the omission of mention of injury to property, while property is specifically mentioned in the same section in reference to notice of the defect, evidences an intention that the requirement as to notice of injury should apply exclusively to the person. The requirement of notice of injury as a condition precedent to an action, while valid and in accord with sound public policy, is in derogation of common right, and should therefore be construed with reasonable strictness and not extended by implication beyond its own terms or held to apply to such damages as are not within its clear intent. 28 Cyc. 1450. Notice of injury to property is not clearly expressed, nor can it be said that the intent to include such injury is clearly manifest.

We conclude that the Court of Civil Appeals correctly held that the trial court erred in sustaining the general demurrer to the petition, the same stating a cause of action for recovery for injury to property, but we hold the petition subject to special exception in failing to allege notice of injury to the person.

We are of opinion that the judgment of the Court of Civil Appeals reversing the judgment of the district court and remanding the cause should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the questions discussed.

**BOCK v. FELLMAN DRY GOODS CO.**  
(No. 66-2818.)(Commission of Appeals of Texas, Section A.  
June 11, 1919.)**1. MASTER AND SERVANT §=285(5), 286(18)—  
PERSONAL INJURY—SAFE PLACE TO WORK—  
QUESTION FOR JURY.**

In an action for death of an employé from falling into an elevator shaft in a poorly lighted room, with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the gate, evidence held sufficient to require the submission of the issues of defendant's negligence and the proximate cause of the accident.

**2. MASTER AND SERVANT §=278(1)—NEGLI-  
GENCE—WEIGHT OF EVIDENCE.**

Plaintiff, in an action for injuries to a servant, is only required to convince the jury by fair preponderance of the evidence that the accident resulted from defendant's negligence.

**3. MASTER AND SERVANT §=276(2), 278(1)—  
EVIDENCE—CIRCUMSTANTIAL EVIDENCE.**

A master's negligence and the proximate cause of injury to a servant may be established by circumstantial evidence.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Kate Bock against the Fellman Dry Goods Company. From a judgment of the Court of Civil Appeals (173 S. W. 582), affirming a judgment for defendant, plaintiff brings error. Judgments reversed, and cause remanded for another trial.

Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, and Ramsey, Black & Ramsey, of Austin, for plaintiff in error.

Mark H. Royston, of Galveston, and Gill, Jones & Tyler, of Houston, for defendant in error.

**STRONG, J.** The plaintiff in error brought this action against the Fellman Dry Goods Company, a private corporation, to recover damages for the death of her son, alleged to have been caused by the negligence of defendant. The trial court, after hearing the evidence, instructed the jury to return a verdict for defendant; and the judgment rendered thereon was affirmed by the Court of Civil Appeals. 173 S. W. 582.

The action of the trial court in withdrawing the case from the jury is the only ruling of which complaint is made.

The facts, briefly stated, show that deceased, a boy about 14 years of age, was employed by defendant, and was killed while in the performance of the duties of his employment by falling into an open elevator shaft or well in the store building of defendant in the city of Galveston. Upon the occasion of his injuries, deceased had been sent from the first floor of the building to the second floor

into the elevator room, for the purpose of getting some empty boxes. He used the stairway in going to the second floor. Shortly after deceased reached the elevator room, another employé, by the name of Grimm, ran the elevator to the second floor, and, leaving the platform or floor of the elevator flush with the floor of the elevator room, passed through the room where the boy was getting the boxes into the salesroom. Grimm had been in the salesroom but a short time, when he heard a noise like a large box falling. He immediately returned to the elevator shaft, and found that the elevator had ascended to the third floor of the building, and that deceased had fallen to the bottom of the shaft, thus receiving injuries resulting in his death.

The plaintiff alleged that defendant was guilty of negligence in failing to use due care to furnish deceased a reasonably safe place to work, in that: (1) The room in which he was working at the time he met his death, and in which the elevator shaft was situated, was poorly lighted; (2) the floor of said room, and especially near the opening of the elevator shaft, was greasy and slippery; (3) the gate to the elevator, and especially the closing equipment thereof, was defective; and (4) the elevator shaft was insufficiently guarded.

The only testimony which we regard as material to the determination of the question presented is as follows:

George Peters testified:

"I am 18 years old. I reside in Galveston, Tex. On February 11, 1911, I was working for the Fellman Dry Goods Company. On said date I was acquainted with a boy named Jennett Bock. I saw Jennett Bock on February 11, 1911. He was in the freight room on the second floor of the new building of the company, at the north end, where the company then kept all the empty boxes. These were generally pasteboard boxes, and I was in there getting some empty boxes for the first floor wrapping counter in the new building. Jennett Bock was in there when I was. I last saw him with an armful of these boxes. He was gathering up more when I left. It was about half past 12, noon, or perhaps 25 minutes after 12 when I last saw Jennett Bock alive. The room in which I saw Jennett Bock, as near as I can figure it out and remember, was 12 or 14 feet wide and about 18 or 20 feet long. There was one window to it toward the alley on the north wall. The window was frosted glass covered with netting. The room was inclosed on the east and south sides by frosted glass partitions and frames that did not go quite up to the ceiling. There was a door leading into it from the salesroom on the south. The freight elevator was operated up and down on the west side of this room, in an opening in the west wall. There was a big wooden gate with pulleys and weights to the gate used to keep the elevator shaft closed when the elevator platform was not still and standing even with the floor of the

room. It was not very light in the room. It was pretty dark in there all the time. You could see upward where the light was where the partitions did not go up quite to the ceiling. You could hardly see the floor where you was walking at all. The floor was dirty and greasy. It was slippery, especially near the opening of the elevator shaft where the gate was. There was great big boxes in the north end and corner, for trash. There was empty shirtwaist paste-board boxes and other ready-made boxes stacked up all around the other sides of the room nearly as far as the frosted glass partitions went.

\* \* \* About 10 minutes after I left Jennett Bock in the freight room I saw him lying in the alley, where he had been taken from the bottom of the elevator well. He was covered with blood and unconscious. As I have told you before, I saw him lying in the alley near the bottom of the shaft about 10 minutes after I had left him in the freight room. I went back into the room on the same floor where I was with the boy Jennett Bock after he fell through the shaft. After I got my dinner, I went back into the freight room. The gate was down when I went back there then, but the rope to the weights of the gate was broken. The floor was dirty and greasy; there were marks in the floor by the opening where Jennett Bock fell through. In the room where I had left Jennett Bock, after I went back after the Bock boy had fallen through the shaft, I saw Mr. Grimm, who sometimes worked the elevator, and Mr. Alphonse Fellman. One or two of the lady clerks came in there before I left. Mr. Fellman asked Mr. Grimm how the gate came to be open so the boy fell through. Grimm said the rope to the gate was broke. They were talking more when I went downstairs. As to what I was doing in the room with Jennett Bock shortly before he fell, one of the wrappers had sent me from the wrapping counter to get some empty boxes to put goods in that were to be wrapped and delivered to customers. Jennett Bock was getting boxes for the same purpose. He had his arms nearly full when I left him."

Jacob Grimm testified:

"I used the freight elevator to go up to the second floor. I stopped the elevator at the second floor of said building on said date. I walked through the door of the elevator room to the south and into the salesroom on that floor. \* \* \* When I left the elevator platform and stepped out on the second floor, the gate to said elevator was up or open. The elevator platform or floor was flush with the floor of said second floor. The gate to said elevator guarding the shaft thereof was operated by ropes, pulleys, and weights. The elevator was operated by pulling a long rope attached to the machinery at the top of the building. If you wanted to go up, you pulled this rope down; if you wanted to go down, you pulled the rope up. The power used was electricity. The gate was an automatic gate in one way—that is, when you stopped the elevator I would lift the gate up so that I could get out, but when I got back in the elevator and started to go up or down, as the elevator went up or down, the gate would come back down to the floor and stop. After I left the elevator, I went through the floor of the freight room to the south on the same floor, as I said before, and closed the freight room door behind me.

\* \* \* I was away from the elevator at said time about 1 minute; would say not possibly more than 1½ minutes. While I was talking to the two young ladies, I heard a loud noise like a heavy box had fallen. I rushed back into the freight room where I had heard the noise. I do not know what made the noise. When I got back to where I had left the elevator, the freight elevator had gone up to the third floor and stopped. When I went back to the elevator at this time, the gate was down. The rope that held the pulleys and weights to the gate was broken. I tried to get the freight elevator back down to the second floor, but the elevator would not work. I looked down through the elevator shaft and saw the boy, Jennett Bock, (deceased) lying there at the bottom of the pit. He was unconscious. \* \* \* Sometimes this gate (of the elevator) got stuck, and would not come down and close the opening until Mr. Bartell, the head porter, got oil and a brush and fixed it. The gate would sometimes get stuck when it was up and would not come down."

The bottom of the elevator gate when down lacked 13 inches reaching the floor, leaving an open space under the gate of 13 inches by 4 feet 5 inches. The witness Johnson testified relative to the size and character of this opening as follows:

"I am 53 years old. My weight is about 148 pounds, I think. I could slip through that opening into the elevator well when the gate was down. A man my size could do so."

[1-3] We are of the opinion that the trial court erred in taking the case from the jury. While there was no direct testimony as to the cause of the accident, we think the jury might have legitimately concluded from the circumstances in evidence that the accident was due to the negligence of defendant. The evidence suggests but two ways in which the accident could have occurred, viz. that when the elevator ascended to the third floor of the building, the gate failed to automatically close as intended, and, by reason of the dark condition of the room, the boy walked into the elevator shaft, or that the gate did close, and the boy slipped on the greasy floor and skidded through the open space under the bottom of the gate. In either event the evidence was sufficient to sustain a finding by the jury that the accident resulted from defendant's failure to furnish deceased a safe place in which to work. The plaintiff was not required to exclude the probability that the accident might have occurred in some other way. To so hold would impose upon her the burden of establishing her case beyond a reasonable doubt. She was only required to convince the jury by a fair preponderance of the evidence that the accident resulted from the negligence of the defendant. While it is true, as held by the Court of Civil Appeals, that in order to show that defendant's negligence was the proximate cause of the injury the evidence must present



something more than mere conjecture or surmise, it is equally true that the cause of an accident may be inferred from circumstances. Both negligence and proximate cause may be established by circumstantial evidence. The marks on the floor indicate that the boy slipped and fell into the elevator shaft. Whether the gate was up or down when he fell, the evidence was sufficient to show, in view of the fact that the floor was greasy and the room poorly lighted, that the failure to properly guard the elevator shaft was the proximate cause of the accident. As said by the Supreme Court of Iowa, in the case of *Lunde v. Packing Co.*, 139 Iowa, 701, 117 N. W. 1068:

"A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result."

We are not to be understood as holding that a preponderance of the evidence tends to show either that defendant was guilty of negligence or that such negligence was the proximate cause of the accident resulting in the boy's death, but merely that the evidence was sufficient to require the submission of these issues to the jury for their determination.

We are of opinion that the judgment of the Court of Civil Appeals and that of the trial court should be reversed, and the cause remanded for another trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

FREEMAN et al. v. W. B. WALKER & SONS. (No. 77-2849).\*

(Commission of Appeals of Texas, Section A. June 11, 1919.)

1. COSTS  $\S$ 173(1) — STATUTORY ATTORNEY'S FEE—CLAIMS AGAINST CARRIER FOR DAMAGED FREIGHT — STATUTE CONSTRUED AS PROSPECTIVE ONLY.

Rev. St. 1911, art. 2178, providing that hereafter any person having a valid bona fide claim against any person or corporation for damaged freight may present the same for payment, and, if not paid within 20 days, may sue thereon, and shall be entitled to attorney's fees, it must be presumed that the Legislature intended by the use of the word "hereafter" that the statute should be prospective, so that attorney's fees could not be had in a suit upon a

claim which arose prior to the act becoming effective.

2. CONSTITUTIONAL LAW  $\S$ 189 — PROVISION FOR ATTORNEY'S FEES—ACTION FOR DAMAGED FREIGHT—RETROSPECTIVE LAW.

To construe Rev. St. 1911, art. 2178, providing for allowance of attorney's fees in certain suits to recover for damaged freight, as applying to damage claims arising prior to the act becoming effective, would render it retrospective in its operation, and therefore obnoxious to Const. art. 1,  $\S$  16.

3. APPEAL AND ERROR  $\S$ 32—REVIEW—CONCLUSIVENESS OF JUDGMENT OF COURT OF CIVIL APPEALS UPON MATTERS APPEALED FROM COUNTY COURT.

Where a cause was appealed from a county court, the judgment of the Court of Civil Appeals is conclusive upon questions of law or fact, except in probate matters and cases involving the revenue laws of the state, of the validity of a statute (Rev. St. art. 1591), and questions presented, which are not within those exceptions, are not subject to review by the Supreme Court.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. B. Walker & Sons against Thomas J. Freeman, receiver of the International & Great Northern Railway Company, and another. Plaintiffs recovered in both the justice and county courts, and upon appeal to the Court of Civil Appeals the judgment was affirmed in part and reversed and rendered in part (175 S. W. 1183), and the defendants bring error. Judgment of the Court of Civil Appeals reformed and affirmed.

Fisher & Fisher and Robt. Thompson, all of Austin (Wilson, Dabney & King, of Houston, of counsel), for plaintiffs in error.

A. S. Phelps and F. C. Morse, both of Austin, for defendants in error.

TAYLOR, J. This suit was filed in the justice's court by the defendants in error to recover damages to a shipment of syrup from Taylor to Austin, Tex. The amount recovered both in the trial court and in the county court on appeal includes the sum of \$10 allowed as attorney's fees under the act of March 13, 1909. R. C. S. 1911, art. 2178. That part of the judgment affirmed on appeal to the Court of Civil Appeals includes the said attorney's fee award. 175 S. W. 1133, 455.

[1, 2] The writ was granted upon the assignments complaining of the construction of said article 2178 so as to permit recovery thereunder of attorney's fees in a suit upon a claim that arose before the act was effective.

That part of the act material herein is as follows:

"Hereafter, any person in this state having a valid, bona fide claim against any person or

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\* Rehearing pending.

corporation doing business in this state, for \* \* \* damaged freight, \* \* \* may present the same to such person or corporation \* \* \* in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, \* \* \* he shall be entitled to recover the amount of such claim \* \* \* and, in addition thereto, a reasonable amount as attorney's fees, \* \* \* not to exceed twenty dollars."

There is no question as to the right to recover attorney's fees under the terms of the article quoted in a suit for nonpayment of a claim for damaged freight accruing subsequent to the time the act became effective. *M., K. & T. Ry. Co. v. Mahaffey*, 105 Tex. 394, 150 S. W. 881; *M., K. & T. Ry. Co. v. Cade*, 233 U. S. 647, 34 Sup. Ct. 678, 58 L. Ed. 1135.

The claim upon which the suit was filed arose and was asserted not later than April 6, 1908. The act from which the above article is quoted became effective July 11, 1909.

The question for determination, concretely stated, is whether the act can be so construed as to entitle the defendants in error to recover attorney's fee on their claim asserted against defendants before the statute became effective.

As stated in *Albertype Co. v. Gust Fleet Co.*, 102 Tex. 222, 114 S. W. 792:

"It is to be presumed that the Legislature of Texas intended to exercise its authority to make laws within the scope of its power under the Constitution of this state. \* \* \*"

Article 1, § 16, of the Constitution provides:

"No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made."

Cooley on Constitutional Limitations (7th Ed.) 529, says:

"There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the Legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden eo nomine by the state Constitution, and provided further that no other objection exists to them than their retrospective character. Nevertheless legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. And some of the states have deemed it just and wise to forbid such laws altogether by their constitutions."

The rule of construction that a statute shall be prospective in its operation, unless in clear terms retrospective, is clearly stated in *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 226, 29 Sup. Ct. 69, 53 L. Ed. 158, as follows:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. \* \* \* (Italics ours.)"

Judge Stayton, in *Mellinger v. City of Houston*, 68 Tex. 87, 8 S. W. 249, says:

"In the absence of constitutional restrictions upon the subject, it is almost universally accepted as a sound rule of construction that a statute shall have only a prospective operation, unless its terms show clearly a legislative intention that it shall have a retroactive effect. There is nothing in the statute before us to evidence the intention of the Legislature to give \* \* \* a strictly retroactive effect" to the statute under consideration, "and it must be held to be a valid law, governing in all actions brought to recover taxes after its passage, against which some valid defense did not exist at the time it took effect. It is true that the statute does not in terms restrict its operation to such actions as might be founded on causes of action not barred by laws in force at the time of its passage, and that its broad and general language might make it applicable to all actions thereafter brought, even upon causes of action then barred; but, if the statute was in terms such as to require such a construction, we are of the opinion that the constitution of this state forbids such legislation." (Italics ours.)

To the same effect is *State v. Railway Co.*, 100 Tex. 175, 97 S. W. 71.

The rights of the parties in this cause became fixed more than a year before the passage of the act under consideration. It is not in clear terms retroactive. This being true, it must be presumed that the Legislature intended it should be prospective in its operation, and, in providing that "hereafter" any person having a claim of the character indicated should be entitled to recover attorney's fees, meant to confer such privilege with reference only to claims thereafter to accrue. If the language of the act is susceptible of a construction that would include within its terms claims that arose before it became effective, it should not be so interpreted in the light of the rules of construction referred to. To construe the act as applicable to rights already determinate at the time of its passage is to render it retrospective in its operation, and therefore obnoxious to the constitutional provision above quoted.

That part of the judgment decreeing a re-

covery of attorney's fees is therefore erroneous, and should be set aside.

[3] The plaintiffs in error ask that other assignments of error be reviewed. As the case is one appealed from the county court, the judgment of the Court of Civil Appeals is conclusive on all questions of law and fact, except in probate matters and cases involving the revenue laws of the state, or the validity of a statute. R. S. art. 1591. None of the remaining questions presented are within the foregoing exception, and for that reason are not subject to review by Supreme Court. *Cole v. State ex rel. Cobolmi*, 106 Tex. 427, 170 S. W. 1036.

We are of opinion that the judgment of the Court of Civil Appeals should be reformed so as to eliminate the award for attorney's fee, and that the judgment as reformed should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### FREEMAN v. W. B. WALKER & SONS. (No. 68-2825).\*

(Commission of Appeals of Texas, Section A. June 11, 1919.)

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. B. Walker & Sons against Thomas J. Freeman, receiver of the International & Great Northern Railway Company and others. Judgment for plaintiffs in the justice and county courts, which was affirmed in part and reversed and rendered in part upon appeal to the Court of Civil Appeals (175 S. W. 456), and the defendants bring error. Judgment of the Civil Court of Appeals reformed and affirmed.

Fisher & Fisher and Robt. Thompson, all of Austin (Wilson, Dabney & King, of Houston, of counsel), for plaintiff in error.

A. S. Phelps and F. C. Morse, both of Austin, for defendant in error.

TAYLOR, J. This case is one appealed from the county court, and is a companion case to *Thomas J. Freeman et al. v. W. B. Walker & Sons* (No. 2840) 212 S. W. 637. The parties are identical in the two cases. The material facts are the same except as to the amounts involved, the time of shipment, and the place from which shipment was made. The Court of Civil Appeals made the same disposition of both cases. 175 S. W. 456, 1133.

The question raised by the only assignment of error subject to review by the Supreme Court in this case has been this day discussed in the companion case, in which recommendation was made that judgment of the Court of Civil Appeals should be reformed so as to eliminate the

award for attorney's fee, and, as reformed, affirmed.

We therefore recommend that the same disposition be made of this case.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### STEVENS et al. v. GALVESTON, H. & S. A. RY. CO. et al. (No. 55-2756.)

(Commission of Appeals of Texas, Section B. June 11, 1919.)

#### 1. RAILROADS $\Leftrightarrow$ 69 — ACQUISITION OF REAL ESTATE—TITLE.

A railroad company has the right to acquire real estate without limitation or restriction in use, and when so acquired its title is as absolute as that of a private individual, at least in so far as concerns immunity from attack by any one except the state.

#### 2. DEEDS $\Leftrightarrow$ 93 — CONSTRUCTION—INTENT.

A deed should be so interpreted as to give effect to the intention of the parties.

#### 3. DEEDS $\Leftrightarrow$ 100 — CONSTRUCTION — CIRCUMSTANCES OF TRANSACTION.

The court in construing language of deed susceptible of different constructions will consider the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted, for purpose of ascertaining the true intent.

#### 4. DEEDS $\Leftrightarrow$ 97 — CONSTRUCTION—INTENT.

If any of the terms used in a deed seem to contradict the manifest intention clearly indicated by the deed as a whole, the intention must govern.

#### 5. DEEDS $\Leftrightarrow$ 144(1) — CONSTRUCTION—CONDITIONAL CONVEYANCE.

When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when the use is for the benefit of a special class of persons or the public at large.

#### 6. DEEDS $\Leftrightarrow$ 100 — CONSTRUCTION—NATURE OF ESTATE GRANTED — PURPOSE OF CONVEYANCE.

In determining the character of the estate granted, the court will consider, not merely the uses for which the property was designated in the conveyance, but the relation of the grantor to those uses.

#### 7. DEEDS $\Leftrightarrow$ 95 — CONSTRUCTION TO GIVE EFFECT TO WHOLE.

Every part of the deed must be given effect if it can be done.

#### 8. DEEDS $\Leftrightarrow$ 120 — CONSTRUCTION — ESTATE GRANTED.

The largest estate that the terms of a deed with all its parts harmonized will permit of will be conferred upon grantee.

9. DEEDS ¶90—CONSTRUCTION FAVORABLE TO GRANTEE.

Where language of deed is so ambiguous as to be susceptible of different constructions, that interpretation will be adopted which is most favorable to grantee.

10. RAILROADS ¶69—CONSTRUCTION OF DEED—ESTATE ACQUIRED.

Deeds to a railroad of property in corporate limits of town to be used for depot ground and railroad purposes in consideration of the expected enhancement in value of grantor's adjoining property, *held* to convey a fee and not merely an easement.

11. DEEDS ¶95—CONSTRUCTION—LANGUAGE OF INSTRUMENT.

To warrant a departure from the general rules of construction and to give deeds a meaning not fairly deducible from the language employed, the circumstances should be such as to impel the conclusion that the parties intended other than their expressed language would ordinarily imply.

12. DEEDS ¶145—CONSTRUCTION—"PROVISO"—"PROVIDED."

The mere use of technical terms which ordinarily denote a limitation or a condition subsequent is an unsafe test of the true nature of the estate granted; the word "proviso" or "provided" itself being sometimes taken as a condition, sometimes as a limitation, and sometimes as a covenant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provided; Proviso.]

13. DEEDS ¶145—CONSTRUCTION—LIMITATION—CONDITION.

Language ordinarily importing a limitation or condition subsequent will be construed most strictly against grantor on the ground that law does not favor forfeitures.

14. DEEDS ¶155—CONSTRUCTION—LIMITATION—CONDITION.

Where there is a doubt from the language of the entire instrument whether its fair construction imports a limitation which would absolutely determine the estate or a condition subsequent determining the estate only upon some act of the grantor tantamount to re-entry, the deed must be construed to import the latter as being in a sense less onerous upon the grantee.

15. RAILROADS ¶72(7)—DEEDS—CONSTRUCTION—CONDITIONS SUBSEQUENT.

Deeds by trustees to a railroad on condition that premises shall be used exclusively for railroad purposes, and that after they shall cease to be used for such purposes they shall revert to grantors or their "successors," naming a small consideration, the real consideration being expected enhancement in value of grantors' adjoining property, *held* to convey a fee upon condition subsequent, and not upon limitation, and railroad took an indefeasible title after grantors' sale of adjoining land.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Suit by H. B. Stevens and others against the Galveston, Harrisburg & San Antonio Railway Company, in which W. W. Mills and others intervened. Judgment for defendant against plaintiffs and interveners. Affirmed as to plaintiffs and reformed and affirmed as to interveners by Court of Civil Appeals (169 S. W. 644), and plaintiffs bring error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

Williams & Neethe, of Galveston, and Coldwell & Sweeney, of El Paso, for interveners.

Baker, Botts, Parker & Garwood, of Houston, and Beall, Kemp & Nagle, of El Paso, for defendant in error.

MCLENDON, J. This suit involves the proper construction of three deeds, executed, respectively, on January 25, 1881, June 8, 1881, and April 9, 1881. The conclusions we have reached do not require a full statement of all the issues presented in the several applications for writs of error. A more detailed statement will be found in the opinion of the Court of Civil Appeals, 169 S. W. 644.

In the deeds of January 25 and June 8, 1881, the grantors were Thomas T. Gantt and David Rankin, acting in their capacity as trustees under the will of Robert Campbell, deceased, joined in by Virginia J. Campbell and Hugh Campbell, Jr., cestuis que trustent. The grantee in the latter was the Galveston, Harrisburg & San Antonio Railway Company, and in the former, Charles Crocker, who conveyed to said railway company. The former of these deeds conveys to the grantee a tract of land in the city of El Paso, containing 21.4 acres. The habendum clause of this deed reads as follows:

"To have and to hold said real estate with all its appurtenances unto said Charles Crocker, his heirs and assigns forever.

"On condition, nevertheless, that said real estate shall be used exclusively for railroad depot grounds and railroad business purposes and that the freight and passenger depots to be built and used by said second party or his assigns shall be within two hundred and ninety-five (295) feet in a northerly or southerly direction from the center line of Main street and within three hundred and sixty-five (365) feet of the center line of Kansas street as said streets are shown on said map of Ansen Mills or that said freight and passenger depots shall be at any point easterly or westerly from the intersection of said Main street and Kansas street that said first and second parties, their successors or assigns may mutually agree upon and that if said premises shall cease wholly to be used for the purposes herein contained they shall revert to the grantors or their successors."

The deed of June 8, 1881, conveys, besides other property not involved, "the right of way for said company's railway through Main street extending to the easterly bound-

ary line of the lands of said parties of the first part"; also the northerly halves of blocks 8, 10, and 42, and the southerly halves of blocks 8, 9, and 43, in the city of El Paso:

"The said halves of said blocks 8, 10, 42, 8, 9 and 43, being the halves lying upon Main street, and extending back to a line running through the center of said blocks and parallel with Main street and including also all the right, title and interest in or claim to the rights of the said parties of the first part in to and over the streets included within the boundary of a line extending around the said halves of blocks. To have and to hold, all and singular, the premises, with all the rights, privileges, and appurtenances thereunto appertaining unto the said Galveston, Harrisburg & San Antonio Railway Company and its successors and assigns so long as the said land shall be used as a railroad right of way and if not so used shall revert to the grantors herein."

In the deed of April 9, 1881, W. W. Mills and J. P. Hague are the grantors, and said railway company the grantee. This deed conveys the 21.4 acres described in the deed of January 25, 1881, and immediately following the description reads as follows:

"The said tracts or parcels of land to be used for depot grounds and railway purposes, by said company on conditions set forth in deed of Thomas T. Gantt and David Rankin of Saint Louis, Missouri, trustees of the estate of Robert Campbell, to Charles Crocker, dated January 25, A. D. 1881, except that the freight and passenger depots therein named may be located three hundred and thirty (330) feet further northeastwardly from the center line of Kansas street. And in case the said parcels of land are not used by said railway company for passenger and freight depots and railway purposes, then in that case all the right, title and interest therein conveyed shall revert to and again be vested in the said parties of the first part; and if said railway company abandon the use of said land for said purposes, all buildings and fixtures erected thereon by said company shall be held part and parcel of said land and shall revert with the same to the said parties of the first part. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above-described premises and every part and parcel thereof with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, its heirs and assigns forever, for the purposes and on the conditions above set forth."

The only consideration expressed in the deeds was \$1, but the trial court found that the real consideration for the conveyances was the expected enhancement in value of

other property owned by the grantors at the time of the conveyances, by reason of the uses to be made of the property.

The plaintiffs, claiming under the deeds of January 25th and June 8th, as vendees through mesne conveyances from the grantors therein, brought this suit to recover of the railway company a three-fourths undivided interest in the property conveyed by said deeds, upon the ground of the alleged diversion of use of portions of the property to purposes inconsistent with the grants. Interveners, claiming as heirs at law of the grantors in the deed of April 9th, sought to recover a one-eighth undivided interest in the 21.4 acres for a like reason. The defendant, in addition to its defensive pleadings, sought affirmatively the removal of cloud from its title, claiming to own the land in fee simple.

The contentions of the respective parties may be briefly summarized as follows:

Plaintiffs and interveners contend: (1) That the deeds, being to a railway company and for railway purposes, must be construed as intending to pass only an easement, and not the fee to the property; (2) that if the deeds be construed as passing the fee, it was upon limitation, and not upon conditions subsequent; and upon failure to use the property for the purposes designated, the title of the grantee terminated and reverted in the grantors, their heirs and assigns.

The defendant contends, on the other hand, that the deeds, properly construed, vested in the railway company a fee-simple title upon conditions subsequent, and that upon conveyance by the grantors of all the lands to be benefited by the conveyances their interest in the conditions of defeasance was forever lost.

We will consider these questions in the order named.

That only an easement is conveyed by the several deeds is sought to be supported by numerous decisions of our American courts construing deeds and contracts for deeds to railway companies, chiefly deeds conveying strips of ground cutting through larger tracts as railway rights of way. We have carefully examined the authorities upon this subject, and are unable to conclude therefrom that the deeds in question should be given the construction contended for by plaintiffs and interveners. The authorities cited and relied upon may be divided into several classes. In one class of cases, it seems to be held by the decided weight of authority that where the deed in the granting clause conveys a right of way only, the estate conveyed will be held to be an easement, and not a fee, although apt words to convey the fee are employed. Such is the holding in *Right of Way Oil Co. v. Gladys City Oil Co.*, 106 Tex. 94, 157 S. W. 737, 51 L. R. A. (N. S.) 268; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342;

*Railway v. Geisel*, 119 Ind. 77, 21 N. E. 470; *Railway v. Reynolds*, 116 Ind. 358, 19 N. E. 141; *Railway v. Coburn*, 91 Ind. 557; *Blakeley v. Railway*, 46 Neb. 272, 64 N. W. 972; *Reichenbach v. Railway*, 10 Wash. 357, 38 Pac. 1126.

To another class of cases belong those in which the grantee claims under a contract for a conveyance of lands for right of way or other railway purposes, with a covenant to convey the fee-simple title. In those cases it is generally held that—

"A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed." *Hill v. Railway*, 32 Vt. 74; *Lockwood v. Railway*, 103 Fed. 243, 43 C. C. A. 202; *Uhl v. Railway*, 51 W. Va. 106, 41 S. E. 340.

A third class of cases is illustrated in *Choteau v. Railway*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, where a deed absolute in form conveying city lots was held to convey only an easement, on the ground that, under the Constitution of the state, as construed by the Missouri courts, no greater estate could be acquired by the grantee.

The case which most strongly supports the contention of plaintiffs and interveners is that of *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 808, 114 Am. St. Rep. 509, 6 Ann. Cas. 289. In that case there was a deed absolute in form, conveying a strip of land through a farm owned by the plaintiff. The facts in that case show that the railway company had already surveyed its line through the farm, and the deed was made with reference to the survey already made. The railroad was never built, and subsequently the railway company conveyed the land to a third party. It was held that the deed, when construed in the light of all the surrounding circumstances, conveyed an easement only. From the opinion we gather that the chief, if not controlling, considerations which induced this decision were that the property had already been surveyed as a railroad right of way, and the railroad company had the right to condemn, or acquire the right of way by agreement with the owner, and that the property so acquired consisted of a strip of land, which cut in two the farm of the defendant. The court in that connection say:

"May a railroad company purchase a strip of land extending a great distance through the country and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use—one that might be obnoxious and menacing to the adjacent owners?"

In concluding its opinion the court say:

"Lands may be acquired by donation or by voluntary grant for aid in the building of railroads, and railroad companies may doubtless

acquire lands for various uses in connection with railroad business that could not be taken by virtue of eminent domain, and as to these different rules may apply. It is intended to confine the decision to cases where the contract or conveyance shows that the land was sold and received for use as a right of way for a railroad."

The same conclusion was reached in *Railway v. Aldridge*, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516.

[1] We do not think that the principles announced in any of the foregoing cases are applicable here. It is not the law in this state that a railway company can acquire only an easement in real property. The contrary was expressly held in *Calcasieu Lumber Co. v. Harris*, 77 Tex. 23, 13 S. W. 453. Under our statutes, a railway company may condemn property, not only for right of way purposes, but for other necessary uses. But it also has the right to acquire real estate without limitation or restriction in use; and, when so acquired, its title is as absolute as that of a private individual, at least in so far as concerns immunity from attack by any one except the state. The question, therefore, for our consideration is whether or not the deeds when properly construed convey a fee upon condition or limitation, or merely an easement in the property.

[2-4] In arriving at a proper solution of this question, we are required to resort to well-established general rules for construing instruments of this character.

"The first rule of exposition, which governs every other, is that contracts should be so interpreted as to give effect to the intention of the parties; and, while the words selected by the parties themselves as a symbol to denote their purpose are usually the primary source from which intention is drawn, and the best and surest guide to its discovery, yet being employed sometimes by designing persons to disguise rather than to express the true thought, and being liable to careless misuse or ignorant misapplication, it is always the duty of the court, in all cases where they are susceptible of different constructions, to take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted, for the purpose of ascertaining the true intent; for the intention of the parties is manifestly paramount to the manner chosen to effect it. The courts, therefore, may avail themselves of the same light which the parties enjoyed when the contract was executed, and may place themselves in the same situation as the parties who made it, in order that they may view the circumstances as those parties viewed them, and so judge the meaning of the words and the correct application of the language and the things described; and if any of the terms used seem to contradict the manifest intention, as clearly indicated by the agreement as a whole, the intention must govern." *Lockwood v. Railway*, above.

The rules announced in the above quotation have been frequently applied in this state.

In *Maddox v. Adair*, 66 S. W. 811, the purpose to be accomplished, as shown by the real consideration for the deed, namely, the enhancement of other property by the erection of a school building on the property conveyed, was held to be controlling in determining the construction to be placed upon the language in the deed. In that case, *Post v. Well*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809, is cited with approval, and commented on as follows:

"It was ruled that the language of the deed, although importing a condition subsequent, should be considered as a covenant, in view of the fact that it was the evident intention of the grantor to protect his remaining property from depreciation in value by reason of the erection adjacent thereto of undesirable structures. Having parted with all his interest in both estates, he was no longer concerned in the condition, and it was held that no burden rested upon the title of the first purchaser. In this case, when *Maddox* disposed of his lots adjoining the lot in controversy, the purpose of the condition was satisfied, and he had no further interest in the continued maintenance of the school."

In *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985, the deed was by a railway company upon consideration of \$5, conveying certain town lots. The grantee was C. M. Dubois, bishop of Galveston, and his successors in office, "for the use of the Roman Catholic Church." The habendum clause read:

"To have and to hold, all and singular, the premises above mentioned unto the said C. M. Dubois, bishop of Galveston, for the use aforesaid, and to his successors and assigns forever."

In holding that this deed passed a fee-simple title in trust, the court say:

"When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit of a special class of persons or of the public at large. In this case it does not appear that the maintenance of the church upon the lots was a matter specially advantageous to the railway company, who made the grant. Upon these propositions the authorities are numerous and in substantial accord."

It will thus be seen that in determining the character of the estate granted, the court took into consideration not merely the uses for which the property was designated in the conveyance, but the relation of the grantor to these uses.

[5, 6] The general principles announced in the foregoing quotations we think are well established by the great weight of authority.

[7-9] Other well-established rules of construction are thus expressed in *Cartwright v. Trueblood*, 90 Tex. 538, 39 S. W. 931:

"Every part of the deed must be given effect if it can be done, and when all of the parts

are harmonized the largest estate that its terms will permit of will be conferred upon the grantee. \* \* \* If the language cannot be harmonized, from which an ambiguity arises in the deed so that it is susceptible of two constructions, that interpretation will be adopted which is most favorable to the grantee."

[10, 11] By the fair application of these rules of construction to each of the deeds in question, we think the conclusion must be reached that the fee, and not merely an easement, was intended to be conveyed. Clearly, such would be true if the grantee were a private individual, and not a railway company. To warrant a departure from the general rules of construction, and give to the deeds a meaning not fairly deducible from the language employed by the parties, the circumstances should be such, in our opinion, as to impel the conclusion that the parties intended other than their expressed language would ordinarily imply. All the considerations in the cases cited for applying a different rule where the grantee is a railway company from that applied where the grantee is a natural person are wanting in this case. As found by the trial court, the circumstances surrounding those conveyances were that the grantors sought the enhancement in value of other lands owned by them in the vicinity of the land conveyed. There is not shown any attempt on the part of the railway company to acquire title to this property by eminent domain, or any intention to acquire it at all previous to the execution of the deeds. The thing conveyed was not a strip of land extending through a larger tract used as a whole for some particular purpose, but consisted of distinct parcels of ground in the corporate limits of a city. The considerations, therefore, which brought forth the decisions in the *Abercrombie* and similar cases are absent here, and we are not pointed to any circumstances which would lead us to conclude that the intention of the parties was other than the fair language of the conveyances would reasonably import, regardless of the fact that the grantee was a railway company.

Passing to the question whether the conveyance of the fee is upon limitation or condition subsequent, we have reached the conclusion that the latter construction must prevail. In arriving at this conclusion, we are guided in the main by the same considerations expressed above in passing upon the question first discussed.

The distinction between a conveyance upon limitation and upon condition subsequent is thus stated by Kent:

"Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies

the utmost time of continuance, and the other marks some event which, if it takes place in the course of that time, will defeat the estate. The material distinction between a condition and a limitation consists in this: That a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs. But it is in the nature of a limitation to determine the estate when the period of limitation arises without entry or claim." *Wiederanders v. State*, 64 Tex. 140.

Under the common law and the great weight of authority in our American courts, it is held that the reversionary interest of the grantor in a deed conveying a fee-simple estate upon condition subsequent is not assignable can only be enforced by the original grantor and those connected with him in blood, and determines upon an assignment of the right or subsequent deed to the property. It is earnestly urged by counsel for plaintiffs that this rule is not in force in Texas. The decision of this question, however, is rendered unnecessary by the conclusion we have reached as expressed below.

While the legal attributes of the two estates under consideration are well defined and clearly distinguished, difficulty often arises when construing particular instruments in determining whether they fall within one or the other class. In this question of construction the chief difficulty lies. Certain general principles have from time to time been laid down, but it is not always easy to apply these principles to the particular case.

[12] Aside from the general rules of construction above announced in passing upon the first question considered, it has been held that certain technical words denote a limitation, and certain other technical words denote a condition subsequent. But, as said by Mr. Washburn in his able work on Real Property (5th Ed. p. 26):

"It is apprehended that the mere use of any of these terms, ordinarily expressive of a condition or a limitation, would be an unsafe test of the true nature of the estate. The word 'proviso' or 'provided,' itself, may sometimes be taken as a condition, sometimes as a limitation, and sometimes as a covenant."

Effect to this rule was given in *Maddox v. Adair*, above, in commenting upon the New York Case.

[13] There is another rule generally applied in construing deeds where the language used may ordinarily import a limitation or condition subsequent, namely, that these provisions are strictly construed against the grantor, on the ground that the law does not favor forfeitures. In construing a contract to import a covenant, and not a condition subsequent, the Supreme Court, in *South Texas Telephone Co. v. Huntington*, 104 Tex. 350, 136 S. W. 1053, 138 S. W. 381, say:

"To constitute a condition subsequent from which a forfeiture may be declared because of a failure of its performance, the language must

be clear and the condition must be created by express terms, or by clear implication, and it must be strictly construed. *Southerland v. Railway*, 3 Dutch, 13-20. If there be doubt as to the meaning of the language used in this instrument, then it must be construed to be a covenant, for the law will not permit a liberal construction to be placed upon its terms in order to cause a forfeiture of a right secured by the instrument. *Woodruff v. Woodruff* [44 N. J. Eq. 349, 16 Atl. 4] 1 L. R. A. 380; *Railway v. Titterton*, 84 Tex. 222 [19 S. W. 472, 31 Am. St. Rep. 39]. *Moore v. Cross*, 87 Tex. 557 [29 S. W. 1051].

[14] The rule there announced is generally supported by authority within and without this state. We think a correct application to be that where there is a doubt from the language of the entire instrument whether its fair construction imports a limitation which would absolutely determine the estate, or a condition subsequent determining the estate only upon some act of the grantor tantamount to a re-entry, the deed must be construed to import the latter as being in a sense less onerous upon the grantee. This conclusion, we think, is in harmony also with the rule that the greatest estate of which the language of the deed is susceptible of conveying will be held to have been intended by the parties, because, although both estates are generally regarded as fees, the former determines absolutely upon the happening of the condition, and is, therefore, more circumscribed than the latter, which requires some act on the part of the grantor for its determination, in addition to the breach of the condition.

To our mind, there is little doubt as to the effect of the deeds of January 25th and April 9th. There is nothing in the language of these deeds which would reasonably imply a limitation. The language used is, we believe, that ordinarily employed in deeds construed to be upon condition subsequent. It is contended by plaintiffs and interveners that the words in the deed of January 25th reading, "If said promises shall cease wholly to be used for the purposes herein contained, they shall revert to the grantors or their successors" (underscoring ours), import a limitation, in that the fair construction of said language is that the estate should determine ipso facto when the properties should cease to be so used. We do not think this is a fair construction of this language. On the contrary, we find practically the same language used in deeds construed to import only a condition subsequent. *Maddox v. Adair*, above; *Jeffery v. Graham*, 61 Tex. 481.

Nor do we think any special significance should be attached to the word "successors" underscored in the above quotation. The grantors were trustees of the property, acting at the instance of the *cestui que trustent*, and in their trust capacity. The word "successors," when used in reference to trustees, ordinarily implies their successors in trust,



and we think should be given that meaning in construing this instrument. There is nothing in the context requiring that it be given a broader meaning.

More difficulty arises in construing the deed of June 8th. The granting clause in that deed without question purports to convey an absolute fee-simple title. The first part of the habendum clause, namely, "so long as said land shall be used as a railroad right of way," is in the technical language of a limitation; but this is immediately followed by this language, "and if not so used shall revert to the grantors herein." The latter quotation, as we have seen, is the language usually employed to express the grantor's right of re-entry upon a condition subsequent broken.

[15] Having in mind all the foregoing considerations, we think the proper construction of each of the three deeds, when viewed in the light of the surrounding circumstances, and the purposes sought to be attained, is that they convey upon condition subsequent, and not upon limitation. To give them this construction, to our mind, reasonably harmonizes all the terms of all the deeds, and gives to the grantors that which they bargained for, as found by the trial court.

Having reached the above conclusions, the disposition to be made of the case, in our opinion, is controlled by the decision in *Maddox v. Adair*. In that case Maddox conveyed to certain school trustees a tract of land by deed in the usual form, except that it contained the following clause:

"But should the said land fail to be used for the purposes for which it is sold, viz., the establishment and maintenance of a first-class seminary of learning thereon, then it shall revert to me, the said J. W. Maddox."

The recited consideration in the deed was \$100 cash; but the evidence showed that the real consideration was the expected enhancement in value to adjacent property owned by Maddox, as a result of the establishment of the school provided for. After the school was established, Maddox sold all of his adjacent property. The school was later abandoned, and Maddox sued to recover the property conveyed. The court in that case say:

"In ascertaining the intention it is proper to look to the circumstances surrounding the transaction. *Railway v. Beller* [90] Tenn. [548] 13 S. W. 891. Maddox desired the school to be used in order that the value of his property might be increased. This was the consideration for the conveyance, and he had no interest in having the school maintained for any other purpose. \* \* \* When he sold his adjacent lots he ceased to be concerned in the continuance of the school, and the purpose of the condition was accomplished. This construction is also in harmony with the language of the condition."

The Supreme Court refused a writ of error in that case, and we think the decision therein is controlling here. The grantors in the several deeds do not appear to have had any interest whatsoever in the conditions expressed in the several deeds, other than the enhancement in value of their other property through compliance with such conditions. The trial court found that they had conveyed all their other property which was expected to be benefited, from which it conclusively appears that their interest in a further compliance with the conditions had determined.

Having reached the foregoing conclusions, the other questions raised by plaintiffs and interveners become immaterial.

We conclude that the railway company has an indefeasible fee-simple title to the property involved in this suit, and that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

# MOOSE v. MISSOURI, K. & T. RY. CO. OF TEXAS. (No. 87-2892.)

(Commission of Appeals of Texas, Section B. June 11, 1919.)

## 1. RAILROADS $\Leftrightarrow$ 480(2)—FIRE FROM LOCOMOTIVE—PRESUMPTIONS.

Where plaintiff has met the burden of proving that fire originated from an engine, the law presumes negligence, and he is entitled to recover unless railroad company proves that engine was provided with the best approved apparatus for arresting sparks, and was properly operated.

## 2. RAILROADS $\Leftrightarrow$ 482(2) — FIRES — ORIGIN — EVIDENCE.

Although it is necessary to trace fire to railroad, it is not necessary that evidence should exclude all possibility of another origin, but it is sufficient if all the facts and circumstances fairly warrant a conclusion that the fire did not originate from some other cause.

## 3. RAILROADS $\Leftrightarrow$ 484(3) — FIRES — ORIGIN — JURY QUESTION.

In action against railroad for fire from locomotive involving issue of whether fire originated from locomotive spark, evidence held to require submission of case to jury.

Error to Court of Civil Appeals of First Supreme Judicial District.

Suit by J. W. Moose against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant was affirmed by

Court of Civil Appeals (179 S. W. 75), and plaintiff brings error. Judgments of district court and Court of Civil Appeals reversed, and cause remanded for new trial.

See, also, 180 S. W. 225.

L. E. Blankenbecker, of New York City, and Ewing Werlein, of Houston, for plaintiff in error.

Baker, Botts, Parker & Garwood, of Houston (W. A. Parish, of Houston, of counsel), for defendant in error.

McCLENDON, J. J. W. Moose brought this suit against the Missouri, Kansas & Texas Railway Company of Texas to recover the value of a house in Houston Heights which was destroyed by fire on the morning of June 2, 1913; plaintiff alleging that the fire was caused by the negligent emission of sparks from one of defendant's engines. The trial court rendered judgment for the defendant upon a verdict returned under peremptory instruction. The Court of Civil Appeals affirmed this judgment, upon the ground that the evidence was not sufficient to warrant a finding that the fire was caused in the manner alleged. 179 S. W. 75.

The sufficiency of the evidence as a matter of law to require submission of the case to a jury is the only question presented in this court. The evidence in some respects, notably in matters relating to time and distance, is somewhat conflicting. Viewing the evidence, however, most strongly for the plaintiff, we think the following facts are fairly deducible therefrom: The house in question was a one-story frame dwelling, some 13 feet in height from the eaves to the ground, with a rather steep roof. It was ceiled with shiplap, and there was no means of ingress into the attic. It was about 14 feet wide and 50 feet long; the lengthwise frontage being towards the railroad. The distance from the track to the house is variously estimated at from 10 to 40 feet. Plaintiff estimates this distance at from 15 to 20 feet. The house was distant from Houston about a 15 or 20 minute run by rail. The defendant's track crossed a switch track of the Houston & Texas Central a short distance from this house in the direction of Houston. This distance is estimated by the several witnesses at from 150 to something about 400 feet. It was customary for trains to either slacken their speed or stop at or near this house in going in the direction of Houston, before crossing the Houston & Texas Central track. The fire occurred some time about daylight on Monday morning, June 2, 1912. A train of defendant going to Houston passed the house shortly before the fire was first discovered. The only witness who heard the train pass testified that it was about an hour before the fire. The weather was dry. Whether the wind was blowing is not shown. One witness testified that he had seen the

train operatives shoveling coal into the engines that passed on this road; from which we think it can be inferred that the defendant used coal as a fuel in its engines, there being no other testimony upon this issue. The witness who heard the train in question pass testified that it made a great deal of noise, as though it were working hard. The evidence shows that trains when starting or quickening their speed after slowing up or stopping at this place would work hard and throw out sparks and smoke. One of defendant's engineers, who was called by plaintiff, testified that he passed over the road with a train of 25 cars, going toward Houston, arriving there about daylight, according to his recollection. He testified that he did not notice any house on fire when he passed, but would have noticed it had there been one at that time. The house in question was occupied at the time by a tenant named Westbrook, who testified that there had been no fire in the house for two weeks prior to the burning; that at that time his wife was away from home; that he had gone to the place the Saturday night previous, and had lit a lamp just long enough to go to bed; that he left the place about 4 o'clock on Sunday afternoon, at which time the house was securely fastened and locked, with no fire in it or lamp burning; and that he himself never smoked. There were no fires of any kind in the vicinity of the house, and no direct evidence as to its cause. When the fire was first discovered, about daylight on Monday morning, a small portion of the roof on the side next to the railroad was in flames.

The defendant offered no testimony. The engineer referred to testified that he did not know the condition of the spark arrester, but that the engine worked well.

The general principles of law governing cases of this character are well settled in this state.

[1] The burden of proof is upon the plaintiff to establish the fact that the fire originated from one of defendant's engines. When this burden is met, "the law presumes negligence, and the plaintiff is entitled to recover for damages done by the fire so set out, unless the railroad company shall prove that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and properly operated." *Railway v. Levine*, 87 Tex. 437, 29 S. W. 466; *Scott v. Railway*, 93 Tex. 625, 57 S. W. 801; *Railway v. Johnson*, 92 Tex. 501, 50 S. W. 563.

[2] The character of proof required of plaintiff in this regard is thus stated in *Ruling Case Law*, vol. 11, pp. 994, 995:

"In actions against railroad companies for injuries to property by communicated fires, while it is necessary to trace the liability for the fire to the defendant, and proof of a mere

possibility that the fire communicated in the operation of the road is not sufficient, yet it is not required that the evidence should exclude all possibility of another origin or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause, and the origin of the fire has generally been held sufficiently established by inferences drawn from circumstantial evidence. Thus it has frequently been held that from proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, the jury may infer that the fire originated from sparks from the passing engine. If it is sought to recover damages for fire alleged to have been caused by the negligent escape of sparks from a locomotive, and the evidence as to the origin of the fire is circumstantial, the fact that the weather had been dry for several days prior to the fire is admissible in connection with other circumstances tending to show that the fire was caused by sparks emitted from such locomotive."

"We bear in mind in passing upon the sufficiency of these facts offered that every case must and will depend more or less upon the collection of circumstances disclosed by the evidence of the given case." *Railway v. Blakeney*, 48 Tex. Civ. App. 443, 106 S. W. 1140.

"From the nature and circumstances of such cases, considerable latitude must be allowed in the introduction of testimony and in the drawing of inferences as to the origin of the fire." *Railway v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 360, 13 Am. St. Rep. 221, citing 1 Thompson on Negligence, 159; *Railway v. Jones*, 9 Colo. 379, 12 Pac. 516; *Butcher v. Railway*, 67 Cal. 518, 8 Pac. 174.

These general principles are well recognized, we believe, by adjudications in this state. *Lumber Co. v. Railway*, 106 Tex. 13, 155 S. W. 175; *Railway v. Curry*, 135 S. W. 592; *Railway v. Blakeney*, supra.

[3] The testimony offered by plaintiff, as above outlined, we think sufficient to support the inference that the fire was probably caused by sparks from one of defendant's engines, and that any other apparent or probable cause was fairly negatived. This inference we believe fairly deducible from the following circumstances: That an engine and train of defendant passed the house in a reasonably short time before the fire, and was heard to make considerable noise, as if the engine were working hard; that under such circumstances it was usual for engines to emit sparks at that place; that the weather was dry; that the house was only a few feet from the track; that the fire started in the roof on the side next to the track; that the house was left the previous afternoon securely locked; that there had been no fire on the premises for two weeks; and that there were no fires in the vicinity which would likely have caused the fire, and no circum-

stances in evidence tending to explain its origin upon any other hypothesis.

We conclude that the judgments of the district court and Court of Civil Appeals should be reversed, and the cause remanded to the district court for a new trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

W. C. BELCHER LAND MORTGAGE CO. v. TAYLOR et al. (No. 62-2801.)

(Commission of Appeals of Texas, Section A. June 11, 1919.)

1. HOMESTEAD  $\S$ 146—EXECUTION OF DEED IN TRUST—RIGHTS OF CHILDREN.

Surviving wife, tenant in common of homestead with her children, to save it from threatened foreclosure of vendor's lien, had the right to extend time of payment of purchase-money note by making new note to third party who took over purchase-money notes from vendor, and to execute deed in trust binding her interest and that of the children in the homestead to secure such note.

2. SUBROGATION  $\S$ 23(6)—PAYMENT OF PURCHASE MONEY—SUBROGATION TO VENDOR'S RIGHT TO LIEN.

One who pays purchase price of homestead subject to vendor's lien, or part thereof, on behalf of purchaser under agreement with the purchaser that vendor's lien shall be retained as security for the money advanced, is entitled to be subrogated to vendor's rights to such lien, and where amount advanced is in excess of that secured by vendor's lien, he is subrogated to the extent of the amount of the lien.

3. MORTGAGES  $\S$ 335—DEED IN TRUST—AMOUNT IN EXCESS OF INDEBTEDNESS.

A sale made under a deed of trust for a sum larger than the amount with which the property is properly chargeable is not void, and a power of sale in such deed can be exercised if any part of the debt is due and owing.

4. HOMESTEAD  $\S$ 96—SALE UNDER DEED IN TRUST—AMOUNT—EXCESS OF INDEBTEDNESS.

Where time of payment of purchase money for homestead was extended by execution of deed in trust of homestead to secure note to third party who took over purchase-money notes from vendor, a sale under the deed in trust was valid, notwithstanding that note to third party was in excess of the amount of indebtedness secured by vendor's lien.

5. HOMESTEAD  $\S$ 146—EXECUTION OF DEED IN TRUST BY SURVIVING WIFE—PRESERVATION OF SEPARATE ESTATE.

Surviving wife had the right to bind her interest in homestead by deed of trust for pur-

pose of extending time for payment of purchase price, under Rev. St. 1879, art. 2854, in force at such time, though she had remarried at time of execution of deed in trust; the transaction being to preserve her separate estate and being merely a change in the form of the indebtedness, and not the creation of a debt.

**6. ACKNOWLEDGMENT**  $\S$ 20(1)—**DISQUALIFICATION — AGENT — VALIDITY OF ACKNOWLEDGMENT.**

Acknowledgment of deed in trust executed by surviving wife to secure note to third party who had taken over purchase-money notes from vendor taken by agent of surviving wife and vendor, who had no interest in the instrument or its consideration, but only in the transaction by way of commission from the vendor for negotiating the notes, was not void.

**7. MORTGAGES**  $\S$ 350—**SALE UNDER DEED IN TRUST—PLACE OF SALE—APPLICABILITY OF STATUTE.**

Under Act of March 21, 1889 (Rev. St. 1911, art. 3759), a sale of property under deed of trust executed prior to enactment of such act was not required to be made in county in which property was situated, although time for payment had been extended after act had taken effect; the mortgage continuing notwithstanding extension agreements.

**8. MORTGAGES**  $\S$ 305 — **DISCHARGE OF MORTGAGE—CHANGE IN FORM OF INDEBTEDNESS.**

A mere change in the form of indebtedness will not discharge the mortgage or deed in trust, the mortgage continuing so long as the debt it is given to secure subsists, since it secures the debt, and not the note or other evidence of the debt.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Mahala Taylor and others against the W. C. Belcher Land Mortgage Company. Judgment for plaintiffs was affirmed by Court of Civil Appeals (173 S. W. 278), and defendant brings error. Judgment of Court of Civil Appeals reversed, and judgment rendered for defendant.

Wm. J. Berne, of Ft. Worth, for plaintiff in error.

Fowler & Fowler, of Bastrop, for defendants in error.

**SONFIELD, P. J.** In the year 1882 Charles H. Glover purchased certain land in Bastrop county from John Wilkes, executing for the purchase money several promissory notes, two of which were in the sum of \$300 each, due respectively on or before October 15, 1887 and 1889, with interest at the rate of 10 per cent. after maturity, and providing that they might be liquidated in cotton at 10 cents per pound. Upon the purchase Glover and his wife moved upon the land, residing thereon and occupying it as their homestead until Glover's death; his wife continuing to so use the same as her homestead

to the date of the trial. No lien was retained upon the land in either the deed to Glover or the notes. Glover died intestate in March, 1884, leaving surviving him his wife and six minor children, aged from one to eleven years. In November, 1886, the surviving wife married H. M. Taylor. Thereafter, on November 26, 1887, the first of the two notes hereinabove mentioned having become due, and payment being insisted upon, and neither the Taylors nor the minor children of Mahala Taylor, former wife of Glover, having the money with which to pay same, and having no property other than their homestead, they made application to the W. C. Belcher Land Mortgage Company to take up and extend said notes, which was granted. Wilkes transferred the notes to the Belcher Company. The transfer, as found by the Court of Civil Appeals, was not intended as a sale, but was for the purpose of subrogating the company to the rights of Wilkes under said notes. Taylor and wife wrote upon said notes their acknowledgment that they were just debts, promising to pay the same at the expiration of five years in accordance with their note of that day, and executed their note of even date in the sum of \$600, payable to the Belcher Company, with interest at the rate of 7 per cent. per annum payable semiannually, reciting that it was given for the unpaid portions of a just and subsisting original purchase-money debt, and secures and perpetuates all of the original vendor's rights, remedies, and liens. At the same time the Taylors executed a deed in trust to said land to Horace H. Cobb, trustee, to secure the payment of said note, reciting therein that it was to secure plaintiff in error in the payment of a just and subsisting original purchase-money debt, subrogating the company to the vendor's lien and continuing same to secure said note. The deed provided that in case of default the land could be sold at the courthouse door in Travis county upon notice posted for ten days on the courthouse door of said county, and that, in the event of the failure or refusal of the trustee to act, such sale should be made by the acting sheriff of Travis county as substitute trustee.

The application of the Taylors to the Belcher Company for the loan was the result of the following negotiations: Wilkes, the payee, employed R. P. Jones to negotiate or sell the notes. Jones approached S. M. Smith, a broker, with request that he find a purchaser. Smith took up the matter with the Belcher Company. The company declined to purchase the notes, because they were payable in cotton and on or before a given date, but expressed a willingness to take up and extend the notes for a period of five years. Smith informed Jones that the notes could be thus extended, and Jones, who also rep-

resented the Taylors, agreed thereto. Thereupon the application was made, and Smith was employed by the Belcher Company to inspect and report upon the value of the land, which he did. Wilkes had stated to Taylor that he would take \$500 for the notes. Upon the due execution of the instruments consummating the extension, the Belcher Company paid the sum of \$585, of which sum Wilkes received \$500, Smith, \$60, and Jones, \$25.

H. M. Taylor having died, Mahala Taylor, his widow, on September 22, 1898, obtained from the Belcher Company a five-year extension of the \$600 note and like extensions on October 10, 1898, and October 1, 1903. The last extension having expired and the \$600 note being due and unpaid, and the said Cobb having refused to act as trustee, the sheriff of Travis county, at the request of the Belcher Company, advertised and sold the land as provided in the deed in trust. The Belcher Company became the purchaser, paying therefor the sum of \$875, and the sheriff executed and delivered to the company a deed thereto.

This action was in trespass to try title and for cancellation of the deed in trust and the deed executed by the sheriff. Trial was had by the court without a jury, and judgment rendered for defendants in error. On appeal the Court of Civil Appeals affirmed the judgment of the district court. 173 S. W. 278.

[1] At the date of the execution of the note and deed in trust, the property in its entirety was subject to the vendor's lien. Mrs. Taylor, as tenant in common with her children, in order to protect her interest, as well as that of her children, and save the property from threatened foreclosure, had the right to extend the time of payment of the debt, and to this end was authorized to execute a deed in trust binding her interest, though homestead, and also the interest of her children. If, as held by the Court of Civil Appeals, the note to the Belcher Company was in an amount in excess of the indebtedness secured by the vendor's lien, this would not render the note and deed in trust void.

[2] The rule is familiar and well settled that one paying on behalf of another the purchase price of land or part thereof, a lien thereon existing in favor of the vendor, is entitled to be subrogated thereto, where the payment is made under agreement with the vendee and upon an understanding, express or implied, that the lien shall be retained as security for the money advanced; and, where the amount advanced is in excess of that secured by the vendor's lien, the party is subrogated to the extent of the amount of the lien. This doctrine is as applicable to the homestead as to other property. Hicks v. Morris, 57 Tex. 658; Tex. Land & Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12; Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559; Hensel v.

Building & Loan Ass'n, 85 Tex. 215, 20 S. W. 116; Flynt v. Taylor, 100 Tex. 60, 98 S. W. 423; Dixon v. National Loan & Investment Co., 40 S. W. 541.

[3] A sale made under a deed in trust for a sum larger than the amount with which the property is properly chargeable is not void, and a power of sale in such deed can be exercised if any part of the debt is due and owing. Groesbeeck v. Crow, 85 Tex. 200, 20 S. W. 49; Hemphill v. Watson, 60 Tex. 679; Word v. Colley, 143 S. W. 257; Vaughn v. Mutual Building Ass'n, 36 S. W. 1013.

[4] The amount of the indebtedness secured by the vendor's lien was included in the note secured by the deed in trust, and, the same being due and payable, and default made in its payment, a sale was authorized under the deed in trust. Mere excess, if any, in the amount of the note does not affect the validity of the sale.

[5] The note and deed in trust, though executed by Mrs. Taylor while a married woman, bound her and her interest in the property; the same being her separate estate. The loan was negotiated for the purpose of preserving this separate estate. To the extent of the then existing indebtedness, it was not the creation of a debt, but a mere change in the form of the indebtedness. Thereby the vendor's lien was not extinguished, but expressly continued, and the Belcher Company was subrogated to the rights of the vendor thereunder. To the extent of the existing indebtedness, the contract, being for the benefit of her separate estate, was authorized under article 2854, R. S. 1879, then in force. Blair v. Teel, 152 S. W. 878.

The deed in trust involved the homestead and separate property of a married woman. The acknowledgment thereto was made before R. P. Jones, who, as found by the Court of Civil Appeals, had a pecuniary interest in the transaction to the extent of his commissions of \$25. Was Jones thereby disqualified from taking the acknowledgment, and the instrument therefore void?

The Court of Civil Appeals found that Jones was acting as the agent of Wilkes, the payee of the notes, and of the Taylors, and Smith, as broker and agent for both the Taylors and the Belcher Company. The undisputed facts with reference to the agency of Jones and Smith establish that, in the negotiations looking to the sale of the notes, Jones represented Wilkes, the payee; in the taking up and extension of the notes, he represented the Taylors. Jones in no manner represented the Belcher Company, nor had he any negotiations with the company. Smith represented the Taylors through Jones in these negotiations, and represented the Belcher Company in inspecting and reporting upon the value of the land. Wilkes paid Taylor a commission of \$25. Wilkes was

anxious to dispose of the notes. The Taylors were willing that they be taken up, substituted, and time of payment extended. The interests of Wilkes and the Taylors were not adverse or conflicting.

The cases cited by the Court of Civil Appeals as sustaining the view that Jones was disqualified to take the acknowledgment of the Taylors determine: That a party to a deed or mortgage is incompetent to take the acknowledgment to its execution (*Brown v. Moore*, 38 Tex. 645; *Rothschild v. Daugher*, 85 Tex. 332, 20 S. W. 142, 16 L. R. A. 719, 34 Am. St. Rep. 811), that one who identifies himself with a transaction, evidenced by a written instrument, by placing his name on the face of the same as an agent for one of the parties thereto, is disqualified from taking the acknowledgment of any of the parties to the instrument (*Sample v. Irwin*, 45 Tex. 567); that an officer is disqualified from taking the acknowledgment of a married woman to a mechanic's lien in favor of a corporation of which such officer is a stockholder (*Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 509).

It is generally held that one having a direct pecuniary interest in the consideration of an instrument, or in upholding such instrument after its execution, is disqualified from taking the acknowledgment thereto. 1 C. J. 804.

[6] Jones was not a party to the instrument, nor does his name appear upon its face as an agent of any party thereto. He was the agent of the Taylors and Wilkes. Wilkes was not a party, nor in any manner concerned, in the deed in trust. Jones had no interest in or under the deed in trust, in the consideration therefor, or in upholding the same after its execution. *Kutch v. Holley*, 77 Tex. 220, 14 S. W. 32. He had an interest in the transaction to the extent that he would receive, not from the Belcher Company, but from Wilkes, the sum of \$25 as commissions. This amount was to be paid him by the payee of the notes for their negotiation, not by the Belcher Company, for securing the execution of the deed in trust. It is true that the notes would not have been negotiated but for the execution of the instrument, and Jones therefore had an indirect interest in its execution. This was, however, an interest in the transaction, and not in the instrument or its consideration. It cannot be held that this character of interest rendered his act void. It is of utmost importance that the officer taking an acknowledgment be disinterested in order to impartial action toward the parties to the instrument. It is likewise important, as a matter of public policy, that verity be given the certificate of acknowledgment. To hold that an indirect interest of this character, in the absence of proof of fraud, bad faith, undue advantage, or improper conduct, renders void

the instrument so executed by a married woman, would be productive of injurious consequences in many cases, and would tend to destroy confidence in instruments executed by married women. Were it in evidence that Jones was to receive compensation from the Belcher Company, a different question would be presented.

The trial court held the sale under the deed in trust void because made in Travis county under the provision of the trust deed, and not in Bastrop county, where the land was situate, as provided by the act of March 21, 1889, being article 3759, R. S. 1911. The Court of Civil Appeals did not pass upon this question.

[7] Without reference to the extension agreements, it is undoubted that the sale was properly made in Travis county. It has been definitely settled that the act of 1889 does not affect deeds in trust executed prior to its enactment, and the power of sale in such deeds must be exercised as provided therein. *International, etc., Ass'n v. Hardy*, 86 Tex. 610, 26 S. W. 497, 24 L. R. A. 284, 40 Am. St. Rep. 870; *Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. Rep. 820. The question to be determined is: Did the extension agreements destroy the power to sell in Travis county as provided in the trust deed? We think not.

[8] A mortgage or deed in trust secures the debt, not the note or other evidence of the debt. Hence no mere change in the form of the indebtedness will discharge the lien; the mortgage continuing so long as the debt it is given to secure subsists, unless discharged by a valid agreement between the parties. *Wilcox v. National Bank*, 93 Tex. 322, 55 S. W. 317; *Wright v. Wooters*, 46 Tex. 380.

Extensions of time of payment were not made through renewal notes, nor by the execution of new deeds in trust, but by agreements in writing and by the execution of interest notes or coupons. Each of the extension contracts provided that in all respects save as expressly modified by the contract the note and deed in trust and all the terms and conditions thereof should remain in full force and effect. The only modification or change through such contracts was as to the time of payment.

The extension contracts did not create a debt or lien; they continued the original obligation and the lien securing same, postponing the date of payment. Default being made in the payment of the original note, a sale in Travis county, as provided in the deed in trust, was authorized.

We conclude that the deed in trust was in all things valid, binding not only the interest of Mrs. Taylor, but also that of her children, and that the sale thereunder passed the title to the Belcher Company.

We are of opinion that the judgment of the Court of Civil Appeals affirming the judg-

ment of the district court should be reversed, and judgment here rendered for the defendant.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### KELLY v. BLAKENEY. (No. 64-2808.)

(Commission of Appeals of Texas, Section A.  
June 11, 1919.)

#### VENDOR AND PURCHASER $\S$ 228(1)—CONFLICTING SALES—INNOCENT PURCHASER—NOTICE OF CLAIM.

The purchaser of land, on whom a prior purchaser from the same party holding an unrecorded deed served an injunction petition that the prior purchaser and record lessee of the lands was owner of them, bought at his peril where he failed to make full and complete inquiry as to the basis of the claimed title of the other and prior purchaser and lessee.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by J. B. Blakeney against John Kelly. From judgment for plaintiff, defendant appealed to the Court of Appeals, which affirmed (172 S. W. 770), and defendant brings error. Judgments of the trial court and the Court of Civil Appeals reversed, and judgment rendered for defendant on recommendation of the Commission of Appeals.

J. Q. Henry, Jones & Thurmond, and Walter F. Jones, all of Del Rio, for plaintiff in error.

John J. Foster, of Del Rio, and James Cornell, of Sonora, for defendant in error.

TAYLOR, J. J. B. Blakeney sued John Kelly in the ordinary form of trespass to try title to recover 5,120 acres of land. Upon trial without a jury judgment was rendered for the plaintiff. Appeal to the Court of Civil Appeals resulted in an affirmance. 172 S. W. 770.

Juan Antonio Urteaga, the common source, was the owner on June 28, 1909. On that date he leased all of the land except a one-fourth interest in section 54 to the firm of Kelly & Norris for 20 years. The lease contract was duly recorded the next day. At the time the lease was executed the defendant was a member of the lessee's firm.

On July 1, 1913, Urteaga conveyed the land by deed to the defendant. The deed was not recorded until December 3, 1913. Two days before the defendant placed his deed of record the plaintiff, for a consideration of \$250, secured a deed to the land from Urteaga and

wife. On the same day, December 3, 1913, he recorded it.

The plaintiff, before buying the land, examined the records of Valverde county, and found only the Kelly-Norris 20-year lease of record as against the Urteaga title. He also employed an attorney to examine the records and ascertain the condition of Urteaga's title in the general land office. The result was that the title appeared to be good in Urteaga with the exception of the Kelly-Norris lease. On the occasion that the plaintiff closed the deal he questioned Urteaga as to his title, who gave assurance that he had made no conveyance of the land by any instrument other than the lease contract. The defendant during the time plaintiff was carrying on the foregoing negotiations lived about seven miles from the land, but the two were not on speaking terms. Plaintiff made inquiry as to the title of no one except Urteaga.

In November, prior to the purchase of the land by plaintiff in December, defendant filed an injunction suit against plaintiff to restrain him from using 26,240 acres of land, including the land sued for. The injunction petition, the citation, and temporary writ all contained an allegation that John Kelly was the owner of the entire 26,240 acres. The language of the trial court's finding is that "said petition, and said citation and temporary writ, each and all, contained an allegation that the plaintiff in said suit, John Kelly, was the owner of all of said lands." The citation and writ were served upon Blakeney the day the injunction suit was filed.

The conclusion of the trial court's sixth finding of fact is as follows:

"Plaintiff had no notice or knowledge of the deed from Urteaga to Kelly, except that imputed to him as a matter of law from Kelly's possession and use of said lands, unless, as a matter of law, the claim of ownership in the injunction suit placed the burden upon plaintiff of making inquiry direct of Kelly as to what his claim of title to said land consisted of beyond the lease contract of record."

The trial court concluded upon the authority of *Hamilton v. Ingram*, 13 Tex. Civ. App. 604, 35 S. W. 748, that the plaintiff's discovery of the said lease contract as the only muniment of defendant's title justified the assumption that the lease was the sole basis for the defendant's possession, and that the plaintiff was therefore relieved from the duty of making further inquiry. The court concluded also that defendant's allegation of ownership in the injunction petition created no additional need for inquiry, for the reason that the defendant could recover in the injunction suit on proof of the lease contract, without proving ownership, citing *Stokes v. Riley*, 29 Tex. Civ. App. 373, 68 S. W. 704, in support of the conclusion.

The Court of Civil Appeals cites *Hamilton v. Ingram* as supporting the trial court's conclusion. No reference is made to *Stokes v. Riley*.

The Supreme Court, upon consideration of the application, were inclined to the view that plaintiff in error's allegation in the injunction petition put the defendant in error on inquiry, and in this view granted the writ.

The cases relied upon by the trial court are not applicable for the reason that no actual notice of an adverse claim of absolute ownership was given in either case to the claimant relying upon the record notice.

Granting that the lease to Kelly and Norris could fully explain the possession of John Kelly, it does not follow that such explanation is in no wise affected by Kelly's assertion to Blakeney that he (Kelly) owned the land; nor does the fact that the plaintiff in error could recover in the injunction suit merely by establishing a leasehold in the land raise a presumption that he had no greater interest. The statement served upon the defendant in error is none the less an assertion of ownership because made in an injunction petition. While litigants sometimes overstate their cases, even when the pleadings are verified, as in injunction suits, there is no presumption that they always do, or that the plaintiff in error did so in this instance. A prospective purchaser of land who has opportunity to make full and complete inquiry as to the basis for possession of the person holding under a claim of absolute ownership, and fails to exhaust all of the available means known to him of acquiring knowledge of the title, buys at his peril. Assuredly this is true when he who is in possession served him who is seeking to buy, with a declaration of ownership solemnly made.

It is stated in *Paris Grocery Co. v. Burks*, 101 Tex. 106, 105 S. W. 174, that—

"He [the intending purchaser] is not required to institute inquiries as to the existence of the rights of which there is no evidence upon the records, *unless there be some fact which he knows or should know sufficient to excite inquiry in the minds of prudent persons.*" (Italics ours.)

The allegation of absolute ownership made in the injunction petition was certainly sufficient to excite inquiry on the part of a prudent person. If plaintiff in error was not diligent in failing to properly record his deed from Urteaga, he counteracted the effect of his lack of diligence, in so far as it affected the defendant in error, by giving him actual notice of his claim of ownership of the land. Regardless of what the conclusion might be if the notice had not been given, it is evident that defendant in error, having such notice, and having failed to inquire of him who

gave it, could not acquire the land as an innocent purchaser. *Houston Oil Co. of Texas v. Hayden*, 104 Tex. 181, 135 S. W. 1149.

We are of the opinion, therefore, that the judgments of the trial court and the Court of Civil Appeals should be reversed, and judgment rendered in favor of the plaintiff in error.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### COX v. BARTON. (No. 79-2856.)

(Commission of Appeals of Texas, Section B. June 11, 1919.)

##### 1. VENDOR AND PURCHASER ⇨352—RECOVERY FOR DEFICIENCY—SPECIAL FINDINGS—CONSTRUCTION.

In an action by a purchaser of land against his vendor for damages for deficiency in acreage, findings by the jury on special issues submitted *held* not to be interpreted as findings that the vendor's agent made false representations as to acreage, or that there was fraud.

##### 2. VENDOR AND PURCHASER ⇨343(2)—DEFICIENCY IN ACREAGE—MUTUAL MISTAKE—RIGHTS OF PURCHASER.

Where a purchaser of land, which is described in the deed as containing 100 acres more or less, upon having a survey made, discovered that there was a deficiency of 16 acres, which was not contemplated by either party, the mistake was a material one, and so gross as to entitle such purchaser to relief as a matter of law.

##### 3. VENDOR AND PURCHASER ⇨350—ACTION BY PURCHASER FOR DAMAGES—DEFICIENCY IN ACREAGE—EVIDENCE—NEGLIGENCE.

Evidence *held* not to support findings of the jury, in an action by the purchaser of land against the vendor and her agent for damages for a deficiency in the acreage, that the purchaser was guilty of negligence in failing to ascertain quantity of land; he having a right to rely upon the estimate of the vendor's agent as being substantially correct.

##### 4. EXCHANGE OF PROPERTY ⇨8(5)—EXCHANGE OF REAL PROPERTY—DAMAGES.

Where a purchaser of land conveyed in part payment a farm, and thereafter discovered that the land conveyed to him contained 84 acres, instead of 100, as estimated by the vendor's agent, his measure of damages was the difference between the value of the property given in exchange and that received by him.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Suit by J. L. Barton against Mrs. Eddie C. Cox and another. From an order of the



Court of Civil Appeals (176 S. W. 793), reversing a judgment of the trial court for defendants and rendering judgment for plaintiff, defendant named brings error. Judgment of the Court of Civil Appeals and of the trial court reversed, and case remanded to District Court for new trial.

Chandler & Pannall, of Stephenville, for plaintiff in error.

Keith & Johnson, of Stephenville, for defendant in error.

MONTGOMERY, P. J. On November 22, 1913, Mrs. Eddie C. Cox conveyed to J. L. Barton a certain tract of land in the corporate limits of Stephenville, Tex. The deed described the land by metes and bounds, one of the boundary lines being a creek, and no meanders of the stream were given. The deed recited the land conveyed as being 100 acres, more or less. In payment for the land, Barton conveyed to Mrs. Cox a farm owned by him, and executed a vendor's lien note for \$2,750. The deed recited a cash consideration of \$5,000 and the execution of the note.

Soon after the conveyance was made, Barton had the land surveyed, and discovered that the tract contained in fact only 84.04 acres. Barton instituted this suit against Mrs. Eddie C. Cox and R. E. Cox, who acted as her agent in negotiating the transaction, to recover damages by reason of the deficiency in the acreage.

He alleged that R. E. Cox falsely represented to him that the tract contained 100 acres, and that he relied upon the representations and was thereby induced to make the trade, and that the land conveyed to Mrs. Cox in part payment for the land conveyed by her to him was valued at \$5,000, and that the total price paid by him was \$7,750, and that the price was based on the estimated acreage and was at the rate of \$77.50 per acre.

He further alleged that, if the representations were not in fact fraudulent, the sale was consummated under a mutual mistake as to the acreage actually contained in the survey, and that the recital in the deed of "100 acres, more or less," was placed in the deed at the instance of R. E. Cox, who at the time stated that if the land was actually surveyed it would show an acreage of 102, or possibly 103, acres, and for that reason he wanted said clause in the deed; that plaintiff was unlearned in the law, and did not know the legal effect of this recital. The plaintiff prayed for judgment for \$1,238.45, the estimated value of the deficiency at \$77.50 per acre.

Defendants denied all the material allegations in the petition, and further pleaded that the sale was not one by the acre, but that it was a sale of a specific tract of land, and that the plaintiff investigated for him-

self, and that all the facts known to defendants were fully disclosed.

The court submitted the case upon special issues to the jury. The issues and verdict thereon were as follows:

"Special Issue No. 1. Was the sale of land from Mrs. Cox to the plaintiff that of a specific quantity of land, to wit, a hundred acres; that is, was it a sale by the acre? Or was it a sale of a specific tract of land by description, each party risking the quantity?"

"A. It was not a sale by the acre. It was a sale of a specific tract in gross.

"Special Issue No. 2. If, in answer to special issue No. 1 you have found that the sale was by the acre of a specific quantity to wit, one hundred acres, then how many acres short of the one hundred was the tract that plaintiff actually got, and what price per acre was plaintiff to pay for said land?"

"A. It was not a sale by the acre, and the tract measured 84.04 acres, being short of 100 acres 15.96 acres, at \$77.50 per acre.

"Special Issue No. 3. What price per acre was the shortage worth at the time the sale was made to plaintiff, exclusive of the building, well, and other improvements on the premises?"

"A. We find that the shortage of the tract of land exclusive of improvements to be worth \$47.50 per acre.

"Special Issue No. 4. If in answer to special issue No. 1, you have found that the sale was of a specific tract by description, then did the defendant R. E. Cox represent to plaintiff that said tract in gross contained one hundred acres of land?"

"A. We find that the said R. E. Cox estimated the tract of land to contain 100 acres.

"Special Issue No. 5. If the defendant R. E. Cox represented to plaintiff that the tract contained one hundred acres of land, then did the plaintiff believe and rely on said representations of the said R. E. Cox.

"A. He did.

"Special Issue No. 6. Did the plaintiff and R. E. Cox both believe that the tract of land contained as much as 100 acres, and was there a mutual mistake on the part of both of them in regard to the amount and quantity of land contained in said tract? If there was, then did plaintiff use such caution and diligence as an ordinarily prudent person would have exercised in matters of that kind to determine the quantity of land in said tract prior to the time the trade was closed?"

"A. They both believed that the tract contained as much as 100 acres, and there was a mutual mistake on the part of both of them as to the amount and quantity of the land in said tract. We find that the plaintiff did not use such caution and diligence as an ordinary person would have exercised in matters of this kind to determine the quantity of land in said tract prior to the time the trade was closed."

Upon this verdict the trial court rendered judgment for the defendants. Barton appealed, and the Court of Civil Appeals reversed the judgment of the trial court and rendered judgment against Mrs. Eddie C. Cox for the deficiency at \$47.50 per acre.

This writ was granted upon the application of Mrs. Eddie C. Cox

#### Opinion.

The Court of Civil Appeals, in reversing the judgment of the trial court and rendering judgment for the plaintiff, Barton, against Mrs. Eddie C. Cox, predicated its action on two theories:

(1) That the verdict of the jury in response to the special issues was in effect a finding that R. E. Cox, the agent of Mrs. Eddie C. Cox, had made false and fraudulent representations as to the number of acres in the tract of land conveyed to Barton.

(2) That the verdict of the jury having found that there was a mutual mistake as to the number of acres contained in the tract conveyed to Barton, Barton was entitled to recover upon the theory of mutual mistake.

In our statement of the case, the special issues submitted and the verdict of the jury thereon have been set out.

[1] We think that the verdict should not be interpreted as finding that R. E. Cox made any false representations. As we construe the whole verdict, the jury found that the sale from Mrs. Cox to Barton was of a specific tract by description and not a sale by the acre; that R. E. Cox did not represent that the tract contained 100 acres, but that he did estimate the quantity of land at 100 acres, and that Barton in purchasing relied upon this estimate; that in making the exchange both parties believed the tract contained 100 acres, and that as to the number of acres there was a mutual mistake. If our interpretation of the verdict is correct, then it follows that the conclusion of the Court of Civil Appeals cannot be sustained upon the ground of fraud.

[2] The Court of Civil Appeals, in addition to the facts found by the jury, found that the mistake was a material one, and so gross as to authorize the court to grant Barton proper relief. After fully considering all the facts, and especially the testimony of R. E. Cox, which is set out in the opinion of the Court of Civil Appeals, we have concluded that the mistake in the number of acres in the survey was a material one, that no such deficiency was contemplated by either party, and that the Court of Civil Appeals did not err in deciding as a matter of law that Barton was entitled to relief therefrom. The circumstances under which relief is given in

cases of this character are fully discussed and the proper rule announced in the case of *O'Connell v. Duke*, 29 Tex. 300, 94 Am. Dec. 282, and we think it only necessary to refer to that case.

[3] We agree with the Court of Civil Appeals that there was no evidence to support the finding of the jury that Barton was guilty of negligence in failing to ascertain the quantity of land. Considering the situation of the parties and the means of knowledge, we think Barton had the right to rely upon the estimate of R. E. Cox as being substantially correct.

[4] From what has been said, it is apparent that, in our opinion, the judgment of the Court of Civil Appeals should be affirmed, unless the Court of Civil Appeals committed reversible error in failing to apply to this case the measure of damages announced by the Supreme Court in the case of *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456. The case of *George v. Hesse*, was one in which an exchange of lands was induced by fraud, and the Supreme Court held that the measure of recovery by the defrauded party was the difference between the value of the property given in exchange and that received by him.

It seems to us that there is a much stronger reason for applying the rule announced in *George v. Hesse* in cases involving mutual mistake than in cases of fraud, and we are of opinion that the rule announced in that case should be followed and applied in this case. It is evident from the record that the case was not submitted in the trial court upon the theory announced in the case of *George v. Hesse*.

There was evidence tending to show that the land given by Barton in exchange for the 100 acres of land conveyed to him was of less value than \$5,000 although the deed recited the consideration at that sum.

For the reasons herein shown, we recommend that the judgment of the Court of Civil Appeals and of the trial court be reversed, and that this case be remanded to the district court for a new trial.

PHILLEPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question of the measure of damages, as to which the reversal is ordered.

## WALKER v. WILMORE. (No. 69-2829.)

(Commission of Appeals of Texas, Section A.  
June 11, 1919.)1. CHATTEL MORTGAGES ⇐34 — ABSOLUTE  
CONVEYANCE AS MORTGAGE—CONSTRUCTION.

Though an instrument may contain all of the terms of an absolute conveyance, if it is apparent from the language used that it was intended as security for a debt, it will be treated as a mortgage.

2. CHATTEL MORTGAGES ⇐34—BILL OF SALE  
AS MORTGAGE—"REPAY."

A bill of sale covering two race horses, but providing in a separate defeasance clause that, if the seller should within ten days repay the recited consideration, etc., held to be a chattel mortgage, and not a sale; "repay" meaning "to pay back; to refund; as, to repay money borrowed or advanced."

[Ed. Note.—For other definitions, see Words and Phrases, Repay.]

3. CHATTEL MORTGAGES ⇐34—BILL OF SALE  
AS MORTGAGE—CONSTRUCTION—VALIDITY OF  
PROVISIONS.

That a bill of sale contains a stipulation that the title to the property is to become absolute on default of the repayment by the seller of the consideration does not prevent the instrument from being construed as a chattel mortgage; such provision being ineffectual, as oppressive to creditors and contrary to public policy.

4. CHATTEL MORTGAGES ⇐40—BILL OF SALE  
AS MORTGAGE—CONSTRUCTION AS QUESTION  
FOR JURY.

Where it clearly appears from the language of a bill of sale that it is intended as a mortgage, it is error to leave its construction to the jury.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by George C. Walker against R. W. Wilmore. Judgment for defendant was affirmed by the Court of Civil Appeals (174 S. W. 921), and plaintiff brings error. Reversed and remanded, as recommended by the Commission of Appeals.

John T. Hill, of El Paso, for plaintiff in error.

Jones, Jones & Hardie, of El Paso, for defendant in error.

STRONG, J. This action was brought by the plaintiff, George C. Walker, against R. W. Wilmore for the possession of two race horses, valued at \$2,500. The trial in the lower court, before a jury, resulted in a verdict and judgment in favor of defendant, which was affirmed by the Court of Civil Appeals. 174 S. W. 921.

The defendant claimed title to the property under the following written instrument, to wit:

"Know all men by these presents that I, George C. Walker, at present residing in the city of El Paso, Texas, for and in consideration of the sum of one hundred and fifty dollars to me paid by R. W. Wilmore, the receipt of which is hereby acknowledged and confessed, have bargained, sold, and by these presents do bargain, sell, and deliver unto the said R. W. Wilmore, at present residing in the city of El Paso, Texas, the following personal property, to wit:

"A certain bay filly, Jumelia, three years old, both hind legs up half way to hock white, with black spots around both coronets, mixed with white; both front feet up to ankles white, with black spots mixed in; narrow white stripe running down over right nostril.

"Also one bay filly, Stella Grain, three years old, containing no marks.

"And I do hereby, for myself and my heirs, executors, administrators, and assigns, covenant to and with the said R. W. Wilmore, his heirs, executors, administrators, and assigns to warrant and defend the title to said property before mentioned against the lawful claims of any person or persons whomsoever forever.

"Witness my hand this the 13th day of March A. D. 1914. [Signed] George C. Walker.

"Whereas, I, George C. Walker, have this day sold to R. W. Wilmore my certain bay filly, Jumelia, and my certain bay filly, Stella Grain, for the sum of \$150 to me paid by the said R. W. Wilmore, the receipt of which is hereby acknowledged, and

"Now it is understood and agreed by and between R. W. Wilmore and myself that, should I within ten days repay to the said R. W. Wilmore the sum of \$150 then the said R. W. Wilmore agrees to reconvey said horses to me, but should I fail within ten days to pay to said R. W. Wilmore the said \$150, then, in that case, said R. W. Wilmore by virtue of said sale shall have the right of complete possession in the title which I have vested in him by said bill of sale.

"[Signed] Geo. C. Walker.

"R. W. Wilmore."

[1, 2] The only question for review is whether or not the trial court erred in refusing to give to the jury the following charge requested by the plaintiff, to wit:

"You are charged that the instrument in evidence shows upon its face that it is a chattel mortgage, and the only question for your determination is whether or not a tender of the money due was made and possession of the horses demanded."

We think the charge should have been given. It is well settled that, though an instrument may contain all of the terms of an absolute conveyance, if it is apparent from the language used that it was intended as security for a debt, it will be treated as a mortgage. *Laird v. Weiss*, 85 Tex. 96, 23 S. W. 864. The language of the instrument in question, to the effect that if Walker should within ten days "repay" the \$150, etc., clearly indicates the relationship of the debtor and creditor. "Repay" means "to pay back; to refund; as, to repay money borrowed or ad-

vanced." Webster's Dict. In the case of *Stephens v. Sherrod*, 6 Tex. 294, 55 Am. Dec. 776, a stipulation which bound the grantee to reconvey the property if the grantor should repay the consideration before a specified date was treated as being equivalent to a formal defeasance agreement, rendering the transaction a mortgage. The only difference in the instrument under consideration and a mortgage in its ordinary form is that the conveyance and defeasance, instead of being in one, are in separate instruments. This is a difference in form only. The instruments were executed at the same time, and had reference to the same property, and must be regarded and construed in law as parts of one and the same instrument. Thus construed, it is clear that the instrument is a chattel mortgage.

[3, 4] The language used shows that it was executed for the purpose of securing the payment of a debt, and it contains a condition of defeasance if the debt is not paid at maturity. The stipulation that the title to the property is to become absolute on default of the payment of the debt does not change the character of the instrument. Such a provision is held ineffectual, as oppressive of creditors and contrary to public policy. *Soell v. Hadden*, 85 Tex. 188, 19 S. W. 1087. It clearly appearing from the language of the instrument itself that it was intended as a mortgage, the trial court erred in leaving its construction to the jury. *Laird v. Weiss*, 85 Tex. 96, 23 S. W. 864; *Lessing v. Grimland*, 74 Tex. 239, 11 S. W. 1095; *Stephens v. Sherrod*, 6 Tex. 294, 55 Am. Dec. 776; *Taylor v. Glass Co.*, 6 Tex. Civ. App. 337, 25 S. W. 466; *Williams v. Bank*, 22 Tex. Civ. App. 581, 56 S. W. 261.

We are of opinion that the judgment of the Court of Civil Appeals and that of the trial court should be reversed, and the cause remanded for another trial in accordance with the views herein expressed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

#### TAYLOR v. WHITE. (No. 19-2620.)

(Commission of Appeals of Texas, Section A. June 11, 1919.)

#### 1. MASTER AND SERVANT §105(2) — SAFE PLACE TO WORK—ELECTRIC POWER PLANT—EXCITER—FAILURE TO GUARD.

An employer operating an electric power plant is not negligent in failing to fence an exciter which is covered with shield leaving no ex-

posure except openings for adjusting and cleaning machine, where other employers in same line of business did not fence in exciters by guard rails, and employé who came in contact with machine was experienced and familiar with the surroundings.

#### 2. MASTER AND SERVANT §101, 102(3)—DUTY OF MASTER—SAFE PLACE TO WORK—SAFE APPLIANCES.

Master is required to exercise ordinary care to provide servant with safe place to work and with reasonably safe and suitable machinery and appliances.

#### 3. MASTER AND SERVANT §101, 102(2) — DUTY OF MASTER—SAFE PLACE TO WORK—SAFE APPLIANCES.

Master is not an insurer of servant's safety, but is required to exercise that degree of care which an ordinarily prudent person engaged in like business would have exercised under similar circumstances.

#### 4. MASTER AND SERVANT §105(1), 265(9)—SAFE PLACE TO WORK—CUSTOMS OF OTHER EMPLOYERS—NEGLIGENCE—PRESUMPTIONS.

The custom of others engaged in like business is not the absolute test of negligence in failing to provide safe working place appliances, but where master was conducting his business in accordance with the uniform custom of others, it devolves upon servant to show that custom is negligent; the presumption being that persons in like business are reasonably prudent.

#### 5. MASTER AND SERVANT §101, 102(4)—SAFE PLACE TO WORK—PROMISE TO REMOVE DEFECTS.

Before master can be held liable for failure to perform a promise to remove a specific danger, it is necessary to show that the existing conditions were of such a nature that their maintenance implied culpability.

#### 6. MASTER AND SERVANT §217(18) — ASSUMPTION OF RISK—FAILURE TO PROVIDE GUARD RAIL AROUND EXCITER.

An experienced employé familiar with an unfenced exciter in an electric power plant and fully appreciating danger of injury from contact with it while in operation assumes the risk.

#### 7. MASTER AND SERVANT §221(5)—ASSUMPTION OF RISK—PROMISE TO REMOVE DEFECT.

A servant is not relieved of the assumption of risks of a known defect by reason of a promise to remedy unless he continues in the service in reliance on such promise and has reasonable grounds to expect its fulfillment.

#### 8. MASTER AND SERVANT §216(1)—NEGLIGENCE OF FELLOW SERVANT.

Servant assumes risks caused by negligence of fellow servant.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by W. W. Taylor against Frank A. White. Judgment for defendant affirmed by Court of Civil Appeals (156 S. W. 349), and plaintiff brings error. Affirmed.

Synnott & Fish and C. B. Reeder, all of Amarillo, for plaintiff in error.

Turner & Wharton and Veale & Lumpkin, all of Amarillo, for defendant in error.

**STRONG, J.** The question presented in this case is whether or not the plaintiff, Taylor, who sued for damages for personal injuries alleged to have been caused by the negligence of defendant, adduced evidence sufficient to entitle him to have his case submitted to the jury.

The trial court directed the jury to return a verdict for defendant. A full statement of the evidence will be found in the opinion by the Court of Civil Appeals affirming the judgment of the trial court. 156 S. W. 349.

In substance the testimony shows that at the time of his injury plaintiff was engaged as engineer in the Amarillo Light & Power Plant, which was being operated by defendant as receiver. In the engine room of the plant was located a machine known as an exciter. This machine was shaped like a cylinder and was about 30 feet long and 12 feet in diameter. It was covered with a metal casing about 2 feet in diameter with four openings in it, 6 inches wide at one end, and about 18 inches at the other, and 16 or 18 inches long. It was about 2 feet from the top of this casing to the floor, and inside of it was a commutator, a cylinder about 12 inches in diameter and 36 inches long, extending the length of the casing. The commutator was smooth with brushes set in the frame which rested on the cylinder, and when the cylinder revolved the friction between it and the brushes generated the electricity. The cylinder when running made 750 revolutions per minute. The exciter was located about 6 feet north of one of the engines in the room and about 3 feet south of another. West of the exciter about 3 feet was a hole in the floor leading to the basement bannistered on three sides. The exciter had a bannister on the east side of it. The exciter was located in open view with ample room for passage around it. Plaintiff's duties require him to pass in close proximity to the exciter every five or ten minutes. It was a part of his duties to clean the exciter and put in new brushes. On the occasion of his injury plaintiff was engaged in cleaning the exciter, and, passing around the machine from one side to the other, he stumbled over a wrench which he did not see, and fell with his breast on the frame of the exciter, his right hand going into the machine, causing the injuries complained of. The wrench over which plaintiff stumbled had been left on the floor about ten minutes before the accident by a fellow servant of plaintiff who was assisting him in his work.

The negligence alleged is that defendant failed to place a guard rail around the excit-

er, and that defendant negligently placed the wrench over which the plaintiff stumbled in close proximity to the exciter. Plaintiff also alleged in reply to the plea of assumed risk that defendant promised to put a guard around the exciter, and that, relying on said promise, he remained in the service.

[1-3] In our opinion, the evidence is not sufficient to show that defendant was guilty of negligence in failing to provide a guard rail. The master is required to exercise ordinary care to provide his servant with a safe place to work and with reasonably safe and suitable machinery and appliances with which to do his work; but he is not an insurer. The measure of care required of the master is that degree of care which an ordinarily prudent person engaged in the same kind of business would have exercised under like or similar circumstances. The best evidence of the degree of care which an ordinarily prudent person would have exercised under given circumstances is the degree of care which ordinarily prudent persons engaged in the same kind of business customarily have exercised and commonly do exercise under like circumstances.

[4] The evidence without controversy shows that exciters of like kind were in general use throughout the country, and that no guard rails were provided in any of the plants using these machines to protect the employees. The custom of others engaged in like business is not the absolute test of negligence, but where the undisputed evidence shows affirmatively, as it does in this case, that the defendant was conducting his business in accordance with the uniform custom of persons engaged in like business, it devolves upon the plaintiff, before he can recover, to produce evidence showing that such custom is negligent. In the absence of such testimony, the legal presumption is that those engaged in like business were reasonably prudent in the conduct of their business, and that they discharged their legal obligations for the safety of their servants. *Railway Co. v. Alexander*, 108 Tex. 594, 132 S. W. 119; *Railway Co. v. Senske*, 201 Fed. 637, 120 C. C. A. 65.

The exciter upon which plaintiff was injured was covered with a shield, leaving no exposure except openings sufficient for the purpose of adjusting and cleaning the machine. The location of the other machinery in the engine room did not in any way interfere with or obstruct the view or passageway around the exciter. Plaintiff was an experienced servant, perfectly familiar with the exciter and its surroundings, and fully appreciated the danger of being injured if he should come in contact with it while in operation. He had worked around this machine constantly for about eleven months, and in the plant for about three years. We

do not think under such circumstances that a master in the exercise of that care required of him for the safety of his servant could reasonably anticipate that a servant while in the exercise of ordinary care for his own safety would be injured by coming in contact with the exciter in the absence of a guard rail.

[5] The evidence being insufficient to show that defendant was guilty of negligence in failing to provide a guard rail, the promise of defendant's superintendent to provide such rail, if made, and relied upon by plaintiff as alleged, would not entitle him to recover. The rule is well established that, before the master can be held liable for a failure to perform a promise to remove a specific danger, it is necessary to show that the existing conditions were of such a nature that their maintenance implied culpability. 4 Labatt's Master and Servant, 3868; *Cole v. Lounge Co.*, 222 Mo. 488, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888.

[6] We are of the opinion that the trial court's action in withdrawing the case from the jury should be sustained upon another ground. If it be conceded that the evidence is sufficient to show negligence in failing to provide a guard rail around the exciter, the undisputed evidence shows that plaintiff had full knowledge of the defect and the added danger. This being true, plaintiff assumed the additional risk caused by such negligence unless relieved therefrom by the promise of defendant's superintendent to remedy the defect.

[7] A servant is not relieved of the assumption of the risks of a known defect by reason of a promise to remedy or repair unless it appears that his continuance in the service was in reliance on such promise. The authorities on this subject generally limit the operation of the promise, as preventing the conclusion that the servant has assumed the risk, to a reasonable time for the master to comply, and, when it is or should be manifest to the servant that the defect will not be remedied, a further continuance in the service will be an assumption of the risk. *Hilje v. Hettich*, 95 Tex. 321, 67 S. W. 90. Plaintiff testified that he first requested defendant's superintendent to provide a guard rail about eight months before he was injured, and received his promise that he would attend to it "right away"; that he renewed the request about four months later, the superintendent saying he would fix it as soon as he could get to it; that he mentioned the matter the last time about six weeks or two months before he was injured, and the superintendent replied, "I will fix it as soon as I can get to it, right away." Plaintiff did not testify that he remained in the service relying on the promise to provide a

guard rail, and we think it clearly appears from his testimony that he did not. He must have known, from the many promises made and broken covering a period of eight months, that defendant had no intention of remedying the alleged defect. To be relieved of the assumption of the risks of a known defect by reason of a promise to remedy, the servant must have reasonable grounds to expect that the promise will be fulfilled. *Railway v. Bingle*, 91 Tex. 287, 42 S. W. 971.

[8] The only other ground of negligence alleged is that defendant negligently placed the wrench over which plaintiff tripped and fell in close proximity to the exciter. The undisputed evidence shows that the wrench was placed on the floor about ten minutes before the accident by a fellow servant of plaintiff who was assisting him in his work. The rule is well settled in this state that the servant assumes the risks caused by the negligence of his fellow servants. *Railway v. Blohn*, 73 Tex. 637, 11 S. W. 867, 4 L. R. A. 764; *Robinson v. Railway*, 46 Tex. 541.

We are of opinion that the judgment of the trial court and that of the Court of Civil Appeals should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### BENAVIDES v. STATE. (No. 5288.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

##### 1. LARCENY $\Leftrightarrow$ 27—PRINCIPALS.

To hold defendant guilty as principal in prosecution for theft of mules, it must appear that he was one of the individuals who took the mules or at the time of taking was doing something in aid of those who did the taking.

##### 2. LARCENY $\Leftrightarrow$ 27 — ACCOMPLICE OR PRINCIPAL—"ACCOMPLICE."

That defendant previous to taking advised theft and gave information touching preparation for the offense would tend to show that he was not a principal, but an "accomplice," defined by Pen. Code 1911, art. 79, as one not present at the commission of the offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appeal from Criminal District Court, Cameron County; Walter F. Timon, Judge.

Cipriano Benavides was convicted of theft, and appeals. Reversed and remanded.

J. T. Canales, of Brownsville, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The appellant was convicted of theft. On the night of December 27th six mules and one horse were taken from the pasture of Roman Esparza. On the evening of that day Roman Esparza, after driving the stock to the Rio Grande river for water, drove them back about 450 yards to his large pasture, when he left them at a point about 600 yards from a small inclosure under the control of appellant, and in which he had some horses, and which inclosure was about two miles from his place of residence. The animals were missed on the morning of December 28th; and it was found that the fence around the small inclosure mentioned had been cut at a point about 60 yards from the river, and there were tracks of six mules, three horses, and three persons at this point. These tracks led to and across the river into Mexico. Appellant's animals were not stolen, though one animal belonging to another party, and which was in the pasture, was missing and never recovered. The six mules and one horse described in the indictment were recovered by the owner from the Mexican authorities at Matamoros, Mexico. The date of the recovery is not disclosed, nor does the evidence show how, when, or from whom the Mexican officers obtained possession of them. The tracks of persons found with those of the animals are only described as one barefoot and two shod. Nothing further is disclosed as to whether they were tracks of men, women, or children. The bare foot trail and one that was shod crossed the river, while the other turned back and was trailed about 150 yards from the river, about a quarter of a mile from the gap which was cut in the fence of appellant's inclosure. While searching for his mules on the day they were missing Roman Esparza told appellant that they were lost, had been stolen, and appellant replied that it was very probable; that his fence had been cut.

A witness testified that he and appellant lived about 60 yards apart; that at about 6 o'clock on the evening of December 27th the witness, on going to the river for his oxen, saw appellant near the river, and heard him conversing with some person on the opposite side of the river, in which conversation appellant said: "It was time to do business. If you don't find the mules there in the brush there on the edge of the river, you will find them in some brush in the edge of the pasture." The person across the river said: "Who is taking them?" Appellant replied: "Don Roman." This testimony was controverted by denial and attack on the motive and reputation of the witness.

We must assume that the jury accepted it as true. If it be also assumed that it relat-

ed to the stolen animals, it having occurred some hours before the animals were stolen, would, in the absence of proof that appellant was present at the time they were taken, or was then doing some act in furtherance of a conspiracy to steal them, and appropriate them, be a circumstance pointing to appellant as an accomplice in the theft, but not as a principal offender.

An accomplice is one who is not present at the commission of the offense, but who, before the act is done, advises, commands, or encourages another to commit the offense, though he may not have given him such aid. Penal Code, art. 79.

The conversation mentioned indicated that appellant, before the offense was committed, gave the principal information to be used by him in taking the animals. The information was such as was intended to enable the principal to find and take the animals in the absence of appellant. It does not indicate that it was contemplated that he should be present when the animals were taken, and we find no evidence inconsistent with the hypothesis that they were taken in his absence.

[1, 2] The testimony of the state's main witness puts appellant at his home, within a few feet of that of the witness and more than two miles from the scene of the taking. There is no direct evidence nor cogent circumstance to show that he left his home. None of the tracks described led to his home, or were found nearer than two miles therefrom, and there is no effort to show that any of the tracks were of a character that would have been made by appellant. The property was found in the possession of Mexican officers, but no evidence is introduced to suggest that the officers got them from appellant or any associate of his. There is no description or identity of the person with whom he conversed across the river, and all circumstances that are disclosed are consistent with the absence of appellant at the time the mules were taken. The state's theory is that the mules were taken by three persons. To hold appellant as a principal he must have been one of them, or at the time been doing something in aid of them; and the fact, if it be one, that he had previously advised the theft and given information touching preparation for the offense does not satisfy the measure of proof demanded by the law. The evidence is wholly circumstantial, and, in so far as it criminales appellant, tends to show that he was an accomplice and not a principal. *Burow v. State*, 210 S. W. 809, and cases there mentioned.

The judgment is reversed, and the cause remanded.

## SMITH v. STATE. (No. 5398.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

1. BURGLARY  $\S$ 42(1)—UNEXPLAINED POSSESSION OF STOLEN GOODS—EVIDENCE TO SUPPORT CONVICTION.

If the state show that a burglary had been committed and that soon thereafter appellant was found in possession of part of the property taken, and no explanation is made by him of such possession, such evidence will support a conviction for burglary.

2. BURGLARY  $\S$ 45—EVIDENCE—IDENTIFICATION OF GOODS—QUESTION FOR JURY.

The sufficiency of the evidence to identify an overcoat found on defendant as having been taken from the burglarized store was one for the jury.

3. BURGLARY  $\S$ 42(3)—EVIDENCE—POSSESSION—SUFFICIENCY.

Evidence that defendant was found in a neighboring town in possession of an overcoat exactly similar to one taken from the burglarized store, that he had on no overcoat the afternoon of the burglary, and carried tools and keys in his cap with which entrance to the burglarized store could be effected, that he tried to secretly dispose of articles corresponding with those taken when the overcoat disappeared, *held*, in the absence of explanation or attempted explanation, sufficient evidence to sustain a verdict of guilty.

4. CRIMINAL LAW  $\S$ 1159(2)—APPEAL—REVERSAL—VERDICT AGAINST THE EVIDENCE.

The Court of Criminal Appeals will not reverse a judgment of conviction unless there is such manifest lack of evidence as to make it apparent that the verdict was the result of prejudice, or that such verdict is against the weight of the evidence.

Appeal from District Court, Donley County; Henry S. Bishop, Judge.

Ira Smith was convicted of burglary, and he appeals. Affirmed.

A. T. Cole, of Clarendon, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted of burglary in the district court of Donley county, and his punishment fixed by the jury at confinement in the penitentiary for a period of five years.

J. B. Masterson had a store in the little town of Hedley, Donley county, Tex., and on the night of November 4, 1918, his store building was entered and an overcoat, certain quantities of silk, six pairs of ladies' shoes, and some ladies' suits were taken. There is no contest in this case of the fact that said store was burglarized and said

property taken. The store had a front and a rear door, each of which the proprietor said was locked on the night in question; the rear door being locked with a Yale lock and the front door with an ordinary lock, the latter of which could be unfastened by several keys which were in evidence. The case was one of circumstantial evidence, and there seems to be no complaint as to the manner in which the law on that question was presented to the jury. The only contention made here is that the evidence is not sufficient to support the verdict. The burglary was on the night of November 4th, and on the afternoon preceding the proprietor was showing his stock of overcoats and sold one to a customer. The next morning, when the burglary was discovered, Masterson at once discovered that an overcoat which he had shown to said customer the afternoon before was gone, along with the other property mentioned. The overcoat was described by the owner as to make, size, and color and pattern, and an overcoat was identified by him in the courtroom as being the one taken from his possession or one which was exactly identical with the same; his expressed opinion being that it was his overcoat. It was testified by the customer who bought an overcoat the afternoon before that he saw in the owner's possession in said store an overcoat identical in all respects with the one exhibited in the courtroom at the trial. A witness named Goldston testified that on the day of the alleged burglary a man whom he identified as appellant came into his store and bought from him a watch case. Said witness testified that after selling the appellant the watch case he walked with him down to a jewelry store to get the time and to the Bon-Ton, where they got a drink, and he states that appellant did not have on any overcoat at that time. On November 7th, it was testified by Miss Grace Dawn, a chambermaid at the Union Hotel in Amarillo, that she went up to a certain room to clean it up and that appellant was in the room and engaged her in conversation and asked her if she wanted to buy some shoes, some silk, and a lady's suit, and upon her expressing willingness to purchase if the articles suited, he told her that he would bring them to let her look at them that night, cautioning her not to say anything about his having them, as he did not want it talked about. A few minutes after this conversation she notified Officer Sullinger of what had been said to her, and Sullinger hunted up the appellant and arrested him. At the time of his arrest appellant had on the overcoat which was identified by the witness Masterson and also had secreted in his cap three skeleton keys, a flat file, a small piece of steel, and a knife. Two of the keys, upon trial, were



found to unlock the front door of the Masterson store. Appellant did not take the stand or put any witness on except one, and him only to show that a Yale lock could not be opened by any flat piece of metal unless made especially to fit the lock. This much of the evidence is stated in order that it may be understood why we are unable to agree with appellant's view that the evidence does not support the verdict.

[1, 2] It has been frequently held in this state that the unexplained possession of property recently stolen will support a conviction for theft thereof. See Branch's Ann. P. C. § 2463, and authorities cited. Also that the jury may infer theft of all of certain missing property from the fact of possession of part of the same. *Rose v. State*, 52 Tex. Cr. R. 155, 106 S. W. 148; *White v. State*, 17 Tex. App. 188; *Gonzales v. State*, 18 Tex. App. 453; *Jack v. State*, 20 Tex. App. 656. Also if the state show that a burglary has been committed, and that recently thereafter appellant was found in possession of all or part of the property taken from said burglarized premises and no explanation is made by him of such possession, same will support conviction of the burglary. Branch's Ann. P. C. § 2346, and authorities cited. Appellant's main objection to the sufficiency of the evidence in the instant case is because of what he claims to be lack of sufficient identification of the overcoat found on appellant. The question of identification of stolen property is one for the jury. *Polin v. State*, 65 S. W. 183; *Hooton v. State*, 53 Tex. Cr. R. 6, 108 S. W. 651; *Lynne v. State*, 53 Tex. Cr. R. 375, 111 S. W. 729; *Suggs v. State*, 65 Tex. Cr. R. 67, 143 S. W. 186.

[3, 4] Not only was appellant found in possession of an overcoat exactly similar in every respect to the one which was taken from the burglarized store on the night of the burglary, and which was not thereafter seen until appellant was arrested in a neighboring town on the third day thereafter, but he also had on no overcoat the afternoon before the burglary, and was also found when arrested to be in possession of tools and keys with which entrance into the burglarized store could be effected, and it may be noted that said articles were found carried by him in a very unusual place about his person; and it was also shown that he had been trying to secretly dispose of other articles which in a general way corresponded with those taken at the same time the overcoat disappeared. No explanation or attempted explanation of any of these facts was offered, and we cannot say that the jury did not have sufficient evidence before them upon which to predicate the verdict of guilty. This court will not reverse unless there is such manifest lack of evidence as

to make it apparent that the verdict was the result of prejudice, or that such verdict is against the great weight of the evidence.

There being no error apparent, the judgment of the trial court will be affirmed.

## SLADE v. STATE. (No. 5426.)

(Court of Criminal Appeals of Texas. May 28, 1918.)

### 1. CRIMINAL LAW §1144(18) — APPEAL — DENIAL OF NEW TRIAL — PRESUMPTION WHERE EVIDENCE NOT PRESERVED.

Where evidence heard upon motion for new trial is not presented by statement of facts or bill of exceptions filed during the term, but it appears the court heard evidence in overruling the motion, the presumption is indulged on appeal that the facts heard justified the conclusion reached.

### 2. STATUTES §225½ — CONSTRUCTION OF STATUTE—LEGISLATIVE INTENT AS TO SIMILAR SUBSEQUENT STATUTES.

Where the language of a statute relating to a female juvenile under the age of 18 years is the same as that relating to male juveniles under 17 years of age which had been previously construed, it must be presumed that the construction of such former statute indicates the legislative intent in the latter.

### 3. INFANTS §68—FEMALE JUVENILE UNDER 18 YEARS—OPTION TO BE TRIED UNDER INDICTMENT OR AS JUVENILE.

Under the provisions of Acts 35th Leg. (4th Called Sess.) c. 28, amending Code Cr. Proc. 1911, art. 1197, a female juvenile under 18 years of age charged with felony had the right to file a statement in court advising the judge of her claim that she was a juvenile, or to exercise her option to be tried under the indictment.

### 4. INFANTS §69—DELINQUENT CHILDREN—CONFINEMENT IN PENITENTIARY.

The contention that the Juvenile Acts disclose the legislative policy to exempt delinquent children from confinement in the state penitentiary, and, even though there is a failure to follow the procedure named and bring to the court's attention the claim of one accused of a felony to be tried as a juvenile, that the legislative policy should nevertheless be given effect by refusing to send such accused person to the penitentiary is untenable.

### 5. CONSTITUTIONAL LAW §70(3)—JUDICIAL POWERS — JUVENILES — CONFINEMENT IN PENITENTIARY — DISCRIMINATION BETWEEN BOYS AND GIRLS.

Rev. St. 1911, art. 5229, declares that boys under 17 years of age charged with felonies, who do not claim the privilege of trial as juveniles, may be sent to the penitentiary, where the conviction condemned them for a period greater than 5 years, but if for less penalty the confinement shall be in the juvenile school, but the statutes make no such exemption for girls

and the discrimination between the two classes, boys and girls, if wrong, is for the Legislature, and not for the courts to remedy.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Dora Slade was convicted of theft and her punishment was fixed at confinement in the penitentiary for 2 years, and she appeals. Judgment affirmed.

J. D. Childs, of San Antonio, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** The appellant is under conviction for theft and punishment fixed at confinement in the penitentiary for two years.

She was tried at a term of court beginning January 6th and ending March 1, 1919. She entered a plea of guilty on advice of counsel, and after conviction, through another attorney, presented a motion for new trial, in which she charged that at the time of her trial she was under 18 years of age, and failed to make that fact known to the court because she was not informed of her right under the statute concerning delinquent children. Pleading the same facts, she presented a motion in arrest of judgment. The court in overruling the motions recites that, with the appellant present in person and by attorney, evidence was submitted upon which the order was entered. The bill of exceptions, bringing before this court the evidence upon which the trial judge acted in overruling the motions, was filed May 13, 1919.

In *Black's Case*, 41 Tex. Cr. R. 185, 53 S. W. 116, it was decided that the court was not authorized to consider a statement of facts or bill of exceptions preserving evidence heard on motion for new trial, except in cases in which such statement of facts or bill of exceptions were filed during the term at which the case was tried; that there was no provision of the law under which such facts could be preserved otherwise. This rule has been reaffirmed in numerous instances, and from it there has been no departure. See *Probest v. State*, 60 Tex. Cr. R. 609, 133 S. W. 263.

[1] Under this rule, when it appears that the court heard evidence in overruling the motion for new trial, the presumption on appeal is indulged that the facts heard by him justified the conclusion which he reached. Some of the cases illustrating this principle will be found in *Jackson v. State*, 78 Tex. Cr. R. 100, 180 S. W. 261. Its application in the present instance would be conclusive against the appellant. We have examined the subject, however, and would not be able to reach a conclusion in accord with appellant's views if we were permitted to pass upon the merits of the question.

[2, 3] We find no fault with the view that chapter 26 of the Acts of the Fourth Called

Session of the Thirty-Fifth Legislature merely changed certain portions of title 17 of the Code of Criminal Procedure, and that the sections of that title not changed by chapter 26 are to be read in connection therewith in ascertaining the legislative will touching delinquent boys and girls. That act was construed in some of its phases, in *McLaren v. State*, 199 S. W. 811, and it was there decided, in construing article 1195 of the Code of Criminal Procedure, that "a boy under 17 years of age, charged with a felony, may, if he so elect, rely upon his plea of not guilty and stand his trial upon the charge of felony, taking the chance of conviction or acquittal; or, he may, if he so elect, file his plea setting up the fact that he is under 17 years of age, which, when established by proof, will require that the court dismiss the felony charge."

We also undertook to construe part of the juvenile law in *McCloud's Case*, 200 S. W. 395, reaching the conclusion, in substance, that there was no valid provision in title 17, supra, which defined a procedure by which females under 18 years of age, who were charged with a felony, could be tried as delinquents. Subsequent to the publication of the opinion stating this conclusion, the Legislature amended title 17 by the enactment of chapter 26, above referred to, in which we find the following:

"When an indictment is returned by the grand jury of any county charging any female juvenile under the age of eighteen years with a felony, the parent, guardian, attorney or next friend of such juvenile, or said juvenile herself, may file a sworn statement in court at any time before announcement of ready for trial is made in the case. When such statement is filed the judge of said court shall hear evidence on the question of the age of the defendant, and if he is satisfied from the evidence that said juvenile is less than eighteen years of age, said judge shall dismiss such prosecution and proceed to try the juvenile as a delinquent child, under the provisions of this act.

"If said juvenile be found to be delinquent, and sentence be not suspended as provided in the laws of this state in cases of felony on first offense, defendant on conviction shall be committed to the Girl's Training School, upon an indeterminate period not extending beyond the time that such juvenile will reach the age of twenty-one years, and the jury trying the case shall state in their verdict the time and place of commitment."

And since this language is the same as that construed in the case of *McLaren v. State*, supra, except that this relates to a female and that related to a male, it must be assumed, under well-defined rules of statutory construction, that the interpretation of the language as made by the court in *McLaren's Case* expresses the legislative intent. See authorities in *Lewis v. State*, 58 Tex. Cr. R. 351, 127 S. W. 808, 21 Ann. Cas. 356.

If we are not mistaken in this conclusion, the right of appellant, she being under 18 years of age and charged with a felony, was to file a statement in court, advising the judge of her claim that she was a juvenile, or to exercise her option to be tried under the indictment for felony.

[4] Counsel insists that the Juvenile Acts disclose the policy on the part of the law-making power to exempt delinquent children from confinement in the state penitentiary, and that even though there is a failure to follow the procedure named by the Legislature and bring to the court's attention the claim of one accused of felony to be tried as a juvenile, the policy of the Legislature should nevertheless be given effect by refusing to send to the penitentiary any person accused of a felony who is in the statutory definition of delinquent children. To do so, the court would make, rather than construe, the law, and bring on the public evils much greater than those they seek to remedy.

[5] The extent to which the Legislature has undertaken to exempt juveniles from confinement in the penitentiary occurs to us as plainly expressed in the statutes. Rev. St. 1911, art. 5229, in effect declares that boys under 17 years of age who are charged with felonies, and who do not claim the privilege of trial as juveniles, may be sent to the penitentiary, where the conviction condemns them for a period greater than 5 years. The same statute provides that upon such conviction, if the penalty is fixed at less than 5 years, the confinement shall be in the juvenile school. Attention was called to this in McLaren's Case, supra; and the absence of similar provisions with reference to girls was adverted to in McLoud's Case. In the subsequent enactment mentioned the Legislature made changes in the law, but failed to make provision applicable to girls similar to that made in article 5229, relating to boys. So that so far as we are aware there is no provision which authorizes the court to exempt from confinement in the penitentiary a girl who is indicted for a felony and fails to avail herself of the option to be tried as a juvenile. The discrimination between the two classes, boys and girls, if wrong, is for the Legislature, and not the courts, to remedy.

The judgment is affirmed.

#### HOLLMAN v. STATE. (No. 5361.)

(Court of Criminal Appeals of Texas. May 28, 1919.)

#### 1. HOMICIDE §§268, 286(1) — WEAPON NOT DEADLY PER SE—INTENT—MANNER OF USE—INSTRUCTION—STATUTE.

A stick, described as a black jack limb about two or three feet long and about as big as wit-

ness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact, notwithstanding death resulted from the blow struck with it; and it was error for the court, after having its attention called thereto, not to charge the substance of Pen. Code 1911, art. 1147, providing that "if the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."

#### 2. CRIMINAL LAW §829(5)—SELF-DEFENSE—INSTRUCTION.

In a prosecution for murder, the court having given the jury an instruction on the law of self-defense without in any way qualifying it, there was no error in refusing to instruct the jury that appellant had a right to arm himself and seek the deceased for an explanation or discussion of the previous difficulty.

#### 3. HOMICIDE §300(8) — INSTRUCTION — PRESUMPTION OF DECEASED'S INTENT TO KILL—USE OF DEADLY WEAPON—EVIDENCE.

In a prosecution for murder, where there was evidence that deceased had his knife in his hand, but no evidence describing the knife upon which the jury could predicate a finding that it was a deadly weapon, the failure of the court to instruct the jury on the presumption of intent to kill by the deceased, arising from his use of deadly weapon, was not error.

Appeal from District Court, Kaufman County; Joel R. Bond, Judge.

John Hollman was convicted of manslaughter under a charge of murder, and he appeals. Judgment reversed.

Lawhorn & McNair, of Taylor, and Wynne & Wynne, of Kaufman, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. The appeal is from a conviction of manslaughter under a charge of murder, and punishment fixed at confinement in the penitentiary for three years.

A short time prior to the homicide appellant (who was a youth 19 years of age) and a son of the deceased got into a difficulty, in which the deceased interfered, and angry words passed between him and the appellant. The deceased, according to some of the testimony, applied to appellant insulting epithets and exhibited his knife in a threatening manner. Subsequently they met, and the homicide took place; the appellant striking the deceased one blow on the head with a stick, fracturing the skull. From the state's standpoint the appellant when about 15 steps from the deceased, said: "Mr. Bruce, you called me a son of a bitch, and I came to make you take it back." Bruce replied, "All right," when the appellant struck the blow.

The appellant and his witnesses presented the theory: That appellant, after the first difficulty, was informed by his brother that

the deceased was willing to make friends, and that appellant approached him for that purpose, and began the conversation by saying: "Mr. Bruce, if I have said anything to hurt your feelings, I want to apologize, and I think you owe me one for what you called me at the schoolhouse." That the deceased responded by drawing his knife and starting toward the appellant, when appellant picked up a stick that was lying upon the ground to defend himself.

[1] Various exceptions were reserved to the charge of the court and the refusal of requested charges. The stick used was described as a black jack limb, the witness describing it stating, "It was about two or three feet long and about as big as my wrist." This testimony was given by a girl 14 years of age, and we find in the record no other description of the instrument used nor of its character as a deadly weapon. Our statute (article 1147) provides that "if the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used, such intention evidently appears," and the court has uniformly held that, in cases where the instrument used was not necessarily a deadly weapon, the court should charge the substance of this article of the statute and inform the jury in appropriate language that if there was no intent to kill, and the instrument was not a deadly weapon in the manner used, the jury might find the accused guilty of an aggravated assault. *Crow v. State*, 55 Tex. Cr. R. 202, 116 S. W. 52, 21 L. R. A. (N. S.) 497, and other cases listed in Branch's Ann. P. C. p. 1180. The stick used by appellant was not per se a deadly weapon, and its character as such was a question of fact, notwithstanding that death resulted from the blow struck with it. *Sheffield v. State*, 1 Tex. App. 641; *Coker v. State*, 59 Tex. Cr. R. 244, 128 S. W. 137; Branch's Ann. P. C. § 2102; *Merka v. State*, 199 S. W. 1128.

The failure of the court to observe and apply the proper rule was specifically brought to his attention by exceptions to the charge, as well as requested charges, and is brought forward for review in accord with the statutes.

[2] The court having given to the jury an instruction on the law of self-defense, without in any way qualifying it, there was no error in refusing to instruct the jury that appellant had a right to arm himself and seek the deceased for an explanation or discussion of the previous difficulty. Such a charge has been held appropriate, and often necessary, in cases in which there was a limitation on the right of self-defense embodied in the court's charge; but the rule requiring it is limited to cases in which there

is such limitation. *Willford v. State*, 38 Tex. Cr. R. 397, 42 S. W. 972; *Smith v. State*, 81 Tex. Cr. R. 368, 195 S. W. 599.

[3] There was evidence that at the time of the homicide deceased had his knife in his hand. We find none, however, descriptive of the knife, or upon which the jury could predicate a finding that it was a deadly weapon. In this state of the evidence we do not regard the failure of the court to instruct the jury on the presumption of intent to kill by the deceased, arising by the use by him of a deadly weapon, as error. *Hudson v. State*, 59 Tex. Cr. R. 655, 129 S. W. 1125, Ann. Cas. 1912A, 1324.

The error pointed out requires a reversal of the judgment, which is ordered.

#### ST. LOUIS, B. & M. RY. CO. v. BROUGH- TON et al. (No. 7682.)

(Court of Civil Appeals of Texas. Galveston.  
March 18, 1919. On Motion for  
Rehearing, May 8, 1919.)

#### 1. RAILROADS §272—PERMANENT IMPROVE- MENTS BY RECEIVER—EVIDENCE.

Evidence held to show that improvements were made upon railway properties by receiver out of earnings while in his hands in excess of amount sued for by one injured by the negligence of the receiver's servants.

#### 2. RAILROADS §397(1)—INJURY TO PERSON ON TRACK—EVIDENCE—ADMISSIBILITY.

In action for negligence in driving cars against standing cars with such force as to cause standing cars to strike one crossing track located on an avenue, testimony as to use of avenue by public was relevant and admissible; but conveyances evidencing defendant's right to operate a railroad along the avenue held irrelevant, and immaterial.

#### 3. APPEAL AND ERROR §1050(2) — ADMIS- SION OF IMMATERIAL TESTIMONY — HARM- LESS ERROR.

If evidence complained of was immaterial and could not affect proper disposition of the case, its admission would at most constitute harmless error, for which court on appeal cannot reverse judgment.

#### 4. JURY §132—QUALIFICATION OF JURORS —EVIDENCE.

Testimony of a juror who had been accepted and sat as a juror held to show that he was qualified.

#### 5. APPEAL AND ERROR, §230 — OBJECTION IN LOWER COURT — DISQUALIFICATION OF JUROR.

An objection to a juror on the ground of disqualification cannot be heard when made for the first time after verdict.

Appeal from District Court, Matagorda  
County; John M. Green, Special Judge.

Action by W. H. Broughton, in behalf of himself and as next friend for his son, against the St. Louis, Brownsville & Mexico Railway Company. From the judgment rendered, the Company appeals. Affirmed.

Gaines & Corbett, of Bay City, and E. H. Crenshaw, Jr., of Kingsville, for appellant.  
J. W. Conger and Krause & Wilson, all of Bay City, for appellees.

LANE, J. This suit was originally brought by W. H. Broughton, father of Ira Broughton, a boy of 13 years of age, in behalf of himself and as next friend for his son, against the Gulf, Colorado & Santa Fé Railway Company and Frank Andrews, as receiver of the properties of the St. Louis, Brownsville & Mexico Railway Company, to recover damages for personal injuries to said Ira Broughton, alleged to have been caused by the negligent operation of one of the trains of the St. Louis, Brownsville & Mexico Railway Company by the servants of said receiver, and for medical expenses incurred by W. H. Broughton for said Ira Broughton.

The case has been once before appealed, and will be found reported under the style Broughton et al. v. Gulf, Colorado & Santa Fé Railway Co. et al., 186 S. W. 354. The statement of the nature of the case and of the pleadings of the parties made in the report referred to is sufficiently full for the purposes of this appeal, together with this additional statement:

After a reversal by this court, upon the grounds disclosed by said report, the plaintiffs filed their amended and supplemental petitions, renewed the material allegations of their former petitions, and in addition thereto alleged that the defendant Gulf, Colorado & Santa Fé Railway Company had, by a judgment in its favor, been discharged from liability, and had been dismissed from the suit; that upon the petition of the St. Louis, Brownsville & Mexico Railway Company, Frank Andrews, receiver, was discharged as such receiver of said railway company on the 17th day of April, 1916, by order of the District Court of the United States, for the Southern District of Texas, and by said order, Frank Andrews, receiver, was directed and required and did forthwith and without sale deliver to the St. Louis, Brownsville & Mexico Railway Company all properties, of whatsoever kind or character, wheresoever situated, belonging to the St. Louis, Brownsville & Mexico Railway Company; that while said properties of said St. Louis, Brownsville & Mexico Railway Company were in the hands of said receiver, earnings from its operation in excess of the aggregate of all debts and liabilities incurred by the receiver were expended for betterments and improvements of the property; that the benefits, all of which

were realized by the company after the property was restored, were far in excess of any demands that were assumed by the said railway company under said order, and far in excess of plaintiffs' demands herein; that thereby the defendant, St. Louis, Brownsville & Mexico Railway Company, became liable, and promised to pay plaintiffs their said damages.

Upon proper motions Frank Andrews, receiver, was dismissed from the suit, and the St. Louis, Brownsville & Mexico Railway Company was made party defendant.

The defendant, St. Louis, Brownsville & Mexico Railway Company, demurred generally to plaintiffs' petition, and specially excepted to the petition on the grounds that it showed upon its face that the injuries alleged to have been received by the plaintiff Ira Broughton were received on the tracks of the Gulf, Colorado & Santa Fé Railway Company; also excepted thereto on the ground that the injuries, if any, sustained by the plaintiff, were results of the gross carelessness and negligence of the plaintiff Ira Broughton in passing from the main line of the Santa Fé to the side track; and, further excepting to plaintiffs' pleadings, defendant alleged that the rights conferred by article 2141, Revised Civil Statutes, were not available to the plaintiff, for the reasons: (1) Defendant's properties were being operated by a receiver appointed by and under authority of the United States District Court for the Southern District of Texas; (2) because said receiver had been discharged without preserving any rights in the plaintiffs.

Defendant, St. Louis, Brownsville & Mexico Railway Company, further answered by general denial and specially alleging that when the injuries were received by Ira Broughton its properties were in the hands of and being operated by Frank Andrews, receiver appointed, qualified, and acting under orders of the United States District Court for the Southern District of Texas, and that defendant was not responsible for any negligent acts of the said Frank Andrews, receiver, or his agents.

Defendant's demurrers, both general and special, were by the court overruled, after which the court charged the jury as follows:

"This case is submitted to you upon what is known as 'Special Issues,' but before setting forth what the special issues are I will give you some explanations, definitions, and instructions on the law of the case, which you are to consider in determining said issues.

"(1) 'Negligence,' as used herein, means the want of ordinary care towards one to whom care is due. By 'ordinary care' is meant such care as an ordinarily prudent person should have exercised under the same or similar circumstances.

"(2) By 'proximate cause' is meant a cause

without which the injury would not have happened and from which that injury or some like injury might reasonably have been anticipated as a natural or probable consequence.

"(3) 'Contributory negligence,' as applied to a minor plaintiff, means some act or omission on the part of the plaintiff which an ordinarily prudent person of his age and discretion would not do or suffer, and which concurring with negligence of a defendant, so causes or contributes to the injury that, but for such want of care on the part of the plaintiff, the injury would not have happened.

"(4) And you are further instructed that in answering these special issues submitted to you, whenever the terms 'negligence,' 'ordinary care,' 'contributory negligence,' and 'proximate cause' are used, you will understand and apply each in the sense in which it has been above defined, and will refer to the definition for its meaning.

"(5) You are the exclusive judges of the facts submitted to you, and of the credibility of the witnesses, and the weight to be given to their testimony, but you are to be governed as to the law by the court's instructions, which you are to consider in their entirety, and not in isolated or detached parts.

"The burden is upon plaintiffs to prove the facts necessary to entitle them to recover, as submitted to you, by a preponderance of the evidence."

The following are the special issues submitted to the jury, together with the answers thereto:

"State whether or not you find from the evidence that betterments and permanent extensions were made upon and for the benefit of the properties of the St. Louis, Brownsville & Mexico Railway Company, by the receiver, Frank Andrews, out of the earnings of said properties while in his hands as receiver, in excess of the amount claimed by plaintiffs in this suit. You will answer this issue Yes or No. Answer: Yes.

"If you answer this issue in the negative, then you need not consider and answer any other of the following issues, but will return such answer as your verdict herein. But if you answer said issue in the affirmative, you will consider the following issues:

"Special Issue No. 2. State whether or not you find from the evidence that the plaintiff Ira Broughton was injured in Bay City, Tex., on the 6th day of April, 1914, by the St. Louis, Brownsville & Mexico Railway Company's train while in the hands of its receiver, Frank Andrews, backing in and upon the side track of Avenue J, running parallel with the main line of the Gulf, Colorado & Santa Fé Railway Company and across Seventh street, and by striking two or three box cars standing upon said side track, thereby caused them to collide with the said plaintiff Ira Broughton. To this issue you will answer Yes or No. Answer: Yes.

"Special Issue No. 3. If you have answered special issue No. 2 in the negative, then you need not answer this special issue, but if you find from the evidence under special issue No. 2 that the plaintiff Ira Broughton was injured, then you will state whether or not such injury was of such a nature as to require the amputa-

tion of the left foot of the said plaintiff Ira Broughton. You will answer this issue Yes or No. Answer: Yes.

"Special Issue No. 4. State whether or not you find from the evidence that the defendant, St. Louis, Brownsville & Mexico Railway Company, operating its train by and through its receiver, Frank Andrews, on the 6th day of April, 1914, while backing its said train upon the side track of the Gulf, Colorado & Santa Fé Railway Company, as hereinbefore stated, on Avenue J, had a lookout on the north car of said moving train as it backed in. To this issue you will answer Yes or No. Answer: No.

"Special Issue No. 5. If you have answered the next preceding special issue No. 4 in the affirmative, you need not answer this issue, but if you have answered same in the negative, then you will state whether or not the said defendant, St. Louis, Brownsville & Mexico Railway Company, so operating its train by its said receiver, Frank Andrews, was negligent in backing its said train in and upon said side track of the Gulf, Colorado & Santa Fé Railway Company, on Avenue J in the city of Bay City, Tex., without having a lookout upon the rear car of said moving train as it so backed in. You will answer this issue Yes or No. Answer: Yes.

"Special Issue No. 6. State whether or not the said defendant, St. Louis, Brownsville & Mexico Railway Company, while in the hands of its receiver, Frank Andrews, in operating its train over the tracks of said Gulf, Colorado & Santa Fé Railway Company on said Avenue J on said 6th day of April, 1914, was moving at the time at an excessive or dangerous rate of speed under the circumstances and conditions surrounding the locality where the accident occurred. You will answer this issue Yes or No. Answer: Yes.

"Special Issue No. 7. If you have answered special issue No. 6 in the negative, then you need not answer this special issue, but if you have answered special issue No. 6 in the affirmative, then state whether or not the rate of speed at which said train was backed on the side track of the Gulf, Colorado & Santa Fé Railway Company on Avenue J was negligence. You will answer this question Yes or No. Answer: Yes.

"Special Issue No. 8. If you have answered both special issues Nos. 5 and 7 in the negative, then you need not answer this special issue, but if you have answered special issue No. 5, or special issue No. 7, in the affirmative, then you will state whether or not such negligence was the proximate cause of the injury, if any, of the said plaintiff Ira Broughton. You will answer this issue Yes or No. Answer: Yes.

"Special Issue No. 9. You will state whether or not the plaintiff Ira Broughton was at the time of his injury, if any, guilty of contributory negligence as that term is hereinbefore defined. You will answer this issue Yes or No. Answer: No.

"If you have answered special issue No. 2 in the negative, then you need not answer special issues following, which are Nos. 10 and 11. Or if you have answered both special issues 5 and 7 in the negative, then you need not do so; or, if you have answered No. 9 in the affirmative, you need not answer Nos. 10 and 11, but if you have answered special issue No. 2 in the

affirmative, and either one or both special issues Nos. 5 and 7 in the affirmative, and special issue No. 9 in the negative, you will answer the next two special issues, which are special issues Nos. 10 and 11.

"Special Issue No. 10. What sum do you believe from the evidence will fairly and justly compensate plaintiff Ira Broughton for alleged injuries suffered by him on the occasion in question, taking into consideration as elements of damage, so far as shown by the evidence, to be a natural and necessary result of such injuries, mental anguish, if any, and physical suffering, if any, to him consequent upon such injury, and the reasonable value, if paid now, of his diminished capacity on account thereof to labor and earn money in the future, after arriving at the age of 21 years, if any? This issue you will answer in dollars, stating the amount thereof. Answer: \$7,500.

"Special Issue No. 11. What sum do you believe from the evidence will fairly and justly compensate plaintiff W. H. Broughton for the loss of the services of his said child, Ira Broughton, during the remainder of the minority of said Ira Broughton, and for all expenses and losses necessarily and reasonably incurred by said W. H. Broughton for medical attention, nursing, and care to said Ira Broughton while sick as a result of such injury, if any? This issue you will answer in dollars, stating the amount thereof. Answer: \$865."

Upon these answers of the jury judgment was rendered in favor of Ira Broughton for the sum of \$7,500 and for W. H. Broughton for the sum of \$865. From this judgment the defendant, St. Louis, Brownsville & Mexico Railway Company, has appealed.

Counsel for appellant has filed in the trial court 90 assignments of error, more than 80 of which have been presented in his brief. After having devoted 222 pages of his brief of 229 pages to a discussion of all and each of these assignments, he has, on page 223, stated that there are in fact only three assignments which present anything more than minor or immaterial error. This admission, however, comes too late to relieve the court of the necessity of reading this entire brief of unnecessary length. This court had, however, come to the conclusion before reaching such admission that all of the assignments except a very few were frivolous and wholly without merit. We are unable to protect this court against the imposition of being required to read unnecessarily long briefs in which numerous assignments, wholly without merit, are at great length presented, but we can and will decline to devote the time of the court in writing at length in the discussion of such assignments. We shall in this case discuss only such assignments as may have been reasonably thought to present error.

By assignments 8, 9, and 10 (Nos. 1 to 7, inclusive, not presented in brief), complaint is made of the action of the trial court in overruling appellant's special demurrers to

plaintiff's petition, assigning the following reasons: First, because said petition shows on its face that the injuries received by Ira Broughton were so received while he was upon the railway track of the Gulf, Colorado & Santa Fé Railway Company, and not upon the property or premises of appellant, and that if either of said railway companies is liable for such injuries the Gulf, Colorado & Santa Fé Railway Company, and not the appellant, is so liable; and, second, that said petition shows on its face that the injuries received by Ira Broughton were caused by his own gross carelessness and contributory negligence.

We have concluded that each of the questions raised by the foregoing assignments was correctly decided adversely to appellant on the former appeal of this case, and, having so concluded, we adhere to the opinions there expressed, and overrule the assignments here presented.

Assignments 11 and 12, complaining of the argument of counsel for appellee, are overruled. The argument was permissible as a reply to argument of counsel of appellant, if not otherwise admissible.

[1] Assignment 13 is in effect an assertion that the finding of the jury, in answer to special issue No. 1, that betterments and permanent improvements were made upon and for the benefit of properties of the appellant company by the receiver, Frank Andrews, out of the earnings of said properties while in his hands as receiver, in excess of the amount sued for by the plaintiffs, is without evidence to support it, and therefore forms no basis for a judgment against appellant.

We think the application of receiver, Frank Andrews, for the issuance and sale of receiver's certificates, embodying a statement that he had paid out of the earnings of the properties in his hands for ballast a sum in excess of \$115,846, which statement was approved by the judge of the court in which the receivership was pending, and which was introduced in evidence without exception, was sufficient evidence upon which to base the finding of the jury complained of. We also think such evidence may be taken as prima facie proof of such payments, and in the absence of any attempt on the part of appellant to show that no betterments were made by the use of the earnings of the properties, the jury was justified in finding the same were so made. We also think that there were other facts disclosed by the Exhibit B, attached to the application so introduced in evidence, which tended to show that betterments had been made to the properties in question out of the earnings of the same. We therefore overrule the thirteenth assignment.

By assignments 14 to 21, inclusive, it is insisted that the answers of the jury to spe-

cial issues 2 to 10, inclusive, hereinbefore set out, were not supported by any evidence, and therefore formed no basis for the judgment rendered. We have carefully reviewed the evidence, and have reached the conclusion that there was ample evidence to support each and all of the answers of the jury to the issues submitted.

[2] Witness J. O. Carrington was permitted to testify, over the objection of counsel for appellant: First, that he had lived in Bay City since 1895 or 1896, and that he knew that Avenue J of said city had been used by the common public for travel ever since he lived there; second, that there was a baseball park located just east of the Santa Fé Railway track, just south of the Southern Pacific tracks to the north of Seventh street, and that the general public used Avenue J in going from the city to said baseball park; third, that he knew that Tom Carlton was the agent of the Gulf, Colorado & Santa Fé Railway Company at Bay City for a number of years, and that one Warner is the present agent of said railway company. The admission of this testimony is made the grounds of the twenty-second, twenty-third, twenty-fourth, and twenty-fifth assignments. Without setting out the reasons assigned by appellant for its complaint of the evidence, we shall content ourselves by saying that all the testimony complained of was both relevant and admissible for purposes offered.

Assignments 26 to 33, inclusive, are complaints of the admission of certain parts of the testimony of several witnesses. We conclude that all of the testimony objected to was clearly relevant and admissible, and that the objections urged to its admission were frivolous and wholly without merit. We shall therefore decline to discuss the assignments in detail. All of them are overruled.

The undisputed evidence shows that a plat of the city of Bay City was made and recorded in 1894, and that an addition thereto was platted and recorded in 1895. These plats show the streets, avenues, and alleys as laid out, which includes Avenue J on which the railway now owned by the Gulf, Colorado & Santa Fé Railway Company was erected about the year 1901. The undisputed evidence also shows that certain lots were sold to various parties with reference to said recorded plats, the deeds thereto calling for the streets, avenues, and alleys shown by said plats; that such sales were made long prior to any conveyances under which the Gulf, Colorado & Santa Fé Railway Company claim, and that some of the lots sold to some of said purchasers fronted on Avenue J as shown on said plats.

[3] After this evidence was introduced appellant offered in evidence certain conveyances evidencing the right of said railway company to construct and operate a railroad

upon and along said Avenue J. The admission of these conveyances in evidence was refused by the court as being immaterial to any issue in the cause. Appellant has made such refusal the ground of its assignments 34 to 38, inclusive. These assignments cannot be sustained. While the railway had the right, by reason of the conveyances to it, to construct and operate its railroad upon and along said Avenue J, it did not have the right to exclude the public therefrom. Neither could it operate its trains in and upon its tracks in such negligent manner as to injure persons traveling along said avenue without incurring liability for such injury. The evidence offered was irrelevant and immaterial to any issue in the cause, and the court did not err in so holding, and in refusing its admission.

[4] By assignments 39 to 43, inclusive, complaint is made of the action of the court in admitting in evidence five certain deeds executed in the years 1896, 1897, and 1898 by those then owning the unsold lots, blocks, etc., in the city of Bay City, as shown on the plats of said city, to five several parties, by which certain lots adjacent to and bounded by Avenue J and other avenues and streets of said city were conveyed to said parties, said deeds having been executed prior to the acquisition of any rights of the predecessor or vendor of the Gulf, Colorado & Santa Fé Railway Company to occupy any part of the streets or avenues of said city. These several assignments, while not grouped as one assignment in appellant's brief, are so arranged therein as that one follows the other in regular order. None of these assignments are submitted as a proposition within itself, nor is there a proposition under either or all of them as a group. We are therefore not advised what legal objection appellant interposes against the introduction of said deeds, and we are unable to perceive any reason why such deeds were not admissible in evidence, unless it be that such evidence was immaterial and could in no way affect the proper disposition of the cause. If it was immaterial, and for that reason only not admissible, the error in admitting it would at most constitute harmless error for which we could not reverse the judgment rendered.

We overrule assignments 44 and 45, complaining of the admission in evidence of the report of the master in chancery, A. L. Jackson, and the order of the judge, W. T. Burns, with reference to said report; such report and order relating to matters of expenditure made or to be made by Frank Andrews, receiver, upon the properties of appellant while the same was in his hands as receiver. The evidence was admissible.

Assignments 46 and 47 are as follows:

Assignment 46. "The court erred in receiving the verdict of the jury and entering judgment



thereon, because the special issues in this cause were not signed by — Garnett, the foreman appointed by this court, but were signed by — Anderson as foreman."

Assignment 47. "The court erred in receiving the verdict of the jury in this cause and entering judgment thereon, for the reason that each of the answers to the special issues submitted to the jury were not signed by the foreman of the jury as required by law."

It is stated that these two assignments are each submitted as a proposition. They are not followed by any independent proposition, nor by any intelligible statement. We do find, however, that the verdict of the jury was signed, "R. Lee Anderson, Foreman," and we fail to find from any statement, except the forty-sixth assignment, that the trial court did the unusual act of appointing a foreman of a trial jury. We overrule both both of said assignments.

By the forty-eighth assignment it is, in effect, insisted that the court erred in receiving the verdict of the jury and rendering judgment thereon for the following reasons:

First. That one J. H. Pile, who had been accepted and sat as a juror in the trial of this cause, was not at such time a qualified juror, in that he had not at such time been a citizen of the state of Texas for a sufficient length of time to qualify him to sit as a juror in the case, and, as he was disqualified, 11 qualified jurors only were left to try the case.

Second. That no cause can be legally tried in a district court of the state with a jury composed of less than 12 jurors, without the consent of both parties to the suit.

Third. That said Pile had been accepted by appellant after he had on his voir dire stated that he was a citizen of the state of Texas, and a qualified voter of Matagorda county, Tex., and otherwise qualified himself as a juror; and

Fourth. That as the trial jury in this case was composed of only 11 qualified jurors, the verdict was not returned as required by law, in that such verdict was not signed by the 11 qualified jurors sitting in trial of the case.

J. H. Pile, on motion for new trial, testified for defendant:

"I am the J. H. Pile, who was impaneled as a juror in the cause of W. H. Broughton et al. v. Gulf, Colorado & Santa Fé Railway Company et al., tried in this court at this term. I left Texas the 4th of this January 2 years ago. I made application for a homestead in Colorado, but I never got a hearing, so I came back. I filed a claim which was improved and which improvements I had purchased. When I did not get a hearing on my application I sold the improvements and came back to Texas. If my application had been granted I would have remained in Colorado. I returned to Texas the 10th day of last June, 1917. I stopped in Gannado, Jackson county; came from there to Matagorda county. I was summoned as a talesman

on this jury. When the court examined me as to my qualification as a juror I told the court I was a qualified voter. I thought I was. When the verdict was returned I advanced to the judge's stand; you as attorney for the defendant called me. You asked if I voted when I was in Oklahoma. I said: 'No, sir; I was not there long enough.' Then you asked if I had been in Texas 12 months, and I said: 'No, sir, I have been here about 9 months.' That was all that was said. Mr. Gaines during that conversation did not say anything about him knowing I had gone, but the next morning I asked him why he did not ask me the question before I qualified. I said, 'You know I had not been back 12 months,' and he said, 'It slipped my memory; that I didn't think about it; I ought to have known it, but I didn't think about it.' When the case was submitted to the jury and we had retired to consider our verdict, the entire 12 was in favor of a verdict for plaintiff. The difference in the sum was all the argument that we had. Every other point except the amount was agreed to; some wanted less and some wanted more; some wanted twice as much as I demanded; some wanted as low as \$2,500, but I did insist on \$7,500, which was finally passed."

Mr. Gaines for plaintiff, testified:

"I knew that Mr. Pile had left the state of Texas; I didn't remember the exact time, and I knew that Mr. Pile had returned to the state of Texas, and I didn't know at what time. I want to state further that when Mr. Pile answered the question propounded by the court on his voir dire it never occurred to me at all that he had not been back in Texas long enough to qualify as a voter, because I have known Mr. Pile so long and so well that it never occurred to me that he could be mistaken about that; and I never heard of nor knew that there was a possible question until after Mr. Fitzmaurice called and stated that the judge would receive the verdict at 7 o'clock, and it was suggested to me by some one, and the first opportunity I had I investigated the matter in the presence of the court and counsel, and then, and then only, I knew that Mr. Pile had not returned to the state for a sufficient length of time to become a qualified juror."

[5] We think the testimony of J. H. Pile shows that he was in fact a qualified juror. It shows that he left the state of Texas after having been a citizen thereof for a number of years, and went to the state of Colorado with the intention of becoming a citizen of the latter state if he was able to procure a home there, but his testimony further shows that he failed to procure a home in said state, and that he returned to Texas without having become a citizen of the state of Colorado, and resumed his residence in Texas. However, if we are mistaken in our conclusion as above expressed, still we cannot sustain the assignment, because the statute requires all challenges to the array or to an individual juror to be made before the jury is impaneled. It was the duty of appellant to have informed itself as to the qualification of the juror, so as to have made the objection at the proper time. We think it well settled

that an objection to a juror on the ground of disqualification cannot be heard when made for the first time after verdict. *I. & G. N. Ry. Co. v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051; *Waggoner v. Porterfield*, 55 Tex. Civ. App. 169, 118 S. W. 1094; *Rice v. Dewberry*, 93 S. W. at page 718; *Newman v. Dodson*, 61 Tex. 96; *Schuster v. La Londe*, 57 Tex. 29; *Blanton v. Mayes*, 72 Tex. 421, 10 S. W. 452.

In the case of *Rice v. Dewberry*, supra, it is said:

"It seems to be settled that an objection that a juror who sat in the trial of a cause was not a qualified juror comes too late when not made until after the verdict has been returned. The rule is not made dependent upon the question of negligence on the part of the complaining party in not sooner discovering the fact of disqualification, but seems to be absolute, and doubtless rests upon reasons of public policy which require that objections going to the qualification of jurors shall be made before the return of the verdict, in order to prevent the possibility of a party to a suit, after he has discovered that a juror is disqualified, taking chances on a verdict in his favor and in such case concealing the fact of the disqualification of the juror, and, if the verdict is otherwise, taking advantage of such irregularity for the purpose of obtaining a new trial."

Another reason for overruling this assignment is that the undisputed evidence shows that Mr. John W. Gaines, leading counsel for appellant, had been notified that the juror Pile was probably not a qualified juror before the verdict was returned, and that he was also notified of the hour at which the court would receive the verdict; and still, with such notice, he waited until the verdict had been returned before he told the court of his information regarding the supposed disqualification of the juror.

By assignments 49 and 50 it is in effect insisted that the court should have instructed a verdict for the defendant because there was no evidence to sustain a judgment for the plaintiffs. These assignments are overruled.

By assignments 51 to 72, inclusive, insistence is made that the court erred in refusing to submit to the jury each of the 22 special charges requested by appellant, and by assignments 73 to 89, inclusive, every section or paragraph of the court's charge is attacked as being erroneous for various reasons. We have carefully examined and considered the charge of the court, set out in the first part of this opinion, and also each of the special charges requested by defendant and refused by the court, and have reached the conclusion that the court by its main charge sufficiently defined the terms "negligence," "proximate cause," and "contributory negligence," as used in the charge, and by special issues submitted fairly and fully to the jury every issue necessary to be determined or found by the jury. We

therefore further conclude that there was no error committed in refusing the requested charges.

The judgment of the trial court is affirmed. Affirmed.

#### On Motion for Rehearing.

Counsel for appellant has filed its motion for rehearing, and therein complains of that portion of the original opinion wherein it is said:

"After having devoted 222 pages of his brief of 229 pages to a discussion of all and each of these (80 or more assignments) he has on page 223 stated that there is in fact only three assignments which present anything more than minor or immaterial error."

It is insisted that this statement is incorrect, and it is asked that same be corrected so as to show just what in fact was said on page 223 of the brief.

On page 220 of the brief it is said:

"There were other errors which, however, do not in our view, require any extended argument, because, in our view, the case must inevitably be reversed: First, because the facts do not show liability on the part of Frank Andrews, receiver; second, the liability, if any, is not shown to have been fixed upon the company; and, third, because of the fact that J. H. Pile, one of the jurors, was not a competent and qualified juror in this case."

Reference was then made to certain proceedings of the trial court, such as the exclusion of certain evidence with reference to the earning capacity of the injured boy, Ira Broughton, the medical bill of an attending physician, etc. Then on page 223 it is said:

"These several errors are all minor errors and not decisive of the cause, but, believing that this case will necessarily be reversed, we respectfully urge the court to properly instruct on these points."

It is apparent that the word "immaterial" used in that portion of the opinion quoted is not found in the statement on page 223 of the brief, and appellant's counsel is justified in the contention that he has not admitted that all of his assignments except the three mentioned were immaterial. We can account for the use of the objectionable word only upon the theory that the writer of the opinion was so strongly impressed with the idea that most of the assignments were frivolous and without any material merit that he inadvertently made use of the word "immaterial." Rule 35 for the Courts of Civil Appeals (142 S. W. 2d) reads as follows:

"When the assignments of error are numerous, counsel should present propositions on those which are most important in the determination of the case, waiving those that cannot control the result of the decision in this court—amongst which may be called those involving questions of fact, wherein the evidence is so preponderating or so conflicting as that the court, under

well-established rules of decision, would not set aside the verdict of the jury or judgment of the court upon them."

It was not the purpose of the writer to make an unjust criticism of the brief of appellant, but in view of what we consider a tacit admission on the part of the writer of the brief that he had violated the rule above quoted, and in view of the fact that the time of this court is too often consumed by being required to wade through much frivolous and immaterial matter presented in briefs filed in this court, we thought it not out of place to admonish litigants that the rules of this court should be observed, to the end that it might more speedily dispose of the business before it.

It is also insisted in the motion for rehearing that this court erred in stating that none of the assignments 39 to 43, inclusive, are submitted as a proposition within itself, nor is there under any, or all of them as a group, such proposition. In so far as we stated that none of the assignments were submitted as a proposition, we find we erred. We overlooked the fact that at the conclusion of these assignments the following words appear: "The foregoing is submitted as a proposition." We do not think, however, any one of the assignments within itself constitutes a proposition, and the mere statement that it is presented as such does not make it a proposition. We were correct in stating that the assignments as a group were not followed by any proposition. However, if we were in error in all the particulars pointed out in the motion, it was harmless error, as we did pass upon the complaint sought to be raised by each of the assignments.

Having made the corrections as above indicated, the motion is overruled.

#### RUPERT v. SWINDLE. (No. 8956.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 8, 1919. Rehearing Denied  
April 12, 1919.)

#### 1. CUSTOMS AND USAGES §10—RENTAL CONTRACT—CROPS AND AMOUNT OF RENTS.

In the absence of specific agreement with respect to the kind of crops that would be planted upon rented land, and the amount of rentals to be paid, the usual custom of the country determines such questions.

#### 2. LANDLORD AND TENANT §18(3)—LEASE BY BUYER—ASSENT—EVIDENCE.

Although there was no evidence of specific agreement relating to kind of crops and amount of rental, evidence held sufficient to sustain finding of contract, where the buyer of land inquired of the tenant what rentals he had been paying to the seller for the previous year, and,

on receiving the desired information, immediately told the tenant he might have the farm for another year, thus implying his assent to the rental on the same terms.

#### 3. APPEAL AND ERROR §931(3)—PRESUMPTION OF NECESSARY FINDING—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, the Court of Civil Appeals will presume a finding of the trial judge necessary to sustain the judgment.

#### 4. EVIDENCE §317(4)—HEARSAY—RENTAL CONTRACT.

In trespass to try title by the buyer of land against a tenant of the seller, since the tenant's claim of right of possession was predicated in part on his prior rental contract with the seller, of which the buyer had notice before he purchased, testimony to prove the fact was admissible over the buyer's objection that he was not present when the contract was made, so that the testimony was hearsay as to him.

#### 5. LANDLORD AND TENANT §180(4)—WRONGFUL OUSTER—MEASURE OF DAMAGES.

In trespass to try title by buyer of land to recover it from seller's tenant, latter, on his cross-action for wrongful ouster, was entitled to recover as damages reasonable market value of his part of the crops which it was reasonably probable he would have raised during the year, less expense of raising and harvesting them, and such sums as he and the dependent members of his family could have earned by engaging in other business.

#### 6. LANDLORD AND TENANT §180(3)—WRONGFUL OUSTER—DAMAGES—POSSIBILITY OF GROWING CROPS—SUFFICIENCY OF EVIDENCE.

In trespass to try title by buyer of land against seller's tenant, latter bringing cross-action for wrongful ouster, evidence that tenant, besides himself and wife, had one son and daughter, both of age, all working on the farm, also two teams and farm implements, held to warrant a finding he could have grown a crop on the farm with practically no outlay of money.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Suit by J. R. Rupert against C. R. Swindle. From judgment for defendant on his cross-action, plaintiff appeals. Affirmed.

John W. Pope and D. W. Bowser, both of Dallas, for appellant.

A. C. Heath and W. C. Prewitt, both of Ft. Worth, for appellee.

DUNKLIN, J. C. R. Swindle rented a farm from C. R. Rea for the year 1915. During that year Rea sold the property to J. R. Rupert, who, on January 4, 1916, instituted this suit against Swindle in the form of trespass to try title to recover the farm from Swindle, who was still in possession of it, holding the same under a claim of tenancy. Contemporaneously with the institution of the suit Rupert sued out a writ of sequestration, under which writ Swindle was ousted

of possession. Swindle filed a cross-action, in which he sought damages against Rupert for wrongfully ousting him of possession of the farm, and prayed for judgment also against the sureties upon the sequestration bond. Plaintiff recovered a judgment for title to the property, and Swindle, upon his cross-action, recovered a judgment against him and the sureties upon the sequestration bond for the sum of \$1,000, from which latter judgment Rupert has prosecuted this appeal.

One of the pleas urged by Swindle was that during the year 1915, and prior to the sale of the property by Rea to Rupert, he had entered into a contract with Rea for the rental of the premises for the year 1916, and that when Rupert purchased the farm from Rea he had notice of that contract, and purchased the farm subject to Swindle's right of tenancy for the year 1916. In answer to special issues, the jury found that Swindle did rent the property from Rea for the year 1916, as alleged, and that Rupert had notice of such contract "some time before September 7, 1915." The jury also further found, as pleaded by Swindle, that after Rupert learned of Swindle's contract with Rea for the rental of the farm for the year 1916, he "agreed to, and acquiesced in" and "ratified," the same, and that Rupert himself entered into a contract with Swindle by the terms of which he expressly rented the farm to Swindle for that year.

[1, 2] By different assignments of error appellant contends that the evidence was insufficient to sustain the finding by the jury that Rupert expressly made any contract of rental, or in any manner ratified the contract which the jury found Rea had made with Swindle to rent to the latter the farm in controversy for the year 1916. We are of the opinion that the evidence was sufficient to sustain the finding of an express contract of rental between Rupert and Swindle. While it is true that the evidence did not show any specific agreement between the parties with respect to the kind of crops that would be planted upon the land, nor the amount of rentals that would be paid therefor by Swindle, but, in the absence of such testimony, the usual custom of the country would determine such questions, and, besides, according to Swindle's testimony, Rupert inquired of him what rentals he had been paying to Rea for the previous year, and, upon receiving the information desired, immediately told Swindle that he might have the farm for another year, thus implying his assent to the rental upon the same terms.

The authorities cited by appellant, announcing the necessary elements of a ratification by a principal of an unauthorized act of an agent, have no application to any of the issues in this case. That term, used in the special issues submitted to the jury, was used to express the same meaning of the fur-

ther language used in the same issue of whether or not Rupert "agreed to and acquiesced in" the prior contract with Rea, and the finding of the jury in answer to that issue cannot reasonably be construed as having any other meaning than that Rupert agreed with Swindle that he might have the use of the farm for the year 1916, under the terms of the lease which he had already made therefor with Rea.

We are of opinion further that the evidence was sufficient to support the finding of the alleged contract with Rea for the rental of the farm for the year in controversy.

[3] Appellant makes no contention that the finding of the jury, to the effect that sometime prior to September 7, 1915, Rupert had notice of Rea's contract with Swindle to lease him the land for the year in controversy, was sufficient to sustain Swindle's plea that such notice antedated Rupert's purchase from Rea, in view of the fact that the contract for such purchase was in writing and bears date of June 7, 1915. There was testimony sufficient to show that such notice was conveyed to Rupert prior to the date of that instrument, and if it were necessary, in order to sustain the judgment, we would presume a finding by the trial judge to that effect. Article 1985, V. S. Tex. Civ. Stats.

[4] Since Swindle's claim of right of possession was predicated in part upon his prior rental contract with Rea, of which Rupert had notice before he purchased the farm, there was no error in requiring a finding by the jury of whether or not such a contract was, in fact, made, and in admitting testimony to prove that fact, over the objection urged by Rupert that he was not present when the contract was made, and therefore the testimony was hearsay as to him.

[5] The jury found that defendant, together with members of his family dependent upon him, by engaging in other business than the cultivation of the farm, could have earned during the year 1916, \$1,000, but that, notwithstanding that fact, the defendant had been damaged in the sum of \$1,000 by being wrongfully ousted of possession of the farm. The court instructed the jury that the amount of damages sustained by Swindle would be the reasonable market value of his part of the crops which it was reasonably probable he would have raised on the farm during the year, less the expense of raising and harvesting them, and less such sums of money as defendant and the dependent members of his family could have earned during the same year by engaging in other business. This was a correct charge upon the measure of the defendant's damages, and we think there was evidence sufficient to support the jury's finding upon that issue.

[6] The evidence shows that besides himself and wife defendant Swindle had one son

and one daughter, both of age, and that all of them worked upon the farm. He also had two teams and farm implements, and such facts, we think, would have warranted a finding that defendant could have grown a crop on the farm with practically no outlay of money. *Rogers v. McGuffey*, 96 Tex. 565, 74 S. W. 753; *Waggoner v. Moore*, 45 Tex. Civ. App. 308, 101 S. W. 1058.

For the reasons indicated, all assignments of error are overruled, and the judgment is affirmed.

EDWARDS et al. v. ROBERTS et al.  
(No. 5961.)

(Court of Civil Appeals of Texas. Austin.  
June 11, 1919.)

CONTRACTS §10(1) — UNILATERAL CONTRACT  
—PART PERFORMANCE.

S., under whom appellees claimed, having accepted from appellants numerous payments of money under the contract, and appellees having incurred at least some expense in pursuance of the contract, the contract is not unilateral in the sense that it is not binding upon appellees.

On motion for rehearing. Denied.

For former opinion, see 209 S. W. 247.

KEY, C. J. Appellees have been permitted to file a second motion for rehearing, but, after due consideration of the same, we have reached the conclusion that the case has been properly disposed of by this court.

However, the statement in our former opinion that the undisputed proof shows that under the contract of August 5, 1909, Edwards took possession of the land in controversy, and made several test holes at his own expense, and that under the contract of August 16, 1909, he and his associates took possession, bought rights of way, and built spur tracks to the property at considerable expense, and had excavated some gravel from the land, is not accurate, and may be misleading.

The contract of August 5, 1909, related to a 35-acre tract of land, of which the 8½-acre tract in controversy was no part. The latter was covered by the contract of August 16, 1909, and the most, though not all, of the expenditures referred to were made in developing the 35-acre tract. However, that fact does not justify an affirmance of the judgment. On the contrary, the Shicks, under whom appellees claim, having accepted from appellants numerous payments of money under the contract of October 16, 1909, and appellees having incurred at least some expense in pursuance of that contract, we hold that it was not, at the time appellees sought to cancel it, a unilateral contract in the sense that it was not binding upon appellees.

Motion overruled.

E. L. WITT & SONS v. STITH. (No. 6077.)

(Court of Civil Appeals of Texas. Austin.  
April 2, 1919. Rehearing Denied  
June 4, 1919.)

VENUE §70—RIGHT TO CHANGE—ALLEGATIONS OF PLEA OF PRIVILEGE—STATUTE.

Under Acts 35th Leg. c. 176 (Vernon's Ann. Civ. St. Supp. 1918, art. 1903), defendants' plea of privilege, alleging they all resided in Kinney county, a subsequent portion of which alleged the two on whom citation was served resided in Kinney county and that some of the other defendants resided in Uvalde county, also that none of the exceptions to exclusive venue in the county of the defendants' residence, mentioned in Rev. St. 1911, arts. 1830, 2308, existed, *held* prima facie proof of right to change of venue from Burnet county to Kinney county, despite a superfluous statement characterized by clerical error, so that, in the absence of plaintiff's controverting affidavit, the cause must be transferred.

Error from Burnet County Court; J. R. Smith, Judge.

Suit by Knight Stith against E. L. Witt & Sons. To review judgment by default for plaintiff, defendants bring error. Judgment reversed, and cause remanded for further proceedings.

Old & Hull, of Uvalde, for plaintiff in error.

Knight Stith, of Burnet, pro se.

JENKINS, J. Defendant in error filed suit in the county court of Burnet county against E. L. Witt & Sons, a firm composed of Mrs. E. L. Witt, P. O. Witt, Sam P. Witt, Tom Witt, Louis E. Witt, Arthur Witt, and Mrs. W. B. McFalter, née Witt, alleging that Mrs. E. L. Witt, Tom Witt, Louis E. Witt, Arthur Witt, and Mrs. McFalter resided in Uvalde county, Tex., and that P. O. Witt and Sam P. Witt resided in Kinney county, Tex. Defendant in error sought to recover damages against the plaintiffs in error for breach of contract to sell him some goats; and also for pasturing goats. As ground of jurisdiction in Burnet county, he alleged that the plaintiffs in error obtained from him \$562.50 upon fraudulent representation made in Burnet county as to the quality of goats that they would deliver to defendant in error, and that he had pastured certain goats for plaintiffs in error, upon which he had a lien for pasturage, and that said goats were located in Burnet county. He asked for foreclosure of his statutory lien on the goats, and also to recover for labor performed in taking care of said goats in Burnet county.

Plaintiffs in error filed a plea of privilege in which they alleged that all of the plaintiffs in error resided in Kinney county; but

In a subsequent portion of said plea they alleged that S. P. Witt and P. C. Witt, upon whom citation was served, resided in Kinney county, Tex., and that some of the other plaintiffs in error resided in Uvalde county, Tex. They alleged that—

"None of the exceptions to exclusive venue in the county of one's residence mentioned in article 1830 and in article 2308 of the Revised Statutes exist in this cause."

In addition thereto said plea contains the following statement:

"That this suit does come within any of the exceptions provided by law in such cases, authorizing this suit to be brought or maintained in the county of Burnet, state of Texas, or elsewhere outside of Kinney county, Tex., where there is a court of competent jurisdiction."

Defendant in error filed a general demurrer to this plea of privilege, which was sustained by the court, and, no answer being filed to the merits, judgment by default was rendered in favor of defendant in error.

We think the court erred in sustaining this demurrer. In so far as there is any uncertainty appearing from said plea as to the residence of plaintiffs in error, it does contain the allegations that none of the plaintiffs in error reside in Burnet county, and it does allege that the only two plaintiffs in error who were served with citation reside in Kinney county, Tex., and also that the business of the farm is conducted in Kinney county, Tex.

Where two or more parties are sued out of the county of their residence, and the defendants reside in different counties, either one of them is entitled to a change of venue by filing the proper affidavit, regardless of where the other defendants might reside, or regardless of the fact that the other defendants may not claim their right to be sued in the county of their residence; provided that none of them reside in the county where the suit is brought, and that none of the exceptions as to exclusive venue provided by the statute exist, conferring venue in the county where the suit is brought.

It is apparent that the statement "that this suit does come within any of the exceptions provided by law in such cases, authorizing this suit to be brought or maintained in the county of Burnet," is a clerical error; the word "not" having been omitted therefrom. Discarding this statement as superfluous, which it is, the plea fully complies with the statute, as appears from the foregoing statement.

The statute (Act of April 2, 1917, c. 176, p. 388, General Laws 35th Legislature [Vernon's Ann. Civ. St. Supp. 1918, art. 1903]), provides that when a plea of privilege, as therein required, is filed, "such plea of privilege when filed shall be prima facie proof of the de-

fendant's right to change of venue." Upon such plea being filed, it becomes the duty of the court where the suit is pending to transfer the same to the proper court, unless a controverting affidavit is filed as provided by said act. The statute provides:

"If, however, the plaintiff desires to controvert the plea of privilege, he shall file a controverting plea under oath, setting out specifically the fact or facts relied upon to confer venue of such cause on the court where the cause is pending. Upon the filing of such controverting plea the judge or the justice of the peace shall note on same a time for a hearing on the plea of privilege; provided, however, that the hearing thereon shall not be had until a copy of such controverting plea, including a copy of such notation thereon, shall have been served on each defendant; or his attorney, for at least ten full days exclusive of the day of service and day of hearing."

If such controverting plea shall be filed in this cause, it will be the duty of the court to hear and determine the same, either separately or together with the main case. If no such controverting affidavit is filed, it will be the duty of the trial court to transfer this cause to Kinney county.

For the reasons stated, the judgment of the trial court is reversed, and this cause is remanded for further proceedings as indicated in this opinion.

Reversed and remanded.

#### STRYKER v. VAN VELZER. (No. 459.)

(Court of Civil Appeals of Texas. Beaumont. May 20, 1918.)

#### APPEAL AND ERROR—1165—CONCLUSION OF FACT AND LAW—DUTY TO FILE—EFFECT OF FAILURE.

The failure of the trial judge, though requested to file findings of fact and conclusions of law within the time provided by Rev. St. art. 2075, necessitates reversal; the court on appeal being unable to review case without a statement of facts which is not before it.

Appeal from Harris County Court; W. E. Monteith, Judge.

Suit by A. C. Van Velzer against A. B. Stryker. From the judgment, defendant appeals. Reversed and remanded for new trial.

Charles Murphy, of Houston, for appellant.  
A. C. Van Velzer, of Houston, in pro. per.

WALKER, J. This is the second appeal in this case. The first appeal, styled A. C. Van Velzer v. A. B. Stryker, is reported in 188 S. W. 724, and reference is hereby made to this former appeal for a full statement of the nature and result of this suit.

The case is before us without a statement of facts. On conclusion of the trial in the court below, appellant requested the judge to file findings of fact and conclusions of law. He failed to do this in the time provided by Rev. St. art. 2075. The refusal of the court so to do was duly excepted to by appellant, and is properly presented to us in appellant's brief. With neither a statement of facts nor conclusions of fact and law, we are unable to review this case.

In *Wandry v. Williams*, 103 Tex. 91, 124 S. W. 85, the Supreme Court said:

"We conclude that the action of the trial judge in failing and refusing to file his conclusions of fact and law is subject to review by the Court of Civil Appeals; and, where it is found that he has not done so, the judgment ought to be reversed."

"The failure of the trial judge to file findings of fact and conclusions of law within ten days after adjournment of the term, as required by" this article, "necessitates a reversal, unless there is a statement of facts in the record from which it appears that appellant could not be reasonably prejudiced by the failure." *Emery v. Barfield*, 156 S. W. 811.

Because the court failed to file findings of fact and conclusions of law, this cause is reversed and remanded for a new trial.

### WILLIAMS et al. v. DAVENPORT. (No. 447.)

(Court of Civil Appeals of Texas. Beaumont.  
April 5, 1919. On Motion for Rehearing,  
May 7, 1919.)

#### 1. LIMITATION OF ACTIONS §45—RUNNING OF STATUTE—ACCRUAL OF ACTION.

Where plaintiff lent sawmill machinery to defendant, limitations did not begin to run in defendant's favor until he repudiated plaintiff's title and notice of the repudiation was brought home to plaintiff.

#### 2. LIMITATION OF ACTIONS §45—RUNNING OF STATUTE—ACCRUAL OF ACTION.

Where plaintiff lent sawmill machinery to defendant, the mere fact that defendant gave a chattel mortgage on all of his sawmill machinery, which included that lent, was not notice to plaintiff of defendant's repudiation of his title so as to start the running of limitations, though the mortgage was filed for record, for plaintiff was not bound to make periodic searches of the records to discover whether defendant had repudiated.

#### 3. APPEAL AND ERROR §1010(1)—REVIEW—SCOPE.

In an action tried to the court, a finding of fact supported by evidence will not be disturbed on appeal.

#### 4. SALES §193—BONA FIDE PURCHASERS—RIGHTS OF.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3969, where personal property lent by plaintiff had been in the possession of the borrower for more than two years, and the loan was not evidenced by an instrument in writing, a purchaser from the borrower, with or without notice, took absolute title, for title was conclusively presumed to be in the borrower, this being so though the borrower was yet liable for the conversion, limitations not having run against plaintiff's claim.

Appeal from District Court, Hardin County; J. Lewellyn, Judge.

Action by W. H. Davenport against Sheridan Williams and Russ Daniel and another. Judgment for plaintiff against the named defendants, and they appeal. Affirmed as to the defendant Williams, and reversed and rendered as to defendant Daniel.

S. D. Tant, of Sour Lake, and T. E. Welch, of Kountze, for appellants.

A. M. Hill, of Kountze, and C. W. Howth, of Beaumont, for appellee.

**WALKER, J.** This is a suit by W. H. Davenport, as plaintiff, against J. B. Nixon, Sheridan Williams, and Russ Daniel, as defendants, to recover damages for the alleged wrongful conversion of certain personal property. The plaintiff alleged that on or about the 1st day of May, 1917, he loaned to Sheridan Williams certain sawmill machinery of the value of \$953.60, and that Williams sold the property to Nixon, who bought it with knowledge of plaintiff's claim, and that Nixon sold the property to Russ Daniel and Sheridan Williams, Russ Daniel buying it with knowledge of plaintiff's claim. Nixon answered that he bought the property in good faith, and without any knowledge of plaintiff's claim, and Russ Daniel answered that he bought it from Nixon without any knowledge of plaintiff's claim. All of the defendants pleaded article 3969, *Vernon's Sayles' Civil Statutes*, and two years' limitation. The defendant Williams further pleaded that he was the owner of the property, having bought the same from the plaintiff. The court found: (1) That the property belonged to the plaintiff; (2) that on or about the 1st day of November, 1914, the plaintiff loaned the property to Sheridan Williams; (3) that the property was of the reasonable market value of \$953.50; (4) that Nixon bought the property without any notice of plaintiff's claim, paying for the same a valuable consideration; (5) that on or about the 10th day of November, 1917, the defendants Russ Daniel and Sheridan Williams repurchased said property from Nixon, and that Daniel bought the same with notice of plaintiff's claim; (6) that the plaintiff has never been

paid or received anything of value for said property.

Plaintiff's original petition was filed on the 23d day of August, 1917. The court rendered judgment for the plaintiff against the defendants Sheridan Williams and Russ Daniel, and in favor of the defendant Nixon.

[1-3] Appellants' first assignment of error is that the court erred in failing to render judgment for them on their plea of limitation, because the undisputed evidence in the case was that said property had been in the hands of Sheridan Williams for more than two years next preceding the filing of the suit. As found by the court, Williams took possession of the property on the 1st day of November, 1914. The suit was not filed until the 23d day of August, 1917. The court having found that this property was loaned by the plaintiff to defendant, limitation did not run in defendants' favor until he had repudiated this trust agreement, and notice of this repudiation had been brought home to the plaintiff, either by actual knowledge or by a notorious assertion of ownership on the part of Sheridan Williams, sufficient to put a prudent man on inquiry. Williams' use of this property in his sawmill was the use for which he had borrowed it. Such use alone was no notice to plaintiff of an adverse claim. However, more than two years after the loan and before the institution of the suit, Williams gave a mortgage on all his sawmill machinery, including this claimed by plaintiff, and this mortgage was placed on the chattel mortgage register of Hardin county, where the property was situated. The law did not require the plaintiff to search the chattel mortgage register from time to time in order to advise himself whether or not Sheridan Williams had repudiated the loan. Knowledge by plaintiff of the execution of this mortgage would have started limitation, but the mere execution of the mortgage and the filing of the same of record, without plaintiff's knowledge, or without actual knowledge of such fact and circumstances sufficient to put a reasonably prudent man on inquiry, would not, in law, put in operation the statute of limitation. In other words, plaintiff cannot be charged with constructive knowledge of the execution and filing of the mortgage. The execution of this mortgage, the filing of it in the proper records, together with all other acts, claims, and assertions of title by Sheridan Williams were properly before the court, and were by him considered in determining the issue of notice as against plaintiff. All these facts together do not, as a matter of law, constitute notice. It was an issue of fact to be determined by the court, and the court having found against appellants, this finding will not be disturbed. *Woodward v. San Antonio Traction Co.*, 95 S. W. 76; *Grumbles v. Grumbles*, 17 Tex. 478; *Hunter v. Hubbard*, 26 Tex. 537.

[4] Article 3969, Vernon's Sayles' Civil Statutes, is as follows:

"Where any loan of goods or chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of two years without demand made and pursued by due process of law on the part of the pretended lender," etc., "the same shall be taken as to the creditors and purchasers, of the persons aforesaid so remaining in possession, to be fraudulent within this chapter, and that the absolute property is with the possession, unless such loan, reservation or limitation of use of property were declared by will, or by deed or other instrument in writing, duly acknowledged or proved and recorded."

The court having found that this property was loaned by the plaintiff to Sheridan Williams, and the record showing that this loan was not declared by an instrument in writing, after two years, by force of this article, the absolute title to this property as to purchasers is conclusively presumed to be in Sheridan Williams. This is true, though Nixon, at the time he bought the same, may have been fully advised of the claim asserted by the plaintiff.

The finding by the court that Nixon bought the property without notice of the claim of plaintiff adds nothing to the strength of his title. He acquired the absolute title, with or without notice of plaintiff's claim. *Vernon's Sayles' Texas Civil Statutes*, art. 3969; *Grumbles v. Sneed*, 22 Tex. 565; *Templeman v. Gibbs*, 86 Tex. 358, 24 S. W. 792; *City Nat. Bank v. Tufts*, 63 Tex. 113; *Hastings v. Kellogg*, 36 S. W. 821; *Arnold v. Beene*, 30 Tex. 13.

As Nixon acquired the title to this property, he could likewise sell it to another, and such purchaser would acquire the absolute title, regardless of the issue of notice. Russ Daniel, being such a purchaser, is in no way liable to plaintiff for the conversion by Sheridan Williams, and in no event can plaintiff recover against Nixon and Daniel for a conversion of the property. Plaintiff is not seeking to recover the property, or an interest in the property, but his suit is for damages growing out of the original conversion by Sheridan Williams.

We are reversing this case with instructions to the trial court, when this case is again called for trial or on motion of either party in term time, to render judgment for the defendants Nixon and Daniel and for the plaintiff against Sheridan Williams for the value of the property as found by the court on this trial. This order is made without prejudice to the rights of plaintiff and Sheridan Williams to amend their pleadings on a subsequent trial. Should any new issues be made as between the plaintiff and Williams, we specially affirm the following findings of fact of the trial court on this appeal:

(1) That the property belonged to the plain-



tiff; (2) that on or about the 1st day of November, 1914, the plaintiff loaned the property to Sheridan Williams; (3) that the property was of the reasonable market value of \$953.50 at the time Sheridan Williams converted the same. As to these issues no further inquiry will be made by the trial court.

Reversed and remanded, with instructions as above.

#### On Motion for Rehearing.

At a previous day of this term of court this cause was reversed, with instructions to the trial court, when the case is again called for trial, to render judgment for the defendants Nixon and Daniel and for the plaintiff against Sheridan Williams. Sheridan Williams and the appellee have filed motions for rehearing. Appellant's motion is overruled.

The motion of the appellee, asking that the judgment of reversal as to Sheridan Williams be set aside and the case affirmed as to him, is granted. It appears from an inspection of the judgment that the trial court rendered judgment in favor of the plaintiff against Sheridan Williams for \$953.50, and also rendered judgment against Sheridan Williams and Russ Daniel, jointly, for \$760.50. The judgment of the trial court in favor of W. H. Davenport against Sheridan Williams, in the sum of \$953.50, is in all things affirmed. The judgment of the trial court in favor of Russ Daniel and Sheridan Williams for \$760.50, in so far as it affects Russ Daniel, is reversed and rendered in his favor, and as the liability of Sheridan Williams on the \$760.50 is the same item covered by the \$953.50, the plaintiff is protected in all his damages in affirming the judgment rendered against Sheridan Williams. The action of the court in rendering judgment in favor of the defendant Nixon is affirmed.

The costs of this appeal are taxed one-half against the appellant, Sheridan Williams, and one-half against the appellee, W. H. Davenport.

STARK et al. v. LEONARD et al. (No. 415.)

(Court of Civil Appeals of Texas. Beaumont.  
April 23, 1919. Rehearing Denied May 14,  
1919.)

#### 1. ADVERSE POSSESSION §109 — REMOVAL FROM PREMISES—ABANDONMENT.

After the acquisition of title by adverse possession, the fact that the adverse owner moves from the premises does not constitute an abandonment in law, nor work a forfeiture of the title acquired as against the former owner.

#### 2. ADVERSE POSSESSION §114(2)—EVIDENCE—SUFFICIENCY.

In a suit for land where plaintiffs set up adverse title, evidence held sufficient to identify

the parcel to which they set up an adverse claim.

#### 3. STIPULATIONS §18(1) — EFFECT — LOCATION OF LAND.

Where defendants stipulated as to the title and location of the land which plaintiffs claimed to have acquired by adverse possession, they cannot repudiate the stipulation and defeat recovery on the ground that the land was located elsewhere, etc.

Appeal from District Court, Newton County; W. T. Davis, Judge.

Action by Lou Leonard and others against W. H. Stark and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Holland & Holland, of Orange, for appellants.

Wightman, Hancock & Wigby, of Newton, for appellees.

BROOKE, J. This is the second appeal in this cause; the opinion on the first appeal being reported in 196 S. W. 709. A full understanding of the case may be better had, perhaps, by referring to the above-styled cause.

One Dick Holmes, the father of Lou Leonard, about 1871, bought what was then known as the Joe Hardy place and gave it to his daughter Lou. At that time the place was supposed to be public land, and Joe Hardy had made a small improvement on it, with the view of purchasing it from the state. After Dick Holmes purchased the place he had the same surveyed by the county surveyor, upon his application to purchase from the state. At this time his daughter Lou was living in the Joe Hardy house with her former husband. After this survey was made for Holmes, the place was known as the Richard Holmes survey, under which name Dick Holmes rendered it for taxes and paid taxes on it for a long number of years. Dick Holmes gave his daughter Mazie a home on this land, but she never lived on it, and he also gave his son Will Holmes a part of the land, and he lived on his place, about 300 yards from the Hardy place, until he died. These various gifts were verbal. Lou Leonard went upon the land with her present husband, Levi, in 1881, and lived there with him until 1888, when they left. After living at various places, they finally pre-empted a piece of land in 1896, where they have since lived.

The land known as the Richard Holmes survey embraced within its boundaries about 20 acres of public land, about 80 acres of the McGee league not in conflict with any other survey, about 40 acres of the McGee league covered by the McWilliams survey in conflict, and about 20 acres of the McWilliams survey not in conflict with the McGee, making 160 acres in all, and the judgment from

which this appeal is perfected is for all of the land.

The first assignment of error made by appellants complains of the action of the court in refusing the request of defendants for a peremptory instruction to the jury to return a verdict in their favor, as shown by their bill of exceptions No. 1. Under this assignment is this proposition:

"Where the only possession of land is shown to have been held under the claim of another who asserts no title in himself, the limitation claim is not available, and the occupancy of appellees, being under a claim of ownership in Richard Holmes, is not such adverse possession in them as to ripen into a limitation title in their favor."

The case was submitted to the jury on special issues, as follows:

"Question No. 1. Did the plaintiffs Lou Leonard and Levi Leonard, or either of them, either in person or through tenants, have peaceable and adverse possession of the land in controversy, cultivating, using, or enjoying the same for a period of ten consecutive years before the filing of this suit? You will answer this question 'Yes' or 'No' as you may find the fact to be.

"Question No. 2. Was the possession of the plaintiffs by themselves or through tenants, if any, of such a nature and character as to put a reasonably prudent person on notice that the plaintiffs were occupying said land and claiming 160 acres thereof? You will answer this question 'Yes' or 'No' as you may determine from the evidence.

"Question No. 3. Do you believe from the evidence that Richard Holmes claimed the land sued for while rendering the same for taxes? You will answer this question 'Yes' or 'No' as you may find the fact to be."

To question No. 1 the jury answered "Yes"; to No. 2 "Yes"; and to No. 3 "No." Therefore by these findings the jury found that Lou Leonard and her husband, either one or both, had adverse possession, cultivation, use, and enjoyment of the same for a period of ten years before the filing of this suit, and that the nature and character of the possession was sufficient to put a reasonably prudent person on notice that the plaintiffs were occupying said land, claiming 160 acres thereof, and that Richard Holmes did not claim the land sued for while rendering the same for taxes. Therefore these findings of the jury answer the contention of appellants, and we hold that the evidence is sufficient to sustain the findings of the jury.

The second and third assignments are:

(a) "The court erred in rendering judgment for plaintiffs for the land sued for upon the verdict of the jury because by the verdict of the jury it was established that plaintiffs asserted claim to a specific tract of land not identified by any evidence as being the land sued for."

(b) "The court erred in submitting to the jury question No. 1 because the undisputed evidence shows that any claim asserted by plain-

tiffs to any land during their period of occupancy was to a specific survey located by metes and bounds, and not identified by any evidence as being the land sued for."

The following agreement as to title was made by the parties to this suit:

"It is agreed by the parties plaintiff and defendant that plaintiffs claim the land sued for by virtue of the statutes of limitation as shown by their petition, and do not claim to have any record or paper title thereto, but their sole claim thereto rests upon occupancy under the statutes of limitation as stated.

"(2) Defendants own the land (subject to plaintiffs' title by limitation) and claim the same by regular chain of conveyances from the sovereignty to themselves, and the record title thereto is perfect in said defendants, said land having been patented or granted by the state of Texas prior to the year 1860 to John McGee, and that defendants would be entitled to recover and hold the same unless defeated in their claim by the plaintiffs' claim of title by limitation, and no proof of such record title shall be required on the trial of this cause."

The proposition under the second assignment is that, where a claim is made to a specific tract of land while being occupied, the limitation title is confined to the specific land, and a failure to identify the particular land claimed constitutes a failure to make out a case entitling the claimant to recover.

It is argued that plaintiffs' possession of land was under a claim to a specific tract as surveyed for them by the surveyor Nations, and if they could recover under the limitation statutes any land, it would be the land claimed, and a failure to identify the land claimed as being the land sued for would defeat a recovery.

The jury found that Richard Holmes lived on the land from 1872 to 1881, and that at the time Richard Holmes purchased said land he gave it to his daughter Lou, one of the appellees; that appellee Lou Leonard lived on the land from 1872 until 1888, and that appellee and Levi Leonard lived on the land from 1881 to 1888; that appellees, in person or by tenants, have had adverse and peaceable use of the land in controversy for a period of ten consecutive years before this suit was filed; that the possession of the land by appellees was of such nature and character as to constitute notice that they were claiming 160 acres. Appellee Lou Leonard testified to the following: That she and Dan Foster married in the fall and made one crop on the Chas. Holmes place and then moved onto the land in controversy; that her father, Richard Holmes, bought the land in controversy from Joe Hardy; that the land in controversy in this suit is known as the Joe Hardy tract of 160 acres; that she with her father moved on this land the year after her marriage; that she resided on the place two or three months and moved to the Dave McWilliams place near the land, leaving her

father and mother living in the house on the land in controversy; that this McWilliams place was then owned by her father; that her father had Mr. Nations to run it out for her some 40-odd years ago.

It was further testified that about 1872 one B. Z. Powell went with Richard Holmes, the father of appellee Lou Leonard, onto the Joe Hardy tract; that Richard Holmes showed him the lines and corners of the 160 acres that he purchased from Joe Hardy; that he went around these same lines of the Joe Hardy tract with Joe McDonald and others for the purpose of showing them the lines of the Joe Hardy tract that Dick Holmes claimed; that they found the lines on the ground and two of the corners that had been shown to him by Holmes, which lines of the Hardy tract included all of the improvements.

The testimony of Lou Leonard showed that her father, Richard Holmes, died before the filing of this suit, but that her mother, Cynthia Holmes, died after the filing hereof; that they died intestate, leaving only three children, the appellee Lou Leonard, Mazie Holmes, and Will Holmes. Said Cynthia and Mazie Holmes on February 28, 1916, by duly recorded deed, conveyed to appellees all of their right, title, and interest in said Joe Hardy survey involved in this cause. On February 2, 1915, said Will Holmes conveyed to the appellee Lou Leonard all of his right, title, and interest in said Joe Hardy survey by duly recorded deed.

[1, 2] The evidence shows that the particular land involved in this suit is the identical tract that was surveyed out by Nations, and is the identical tract which the appellees claim in this suit. There was no abandonment of the possession or claim, but such possession was adverse and matured under the ten-year statute of limitation. It is a well-settled rule of law that, after the acquisition of title under the statutes of limitation, the mere moving from the premises does not constitute an abandonment in law, nor does same work a forfeiture of title acquired as against the former owner thereof.

By the agreement in this cause the appellants are precluded from claiming that any of the land in controversy was public domain. There is no merit in said second and third

assignments, and in our opinion the same should be overruled.

The fourth assignment of error is as follows:

"The court erred in rendering judgment for the plaintiffs for the land sued for because it was shown by the undisputed evidence that a portion of the land was public domain during all of the period of occupancy of the plaintiff and during such time belonged to the state of Texas, and could not be acquired under the statutes of limitation, and there was no evidence to show what portion of said land was such public domain."

We have discussed this assignment, and in our judgment there is no merit in the same, and it is overruled.

The fifth assignment is:

"The court erred in rendering judgment for the plaintiffs for the land sued for because it is shown by the undisputed evidence that a portion of same is on the David McWilliams survey, a survey older than the survey under which plaintiffs claim, and that during the period of occupancy by plaintiffs said David McWilliams survey was in the actual possession of the claimant and owner thereof, and it is not shown what portion of said McWilliams survey was in the actual possession of plaintiffs or the extent of the conflict between said surveys."

[3] By the agreement of appellees the land in controversy was patented in 1860. The rule is that parties are bound by agreements, and that, where a party to a cause, by agreement or otherwise, invites a finding as to a particular fact, he cannot complain that such finding is made. The appellants agreed that all of the land in controversy was on the McGee league, and they are precluded by that agreement from claiming that the south part of the Joe Hardy tract extended a short distance south of the McGee.

We have for the second time carefully gone over the statement of facts and the assignments of error in this cause. The court submitted the cause on special issues, which were found in favor of appellees. A thorough consideration of the record leads us to the conclusion that no error has been committed, and that in all things justice has been done.

The cause is affirmed.

**EVANS v. McKAY. (No. 8018.)**

(Court of Civil Appeals of Texas. Dallas.  
April 12, 1919. Rehearing Denied  
May 31, 1919.)

**1. LIBEL AND SLANDER ⇨85—LIBEL—PLEADING.**

A libel suit being based on language or its equivalent, a complaint should put the court in possession of the libelous matter published, so as to enable court to determine whether words are actionable, and that defendant may be advised concerning exact charges he will be called upon to meet.

**2. LIBEL AND SLANDER ⇨85—LIBEL—PLEADING—SUFFICIENCY.**

Allegation in complaint that defendant published and delivered to plaintiff's employer a statement in writing wherein defendant alleged and stated that she "had an assignment of wages and power of attorney on him, the plaintiff, to the extent of \$12, providing for an attorney's fee of \$10 additional," sufficiently disclosed a libel under Vernon's Sayles' Ann. Civ. St. 1914, art. 5595; the rule as to pleading being satisfied with any allegation that discloses the very language used, whether purporting to be quoted from the writing or not.

**3. MASTER AND SERVANT ⇨341—INTERFERENCE WITH RELATION BY THIRD PERSON—PROCURING SERVANT'S DISCHARGE.**

Where one knowingly induces a master to break his contract with his servant, the servant has a right of action against the one so causing the breach for any damages resulting.

**4. MASTER AND SERVANT ⇨341—INTERFERENCE WITH RELATION BY THIRD PERSON—DAMAGES TO SERVANT BY PROCUREMENT OF DISCHARGE.**

The fact that an employé's contract is from month to month does not preclude recovery of damages from one who wrongfully procured his discharge.

**5. LIBEL AND SLANDER ⇨10(6)—LIBEL—NOTICE TO EMPLOYER.**

It is not libelous for one who is the owner of the assignment of another's wages to give notice of that fact to the master, but, if at the time notice is given the debt which the assignment secures had been paid, and it is maliciously claimed that it has not, the one giving notice is liable for such damages as proximately result from the unlawful act.

**6. LIBEL AND SLANDER ⇨81—PLEADING—MATERIALITY.**

In an action against one who had caused the discharge of plaintiff from his employment by falsely and maliciously giving notice to the employer that she had an assignment of plaintiff's wages, allegations that defendant was engaged in conducting a usury business in the name of the M. Co., of which defendant was sole owner, but which defendant, in order to avoid the law and its penalties, falsely claimed was owned by a nonresident, were proper and material where defendant was sought to be held

liable for acts done by the loan company as her agent.

**7. LIBEL AND SLANDER ⇨88—LIBEL—PLEADING—DAMAGES.**

In an action for damages on account of discharge occasioned by defendant falsely and maliciously sending written notice to plaintiff's employer that defendant had an assignment of plaintiff's wages, allegations that defendant was engaged in making short-time wage loans upon which she collected in violation of law from 20 to 30 per cent. interest per month and was assisted in that respect by various agents for whose acts she was responsible, and that one of her means for extorting usurious interest was to notify employers, particularly the employer of plaintiff, that she had an assignment of the wages of the employé, were proper and material as tending to show the degree and deliberateness of the act; the petition containing a prayer for exemplary damages.

**8. LIBEL AND SLANDER ⇨88—PLEADING—DAMAGES.**

In an action for damages in that plaintiff was discharged from his employment by reason of a notice sent by defendant to his employer falsely claiming he was indebted to defendant, allegations that as a result of such discharge he was exposed to public hatred, contempt, and ridicule, and his reputation for honesty and integrity impaired, and he was for many years prevented from securing other employment, which was of special value to him at that time because of his wife's illness, and that as a result of such libelous statement to his employer and his subsequent discharge and the bringing into question his reputation for honesty and integrity and the fact that he would be confronted with and forced to disclose such facts when seeking employment in the future, he suffered much chagrin, humiliation, distress of mind, mental pain, and agony, were a sufficient basis for the recovery of damages.

**9. LIBEL AND SLANDER ⇨88, 116—LIBEL—"GENERAL DAMAGES."**

In the law of libel, general damages are those which naturally, proximately and necessarily result from publishing the libel, and are recoverable under a general averment; the elements of such damages being injury to character, or reputation, feelings, mental suffering and anguish, and other like wrongs or injuries incapable of money valuation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages.]

**10. DAMAGES ⇨87(1)—"EXEMPLARY DAMAGES."**

"Exemplary damages" are awarded as matter of sound public policy in punishment of the guilty one for malicious acts, and not as compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exemplary Damages.]

**11. DAMAGES ⇨91(1)—EXEMPLARY DAMAGES—"MALICIOUS."**

In the law relating to exemplary damages, any unlawful act done willfully and purposely

to the injury of another is in a legal sense, as against that person, "malicious."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malicious.]

**12. LIBEL AND SLANDER** ⇨5—LIBEL—IMPLIED MALICE.

In cases founded on libelous publication, the jury may infer the existence of malice from absence of probable cause for making the publication, or from evidence of express malice.

**13. LIBEL AND SLANDER** ⇨120(2)—LIBEL—EXEMPLARY DAMAGES—MALICE.

An employé who was discharged from his employment by reason of defendant falsely and maliciously notifying the employer that the employé owed her a debt and that she had an assignment of his wages was properly allowed exemplary damages.

**14. JUDGMENT** ⇨744—MATTERS DETERMINED—PAYMENT OF DEBT BEFORE NOTICE OF ASSIGNMENT.

In an action by an employé discharged from his employment by reason of a false and malicious notice by defendant to his employer that plaintiff owed defendant a debt and that she had an assignment of plaintiff's wages, a judgment, in a prior action by the plaintiff against the employer and defendant for his wages and to cancel the assignment of wages, adjudging that the debt had been paid before notice of the assignment to the employer was given, was admissible in evidence to prove such fact.

**15. JUDGMENT** ⇨744—RES JUDICATA—ISSUES DETERMINED—PAYMENT OF DEBT.

A judgment in an action by plaintiff against a railroad and defendant to recover wages and to cancel an assignment of the wages to the individual defendant, adjudging that the debt to defendant had been paid prior to notice to the railroad of the assignment of the wages, was res judicata in an action by plaintiff against defendant for damages on account of his discharge from employment, occasioned by defendant falsely and maliciously notifying the railroad that plaintiff owed defendant a debt, and that defendant had an assignment of plaintiff's wages.

**16. JUDGMENT** ⇨713(1)—NATURE OF—"RES JUDICATA."

Res judicata is but the assertion in a pending suit that some legal or equitable issue there presented has been decided by some other court of competent jurisdiction and is as a consequence a bar to again litigate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

**17. JUDGMENT** ⇨540—RES JUDICATA—IDENTITY OF PARTIES AND CAUSES.

In order for a second suit upon the same cause of action to be barred under the doctrine of res judicata, there must be identity in the thing sued for in the cause of action, in the persons and parties, and in the quality in the persons for or against whom the claim is made.

**18. JUDGMENT** ⇨584, 634—RES JUDICATA—SAME AND DIFFERENT CAUSES OF ACTION.

There is a difference between the effect of a judgment as a bar against the prosecution of a

second suit on the same claim or demand and its effect as a bar in another action between the same parties upon a different claim or demand; as in the former case the judgment constitutes an absolute bar to a subsequent action, while in an action between the same parties upon a different claim or demand the judgment in the former action operates only as an estoppel as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

**19. JUDGMENT** ⇨486(1)—COLLATERAL ATTACK.

A void judgment may be collaterally attacked.

**20. JUDGMENT** ⇨576(1)—ERRONEOUS JUDGMENTS—RES JUDICATA.

An erroneous judgment is not void, and, unless appealed from, remains in force, and any error or irregularity therein does not lessen its effect as a bar to further suits upon the same cause of action.

**21. JUDGMENT** ⇨501—COLLATERAL ATTACK—ERRORS.

Where a court of general jurisdiction, in the exercise of its ordinary judicial function, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and the subject-matter of the controversy, such judgment is never void, no matter how erroneous it may appear to be from the face of the record or otherwise.

**22. JUDGMENT** ⇨731—MATTER ADJUDICATED—PRESUMPTION.

Where the pleadings upon which trial was had put in issue plaintiff's right to recover upon two causes of action, and judgment awarded him a recovery upon one and was silent as to the other, such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause of action.

**23. JUDGMENT** ⇨741—CONCLUSIVENESS—INFERENCES.

In action to recover usurious interest paid and exacted and to cancel an assignment of wages on the ground that the debt had been paid, a judgment only canceling the assignment was prima facie an adjudication that plaintiff was not entitled to recover the alleged usurious interest.

**24. JUDGMENT** ⇨725(6)—RES JUDICATA—MATTERS NECESSARILY DECIDED.

In an action against plaintiff's employer and defendant for wages and cancellation of an assignment of wages to defendant, it being alleged that the debt to defendant was paid prior to notice to the employer of the assignment, a judgment for plaintiff for wages and a cancellation of the assignment necessarily included a finding that the debt had been paid to defendant and the assignment canceled prior to the date notice was given the employer, and the judgment was admissible in another action by plaintiff against the defendant to show such fact.

**25. PRINCIPAL AND AGENT** ⇨163(1)—"RATIFICATION."

"Ratification" is the election by one to accept an act or contract previously done or en-

tered into in his behalf by another who had at the time no authority to do the act or make the contract in his behalf.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ratification.]

**26. PRINCIPAL AND AGENT §169(2)—RATIFICATION.**

Where one sued his employer for wages, and employer set up defense that wages had been assigned to defendant, and defendant, who was also sued for alleged usurious interest and to cancel the assignment, appeared and filed the assignment, she thereby ratified the unauthorized act of another in giving notice of such assignment to the employer, and was bound thereby in an action by plaintiff for damages for discharge from employment by reason of such notice of assignment.

**27. PRINCIPAL AND AGENT §175(1)—RATIFICATION—EFFECT.**

Where one ratifies the unauthorized act of another in his behalf, the legal consequences of the act follow as a matter of course.

**28. EVIDENCE §121(2)—RES GESTÆ.**

In an action by an employé for damages for discharge occasioned by defendant falsely and maliciously notifying the employer that plaintiff owed her a debt, and that she had an assignment of his wages, plaintiff could testify that the employer's agents notified him at the time of his discharge that he was discharged because a loan company had given notice that it held an assignment of his wages, being a part of the res gestæ incidental to and explanatory of plaintiff's claim that the railroad company discharged him because of the giving of the false notice.

**29. EVIDENCE §118—RES GESTÆ.**

The tendency of the courts is to extend rather than narrow the scope of the rule admitting otherwise hearsay matter as res gestæ.

**30. APPEAL AND ERROR §1060(1)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.**

Impertinent remarks of counsel will not be held reversible error, although it prejudices the jury and increases the verdict, where no complaint was made as to the size of the verdict, and liability was established by other testimony.

**31. TRIAL §352(1)—SPECIAL ISSUES—INVADING PROVINCE OF JURY.**

The submission of a special issue inquiring of the jury whether one C. filed notice with plaintiff's employer claiming that defendant had an assignment of plaintiff's wages was not erroneous as depriving defendant of the right to have the jury decide whether C. was the authorized agent of defendant, as it did not prevent defendant from requesting the court to submit the question of C.'s agency.

**32. APPEAL AND ERROR §1062(1)—HARMLESS ERROR—SUBMISSION OF ISSUES.**

In an action for damages based on wrongful acts of defendant's alleged agent, submission of issue which deprived defendant of the right to have the jury decide whether such other person was the authorized agent of defendant was

harmless and immaterial, where it was established that defendant ratified and adopted such third person's wrongful act.

**33. TRIAL §352(5) — SPECIAL ISSUE — EMBRACING MORE THAN ONE PROPOSITION.**

Financial injury and mental suffering are both elements of actual damages, the first being classified as special and the second as general damages, and hence a special issue inquiring of the jury whether plaintiff sustained "any financial injury or mental suffering" was not erroneous on ground that financial injury and mental suffering were distinct elements of damages and should have been separately submitted.

**34. LIBEL AND SLANDER §4, 5 — LIBEL — "MALICE IN LAW" — "MALICE IN FACT."**

In actions for libel, there are two kinds of malice, "malice in law" and "malice in fact," or "express malice," malice in law arising in cases where the words uttered are presumed in law to be malicious.

[Ed. Note.—For other definitions, see Words and Phrases, Malice in Fact; Malice in Law.]

**35. LIBEL AND SLANDER §4 — LIBEL — EXPRESS MALICE.**

Where words uttered are not actionable per se or presumptively libelous, it becomes necessary to prove express malice or that the alleged libelous matter was published in reckless disregard of plaintiff's rights and in a spirit of indifference concerning the injury which it might inflict.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by R. L. McKay against E. Evans. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Crawford, Bern Wilson, and Ellis P. House, all of Dallas, for appellant.

Geo. Clifton Edwards and Carden, Starnling, Carden, Hemphill & Wallace, all of Dallas, for appellee.

**RASBURY, J.** Appellee sued appellant, alleging that she was engaged in lending money at usurious and oppressive rates of interest in the name of the Model Loan Company, which she pretended was owned by another, to recover actual and exemplary damages charged to have been the result of appellee's discharge from the service of the Houston & Texas Central Railroad Company through the wrongful, fraudulent, and malicious conduct of appellant and her agents. Appellee, as basis for his suit, alleged that, while appellee was employed by said railroad company, and while said company had in force a rule that any employé who assigned his salary would at once be discharged from its service, appellant, with knowledge thereof, wrongfully, willfully, maliciously, in wanton disregard of appellee's rights, and for the purpose of effecting his discharge, notified the railroad company in writing that she held an assignment of appellee's salary, coupled with power

of attorney to collect same, and falsely claimed that appellee was indebted to her in the sum of \$22, in consequence of which he was discharged from the service of the railroad company and the wage then due him withheld. Appellant, after many exceptions, on some of which the action of the court is to be considered in this opinion on the merits, denied ownership of Model Loan Company, alleging that she was merely an employé of that concern, but that appellee did owe her \$22 and did execute and deliver to her in security thereof an assignment of his salary, coupled with power of attorney to collect, but that she never gave the notice of that fact to the railroad company or authorized it or ratified the act of any person in so doing, either in her name or in the name of the Model Loan Company, and was guilty of no act tending to injure appellee. There was trial to jury, to whom the issues of fact were referred for special verdict in form of the usual interrogatories, upon the answers to which judgment was awarded appellee for \$1,400 actual, and \$2,800 exemplary damages. From that judgment this appeal is prosecuted.

We make no general statement of the pleading and the facts for the reason that to do so would result, as to the pleading, in unnecessary duplication, since there are numerous assignments, often repeated, attacking the pleading which must be considered, and, as to the facts, for the reason that the sufficiency of the evidence as a whole to sustain the verdict is not challenged, though as to certain issues that claim is made, in which cases we will review the evidence to the extent required. Counsel on each side of the controversy frankly admit that the issues are simple and few, one of them declaring that the real issues are but four, yet counsel for appellant present 57 assignments of error, many of them repetitions, in a printed brief of 196 pages, which are met seriatim by as many counter propositions by counsel for appellee in a printed brief of 141 pages. To follow the manner of presenting the case in the briefs would extend this opinion to a length beyond toleration, which as a consequence makes it necessary for us to segregate the issues as such from the assignments and perform the work imposed by the rules upon counsel.

[1, 2] Appellant first assigns as error the action of the court in overruling her general demurrer; the precise point being that the petition was insufficient because it did not set out in *hæc verba* the writing alleged to contain the false claim that appellee was indebted to appellant. The allegation was that appellant "wrote, published, and caused to be delivered to Houston & Texas Central Railway Company \* \* \* a statement in writing, wherein the defendant \* \* \* alleged and stated that the defendant had an assignment of wages and power of attorney

on him, the plaintiff, to the extent of \$12, providing for an attorney's fee of \$10 additional." By appropriate allegations the innuendo intended by the notice was shown, that it was done maliciously, and the claim made that appellee was not indebted to appellant in any sum, but as result of the notice he was discharged, etc. The allegations quoted disclose within the meaning of the statute a libel. Article 5595, Vernon's Sayles' Civil Statutes. As a consequence the rules for pleading libel are to determine the sufficiency of the allegations quoted. While the common-law distinctions and technicalities do not obtain in our practice, clear and sufficient allegations of the facts constituting the cause or defense is required, and what is required depends in a large measure upon the character of the suit. "A libel suit is based on language or its equivalent. The complaint \* \* \* should put the court in possession of the libelous matter published, the language used, \* \* \* so as to enable the court to determine whether the words are actionable." *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768. The reason for the rule which requires the language used to be set out is that the court may determine whether its use imposes liability and that the defendant may be advised concerning the exact charges he will be called upon to meet. 17 R. C. L. 390. The question then is: Did the allegations quoted comply with the rules? We think they did. It is alleged that appellant wrote, published, and delivered to appellee's employer a statement in writing wherein the defendant alleged and stated that she "had an assignment of wages and power of attorney on him, the plaintiff, to the extent of \$12, providing for an attorney's fee of \$10 additional." The allegations do not purport in the least to give the substance and meaning of the language written and published. On the contrary, it is charged directly and specifically that appellant wrote and delivered to appellee's employer the exact and precise statement set out in the pleading. It is our opinion that the rule is satisfied with any allegation that discloses the very language used, whether purporting to be quoted from the writing or not. The identical words alleged to have been published were set out. The court thereby was enabled to determine whether they in law imposed liability, and the defendant informed what he would be required to meet. Proof of other or different language would, of course, have been excluded upon objection.

[3, 4] Error is next assigned upon the action of the court in overruling one of appellant's special exceptions, the effect of which is to challenge the sufficiency of that portion of appellee's petition which alleges that at the time he was discharged as result of the false and libelous publication uttered by appellant he was earning \$45 per month, with

reasonable prospect of promotion as he increased in knowledge and efficiency and consequent enhanced earnings, as basis of recovery, for the reason that no definite or permanent term of employment was alleged or any probability of a continuance of the indefinite employment.

It is a general principle of law that, if one "knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing the breach for any damages resulting to him by such breach." *Raymond v. Yarrington*, 96 Tex. 443, 73 S. W. 801, 62 L. R. A. 962, 97 Am. St. Rep. 914. The duration of the term of the contract thus violated or its permanency or impermanency does not, in our opinion, affect the right to recover whatever damages may have resulted. The duration of the contract might and probably would be a proper subject for consideration by the jury in determining the amount of the damages probably or proximately arising from its breach. That it would not, merely because it was from month to month, preclude recovery for what could be shown to have resulted, we think clear.

[5] Appellant specially excepted to appellee's allegations setting forth the giving of the notice that appellant held an assignment of appellee's wages, on the ground, in effect, that an assignment of wages was lawful, and hence it was not libelous to give notice of its possession and ownership. The exception was overruled, and the court's action in that respect assigned as error. It is not, in our opinion, libelous for one who is the owner of an assignment of another's wage to give notice of that fact to the proper person. Giving such notice would but be the exercise of a contract right, and would confer no right to recover damages, whatever might result. If, however, at the time notice is given the debt which the assignment secures has been paid, yet it be falsely claimed that it has not, the one giving such notice is liable for such damages as proximately result from the unlawful act. The liability in such cases is not determined by the original bona fides of the assignment, but by the subsequent false claim.

[6] Assignments 6, 7, 8, and 9 are grouped. These assignments challenge the action of the court in overruling as many special exceptions directed against certain allegations in appellee's petition asserted to be immaterial and prejudicial. The allegations complained of are essentially different in relation and purpose. The substance of those first presented is that appellant was engaged in conducting a usury business in the name of the Model Loan Company, of which appellant was sole owner, but which appellant, in order to avoid the law and its penalties, falsely claimed was owned by a nonresident of Texas, because of which it was alleged that she was personally liable on

several recited grounds for her acts alleged to have been done as agent. Obviously such allegations were material, since, if appellant was owner of and conducting the Model Loan Company, she would be personally liable for any actionable wrong done in its name or by its agents. The allegations raised at most a material issue of fact.

[7] The substance of the allegations presented secondly under the several assignments enumerated is the charge that appellant was engaged in making short-time wage loans upon which she collected, in violation of law, 20 to 30 per cent. interest per month, and was assisted in that respect by various agents for whose acts she was responsible, and that one of her means for extorting usurious interest was to notify employers, particularly the employer of appellee, that she had an assignment of the wages of the employé, and that appellant did, with knowledge of the rule of appellee's employer, maliciously and in order to secure appellee's discharge, give such notice falsely claiming an indebtedness against appellee. The proposition advanced is that, even if it be true that appellant was engaged in an unlawful business, the fact was wholly immaterial in the present suit, and had the effect of prejudicing the minds of the jurors.

We conclude that the facts alleged were admissible in evidence as tending to prove the issue of malice. If, as alleged, appellant did, because of appellee's refusal to pay the unlawful rate of interest, give the notice in order to secure his discharge, it can hardly be denied that it disclosed a malicious purpose. If it was a common practice of appellant to extort usury in such manner, that fact tended to prove the degree and deliberateness of the act. Appellee could rely upon the false publication and the circumstances of its publication to establish malice; yet he was also entitled to show it by extrinsic evidence. Showing malice in a given case is more or less reflecting the mind of the one charged therewith. "It is very difficult to say what possible evidence is inadmissible on this issue." *Newell, S. & L. § 414*. The relation of the parties, the circumstances surrounding the transaction which culminated in the publication, often indicate, in a manner that the publication cannot, whether malice existed. The common practice of collecting unlawful interest by securing the discharge of one on a false claim of indebtedness tends more strongly to establish malice than would a single similar act, it occurs to us.

[8, 9] Assignment 11 also complains of the action of the court in overruling one of appellant's special exceptions. Appellee, after reciting that the notice falsely claiming he was indebted to appellant was given to his employer, and as result thereof he



was discharged, exposed to public hatred, contempt, and ridicule, and his reputation for honesty and integrity impaired, and whereby he was for many months prevented from securing other employment, which was of special value to him at that time because of his wife's illness, averred that as result of said libelous statement to his employer and his subsequent discharge and the bringing into question his reputation for honesty and integrity and the fact that he would be confronted with and forced to disclose such facts when seeking employment in the future, he suffered great chagrin, humiliation, distress of mind, mental pain, and agony, all to his damage in the amount of \$5,000. The contention is that the allegations cannot form the basis of recovery, because they do not disclose any specific damages resulting from the acts complained of and are remote and speculative. In our opinion, the allegations are a sufficient basis for the recovery of damages. Broadly speaking, there are two classes of damages recoverable in libel cases, general and special. General damages are those which naturally, proximately, and necessarily result from publishing the libel. The law infers them. They are recoverable under general averment. The elements of general damages in such cases are injury to character or reputation, feelings, mental suffering, or anguish and other like wrongs or injuries incapable of money valuation. 17 R. C. L. 429. They are neither remote nor speculative. While incapable of precise measurement by money standards, the injury, when inflicted, is more serious than those which can be accurately measured by such values. The allegations asserted that appellant published that of appellee which is denounced by the statute as libelous, which tended to injure his reputation and thereby expose him to public hatred, contempt, and ridicule, and to impeach his honesty and integrity, as result of which he was chagrined, humiliated, and suffered great distress of mind, mental pain, and anguish. That such emotions would naturally, proximately, and necessarily result under the circumstances, we think, is hardly to be denied.

[10-13] The contention is also made that the court erred in overruling one of appellant's special exceptions which asserted in substance that the facts alleged in the petition were insufficient to warrant a finding for exemplary damages. Exemplary damages are awarded as matter of sound public policy in punishment of the guilty one for malicious acts, and not as compensation. The amount awarded goes to the complaining party merely because assessed in his suit. "In a legal sense, any unlawful act done willfully and purposely to the injury of another is, as against that person, malicious." *Culbertson v. Cabeen*, 29 Tex. 247. In cases

founded on libelous publication the jury "may infer the existence of malice from absence of probable cause for making the publication, or upon evidence of express malice." *Cotulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819. On such issue appellee alleged, in substance, that the statement that he was indebted to appellant in the sum of \$22, and that that amount was secured by an assignment of appellee's wages, was false and known by appellant to be false at the time, and that the notice was published and given with the deliberate and willful intention of effecting appellee's discharge because of his refusal to pay a debt he did not owe. It seems to us that the allegation that appellant falsely claimed that appellee owed a debt already discharged and the further allegations that the notice was given in the light of such knowledge is sufficient in the first instance for the jury to infer malice on the ground that the publication was without probable cause, and that the allegations that the notice was deliberately published for the purpose of securing appellee's discharge because of his refusal to again pay the debt is sufficient in the second instance for the jury to find express malice. In short, the allegations disclosed facts sufficient to present both issues to the jury, and for that reason the exception was properly overruled.

Assignments 22 to 26, inclusive, are grouped, and relate to the action of the court in admitting in evidence the pleadings of the respective parties and the judgment of the justice of the peace of precinct No. 1, Dallas county, in case of *R. L. McKay v. Houston & Texas Cent. R. Co.* and *E. Evans*. The propositions presented by appellant and presently to be considered can best be understood by a statement of the pleading and judgment so admitted in evidence as disclosed by the statement of facts. After appellee was discharged by the *Houston & Texas Central Railroad Company*, it refused to pay the wages then due him, whereupon appellee sued it and *E. Evans* in justice court, alleging, in substance, as to the railroad company, that it owed him wages in sum of \$35, which amount he sued to recover, together with statutory attorney's fee of \$20, because of its refusal to pay his wages for a period of 30 days, and, as to *E. Evans*, that she, as owner of a usury business operated under the name of the *Model Loan Company*, claimed his wage under an assignment thereof which was fraudulent and void because the loan it secured had long since been paid, for which reason he prayed that the assignment be canceled and held for naught, and by supplemental pleading alleged as to *E. Evans* that he did not execute the instrument dated 1912, but that about May, 1911, he borrowed \$10 from *Evans*, which was all he borrowed from her, and that he repaid said sum and \$8 additional as usury, for double the amount

of which he sought judgment. The railroad company admitted the indebtedness to McKay, but averred that its codefendant, E. Evans, purporting to do business as the Model Loan Company, had an assignment of the wage due or to become due McKay by it to secure payment of an indebtedness due her by McKay amounting to \$22, and that it did not know to whom to pay the money. The railroad company tendered the sum due into court and asked that it be protected by appropriate judgment. The record does not contain any written pleading by E. Evans. The transcript of the justice's docket does, however, contain the notation that "defendant Evans filed answer." There was also filed as part of the record in the justice court an instrument dated "February 29/12," consisting of two parts both signed by McKay. By the terms of the initial portion of the instrument McKay assigned to E. Evans all his wage, etc., due or to become due from the Continental Gin Company for February, March, April, May, June, and each month thereafter. To enable E. Evans to collect the wage so assigned it was recited that McKay had signed a blank assignment and power of attorney in which Evans was authorized to insert the name of McKay's then employer or any future employer and the day, month, or year in which the wage was earned, and to authorize another to do all she could do by the terms of the instruments. The second part of the instrument was an assignment by McKay to Evans of all the wage due or to become due him by the Houston & Texas Central Railroad Company during November, 1914, and each month thereafter until \$12, all costs incurred, and an attorney's fee of \$10 had been paid. For such purpose Evans was appointed the attorney in fact of McKay with wide authority in that respect. The second portion, while dated November 13, 1914, is obviously the blank referred to in the first portion authorizing Evans to fill in all dates of whatever character. Whether the instrument was filed with the justice as evidence or as the basis of appellant's claim in that suit does not appear. There was trial to jury, whose verdict was for McKay against the railroad company for \$35.92, and "for cancellation of the power of attorney of the Model Loan Company," followed by judgment which recited, in substance, that McKay and Evans appeared in person and by attorney and the railroad company by attorney, and, jury having been demanded and having returned the verdict recited above, it was adjudged and decreed by the court that McKay should recover of the railroad company \$35.92, and that the "instrument in writing filed herein by Miss E. Evans and called the power of attorney and assignment, and all claims based on it against plaintiff, be and hereby are canceled and held void and of no effect."

No appeal from the justice's judgment was prosecuted.

[14] The first complaint relates to the admission in evidence of the judgment. Obviously the purpose sought by the introduction of the judgment was to prove that it had been adjudged by the justice court that the debt which appellant claimed against appellee had been paid and the assignment of appellee's wage and the power to collect same canceled at the time the notice was given the railroad company. In our opinion the judgment was admissible for that purpose. If, in the trial in the justice court, it was adjudged that the debt had been paid before the notice to the railroad company was given, the record and judgment would be the best evidence of that fact. In fact, it occurs to us, if the pleading and the judgment in the justice court disclosed with reasonable certainty that such was the issue and judgment in that court, it would be conclusive in the absence of an appeal from or some character of direct attack upon the judgment.

[15-18] While counsel for appellant do not precisely deny the admissibility and force of such a judgment for the purpose indicated, they do argue, in effect, that the justice's judgment was improperly admitted in evidence for the reason that the judgment was not *res judicata* of that issue under the rule in such cases. Precisely speaking the judgment was not offered in bar or estoppel of any right of appellant to meet the issues in the damage suit. It was offered to prove one of the facts necessary to entitle appellee to recover. If, however, the admissibility of the judgment for that purpose did depend upon whether it was *res judicata* of the issue sought to be proved, we yet are of opinion that it comes within the rule. *Res judicata* is but the assertion in a pending suit that some legal or equitable issue there presented has been decided by some other court of competent jurisdiction and is as a consequence a bar to the right to again litigate it. The rule has variations. In case of a second suit upon the same cause of action the rule is that there must be identity in the thing sued for, in the cause of action, in the persons and parties, and in the quality in the persons for or against whom the claim is made. There is, however, a difference between the effect of a judgment as a bar against the prosecution of a second suit on the same claim or demand and its effect as a bar in another action between the same parties upon a different claim or demand. "In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. \* \* \* But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the

determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U. S. 352, 24 L. Ed. 195. From which it follows that in a suit between the same parties, but not upon the same claim or demand, any issue controverted and adjudged in the former suit is a bar to the right to litigate that issue in the subsequent suit. Stated in another way: "Where it appears from the record of a court \* \* \* that an issue has been presented and decided, then the decision so made, so long as it is not set aside in some lawful manner, must be held conclusive upon the rights of the parties when the same issue is again presented. \* \* \*" *Freeman v. McAninch*, 87 Tex. 132, 27 S. W. 97, 47 Am. St. Rep. 79. The application of the rule stated in the present controversy is that as between the parties any issue determined in the justice court barred either from again litigating it in this proceeding, and the judgment was admissible for that purpose, regardless of the fact that the cause of action in the former suit is different from that in the case at bar.

[19-21] It is also urged that the judgment was inadmissible for the purpose offered because not responsive to the verdict of the jury. The precise point is that the verdict did not dispose of: (1) Appellee's claim for attorney's fees against the railroad company; (2) appellee's claim against appellant for \$16 alleged usury penalty; (3) appellant's alleged debt and attorney's fees against appellee. As shown by our statement of the pleadings of the respective parties, appellee did seek to recover of the railroad company the statutory attorney's fee for withholding his wage and to recover of appellant \$16, being double the amount of usurious interest exacted by appellant, and it can be assumed that appellant sought to recover the debt she claimed against appellee set out in the pleading of the railroad company, though there is no pleading on file to that effect. We have also recited that the verdict of the jury was that appellee recover against the railroad company \$35.92, the amount of his wage, and that the power of attorney of the Model Loan Company be canceled. The judgment was that appellee recover of the railroad company \$35.92, and that the power of attorney and assignment filed in the case by appellant and all claims based thereon against appellee be canceled and held for naught. The complaints recited are but collateral attacks upon the judgment. As in case of other collateral attacks, if the judgment is void, it would not constitute a bar to the right to again litigate the issue sought to be proved by the judgment. Erroneous judgments are not void, however, and unless appealed from, they remain in force, and any error or irregularity therein does not lessen "its effect as a bar to further suits upon the same cause of action." 23 Cyc. 1124, 1125. "Where a

court of general jurisdiction, in the exercise of its ordinary judicial function, renders a judgment, in a cause in which it has jurisdiction over the person of the defendant and the subject-matter of the controversy, such judgment is never void, no matter how erroneous it may appear, from the face of the records or otherwise, to be." *Clayton v. Hurt*, 88 Tex. 595, 32 S. W. 876; *Rankin v. Hooks*, 81 S. W. 1005. The record from the justice court which we have recited discloses jurisdiction of both the parties and the subject-matter. We conclude, therefore, that the issue so presented is without merit.

[22, 23] On the other hand, if the objection raised as to the admissibility of the judgment is not a collateral attack thereon, we are nevertheless of the opinion that it is without merit, for the reason that all the matters recited were in issue by the pleading and concluded by the verdict and judgment. Where "the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment [or verdict] awards him a recovery upon one, but is silent as to the other, such judgment [or verdict] is prima facie an adjudication that he was not entitled to recover upon such other cause." *Rackley v. Fowlkes*, 89 Tex. 613, 36 S. W. 77; *Trammell v. Rosen*, 106 Tex. 132, 157 S. W. 1161. As a consequence the failure to award appellee in the justice court judgment either for the attorney's fee against the railroad company or the usury penalty against appellant was prima facie an adjudication that he was not entitled to either. In like manner the verdict of the jury canceling the assignment and power of attorney upon which appellant based its claim against appellee for \$22 was prima facie an adjudication that appellee was not entitled to recover same.

[24] It is also urged that the judgment was inadmissible for the purpose for which it was introduced for the reason that it does not appear therefrom that the debt had been paid and the assignment canceled prior to the date the notice was given to appellee's employer. As we have shown, it was alleged that the notice was given to appellee's employer November 13, 1914. Appellant answered first in justice court, according to notation on the docket January 11, 1915. On February, 10, 1915, she filed in court the assignment and power of attorney under which she claimed the money due appellee by the railroad company. On the same day appellee filed in the justice court sworn supplemental petition alleging, among other things, that he did not execute the instrument filed by appellant, and that all the money he ever borrowed from appellant was in May, 1911, which had been repaid with usurious interest at a date long prior to the giving of said notice. It is thus seen that the issue of the validity of the very assignment relied upon

by appellant as well as the time when it was satisfied was in issue in the justice court, and that the pleading places the date of its satisfaction at a time prior to the date of giving the alleged false notice to the appellee's employer, and the judgment is as conclusive on that issue as any other issue in the case.

Complaint is made of the action of the court in instructing the jury upon conclusion of the evidence that the justice's judgment conclusively established the falsity of appellant's claim that she had an assignment of appellee's wage coupled with power of attorney at the time the notice was given the railroad company. We have already indicated that it is our opinion that the pleading of both parties in the justice court put in issue the only assignment ever executed or claimed to have been executed by appellee, and that the pleading of appellee placed in issue the claim that he had paid appellant the only debt he owed long prior to the time the notice was given to the railroad company, and that the verdict of the jury and the judgment of the court, being for appellee, foreclosed that issue against appellant. That being true, there was nothing to submit to the jury and the court's charge was correct.

[25-27] The evidence upon trial in the district court disclosed that the notice to the railroad company claiming that appellant had an assignment of appellee's wages was given by one Crump. Whether he was authorized to do so by appellant was a controverted issue. At the conclusion of the trial the court instructed the jury in substance that the giving of the notice by Crump "tied up" appellee's wages, and that appellant in seeking to obtain the benefit of such act ratified same. The action of the court in that respect is assigned as error. A composite definition of ratification as relates to the law of agency is said to be "the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so." 2 C. J. 467. It is the election by one "to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf." *Gallup v. Liberty County*, 57 Tex. Civ. App. 175, 186, 122 S. W. 291, 296. The inquiry then is: Did appellant, the question of Crump's agency being an issuable fact, adopt and seek the benefit of his unauthorized act in such manner as to render her responsible for the legal consequences resulting therefrom? We conclude she did. The act purported to be done for appellant by Crump was giving notice to the railroad company that appellant had an assignment of appellee's wages and authority

to demand and receive the same and the consequent impounding of the money. There was no pleading in the justice court by which appellant either affirmed or denied Crump's agency or admitted or denied his authority to give the notice. Appellee and the railroad company did in that court plead that she claimed to be entitled to the wage by assignment, and appellant did file in that court a purported assignment by appellee of the wage due him by the railroad company and that issue was determined by the jury. Thus it results that, with knowledge of the fact that Crump without her authority had given the notice, claiming the fund as hers, impounded or "tied up" same, she not only did not repudiate his act, but sought to have established the truth of the claim and have the fund so impounded adjudged to her. Such, we believe, was both adoption of the unauthorized act and seeking the benefits thereof. The legal consequences of the act follow as matter of course.

[28, 29] There are a number of assignments complaining of the action of the court in permitting appellee to testify to certain declarations of the agents of the railroad company. This testimony generally was that the railroad company's agent notified appellee that he would not be retained in its employ because a loan company had given notice that it held an assignment of appellee's wages, appellee's claim and offer to show the agent the debt had been paid, and the agent's declaration that it would be useless for the reason that the company refused to retain any employé in such cases. The testimony, in our opinion, was admissible as part of the *res gestæ*, since it was incidental to and explanatory of appellee's claim that the railroad company discharged him as result of the giving of the false notice. We shall not, of course, attempt to discuss even in a general way the many reasons why testimony ordinarily hearsay and irrelevant is in certain cases admissible as part of the *res gestæ*. The propriety and justification for it is at least well settled, while the tendency of the cases is to extend rather than narrow its scope. 10 R. C. L. 974. The authority cited declares, in substance, that *res gestæ* are acts and words so closely connected with and incidental to and explanatory of the main fact that without them it could not be understood, are the events themselves related by "the instructive words and acts of the participants, \* \* \*" and serve to illustrate the matter under investigation.

[30] Error is assigned upon the refusal of the court to instruct the jury not to consider certain questions and remarks of counsel addressed to the witnesses for appellant. These questions were addressed to witnesses who were engaged in or connected with others

engaged in doing what was asserted to be a usury business, and in examining the witnesses counsel would inquire of them if they were not engaged in the "loan shark" business, and in one instance intimated that one of the witnesses, because engaged in such business, had not earned an honest dollar since that time. We have examined the bills of exception. The answers to many of the questions are not set out; merely the question. The bills omit to show by some sort of explanatory preface what had preceded so as to disclose the relation of the question to what preceded, or, if not that, to show its lack of relation and consequent impertinency. At the same time we do not approve such methods of cross-examination. Yet liability was established by other testimony, and did not depend upon whether the witnesses were engaged in or connected with the "loan shark" business. If it biased or prejudiced the jury, the only result would be to increase the verdict. No complaint is made in that respect. So, while we cannot approve the innuendoes and obvious imputations, the record does not, in our opinion, disclose ground sufficient to warrant a reversal.

[31, 32] By special issue the court inquired of the jury whether one Crump filed notice with the jury claiming that appellant had an assignment of appellee's wages. Complaint is made of the court's action in that respect on the ground that it deprived appellant of the right to have the jury to decide whether Crump was the authorized agent of appellant in that matter. While we do not think the special issue prevented the court from submitting or appellant from requesting the court to submit the question of Crump's agency, at the same time the question of agency under the trial court's holding, in which we concur, that appellant adopted and ratified Crump's act in giving the notice, became and is immaterial.

[33] Among other issues submitted to the jury was one inquiring of them whether appellee sustained "any financial injury or mental suffering" as a result of giving the false notice. It was complained at the time and is here renewed that the manner of submitting the issue was erroneous for the reason that financial injury and mental suffering are distinct elements of damages, and for that reason should have been separately submitted. Financial injury and mental suffering are both elements of actual damages, the first being classified as special, and the second as general, damages, as we have pointed out at another place in this opinion. It thus results that the special issue is but a general inquiry as to the extent of the actual damages suffered by appellee, and not as a consequence subject to the criticism that it requires but one answer to issues susceptible of separate and adverse findings.

[34, 35] The appellee alleged and the jury in answer to appropriate special issue found that in giving the notice to appellee's employer appellant did so in reckless disregard of appellee's rights and in a spirit of indifference concerning the injury it might inflict and as exemplary damages for doing so awarded appellee \$2,800. By several assignments appellant asserts, in effect, that the evidence adduced will not support such a finding. "In actions for libel there are two kinds of malice; malice in law and malice in fact, or express malice." 17 R. C. L. 322. Malice in law arises in cases where the words uttered are presumed in law to be malicious. Such words being actionable per se dispenses with further proof of malice. The words uttered not being actionable per se or presumptively libelous, it becomes necessary to prove express malice in the ordinary way or as found by the jury that the notice was published in reckless disregard of appellee's rights and in a spirit of indifference concerning the injury it might inflict. The facts relied upon by the lower court in submitting the issue of malice in fact or express malice as ground for allowance of exemplary damages are that the appellant, knowing her debt had been paid and knowing that appellee's employer's custom was to discharge employees who assigned their wages, gave notice to appellee's employer that she in fact held an assignment of appellee's wages for an unpaid debt due her, coupled with power of attorney authorizing her to demand and receive same. The claim was false, and as result of the notice appellee was discharged. In *Cotton v. Cooper*, 160 S. W. 597, similar facts were held sufficient to warrant a verdict awarding exemplary damages. *Id.*, 209 S. W. 135.

There are a great number of assignments submitted as propositions, and then grouped, and under which, as grouped, general propositions are advanced. In nearly every case the assignments are not propositions within themselves, and are improperly grouped, for the reason that they raise and present totally different issues. While we have not considered each assignment separately, we have waived the rules as the speediest way out of the matter and considered the general propositions save where they repeat. While we have considered, we have not written upon, a large number of others, for the reason that to do so would extend this opinion beyond all reasonable proportions. A number of such issues are the admission of testimony. While in several instances we think the testimony was improper, we have reached the conclusion that its admission was not such error as was reasonably calculated to or probably did cause the rendition of an improper judgment in the case.

The judgment is affirmed.

**C. R. GARNER & CO. v. BEAUMONT COTTON OIL MILL CO. (No. 448.)**

(Court of Civil Appeals of Texas. Beaumont. April 29, 1919. Rehearing Denied May 7, 1919.)

**1. SALES ⇨420 — ANTICIPATORY BREACH — EVIDENCE.**

In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, whether there was a breach *held* for the jury.

**2. SALES ⇨420 — ANTICIPATORY BREACH — PROMPTNESS IN CLAIMING BREACH.**

In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, whether plaintiff acted promptly in claiming the breach *held* for the jury.

**3. SALES ⇨172—SUIT BASED ON ANTICIPATORY BREACH—DEFENSE.**

In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, that defendant's plant was destroyed by fire after contract was made *held* no defense, even if contract did provide that defendant was not responsible for damages arising from causes beyond its control.

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Suit by C. R. Garner & Co. against the Beaumont Cotton Oil Mill Company, in which defendant filed a cross-action against plaintiff. From the judgment rendered, plaintiff appeals. Reversed and remanded.

Madden, Truelove, Ryburn & Pipkin, of Amarillo, and Crook, Lord, Lawhon & Ney, of Beaumont, for appellant.

Smith & Crawford, of Beaumont, for appellee.

HIGHTOWER, C. J. The nature and result of this suit is succinctly stated in appellant's brief, and that statement is conceded by appellee to be correct. It is substantially as follows:

This suit was instituted by the appellant, C. R. Garner & Co., against the appellee, Beaumont Cotton Oil Mill Company, in the district court of Jefferson county, to recover damages for a claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake; it being alleged that at the time of such breach such cake was worth \$7 more per ton than the contract price, and plaintiff claimed damages in the sum of \$3,500.

Trial was had with a jury, and upon conclusion of the evidence the court instructed a verdict in favor of appellee as to appellant's cause of action, and upon answers by the jury to special issues on appellee's cross-action for damages for alleged wrongful detention of money garnished by the

hands of certain insurance companies, judgment was rendered in favor of appellee against appellant for such damages.

Appellant, who was plaintiff, alleged, substantially, that it was a corporation, engaged in brokerage business at Amarillo, Tex., buying and selling cotton seed products, and that appellee, at such time, was engaged in manufacturing such products and selling same to purchasers throughout the state, having its mill and place of business in the City of Beaumont, Jefferson county, Tex.; that appellant, on October 25, 1917, made a contract with appellee, by which it purchased 500 tons of cracked and screened cotton seed cake or meal at appellant's option, guaranteed to contain 49 per cent. protein and fat, at the aggregate price of \$50 per ton, f. o. b. the cars at Beaumont, Tex., shipment to be made on or after November 1, 1917, and not later than December 10, 1917; that thereafter, on November 3 and 6, 1917, appellant furnished shipping instructions, which were accepted by appellee; that on November 10, 1917, appellee breached said contract, and failed and refused to carry out the terms thereof, and refused to deliver said cotton seed cake and meal, but declared to appellant that it could not carry out said contract.

Appellant alleged that it did not carry such cotton seed products in stock, but bought and sold the same by telegram, telephone, and by letter, contracting to sell at the time such purchases were made, all of which facts were well known to appellee; that appellant advised appellee, as early as October 26, 1917, that said 500 tons of cake had been sold, but, although having such knowledge, appellee thereafter, on said November 10, 1917, refused to ship said cotton seed cake or meal, and appellant, in order to protect its customers, was obliged to buy same in for appellee's account, of which fact appellant fully advised appellee prior to such purchase, and did, in fact, buy such cake in at \$57 per ton, f. o. b. the cars from the Texas Refining Company at Greenville, Tex., such purchase being made on November 12, 1917, the cake purchased being of the same grade, and upon the same terms of shipment; that the market price of such cake on November 10 and 12, 1917, was the sum of \$57 per ton, f. o. b. the mills, and that such was the market f. o. b. the cars at appellee's mill in Beaumont on such dates; and that therefore appellant was entitled to recover said sum of \$3,500, with legal interest from the day of such alleged breach of contract.

Appellee answered by special exceptions, general demurrer, and also by the following special pleas:

(1) That said sale was made under the terms of the contract attached to appellee's

answer, referred to as Exhibit A, which contains the stipulation that appellee should not be responsible for any damages arising from any cause beyond its control. The provision here referred to by appellee and claimed to have been a provision of the contract in question was follows:

"We are not responsible for damages arising from delays in transportation, or for any other causes beyond our control."

(2) That on November 9, 1917, appellee's mill and plant was entirely destroyed by fire, through no fault of its own, of which fact appellant was fully advised, but that appellant, though knowing the full time for fulfilling the contract had not transpired, maliciously and without probable cause, on November 21, 1917, instituted this suit, and caused writs of garnishment to be issued against certain insurance companies, and caused said companies to hold up the amount due to appellee on certain policies, for which such amounts and for the interest due on these amounts so claimed to have been wrongfully garnished by appellant, appellee sought recovery as damages.

(3) That such suits (garnishment proceedings) by appellant were wrongfully and prematurely brought, causing damages to appellee's credit and business reputation, and causing the bank in which appellee carried its account to mature its unmatured notes, causing the bondholders to become uneasy and causing the defendant to sell several hundred dollars' worth of cotton seed cake, when it could have held same and made a profit of several thousand dollars, stating the amount, and causing it to sell at a loss of several thousand dollars, stating the amount, parts of its machinery, all to its actual damage in the sum of \$10,000, and appellee further prayed for exemplary damages.

Appellant, by supplemental petition, denied the matters set forth in appellee's answer, and alleged that that provision of the claimed contract on the part of appellee and referred to in its answer, reading as follows:

"We are not responsible for damages arising from delays in transportation, or for any other causes beyond our control"

—was no part of the contract made between appellant and appellee for the sale and purchase of said cotton seed products, and that such provision or claimed provision of the contract, though claimed to have been made a part of same by appellee, by having been wired to appellant as appellee's confirmation of such contract, was never received by appellant until after the fire in question, and was never accepted by appellant as any part of the contract, and that such provision was never, in fact, a part of the contract between appellant and appellee.

Since the trial court peremptorily instructed a verdict against appellant on its cross-action against appellee, the only question necessary for determination by this court is whether the evidence introduced on the trial was sufficient to raise the issue of anticipatory breach of the contract upon the part of appellee, and whether, also, the evidence was sufficient to raise the issue as to whether appellant promptly acted upon such anticipatory breach, and we therefore deem it proper to state largely the evidence introduced on these points.

C. R. Garner, appellant's secretary, testified that he was in active charge of appellant's business, which was that of buying and selling cotton seed products in a wholesale way, having shipment made direct from mills to appellant's customers; that the negotiations out of which this action arose began with a telegram from appellee, addressed to appellant, dated October 25, 1917, reading as follows:

"Offer you five hundred tons cracked cake forty-nine per cent. protein and fat subject being unsold shipment Nov. first ten days Dec. fifty-one dollars f. o. b. cars Beaumont."

Garner further testified:

That after the receipt of this telegram, he had a telephone conversation with Mr. McAdams, appellee's president, in which he told McAdams that he could sell the cake at \$50, and that McAdams would let him know later in the day whether he could sell him at that price. Accordingly, on the afternoon of the same day, he received the following wire from appellee:

"You may go ahead and sell five hundred pounds [tons] as per my former telegram at fifty dollars net to us f. o. b. Beaumont wire confirmation today."

That on the same day the following confirmation was wired back to appellee:

"Sold per your offer 500 tons 43 per cent protein, prime in color and odor, cracked, screened cotton seed cake or meal, buyer's option November first ten days in December \$50.00 f. o. b. Beaumont regular confirmation mailed."

That on October 26th appellant received from appellee the following wire:

"Telegram received referring to our telegram of twenty-fourth was for 49 per cent. protein and fat combined at sellers convenience during period named November first ten days in December. On receipt of this please telegraph confirmation this basis."

Garner further testified that the basis mentioned in this telegram was confirmed by wire from appellant to appellee reading as follows:

"Answering day message 49 per cent. protein and fat combined satisfactory."

Appellant also introduced in evidence a letter to appellee dated October 25, 1917, con-

firming this telegram, and also its original confirmation of the contract dated October 25, 1917, confirming the products purchased and the terms, etc., of the purchase. Mr. Garner then testified that this confirmation was never returned to appellant. Appellant then, by Garner, identified shipping instructions, dated November 3d and November 6th, for 120 and 380 tons of the products mentioned in the contract, which instructions were forwarded to appellee on such dates, and also introduced letters inclosing such instructions. There was also introduced in evidence a telegram to appellant from appellee, dated at Beaumont on November 5th, reading as follows:

"Your Reno, Nevada, instructions third can get out part last this week. Balance as early as possible next week advise"

—and also a reply message from appellant to appellee on November 6th, as follows:

"Your wire 5th reference Reno shipping instructions satisfactory to us. Please rush all possible."

Then, on the 8th of November, appellant received from appellee the following wire:

"Instructions received balance your contract can we change some of your instructions to meal so as to take care of meal made while grinding cake we are heavily sold up on cake and this will also help us from delaying your orders than may otherwise might be. Please advise."

To this message appellant replied, on November 9th, as follows:

"Answering day message. Cannot change cake ordered to meal but have party wanting three hundred ten tons meal 43 per cent. protein prime in color and odor November December shipment. On receipt of this please telegraph your lowest price quick."

And on November 9th appellant received from appellee the following telegram:

"Our plant entirely destroyed last night by fire impossible fill shipping order per your instructions will advise more fully by letter."

Mr. Garner then testified that his answer to this last-mentioned telegram was a telephone conversation with Mr. McAdams, appellee's president, and in this connection his evidence was as follows:

"I replied to that telegram. I talked over the phone with Mr. McAdams on November 10th. That was Mr. Y. O. McAdams, president of the Beaumont Cotton Oil Company. I called up Mr. McAdams and asked him what he was going to do, and what arrangements he was making about filling the cake orders sent down to him, and he told me that he had lost his entire plant by fire and he would be unable to fill the contract, and on account of the fire canceling the contract, and I thought I knew Mr. McAdams pretty well, and a little personal friendship existed between us, and I insisted that he should not treat me that way, but that he should go ahead and fill that contract. And he still in-

sisted that he had lost everything that he had and that on account of the fire he would cancel the contract and he would be unable to ship the cake. As to what he said about shipping or refusing to ship the cake, in that conversation, along that line, he said—he was telling me all the time he would cancel the contract, but I insisted that from a personal standpoint, even, he should go ahead and fill the contract with us, and he said he would let me know Saturday by telegram what he would be able to do about it. He told me that, if it was possible to make any arrangements to fill the contract, he would see about it and let me know fully the 10th—that was Saturday; and he kept telling me all the time the contract was canceled and how sorry he was he was unable to fill it."

He further testified, referring to a telegram then being exhibited, as follows:

"This telegram is one that I sent to Mr. McAdams on the 12th. I also sent this other one. My memory is that this telegram from the Beaumont Cotton Oil Company was received some time on the morning of the 13th. I do not know the exact hour in the morning, but it was put in the office in the morning of the 13th of November."

The telegrams to which the witness was referring above were as follows:

"Amarillo, Texas, November 12, 1917,

"10:55 A. M.

"Y. O. McAdams, President Beaumont Cotton Oil Mill Co., Beaumont, Texas: You promised to wire us Saturday whether or not you would buy five hundred tons of cake you have contracted for November first ten days December shipment with us from Beaumont, Texas, Fifty Dollars per ton f. o. b. Beaumont, Texas., which you hold shipping instructions covering. Market advancing daily and we must have positive information by telegraph date if you have bought or will buy from other sources to fill this contract for shipment within contract period. *Unless we hear from you will buy in for your account five hundred tons of cake from Texas Refining Co., Greenville, Texas, at fifty-seven dollars per ton f. o. b. Greenville, Mount Pleasant, Texas.* This price fifty cents per ton less than we can buy from other parties. Answer immediately.

"C. R. Garner & Company."

The second of these telegrams mentioned by the witness reads as follows:

"Amarillo, Texas, November 12, 1917.

"Y. O. McAdams, President Beaumont Cotton Oil Mill Co., Beaumont, Texas: Wire immediately if you are going to ship five hundred tons per our contract with you per telegram date must know immediately without fail.

"C. R. Garner & Company.

5:10 P. M."

Not having a reply from appellee to either of its messages of November 12th, on the morning of the 13th appellant wired appellee as follows:

"In accordance with your wire and letter of the ninth instant and telephone conversation of



tenth instant advising you could not fill order for five hundred tons cake bought as per exchange of telegrams October twenty-fifth we have bought five hundred tons forty-nine per cent. combined protein and fat cracked screened cake or meal our option for your account in accordance with our wire of twelfth instant from Texas Refining Co., Greenville, Texas, fifty-seven dollars ton f. o. b. Greenville, Mount Pleasant, Texas, November first ten days December shipment and you will govern yourself accordingly, letter follows."

And on the same day appellant mailed to appellee a confirmatory letter, quoting the last-mentioned message and confirming same. The evidence further shows that at 6:23 p. m. on November 12th a telegram was filed by the Beaumont Cotton Oil Mill Company with the Western Union telegraph office at Beaumont, the message being sent charges collect, addressed to appellant, but it was shown by the witness Garner that said telegram was not received by appellant until some time during the morning of November 13th, and this telegram reads as follows:

"Telegram to Y. O. McAdams to hand. We have until end of contract period to fill trade under our contract of sale. We have right to cancel this sale if beyond our ability to meet conditions our mill a total loss until we make insurance adjustments and finish checking up our business we are unable to advise definitely whether or not we can fill trade or must exercise the above right; buy nothing for our account."

It was further shown by appellant, through the witness Garner, that the appellee never did deliver the 500 tons of cotton seed cake covered by the contract, and that the appellant bought that quantity of such cake from the Texas Refining Company, securing an option therefor on November 10th, by calling J. D. Middleton, manager, on long-distance telephone, buying such cake at \$57 per ton f. o. b. cars at Greenville.

Garner also testified that he was familiar with the market value of the cotton seed cake on November 10 and 12, 1917, in Beaumont, Tex., and that the market value of the class of cake called for in the contract was \$57.50, f. o. b. cars at Beaumont, Tex., on these dates. There was also introduced correspondence, invoices, drafts, etc., showing purchase of the cotton seed cake in question from the Texas Refining Company on November 12th for \$57 per ton, f. o. b. the cars at Greenville and Mt. Pleasant, Tex.; Texas common points the same as Beaumont. There was also introduced in evidence a telegram from appellee, received by appellant on November 20, 1917, reading as follows:

"Following our conversation of last Sunday should we be able to give you four to six hundred tons guaranteed sound forty-two per cent. protein slab cake which should run forty-nine per cent. protein and fat at Port Arthur, Texas, at forty-six dollars per ton shipment November

first ten days December sacked in Kolo bags, *this in place of the five hundred tons we had sold you but had to cancel account of our fire* you can have this milled and sacked in transit at about four dollars per ton we should think. Wire quick answer."

The manager of the Texas Refining Company at Greenville fully corroborated and confirmed the testimony of Garner with reference to the purchase of the cake from that concern, and as to the securing of an option, which was on November 10th, and the exercise of such option on November 12th, for \$57 per ton, and also this witness testified that such was the market value of this kind and class of cake f. o. b. the cars at Beaumont, Tex., on said date.

Y. O. McAdams, appellee's president, and a witness for appellee, on the trial contradicted appellant's witness Garner in material respects as to what was said between those two in the telephone conversation on the 10th of November, and McAdams testified, in substance, that he did not tell Garner in that conversation that appellee could not or would not fill the contract for the sale and purchase of the cotton seed cake in question, but that he only told Garner that, owing to the fact that appellee's mill had been destroyed by fire, it would be impossible for appellee to comply with appellant's shipping instructions of November 3d and 6th; that witness did not tell Garner that appellee would not carry out the contract, and, in fact, that witness told Garner that he (witness) would see what he could do with reference to filling the contract, and would do the best that could be done in that direction. McAdams did not deny, however, Garner's testimony to the effect that he (McAdams) during the same conversation promised Garner that he would let him know definitely on that same day by wire what appellee would do with reference to filling this contract, and if he had contradicted Garner in this matter, as he did in other portions of Garner's testimony, it would not have warranted the court in taking the question from the jury by peremptory instruction, if appellant's evidence was sufficient to raise the issue that appellee, acting through McAdams, repudiated and renounced its liability under the contract and declined to fill the same, and appellant acted upon such repudiation promptly as it claims to have done.

[1] Appellant's first assignment of error complains of the peremptory instruction given by the court in appellee's favor, and contends that the case should have been submitted to the jury for its determination as to whether appellee breached the contract sued upon, etc. The proposition is as follows:

"Since the evidence would authorize a finding that, at the time plaintiff purchased the cake or meal in the open market, defendant had repudi-

ated the contract of purchase by declaring that he would not fulfill the same, and that the plaintiff acted upon such anticipatory breach, it was error for the court to peremptorily instruct the jury to find against the plaintiff upon this issue."

In support of its contention appellant cites the following authorities: *Greenwall Theatrical Co. v. Markowitz*, 97 Tex. 479, 79 S. W. 1069, 85 L. R. A. 302; *Kilgore v. N. W. Tex. Baptist Ed. Ass'n*, 90 Tex. 139, 37 S. W. 598; *Young v. Watson*, 140 S. W. 840; *Sup. Council Am. Leg. of Honor v. Batte*, 34 Tex. Civ. App. 456, 79 S. W. 629; *Sup. Council v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; 3 *Elliott on Contracts*, § 2028; 9 *Cyc.* 641.

Appellee, as to the first counter proposition, makes the following:

"Since the uncontroverted evidence shows that there was no refusal on the part of appellee to comply with the contract, but, on the contrary, same was left open for future arrangements, the court properly peremptorily instructed the jury to find against the appellant."

In support of this counter proposition, appellee cites the following authorities: *Swift & Co. v. Continental Oil & Cotton Co.*, 170 S. W. 114; *Kilgore v. N. W. Tex. Baptist Society*, 90 Tex. 139, 37 S. W. 598; *United States v. Smoot*, 15 Wall. 36, 21 L. Ed. 107; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Benjamin on Sales*, § 568.

All the cases cited by both parties go back to and announce as correct the rule in cases of this character as laid down by Benjamin on Sales in the section above referred to. Benjamin states the rule as follows:

"A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made, for, if he afterwards continues to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end."

In the Kilgore Case, cited by both parties, it was said:

"The evidence tends to show that, after the declarations of Kilgore were made, and the acts done by him upon which the abandonment was predicated, the officers of the corporation entreated with him and his sureties for a continuance of the work under the contract. If that be true, then it would operate as a waiver of the breach, which might have been claimed, if promptly accepted by the corporation."

And further in the same case:

"When the promisor is in good faith actively engaged in the performance of a contract, a declared intention to abandon it at some future time, however positively made, could not operate to terminate it, because he at the same time

would by his act or performance be in a more emphatic manner affirming the existence of the contract and maintaining the terms thereof."

It must be borne in mind that in the Kilgore Case the promisor, notwithstanding his declarations that he intended to abandon his contract, and would do so, still at the very time of such declaration he was in the active performance of his contract, and the other party thereto continued to insist and urge him to continue the performance of his contract, and in that case the court applied the familiar maxim that "Actions speak louder than words," and held that Kilgore's declaration to the effect that he intended to abandon the contract, if made, were not sufficient to show a breach of the contract on his part in the face of the fact that he was then engaged in the active performance of his contract.

In *Greenwall Theatrical Co. v. Markowitz*, supra, the action was one by the plaintiff for anticipatory breach of contract, like the present case, and in that case the Supreme Court of this state, among other things, said:

"Before the time when defendant was bound to perform, it could not, by its renunciation of its obligation, put an end to the contract; but by its action it left the plaintiff at liberty, if he saw fit, to take it at its word, and treat its contract as a breach and the contract as thereby terminated, and hold the defendant responsible for the damages resulting."

We think that this case, considering the evidence adduced upon the trial, ought to be ruled by the Greenwall Theatrical Company Case just quoted from. According to the testimony of appellant's witness Garner, appellee's president, McAdams, stated to him emphatically, in the telephone conversation of November 10th, that appellee would not be able to fill the contract between the parties on account of the destruction of its mill plant by fire, and that appellee would cancel the contract, and that appellee considered that the contract was canceled by the fire; and if Garner's testimony be given credence, it would justify the conclusion by a jury that in said conversation appellee's president positively renounced any liability to fulfill the contract, and gave as a reason for its cancellation the destruction of its plant by fire. It is true Garner testified that in the same connection McAdams stated to him that he would let him know for sure by wire on that same evening what appellee would do about fulfilling the contract, and that Garner did not at the very time of such conversation act upon McAdams' statement that appellee would cancel the contract, or considered the contract canceled, but, in view of the promise on the part of McAdams to let appellee know for certain on the same evening whether it would change its mind and fulfill the contract, and in view of appellee's failure to comply with such promise, and in

view of all of the uncontradicted evidence on the part of appellant, that appellee refused to answer either of appellant's telegrams on the 12th of November, which telegrams are hereinbefore copied, we have reached the conclusion that the evidence in this case was such as to compel a submission by the trial court to the jury of the issue as to whether there was a breach of the contract in question by appellee.

In view of another trial of the case, we think it would hardly be proper to enter further into an argument showing the probative force of the evidence bearing upon this issue. We simply hold that the evidence was sufficient to carry the case to the jury on that question.

[2] On the further point—that is: Did appellant act promptly upon this anticipatory breach of contract, if there was such?—it is the contention of appellee that the evidence shows without contradiction that, even though there was a renunciation of the contract by appellee and a positive refusal to carry it out, still appellant did not promptly act upon such refusal or breach, but continued to urge performance of the contract by appellee, and thereby waived its right to declare a breach and hold appellee for the measure of damages sought to be recovered in this case.

It is true that appellant's witness Garner stated that he insisted, in the conversation by phone, that appellee carry out its contract with appellant; but it also appears, or at least it was left by the evidence as a question of fact for the jury to determine, that Garner, acting for appellant, had no intention of waiving appellant's rights under the contract, by reason of appellee's breach at that time, and from the fact that Garner, acting for appellant, waited until the evening of the 12th to determine whether appellee was going to comply with the contract, it does not follow, as a matter of law, that appellant did not act promptly in claiming the breach, and therefore this question was also one for the determination of the jury.

[3] The record discloses that there was some contention made by appellee's answer below to the effect that appellee would not be liable in this case because of the destruction of its mill plant by fire, in view of the provision of the contract as claimed by it, to the effect that it would not be liable for any damages caused by anything beyond its control. Even if that provision had been in the contract as finally closed between the parties, we are of the opinion that it could not avail appellee in this case, and that its plant was destroyed by fire after the contract was made would be no defense to appellant's cause of action as here asserted. This contention is not made by appellee in this court, as we understand it; but, if so, it would

have to be overruled, and we merely make these remarks on this point in view of another trial of the case.

It follows, from what we have said, that this court is of the opinion that the judgment of the trial court ought to be reversed, and the cause remanded; and it will be so ordered.

Reversed and remanded.

#### STATE v. ELLIOTT. (No. 7748.)

(Court of Civil Appeals of Texas. Galveston. May 17, 1919.)

##### 1. MASTER AND SERVANT ~~§~~101, 102(1)—DUTY TO EMPLOYER.

The state, as an employer operating state's railroad, is bound to furnish employes with a safe place in which to work.

##### 2. ACTION ~~§~~27(2)—CONTRACT OR TORT—INJURY TO EMPLOYEES.

A servant injured by negligence of master may elect to sue either on contract or for tort.

##### 3. STATES ~~§~~191(1)—CONTRACTS—LIABILITY.

When the state makes a contract, it is bound as much as a citizen would be bound by a like contract, notwithstanding the state cannot be sued without permission.

##### 4. MASTER AND SERVANT ~~§~~88(1)—STATE'S LIABILITY FOR INJURY TO EMPLOYEES.

Where the state owned and operated a railroad under Laws 30th Leg. c. 74; Laws 31st Leg. (2d Ex. Sess.) c. 24; Laws 33d Leg. c. 139 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 6745a-6745f), and employed labor, held that the state occupies to such employes the relations of an ordinary employer; and, where an employe was injured through the negligence of agents having supervision and management of the road, the state is liable, though it cannot be sued without permission.

##### 5. LIMITATION OF ACTIONS ~~§~~69—RUNNING OF STATUTE—LEAVE TO SUE.

As a state cannot be sued without permission, limitations against an action by employe on a state railroad, who was injured by those having the management of the road, do not begin to run until permission to sue is granted.

##### 6. LIMITATION OF ACTIONS ~~§~~131—RUNNING OF STATUTE.

Where an employe on a state railroad was injured, and his petition to the Legislature for privilege of entering the courts with his cause of action, of which, under Const. art. 3, § 57, he was required to give advance notice of 30 days, was presented within two years after injury, the running of limitations against an action for such injuries was tolled.

##### 7. LIMITATION OF ACTIONS ~~§~~175—RUNNING OF STATUTE—WAIVER.

As there is no constitutional provision requiring the state to plead limitations in an action against it, the Legislature, on passing an

act allowing an employé of a state railroad who was injured to sue, may waive limitations, and provide that limitations should not begin to run until the passage of the act.

**8. CONSTITUTIONAL LAW 188—RETROSPECTIVE LEGISLATION—WHAT CONSTITUTES.**

Where the Legislature, in passing an act giving an employé of the state railroad permission to sue for injury, provided that limitations should not begin to run until the passage of the act, such act was not under the ban interdicting retroactive statutes.

Appeal from District Court, Anderson County; John S. Prince, Judge.

Action by John H. Elliott against the State of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

B. F. Looney, Atty. Gen., Luther Nickels, of Eastland, A. G. Greenwood, of Palestine, and C. M. Cureton, and W. J. Townsend, both of Austin, for appellant.

Campbell & Sewell, N. B. Morris, and N. B. Morris, Jr., all of Palestine, and Williams & Neethe, of Galveston, for the State.

**GRAVES, J.** The Thirty-Fifth Legislature, at its Fourth Called Session (1918), passed an act enabling John Elliott, appellee, to sue the state of Texas for personal injuries alleged to have been suffered by him on or about March 6, 1916, while working for the State Railroad. This act was approved March 25, 1918, and is published as chapter 32, p. 59, Acts of the Fourth Called Session Thirty-Fifth Legislature, and, omitting caption, emergency, and service of process clauses, reads as follows:

"Section 1. John H. Elliott be and he is hereby granted permission to sue the state of Texas for damages for personal injuries received by him while on duty as a bridge carpenter in the employ of the Texas State Railroad about March 6, 1916.

"Sec. 2. That such suit may be filed in the district court of Anderson county, Texas, where the injury occurred, at any time within two years from the date this act takes effect; and said cause of action shall not be barred by limitation until two years from the date this act takes effect.

"Sec. 3. That such suit upon said cause of action shall be tried and determined in the trial and appellate courts according to the same rules of law and procedure, as to liability and defenses, that would be applicable if such suit were against an ordinary Texas railroad corporation; provided any amount determined due plaintiff in accordance with the provision of this act shall be approved by act of the Legislature."

On April 12, 1918, Elliott filed this suit against the state to recover damages for the injuries referred to, setting up this statute as the basis of his right to bring it, and al-

leging the injuries to have been sustained by him on the date given, while at work for the state as a bridge hand on what is known as the Texas State Railroad, which extends from Rusk, in Cherokee county, to Palestine, in Anderson county, in Texas; that by authority of law the railroad had been established, equipped, and was then through a general manager in person and such other agents and servants as are usually employed in that kind of business, being maintained and operated by the state as a common carrier of passengers and freight for hire; that at the time of his injury the appellee, while working under the orders of one of these employés, a foreman in charge of repairing bridges, etc., was riding along this State Railroad in the service of the state upon a push car furnished by the road and this foreman to transport the bridge carpenters to and from this work, and that the push car was negligently derailed, throwing him off and injuring him; that the derailment and his consequent injuries were the direct and proximate result of the negligence of the manager of the railroad, and of his servants, agents, and employés in failing to have and keep the push car in a safe condition, in operating it at a dangerous rate of speed, and in failing to keep and maintain the railroad track itself in a safe condition, in that its rails were allowed to spread and remain too far apart.

Upon the theory that the act thus passed was beyond the power of the Legislature as being an *ex post facto* or retroactive law, attempting to create liability against the state when none existed at the time of the accident in question, that it operated to suspend the statutes of limitation specially in favor of Elliott, that it essayed by special act to change the rules of liability, evidence, etc., retroactively, and, generally and independently, that the state was not liable for the alleged acts of negligence of its officers, agents, or employés, the same being merely their personal torts or misfeasances, the defendant presented and urged various demurrers and exceptions to the petition, assailing the statute as actually having the effect of contravening all these provisions of the Constitution of Texas:

(1) Section 49, art. 3, which provides that "no debt shall be created by or on behalf of the state, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the state in war, or pay existing debt."

(2) Section 44, art. 3, reading: "The Legislature \* \* \* shall not grant \* \* \* by appropriation or otherwise, any amount of money out of the treasury of the state, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law."

(3) Section 53, art. 3, reciting that "the Legislature shall have no power to grant \* \* \* any extra compensation, fee or allowance to a public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into, and performed in whole or in part."

(4) Section 51, art. 3, providing that "the Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual \* \* \* whatsoever."

(5) Section 6, art. 16, wherein it is provided that "no appropriation for private or individual purposes shall be made."

(6) Section 56, art. 3, providing that the Legislature shall not pass any local or special law, "regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts," etc., or "for limitation of civil or criminal actions," or "in all other cases where a general law can be made applicable."

(7) Section 3, art. 1, which is: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

(8) Section 16, art. 1, reading: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

Other special exceptions averred that the cause of action was barred by the statute of two years' limitation, in that it appeared to have arisen on March 6, 1916, more than two years before the filing of this suit to recover thereon, on April 12, 1918.

There were further defensive pleadings, but, since the demurrers fully raise the only questions presented upon appeal, it becomes unnecessary to recite them.

All the demurrers were overruled, the cause was submitted to a jury on special issues, who, after finding that Elliott sustained his injuries as a direct and proximate cause or result of the negligence of the manager of the railroad, his agents, servants, and employés in charge of and operating the same, in failing to have the track in a reasonably safe condition, and in failing to operate the push car at a reasonably safe rate of speed, fixed his damages at \$8,500; from a judgment entered against it pursuant to the verdict the state appeals.

It is first contended the general demurrer should have been sustained below, because "it having appeared from the petition, and being judicially known, that the State Railroad was being operated by agents or servants of the state at the time of the accident in question, and it being alleged that the injuries complained of were caused by the negligence of such agents or servants, no liability accrued against the state by reason of

such negligence, and therefore the petition failed to show a cause of action against the state."

Then follow numerous propositions and assignments presenting in extended detail all the above-mentioned constitutional objections, and possibly some others, to the enabling act declared upon, together with citations of authorities, and able arguments in support of the insistence that the act offends the Constitution in quite a number of particulars.

After careful consideration of the issues presented by the appeal, however, aided, as the court has been, by illuminating oral discussion from counsel for both litigants, neither the assault upon the law permitting the suit nor upon the judgment rendered is thought to be well founded; indeed, the state's contentions are to us so comprehensively and satisfactorily answered in the brief filed in this court by the able and experienced counsel for the appellee that, under a feeling that we may not otherwise better express the conclusions reached, the liberty is taken of here adopting this part of it as the opinion of this court:

"Notwithstanding the many assignments of error in appellant's brief, and the many constitutional provisions relied on therein, there is but one really serious question in this case, which is whether or not liability of the state arose out of the facts attending appellee's injury under the principles of law then existing. That question may be presented fully under appellant's first assignment without following all the others in their order.

[1] "First Counter Proposition. The state being the owner of the State Railroad, and doing with it a general railroad business, including that of common carrier, and having, through her agents, duly authorized by the Legislature, entered into a contract of employment with appellee, one of the obligations of which was that the employer, the state, would exercise due care to furnish plaintiff a safe place in which to work, and having failed to exercise such care, thus breaking her contractual obligation and causing the injury to plaintiff, was liable for the resulting damages. *Fristoe v. Blum*, 92 Tex. 76 [45 S. W. 998], and authorities therein cited; *Ry. Co. v. Culberson*, 72 Tex. 378 [10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805]; *Ry. Co. v. Gaskill*, 103 Tex. 443 [129 S. W. 345]; *Imperial Sugar Co. v. Cabell*, 179 S. W. 91; *Gibbons v. United States*, 8 Wall. 269 [19 L. Ed. 453]; *Chapman v. State* [104 Cal. 690, 38 Pac. 457] 43 Am. St. Rep. 158; *Ry. Co. v. Herbert*, 116 U. S. 647 [6 Sup. Ct. 590, 29 L. Ed. 755]; *Hough v. Ry. Co.*, 100 U. S. 216-218 [25 L. Ed. 612]; *Ry. Co. v. Fort*, 11 Wall. 533, 537 [21 L. Ed. 739]; *Wood, Master and Servant*, p. 164, § 83; *Labatt, Master and Servant*, p. 2390, § 898.

[2] "That servant injured by negligence of master may elect to sue either on contract or for tort. *Williams v. Southern Ry. Co.* [128 N. C. 286] 38 S. E. 894; *Kansas City Ry. Co. v. Becker* [67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814] 77 Am. St. Rep. 81.

[3, 4] "Second Counter Proposition. By the statutes under which the state constructed, owned, and operated the state railroad, the state voluntarily assumed liability for all such claims as that of plaintiff. Laws 30th Legislature (1907) p. 151; Laws 31st Legislature (1909 2d Ex. Sess.) p. 445; Laws 33d Legislature (1913) p. 279; Vernon's Sayles' Statutes, arts. 6745a to 6745f; Western & Atlantic Ry. Co. v. Carlton, 28 Ga. 180; Ballou v. State, 111 N. Y. 496, 18 N. E. 627; Coleman v. State, 134 N. Y. 564, 31 N. E. 902.

"These propositions, if sound, meet all the objections urged against the statute granting to plaintiff leave to sue. That they are sound is believed to be demonstrable both by principle and by authority.

"No one can deny that when the state makes a contract she is as much bound by it as a citizen would be bound by a like contract. In *Fristoe v. Blum*, supra, the law is thus stated:

"It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes a suitor in its own courts, or a party to a contract with a citizen, the law applies to it as under like conditions governs the contracts of an individual. *State v. Kroner*, 2 Tex. 492; *State v. Purcell*, 16 Tex. 305; *Green v. State*, 73 Cal. 32 [11 Pac. 602, 14 Pac. 610]; *Carr v. State*, 127 Ind. 204 [26 N. E. 778, 11 L. R. A. 370] 22 Am. St. Rep. 624; *State v. Snyder*, 66 Tex. 700 [18 S. W. 106]; *State v. Cardozo*, 8 S. C. 79 [28 Am. Rep. 275]; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *People v. Stephens*, 71 N. Y. 549; *People v. Canal Commissioners*, 5 Denio, 401; *Coleman v. State*, 134 N. Y. 564 [31 N. E. 902]; *State v. Dennis*, 39 Kan. 509 [18 Pac. 723]; *Morton, Bliss & Co. v. Comptroller*, 4 S. C. 448; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Railway v. United States*, 104 U. S. 680, 23 L. Ed. 891.

"In *Carr v. State*, 127 Ind. 204 [26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624], the Supreme Court of that state said: 'As there is a perfect contract, the state is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. In entering into the contract it laid aside its attributes as a sovereign and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into an ordinary business contract.'

"The Court of Appeals of the State of New York in the case of *People v. Stephens*, 71 N. Y. 549, used the following language: 'The state, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the con-

tract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged into the dealer, contractor, and suitor.'

"The Supreme Court of South Carolina clearly announced the same doctrine in the case of *Morton, Bliss & Co. v. Comptroller*, in the following language: 'When a sovereign state enters into a contract or bargain with an individual, it assumes to be bound, in all particulars, as an individual under like circumstances would be bound, by what is expressed or properly implied by the terms of such contract. The measure of its obligation is that applied to individuals.'

"The authorities cited above fully justify the conclusion that the contract of Bennick for the purchase of the land from the state bound the state and Bennick each to the same extent as if it had been made between two private individuals. Bennick had all the rights that he would have had if the vendor had been a citizen instead of the state. So long as he paid the purchase money and interest the state could not deprive him of the land. He was within the protection of the Constitution. On the other hand, the state by the common law had the right as a vendor, upon the failure of Bennick to perform his part of the contract, to rescind the sale made to him and resume its control of the land.

"Many other quotations might be given stating the same principle. If the state is bound by her contract as a citizen would be bound, she must be liable as a citizen would be liable for its breach. To say that she is not liable would be to assert that which is inconsistent with the existence of a contractual obligation.

"Because of her sovereignty, the state is not amenable to the processes of courts, and cannot be sued therein, without her consent, but this in no way detracts from the proposition that she may be liable. Generally, she provides for the meeting of her obligations and liabilities in other ways; but she may, if she choose, authorize the courts to determine whether or not a particular obligation or liability exists, and she confers such authority by such an act of the Legislature as that in question. It may be true, under section 44 of article 3 of our Constitution, the Legislature has not the power, by such an act, to impose a liability where none arose out of the facts under the law existing when those facts occurred—in other words, to make a gift or gratuity; but the Legislature undoubtedly has the power to authorize an inquiry in court into the question of liability vel non and then to provide for its discharge if one be established.

"The first counter proposition asserts that there was a contract between the state and the plaintiff, and that the injury to the latter was caused by a breach—nonperformance—of one of the obligations of the contract. Unquestionably the relation between employer and employé is created by contract, and the obligations of each to the other are imposed thereby.

"In *Railway Company v. Culberson*, supra, that proposition is thus stated: 'But the duties which are owed by a railroad company to its servant are not duties owed to him in common

with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other.'

"In *Railway v. Dunham*, 49 Tex. 187, Judge Gould, quoting from New York cases, thus states the doctrine:

"Speaking of the master's duty to have placed for the 'servant's use proper and adequate physical means, and for his helpmates fit and competent fellow servants,' the court says: 'That some general agent, clothed with the power and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's nonperformance. It is for the master to do by himself or by some other. When it is done, then, and not until then, his duty is met or his contract kept.'"

"Further statements of the doctrine are as follows: *G. H. & S. A. Ry. Co. v. Smith*, 76 Tex. 616 [13 S. W. 562, 18 Am. St. Rep. 78]:

"'If it be a neglect of one of the duties the master has impliedly contracted to perform, the master is liable, no matter what be the rank or grade of the person he has designated, because that person is an agent, and not a servant; but in all other cases he is not liable, because of the application of the rule as to fellow servants.'

"*Brown v. Winona & St. Peter Ry. Co.*, 27 Minn. 164, 6 N. W. 484, 38 Am. Rep. 285: 'The duties which the contract of employment imposes on the master are that, where machinery or instrumentalities are used in the work, he will exercise due care and caution in providing such as are fit and safe,' etc.

"*Railway v. Ranney*, 37 Ohio St. 669: 'The respective rights and duties of employer and employé sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employé, and, among other things, to exercise reasonable care in the selection of prudent fellow servants,' etc.

"The obligations of employer and employé under the contract of employment are reciprocal. Among those of employer are the payment of wages, exercise of due care to furnish safe tools, appliances, and places to work, and competent fellow servants, etc. Among those of the employé are fidelity, diligence, and the exercise of due care and skill in the performance of the work undertaken. If appellee had, by failure to exercise such diligence, or care, or skill, inflicted injury on property of the state upon which he worked, could any one deny that he would have been liable to the state under his contract of employment? If not, how can it be held that the state did not become liable to him by the same kind of a breach of the same contract—by a breach of one of the reciprocal obligations of the contract? It might as well be said that the state would not be liable for the promised compensation as that she is not bound to perform her other obligations, or to become liable for nonperformance. But it is said that the failure here to exercise proper care was that of officers or agents of the state, and that the state is not legally responsible for torts and other wrongs committed by such officers or agents. It is not contended at this point that she is. The proposition is that she is responsible for her own failure to perform, for her

breach of her own contract. That the failure to perform, the breach, may have been due to the fault of the agents to whom performance was intrusted by her in no manner alters the case. As her contracts are made through agents, so must they be broken, if broken at all, by agents. She could not perform except by her officers or agents to whom she committed the duty of performance, and their failure to perform is her failure. This is just as true between her and her servants as it would be between an ordinary master and his servants.

"The books abound with cases in which sovereigns have been held liable for breaches of their contracts by wrongful conduct of their officers or agents. This is one of the precise points decided in *Imperial Sugar Company v. Cabell*, supra. There the state was bound, as vendee, in a contract with the Sugar Company to do certain things, and left the doing of those things to her officers, as she needs must. Those officers failed and refused to do the stipulated things, and the Sugar Company rescinded the contract. It was contended there as strenuously as it is contended here that the wrong of the officers was not the wrong of the state, but the effect of the contention was denied by this court.

"The confusion of ideas in this contention is obvious. It is one thing to say that the wrongful act of an officer is not the wrong of the state and not imputable to it, but a very different thing to say that the failure of an officer or agent to whom the duty of performance has been committed to perform a contractual obligation which the state is bound to perform is not a breach of that obligation and is not imputable to the state. The action or nonaction of the officer or agent may give rise to a right of action against him in favor of the state, or of the other injured person, but it is nevertheless a breach of the contract of the state. The difference between conduct of an officer, which is a breach of the contract of the sovereign, which makes the sovereign liable, and other conduct of the same officer, which is only his personal wrong, for which the sovereign is not liable, is clearly shown in the case of *Gibbons v. United States*, supra.

"*Gibbons*, having a contract with the United States to deliver 200,000 bushels of oats, delivered a part and tendered the remainder. They were wrongfully refused by the quartermaster, thus causing a breach of the contract, and for this the United States was held liable for the damage which resulted to *Gibbons*. But some time after this breach, which was held to have discharged the contract and released *Gibbons* therefrom, the same quartermaster required *Gibbons*, by duress as he claimed, to deliver at the contract price the remainder of the oats, a rise in the market price of oats having been meantime taken place, and *Gibbons* claimed this difference in addition to the loss sustained by him from the prior refusal to receive. As to this the court held that, if the last delivery was under duress, there was no contract, but only a tort of the officer for which the United States was not liable, and, if there was no duress, the plaintiff consented to make the delivery at the price insisted upon by the quartermaster and was bound by his consent. Thus the court fully recognized the binding force of the refusal of the officer which constituted a breach of the contract, and at the same time held that the

further conduct of the quartermaster, which was not in violation of any contract, since none was then in force, was only a tort not binding on the government.

"It would be difficult to show in a clearer light the distinction here contended for.

"That the liability of the state may arise out of a contract implied by law as well as from an express undertaking is held in *United States v. Palmer*, 128 U. S. 263, 9 Sup. Ct. 104, 32 L. Ed. 442; *United States v. Berdan Fire Arms Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530; *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290.

"The decision in *Chapman v. State*, supra, approaches yet more clearly to the questions in this case, and in principle is not distinguishable.

"The state of California owned and operated a public wharf which was in charge of its officers, through whose neglect it was allowed to fall into disrepair. Coal belonging to plaintiff was taken upon the wharf, and, on account of its bad condition, the wharf broke away, and the coal fell into the bay and was lost. After stating a statute and a provision of the Constitution of the state, and holding that the statute, which was enacted after the occurrence, could not create liability if none arose under the law existing at the time of the occurrence, and announcing the proposition that the state is not liable for the negligent acts of its officers while engaged in discharging 'ordinary official duties pertaining to the administration of the government,' the court says:

"But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort, pure and simple and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract.

"The facts stated in the complaint show that the defendant, in consideration of wharfage paid to it, received upon one of its public wharves the coal belonging to plaintiff's assignors, and to be delivered to them on such wharf for removal therefrom. A wharfinger is one who for hire receives merchandise on his wharf, either for the purpose of forwarding, or for delivery to the consignee on such wharf, and the matters alleged in the complaint show a contract of the latter character, and the state is bound thereby to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract. The principle that a state is bound by the same rules as an individual in measuring its liability on a contract is well expressed by *Allen, J.*, in his concurring opinion in the case of *People v. Stephens*, 71 N. Y. 540, in which he said: "The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject. But when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both

stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor." See, also, *Carr v. State*, 127 Ind. 204 [26 N. E. 778, 11 L. R. A. 370] 22 Am. St. Rep. 624.

"What, then, was the nature and extent of the obligation assumed by the state when, in consideration of the wharfage paid by them, it received the coal of plaintiff's assignors upon its wharf?

"The wharfinger is bound to return or deliver the goods according to his contract." *Edwards on Bailments* (3d Ed.) § 362. A wharfinger is impliedly bound by his contract as such to exercise ordinary care for the preservation and safety of property intrusted to him (*Edwards on Bailments* [3d Ed.] § 359), and this imposes upon him the duty to exercise ordinary care to ascertain the condition of his wharf, that he may know whether it is reasonably safe for the purpose for which he hires it; and if merchandise is received by him upon a wharf which is unsafe, and is thereby lost, so that he cannot deliver it according to his contract, the wharfinger is liable therefor if ordinary care would have enabled him to know the condition of his wharf, and such negligence on his part will be treated as a failure to exercise ordinary care for the safety of the property intrusted to him.

"After further discussing the contractual obligations of wharfinger, the court proceeds:

"We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach—that is, when the coal was lost through the negligence of the officers in charge of the state's wharf—although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the Legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and, in so far as that act gives the right to sue the state upon its contracts, the Legislature did not create the liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the Constitution.

"The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him. It only shows that he cannot enforce against the state his claim, and make it answer in a court of law for its liability. What is made out by this objection is not that there is no liability and no claim, but that there is no remedy. *Coster v. Mayor of Albany*, 43 N. Y. 407.

"In the case of *Western & Atlantic Ry. Co. v. Carlton*, 28 Ga. 180, the plaintiff was a shipper of hogs over the railroad, which was owned by the state and managed by a superintendent, and the suit was for damages caused to plaintiff's hogs shipped over the road caused by the car failing or giving out. It was contended that



the state was not a common carrier and not liable. The contention was thus answered by the court:

"When a state embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character, and is subject to like regulation with persons engaged in the same calling. But if, under such regulations, citizens acquire rights for wrongs or injuries sustained at the hands of the agents of the state, in conducting the business in which the state may have embarked, there may be, ordinarily, a difficulty in regard to the remedy to which the injured party might be entitled. In such cases, in England, the king is petitioned in his court of chancery, and the chancellor administers right as a matter of grace, not by compulsion. Here the usual course pursued by the citizen has been to petition the Legislature, and that has been the resort when no other remedy has been provided. The Legislature, however, has wisely and justly provided a remedy for persons having claims against the Western & Atlantic Railroad. They may present them for settlement to the superintendent of the railroad. If a dispute should arise concerning any claim which cannot be amicably settled, a claimant may bring suit against the superintendent of the railroad. We think, then, that the state, engaging in the carrying business, assumes the obligations and liabilities incident to that business when carried on by individuals, and the remedy is by suit against the superintendent of the road when the claim cannot be adjusted without."

"Now we ask: Is the implied contract of a wharfinger or a warehouseman to exercise care to make his premises safe for the reception of the property of his customers any more contractual or binding than is the implied contract of a railroad company to use care to keep safe for the use of its employes the tracks on which they work, and on which their lives and limbs are daily risked?"

"Is a state engaged in conducting the business of a common carrier with a railroad owned by it liable for damage to hogs when it is not liable for injuries inflicted upon men in its services to whom it owes the kind of obligations that a master owes to his servants?"

"These decisions are grounded in the principles recognized by other courts in the United States, among them our own, and we submit that it is impossible to deny plaintiff a recovery consistently with those decisions and those principles."

"From the premise that a state is not responsible for the torts of its officers and agents, appellant tries to deduce a conclusion which would well-nigh exclude all liability of the state. A state would not be bound by a contract if it were not liable for its breach. The binding obligation of a contract of a state cannot be denied, and yet that contract must be made by some person or persons representing the state. Likewise, the breach must be committed by some representative, and that representative must be an officer or agent to whom performance is intrusted. Thus it is that the state is made liable for the conduct of such representative amounting to a breach of its contractual undertaking."

"And it is not true in any such broad sense as appellant contends that a state cannot become liable, without contract, for tortious con-

duct of those representing it. Ordinarily officers and agents performing duties prescribed by law in the ordinary affairs of the government violate those laws or exceed their authority when they perpetrate wrongs. For such conduct no liability of the state arises. But sometimes the officer or agent acts for the state, as did those in charge of this railroad, in doing the very things prescribed by the law under which he acts, in doing which he commits a wrong to another. In such cases liability of the state may arise. Cooley's Elements of Torts (2d Ed.) 141; Bishop Non-Contract Law (1889 Ed.) 749; Green v. State, 73 Cal. 32 [11 Pac. 602, 14 Pac. 610].

"The injured person cannot sue the state without her consent, but this in no way shows that the state is not liable. When consent is granted, the question whether or not there is liability depends on general principles, of which the rule that torts of officers and agents are not imputable to the state is only one, and that is not so universal in its application as to render the state immune from wrongs committed by it through its agents thereunder authorized by it."

"The reluctance sometimes shown to hold states liable results partly from the fact that suits are so rarely brought against them, owing either to settlement otherwise made or to lack of consent, and partly to the influence of the old maxim of the common law that 'the king can do no wrong,' a maxim which has no place in American jurisprudence. Langford v. United States, 101 U. S. 342 [25 L. Ed. 1010].

"Notwithstanding the many declarations of the capacity of states to commit both breaches of contracts and torts which may make them liable to persons thereby injured, their immunity from suit, and the persistence of the feeling flowing from the outworn maxim, have given rise to exaggerated notions in some minds as to their irresponsibility as mischievous as they are harsh and unjust. It should be pleasing to just-minded men to know that the Legislature of Texas was actuated by no harsh or narrow spirit in giving this remedy to this plaintiff, but readily consented to have his claim for compensation put to the proper tests in the courts in the fullest way."

"If it is true, as seems to be thought by counsel for appellant, that the act for plaintiff's relief manifests an intent to make the state liable, or at least to recognize the existence of a liability already accrued, the fact ought to have weight with the courts as a construction by that department of the laws under which this railroad was owned and operated."

"In 1907 an act was passed authorizing the penitentiary board to complete the road, already partly constructed, and to equip, maintain, and operate it, together with a telegraph or telephone line, granting the power of eminent domain, and the power to issue bonds, and to use the proceeds thereof for the purposes set forth, and giving to the Railroad Commission the same jurisdiction over the traffic of this road as it had over that of other railroads."

"In 1909 another, but cumulative, act was passed authorizing a further issue of bonds and a sale of the road when completed. This act pledges the net revenue and income from every source from year to year 'remaining and after the payment of the current expenses and neces-

sary improvements of every character' to secure the bonds.

"The act of 1913 took the management, control, and operation of the road away from the Prison Commission and placed it with a manager. That officer was given full power and authority 'to manage, control, and operate said railroad,' and to employ such assistance as may be necessary for successful operation. To enable the manager to improve, develop, and operate the same, the act appropriated \$60,000 out of the general revenue, and provided that all his expenditures thereout should be made with the approval of the Governor. By section 6 the manager was required to keep a system of books, showing receipts and disbursements, to report the same to the comptroller, and to pay the money received during the preceding month into the state treasury; and that section expressly provided that all moneys so received, as well as all appropriated, 'shall be subject to payment for the necessary expenses incurred in the maintenance and operation of said railroad.' As a part of the emergency clause, it was recited that the business is daily increasing, and that life and property are endangered by the condition of the road.

"It is submitted that these acts show:

"(1) That the state caused its railroad to be constructed and operated as other business railroads, and assumed full responsibility for the ownership of the railroad and the business.

"(2) That the state acknowledged its duty to maintain and operate the road in such manner as to protect life and property.

"(3) That it not only recognized its duty to pay expenses of operation and devoted to the payment thereof the revenue derived from operation as one of the first charges thereon, but appropriated money out of the general revenue for the same purpose.

"(4) That it committed to the general manager and those to be employed by him the doing of all these things for the state.

"In the everyday language of courts, railroad men, economists, legislatures, and boards regulating railroads, 'operating expenses' includes payment of damages for personal injuries such as plaintiff's. This is judicially known to the court. If, therefore, a breach of the contract with plaintiff was not enough, of itself, to make the state liable, she assumed liability by those enactments.

"It has been the design in the foregoing discussion affirmatively to present the views of the law sustaining this judgment, so as at the same time to distinguish the many authorities relied on by appellant. Some of these authorities are not accessible to the writer at this time, but none which has been examined at all conflicts with the views here presented, unless it be in a somewhat too comprehensive, if not extravagant, statement of the law in some of them as to the nonliability of a state for the wrongs and torts of its officers and agents. Why such authorities are not applicable here has already been shown, it is believed, and a detailed discussion of them would be tedious and useless.

"The contention that the state is liable in this case asserts nothing novel. Other states have owned railroads, canals, and other businesses, and have accepted the consequences of their ownership of the institutions and business,

generally by statute, as in the case of Georgia with reference to its railroads, and of New York in reference to its canals. The decisions in those states show that they have assumed full liability for all such claims as we present here.

"The suggestion in appellant's argument that the ownership and operation of this railroad by the state constituted a part of the ordinary conduct of governmental affairs seems not to need extensive notice. It seems too plain to require comment that the manager and those in charge of this railroad were not engaged in the performance of duties to the state incident to the conduct of its penitentiaries and care for its convicts. Such an argument disregards all distinctions in government. The extent to which it might be carried is well pointed out in the opinion of the Supreme Court of the United States in the case of *South Carolina v. United States*, 199 U. S. 437 [26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737]."

[5-8] Little else need be said. Since, in our view, liability of the state arose out of the facts, we are further of opinion that the action was not barred for the reason that limitation did not begin running in the state's favor until permission to sue it had been granted. *Stanley v. Schwalby*, 85 Tex. 349, 19 S. W. 284; *Whitley v. Patten*, 10 Tex. Civ. App. 83-84, 31 S. W. 60. If, however, it could be said that limitation did begin to run, no good reason occurs why the petition of appellee to the Legislature for the privilege of entering the courts with his cause of action, which under section 57 of article 3 of the Constitution he was required to give advance notice of for 30 days, and which he in fact presented within two years after his rights accrued, did not interrupt it. *Stanley v. Schwalby*, 147 U. S. 517, 13 Sup. Ct. 418, 37 L. Ed. 259. Moreover, no constitutional provision required the state to plead limitation as a defense; hence its Legislature was not without the power, through a measure of the character here involved to waive it, such an act being a forward-looking one, and not therefore under the ban interdicting *ex post facto* and retroactive statutes. *O'Hara v. State*, 112 N. Y. 146, 19 N. E. 659, 2 L. R. A. 603, 8 Am. St. Rep. 726; *Davis v. Dawes*, 4 Watts & S. (Pa.) 40; *Lewis v. Turner*, 40 Ga. 416.

If the state through her Legislature may grant the right to be sued, which has long since been well settled, it is not perceived why she may not also prescribe the conditions on which, and the procedure through which, that may be done. The statute here presented merely adopts an existing and familiar means of carrying out the purposes contemplated. If specific mention thereof had been omitted, leaving nothing but the bare right to sue, the same procedure would nevertheless have necessarily been followed.

No reversible error having been pointed out, all assignments are overruled and the judgment is affirmed.

Affirmed.

ANGELINA & N. R. R. CO. v. RAILROAD  
COMMISSION OF TEXAS.  
(No. 6209.)

(Court of Civil Appeals of Texas. San Antonio. April 30, 1919. Rehearing Denied May 28, 1919.)

1. TRIAL  $\Leftrightarrow$  351(5) — INSTRUCTIONS — ISSUES COVERED IN GENERAL CHARGE.

Refusal to give certain issues to the jury in a special charge is not error, where such issues were sufficiently given in the general charge.

2. RAILROADS  $\Leftrightarrow$  9(2) — STATIONS — SUIT TO ENJOIN RAILROAD COMMISSION — BURDEN OF PROOF.

Under Rev. St. art. 6654, subd. 12, and article 6693, the burden rests upon a railroad company, assailing an order of the Railroad Commission requiring it to maintain a depot at a certain station, to show the unreasonableness of the exercise of the power vested in commission by statute.

3. RAILROADS  $\Leftrightarrow$  225 — OPERATION — ACCOMMODATIONS AND FACILITIES AT STATIONS.

Rev. St. art. 6589, requiring every railroad to erect at every station established by it for the reception and delivery of freight suitable buildings to protect such freight, is mandatory, and to secure compliance therewith it is the duty of the Railroad Commission to order a railroad company which maintains only a shed at a town containing several stores, mills, etc., to erect a depot there, sufficient to handle the freight and passenger traffic.

4. RAILROADS  $\Leftrightarrow$  226 — STATIONS — ENFORCEMENT OF ORDERS OF RAILROAD COMMISSION — EXPENSE TO RAILROAD.

A railroad company cannot evade the statutory duty imposed upon it to erect and maintain suitable depots at each of its stations and entirely ignore public convenience and accommodation, because of increased expense to the company.

5. RAILROADS  $\Leftrightarrow$  226 — POWERS OF RAILROAD COMMISSION — AGENTS AT STATIONS.

The duty imposed upon a railroad by Rev. St. § 6693, to provide and maintain adequate depots at every station for accommodation of passengers and to keep them well lighted and warmed carries with it by necessary implication the furnishing of agents at such stations, and the Railroad Commission has power to secure compliance therewith.

6. RAILROADS  $\Leftrightarrow$  226 — REGULATION — PROVISIONS OF MANDATORY STATUTE — REASONABLENESS OF ORDER.

An order of the Railroad Commission to compel compliance with a mandatory statute requiring the erection of suitable depot buildings at stations is not subject to a test of reasonableness; the only question of reasonableness possible being as to the kind of buildings required to be built.

Appeal from District Court, Travis County; George Calhoun, Judge.

Suit by the Angelina & Neches River Railroad Company against the Railroad Commission of Texas to set aside a certain order of the Commission. A temporary writ of injunction was applied for by the Railroad Company and granted. From an order dissolving the writ of injunction, the Railroad Company appeals. Affirmed.

Mantooth & Collins, of Lufkin, for appellant.

C. M. Cureton, W. J. Townsend, and John L. Peeler, all of Austin, for appellee.

FLY, C. J. In this suit appellant seeks to cancel and annul an order requiring appellant to provide and maintain at Etolle, a station on its line, an adequate and sufficient passenger and freight depot facilities, and to place an agent in charge thereof to accommodate the traveling public and freight going from and arriving at the station, and requiring appellant to furnish plans and specifications, within 20 days from date of the order, to appellee. A temporary writ of injunction was applied for and granted. The cause was tried by jury upon special issues, and the temporary writ of injunction was dissolved, and judgment rendered requiring appellant to comply with the order of the Railroad Commission of Texas.

The court submitted the cause to the jury on two issues: First, as to whether the requirement by appellee was unjust and unreasonable; second, as to whether the requirement of the order that an agent should be kept at such station was unjust and unreasonable. Both issues were answered in the negative. We conclude that the evidence fully sustains the answers of the jury.

The fourth and eighth assignments of error are grouped; the fourth complaining of a charge to the effect that the statutes of Texas make it the duty of each and every railroad to provide and maintain adequate, comfortable, and clean depots and depot buildings at its several stations for the accommodation of passengers and freight; the eighth complaining of the refusal of a special charge which in effect took the case from the jury in requiring a verdict for appellant because the order of appellee is in contravention of the federal and state Constitutions, in that it took appellant's property and applied it "to public and private use without just compensation." It is questionable whether the two assignments are properly mated and joined together, a twain correctly made one; however, they will be considered.

In article 6654, subd. 12, Revised Statutes, it is provided that it shall be the duty of each and every railroad to—

"provide and maintain adequate, comfortable and clean depots and depot buildings at its sev-

eral stations for the accommodation of passengers; and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads."

The same provisions are made in article 6693, with the addition of a requirement that separate apartments be kept and maintained for the use of white and negro passengers. The charge of which complaint is made is couched in the language of the statute, and appellant complains that the statutory requirements, which the court was placing before the jury should have been burdened with conditions about the revenues of the railroad during its existence as a common carrier, and that appellant was entitled "to a reasonable and just compensation for services rendered and a return on its investment made and money expended in carrying on the business, as in the absence of such consideration the orders of the railway company would be unjust and unreasonable." The court correctly instructed the jury as to the statutory duties of railroad companies in connection with depot buildings, and then in a succeeding paragraph of the charge the jury were instructed:

"The statutes of this state provide that, if any railroad within this state shall be dissatisfied with any order or regulation made by the Railroad Commission of Texas, such railroad, so dissatisfied, may enjoin the enforcement of such order of the Railroad Commission, provided such railroad company can show by clear and satisfactory evidence that such order of the Railroad Commission is unreasonable and unjust to such railroad company."

This is the law of Texas, and appellant feels aggrieved because it was not ignored and a rule in defiance of it given to the jury, placing the burden on appellee to prove matters not required by the statute.

[1] The issues sought to be submitted by appellant in its fourth special charge were given clearly and succinctly by the court in the general charge, and a reiteration of them could not have been productive of good to any one. No valid reason is offered as to why it could be error to refuse to duplicate the giving of the issues to the jury, and the propositions offered under the two assignments, named the "first assignment of error," do not seem to logically arise from the matter contained in the assignments of error, and are far-fetched, and not germane. In the first proposition is the complaint that the court should not have submitted the issue of the reasonableness and justness of the order to the jury, and that under an assignment which assailed the action of the court in refusing a special charge which sought to have the question of reasonableness and un-

justness of the order resubmitted to the jury. The assignment is overruled.

Appellant claims that it was an issue as to whether the courts are bound to accept as final the determination of the Railroad Commission that there is a public necessity for a station at Etolle. There was no such issue raised in this case, although it should have been; for, if any such issue had been sustained, appellant would not be appealing from a judgment based on the verdict of a jury, but from one of dismissal of the cause of action. There was but one, if any, issue to go to a jury, and that is: Was the order of the commission, under the facts, reasonable and just? The jury, under sufficient and competent facts, have answered the issue in the affirmative.

[2] The question of reasonableness of accommodations for passengers and freight at stations is lodged primarily with the Railroad Commission, and when an action by that tribunal is assailed, the burden rests upon the assailant to show the unreasonableness of the exercise of the power vested in it by the statutes, which imperatively demand the erection of depots at stations. The orders of the commission along the lines and within the bounds of the statutes must be deemed just and reasonable and proper until the improvements demanded are shown, by clear and satisfactory evidence, to be unjust and unreasonable. Etolle is admitted by appellant to be a station on its line of railway, and it is uncontroverted that it has no facilities for protecting or taking care of passengers who may embark or disembark there, and that its little shed is utterly incapable of protecting freight from the weather or from "thieves that break through and steal." It had made no effort to comply with the laws of the state in regard to stations. Those laws have met the approval of England and America for many years, and they are sanctioned and fashioned by the requirements of the common law. There was no testimony tending to show that any costly or extravagant improvements had been demanded by appellee, but simply "an adequate and sufficient passenger and freight depot building and depot facilities and install and maintain at said station an agent for the proper accommodation of the traveling public and business of said station as required by law." Appellant does not want to build any depot, however humble it might be, nor furnish any agent, however cheap and inefficient he might be. It simply refuses to obey any part of the order, and is claiming that it is utterly unreasonable to require it to have any place at Etolle, one of its stations, to shelter its passengers from inclement weather or protect its freight, or to have an agent to sell tickets or give bills of lading or receive freight. If it should entail a loss for the time being to make the improvements de-

sired, that would not be proof of the unreasonableness of the order. Most improvements of new enterprises are at first liabilities rather than assets and out of proportion to the income, but it must be taken into consideration that improvements will usually bring an increase of patronage and eventually pay for themselves. Again, the rights of the people that spoke the corporation into existence are superior to those of its creature, and an inability to give service would not be an argument in favor of not compelling it to obey the law, but rather an argument in favor of ending its existence or placing it in the hands of a receiver. However, the comparatively small sum that will probably be required to build a depot building as ordered by the appellee cannot affect the solvency of appellant.

[3] In article 6589, formerly article 4519, every railroad company is required to—

“erect at each and every depot, station or place established by such company for the reception and delivery of freight, suitable buildings or inclosures to protect produce, goods, wares and merchandise and freight of every description from damage by exposure to the weather, stock or otherwise. \* \* \*

In *R. R. Comm. v. Railway*, 102 Tex. 398, 117 S. W. 794, it is held:

“‘Stations,’ as here meant, are the places at which passengers and property are received for transportation, or delivered after transportation.”

Etoile was voluntarily established by appellant as a station, as defined by the Supreme Court, and the law made it the imperative duty of appellant to build a depot and furnish accommodations for passengers and freight. It was not incumbent upon it to establish a station there, perhaps, but, when it did so, it should be compelled to furnish the statutory accommodations. The evidence shows that Etoile is a town with five or six stores, a telephone exchange, post office, two gristmills, schoolhouse, gin and saw mill and two systems of telephones. The requirement of the statute that a depot building should be erected at such a place is mandatory, and it was the duty of the Railroad Commission in compliance with law to order appellant to perform its statutory duty. It might as well be contended that it would be unreasonable to keep its roadbed so trains could run over it, or to have headlights on its engines, as to claim that it is unreasonable to require, not a certain kind of depot, but any depot at an established station where there was passenger and freight traffic. The question presented in this case is not one of general rules and regulations, promulgated by the Railroad Commission, but an order applying to a single railroad under a certain state of facts. In the first the reasonableness of the general rules, not depending upon

facts, would be a matter of law to be determined by the court, as held by the Supreme Court in *Austin v. Cemetery Association*, 87 Tex. 338, 28 S. W. 528, 47 Am. St. Rep. 114, and by the Court of Civil Appeals in *Railroad Commission v. Railway*, 16 Tex. Civ. App. 129, 40 S. W. 526, 1052. If, however, as contended by appellant, the reasonableness of the order should have been determined by the court, appellant is in no position to complain because it sought in every way it could to have the question submitted to the jury, and if that question had not been submitted, there was no question to go to the jury, and an instructed verdict would have followed. We are of opinion that even the issue of reasonableness of the order did not arise.

[4] It was a statutory exercise of power to require the erection of the necessary improvements to accommodate the passengers, whether numerous or few, who responded to the invitation of appellant to enter and leave the train at Etoile. As said in the cited case of *Railroad Commission v. Railway*:

“The railroad companies have never urged, nor can they successfully urge, that they should not be required to transport in carload lots because the delay and switching of the car at point of destination or having it unloaded there will result in inconvenience and expense to the company. The interest of the public requires of the railway companies that they shall maintain their tracks and rolling stock in a reasonably safe condition, and that they shall offer to the public adequate and proper facilities for transportation, and they are required, in the pursuit of diligence and care, to do many other things. All of these duties occasion an expense to the railway companies. Without doing these things and performing these duties the railway companies could possibly operate their roads at a less cost and expense, but in this age it is not seriously contended that the extra cost and expense connected with the observance of these duties \* \* \* will excuse the roads from performing them. In the performance of these duties it is difficult to determine the extent of the benefits to result to the public, but in a general way it must be admitted that to some extent it exists, but the difficulty lies in ascertaining the extent of it and measuring it. But the recognition of the existence of some appreciable benefit to result to the public from the performance of many of these duties removes the only obstacle in the way requiring their performance. The moment it is admitted that the public interest requires the service, the railway company must stand ready to perform it; and the fact that this may occasion a reasonable cost and expense will not relieve the railway from its duty.”

A writ of error was refused in that case.

In this case, unlike that from which we have quoted, the public convenience and accommodation is ignored, and an evasion of statutory duty is sought to be excused by a plea of expense to the railway company. There may not be many passengers who seek

to embark or disembark at Etoile, but they have the same protection extended to them by a mandatory statute as those at a place where hundreds daily board the trains, and a corporation will not be permitted to violate a positive statute and put dollars at a higher premium than human comfort, health, and safety. The public has some rights to guard and protect while we are protecting the bank account of the corporation. If appellant has reaped a revenue of only \$62.32 a month during a period of dire drouth and failure of crops from the station at Etoile, it may be that better service will increase the revenue, by increasing patronage. There is no evidence, as claimed, that the revenue at Etoile will decrease in the future. The Railroad Commission heard the evidence of appellant as to the reasonableness of its order, the district court and jury heard that evidence, and both tribunals have declared the order reasonable and just, and no valid reasons have been offered in this court to justify a setting aside of the order.

[5] While the statutes bearing on railroads do not in terms require agents to be furnished at railway stations and do not in terms authorize the Railroad Commission to make such appointment, it becomes a duty, and such authority arises by imperative implication from the many duties placed upon railway companies and the authority given the Railroad Commission to enforce compliance with such duties. The statutes require that freight shall be delivered to the owner, agent, or consignee, that baggage shall be checked when taken for transportation "by the agent or servant of such corporation"; that they shall erect suitable buildings at stations for the protection of passengers and freight, and shall keep depots or passenger houses lighted and warmed and open to egress and ingress of all passengers for an hour before the arrival and after the departure of trains, and other duties which cannot be performed without the presence of an agent or servant. The Railroad Commission is given special and plenary power, not hampered as in the fixing of rates by the reasonableness of them, to require compliance with the terms of article 6693 as to providing and maintaining "adequate, comfortable and clean depots and depot buildings at their several stations for the accommodation of passengers, and to keep said depot buildings well lighted and warmed for \* \* \* the accommodation of the traveling public." The depot buildings could not be automatically lighted and warmed, but the presence of an agent or servant would necessarily be required to perform those duties. The authority to require compliance with the statute would be futile and vain if it did not carry with it the authority to require the presence of such agent or servant. All reasonable canons of interpretation and construction would necessarily involve such authority. A statute

should not be enlarged by implication unless it is necessary to make it accomplish the design for which it was enacted. But, if that be necessary, the implication will be indulged in. *Yatter v. Smilie*, 72 Vt. 349, 47 Atl. 1070; *Lewis-Sutherland Stat. Cons.* §§ 500-508. As said in the section last quoted:

"Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted."

See, also, sections 510 and 511, same textbook.

The same subject has been treated and the same rules enunciated in Texas. In the case of *Callaghan v. McGown*, 90 S. W. 319, this court held:

"The proposition under the fourth assignment that, 'where the statute fails to confer on the officer sufficient powers to perform all necessary functions incident to the public service, and his partial exercise of authority will only serve to confuse and confound the government, no effect will be given to the law, and it will be treated as nugatory,' is not supported in appellants' brief by citation of authorities, and none can be found to sustain it. On the contrary, the rule is that, whenever a power is given or a duty is imposed by statute, everything necessary to make that power effectual or essential to the performance of the duty is conferred by implication upon the person or body given the power or charged with the performance of the duty in the absence of express authority"—citing *Mayor v. Sands*, 105 N. Y. 210, 11 N. E. 820.

In the case of *Brown v. Clark*, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670, it was held:

"It is elementary that the grant of specific power, or the imposition of a definite duty upon any person or court, confers by implication the authority to do whatever may be necessary in order to execute the power conferred or to perform the duty imposed, and the implied power is as much a part of the statute as if it were written into the body of the act itself."

To the same effect is *Spence v. Fenchler*, 107 Tex. 443, 180 S. W. 597.

The subject is thus treated in *Elliott on Railroads*, § 635:

"A Railroad Commission, although it is a statutory tribunal, with naked statutory powers, necessarily possesses some incidental or implied powers such as by necessary implication result from the principal powers granted by the statute creating the commission."

[6] It must be kept in mind that appellee did not seek to name a place where a station should be established; for appellant

had already established it. All that appellee sought to do was to compel obedience to a mandatory statute which commanded appellant to build a suitable house to accommodate its passenger and freight traffic at Etoile. There was nothing unreasonable or unjust in a request that appellant should obey the laws of the state which created it; such laws being read into and becoming a part of the instrument that gave it existence—its charter.

The court did not err in refusing the special charge numbered 1 asked by appellant. The statute required the depot to be erected at the station at Etoile, which had been established by appellant, and the appellee had ordered it built as required by statute. Appellant got all it was entitled to when it had the reasonableness and justice of its being compelled to obey the law of the state submitted to a jury, and it had no right to ask that its obedience to law should be contingent on whether it was making money. No such condition or contingency appears in the statute, no more than in any other statute, federal or state, requiring the performance of certain duties. It could dispense with automatic couplers, or grabirons, handholds, foot stirrups, or sidings or spur tracks, or locomotive driving wheel brakes or drawbars, or separate apartments for the races, or any other appliance required, on the plea that it was not making money. The authorities cited by appellant do not sustain its contentions. No constitutional, no equitable right is sought to be taken from appellant, but it is merely asked to obey the laws of the state under which it is operating.

The evidence indicates that appellant conducted its business in a slipshod manner, with little regard to the accommodation of the people residing along or in the vicinity of its line, and is being run in the interest of a lumber company whose stockholders and directors are the stockholders and directors of the railroad company. It is a fair deduction from the testimony that the road was built to enhance the value of the property of the lumber company, and inure to its benefit, regardless of the rights of those who lived along the line or in the country tributary to it.

However, we are of the opinion, as hereinbefore indicated, that the court would have been justified in dismissing the suit or instructing a verdict for appellee, because under a mandatory statute requiring the erection of suitable depot buildings at stations the order to comply with that law was not subject to a test of reasonableness, and the only question as to the reasonableness and justice of the order of the Railroad Commission could arise as to the kind of buildings required to be built. The plans of the building have never been submitted to appellee,

and no order has been issued requiring the building of improvements costing any certain sum. An adequate building might cost \$100, \$250, or \$500, but no order has been made fixing the cost.

The judgment is affirmed.

PIERCE-FORDICE OIL ASS'N v. BRADING. (No. 8945.)

(Court of Civil Appeals of Texas. Ft. Worth, Feb. 22, 1919. On Motion for Rehearing, April 5, 1919.)

1. MASTER AND SERVANT  $\S$  305 — LIABILITY FOR SERVANT'S TORT—DEVIATION.

If a servant's deviation from his instructions amounts to an entire abandonment of the service, the master is not liable for injuries by the servant during such deviation; but if the deviation is a mere incident to a duty of the service, and after termination of it authorized service is resumed, the master is liable.

2. MASTER AND SERVANT  $\S$  302(6) — LIABILITY FOR TORT OF SERVANT—DEVIATION.

Where local manager of company started on trip to post office in company's automobile with another employé to mail report to company, a duty of his employment, and, after making a stop on the other employé's personal business, started to go on, and negligently injured a pedestrian, the company was liable, though, after mailing the report, he intended to journey on to his home, and though the use of the automobile was after business hours.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Action by J. A. Brading against the Pierce-Fordice Oil Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin, Bullington, Boone & Humphrey, of Wichita Falls, for appellant.

Weeks & Weeks and R. P. Mathis, all of Wichita Falls, for appellee.

DUNKLIN, J. J. A. Brading was run over and injured by an automobile in Wichita Falls driven by J. E. Ward, an employé of the Pierce-Fordice Oil Association, and recovered a judgment against the association for damages by reason of such injury, from which judgment the association has prosecuted this appeal.

The defendant association was engaged in selling oil, gasoline, and other products of petroleum in the city of Wichita Falls, where it established a place of business, and J. E. Ward was in general charge of all its business transacted in that city. The association furnished Ward an automobile for use in the discharge of his duties. Appellant maintained a warehouse in Wichita Falls,

of which L. S. Prince was in charge. On the night of December 30, 1916, Prince and Ward worked until about 10 o'clock making up an invoice of the stock of goods belonging to defendant, to be mailed to the company's office at Ft. Worth. It was one of the duties of Prince and Ward to prepare and mail the invoice in time for it to reach the company's office by the end of the month, and about 10 o'clock at night, and as soon as the invoice was finished, they started with it in the automobile for the purpose of going to the post office and there depositing it in the mail, which was later done. A few days prior thereto Prince had left his overcoat upon the train, and a friend who had found it had notified him that it was in the express office at the railway station, and on the trip to the post office Ward stopped the car near the passenger depot in order for Prince to get the coat. The stop was made on what is known as Eighth street, and after Prince alighted from the car Ward drove it through an alley to Ninth street, and there waited for Prince near the edge of the passenger shed. When Prince joined him and got into the car, it became necessary to run the car backward, on account of the proximity of other vehicles waiting at the station. While the car was being run backward, it ran over Brading, who had just stepped off the passenger platform and was out in the street.

The case was tried before a jury, who returned a verdict upon special issues submitted. The findings of the jury, stated in narrative form, were as follows:

(1) At the time plaintiff was struck by the automobile, Ward, in operating the machine, was performing one of his duties as agent for the defendant, and was then using the machine in connection with the defendant's business.

(2) Ward drove the machine backward at an excessive rate of speed, without giving any signal that he was about to do so, and without looking around to observe whether or not there was danger of striking any one with the machine, and in driving the machine backward he drove it in an improper direction.

(3) Such action on the part of Ward constituted negligence.

(4) And such negligence was the proximate cause of plaintiff's injury.

(5) Plaintiff did not know that the automobile was about to be run backward. He used ordinary care to see and hear the machine, but did not see or hear it as it approached him, and he could not by the exercise of ordinary care have foreseen that the automobile was going to be run backward at the time and in the manner it was backed.

(6) Plaintiff was not guilty of any negligence contributing to his injury.

(7) As a result of plaintiff's injury he sustained damages in the sum of \$2,750.

(8) The place where plaintiff was struck by the automobile was customarily used by pedestrians.

The only contention made by appellant, by different assignments of error, briefly stated, is that the evidence showed conclusively that at the time of plaintiff's injury Ward was not engaged in the performance of any of the duties of his employment by the defendant, but was on a private errand of his own and of Prince, and therefore defendant was not liable for his negligence.

The following facts were conclusively established by the proof:

The accident occurred December 30, 1916. On September 1st next preceding that date Ward received from the defendant a written notice reading as follows:

"The use of company cars after working hours, or on Sundays and holidays, is absolutely prohibited, and you are hereby notified that in future you must not under any circumstances use company cars except during business hours in the transaction of company business. \* \* \* When the trucks or automobiles are not in actual service transacting company business, they must be kept in the company garage at our plant, and under no circumstances used by you personally, or any of our employees at your agency."

Contrary to said instructions, Ward did not keep the car in defendant's garage, but kept it at his home at night and at all other times when it was not in use. He used it in the discharge of the duties of his employment at all times, but he rode in it from his home to his place of business every morning, back to his home for dinner at noon hour, from there to his business in the afternoon, and again to his home at night. He also used it in carrying the company's mail to the post office. He lived about six blocks from his place of business. He was in general charge of defendant's business in Wichita Falls. No objection was ever made by the company to the violation of its written instructions with respect to the use of the machine, although he testified that he did not know whether or not the company was informed of such violation; neither did any other witness testify that such knowledge was conveyed to defendant's officers in Ft. Worth.

There may have been another route from the warehouse to the post office a little more direct than the route pursued on the night of the accident, which was by way of the railway station; but, if there was any difference, it was very slight. After depositing the invoice in the post office, Ward drove the automobile to his home, and there kept it for the night. When he left the warehouse, he intended to go to his home after he had mailed the invoice at the post office.

Appellant insists that it was not liable for Ward's negligence, which resulted in



plaintiff's injury, first, because the use of the automobile to go to the post office was incidental only to Ward's trip home, which was clearly forbidden by his employer, who also forbade him the use of the car after business hours or for the convenience of any other employé; second, because, even though it should be said that the trip to the post office was within the scope of Ward's employment, yet the stopping of the car at the railway station for the accommodation of Prince alone, and not in furtherance of the interests of the company, was such a turning aside and deviation from the duties of his employment as to excuse appellant from liability for such negligence.

In support of the first proposition the following are some of the authorities cited by appellant: *Keck's Adm'r v. Louisville Gas & Elec. Co.*, 179 Ky. 314, 200 S. W. 452, L. R. A. 1918C, 654; *St. L., I. M. & S. Ry. Co. v. Robinson*, 117 Ark. 37, 173 S. W. 822; *Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790; *Eakin's Adm'r v. Anderson*, 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731. In support of the second proposition, above stated among others, the following authorities are cited by appellant: *G., H. & S. A. Ry. Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367; *Hill v. Staats*, 187 S. W. 1039; *Id.* 189 S. W. 85; *Butler v. Gulf Pipe Line Co.*, 144 S. W. 340; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

Many of the authorities noted, as well as others, are cited in support of both propositions. We shall not undertake to review the authorities at length, as we believe most of them, to say the least, are distinguishable from the present case by reason of a difference in the facts. While in all of the cases cited the master was held not liable for the injury inflicted through the negligence of the servant, yet in many of them the trip, during which the injury complained of was inflicted, was made wholly for the convenience of the servant, and was in no manner connected with the business of the master. In some of the other cases there was a clear deviation from the duties of the servant, during which deviation the injury was inflicted. In the case of *Railway Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, our Supreme Court held that the railway company was not liable for the death of one of its employés, caused by having compressed air turned on him by another employé as a practical joke, while using such air in discharging the duties of his employment. In the course of the opinion in that

case, after reviewing many authorities, the following is said:

"It is in cases of the character supposed, where there has been a mingling of personal motive or purpose of the servant with the doing of his work for his employer, that much of the difficulty and conflict of opinion have arisen in determining whether or not the wrong committed should be ascribed to the master, or be regarded as the personal tort of the servant alone. It is now settled, in this state, at least, that the presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty and in the prosecution of the master's work. But when he goes entirely aside from his work, and engages in the doing of an act not in furtherance of the master's business, but to accomplish some purpose of his own, there is no principle which charges the master with responsibility for such action."

In the case of *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236, by the Kansas City Court of Appeals of Missouri, Presiding Justice Ellison has given an extended and interesting review of the authorities bearing upon similar cases to the present suit. It was held in that suit that the owner of an automobile could not escape liability for an injury inflicted through the negligence of his chauffeur merely because at the time of the injury the servant had deviated from the instructions of the master, if it could be said that at the time of the injury the servant was in the performance of duties in the scope of his employment. In the course of the opinion the following is quoted with approval from *Ritchie v. Waller*, 68 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361:

"If the servant in going extra viam is really engaged in the execution of the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own. Thus in *Patten v. Rea*, 2 Com. Bench (N. S.) 605, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor, he negligently drove against a horse and killed it, and the master was held responsible."

To the same effect are many other authorities cited in the same case.

[1, 2] According to the weight of the authorities, as we construe them, the test of liability of the master for an injury inflicted through negligence of his servant, while he is acting contrary to the master's instructions, is to be determined as follows: If the deviation from such instructions amounts to an entire abandonment of the master's service, then the master is not liable; but if such deviation is a mere incident to the discharge of a duty which the servant is performing at the time such departure occurs, and after the termination of which authorized service

is resumed, then the master is liable. To excuse the master under the circumstances last instanced would be, as said by Presiding Justice Ellison in *Whimster v. Holmes*—

"little short of a statement that so long as an employé keeps within the orders of his employer he is in line of his employment, but so soon as he violates an order he is out of it. That would come near meaning that no liability would be incurred by an employer for the wrong of his servant, unless he ordered him to commit the wrong."

And applying that reasoning to the facts of that case, the court continued as follows:

"It was a part of the chauffeur's service to take the machine home, and that he was slow about it, or went in indirect ways, does not alter the matter so long as he was in pursuit of that object."

So, in the present suit, the trip of Ward to the post office in the automobile to mail the report to his superior officers in Ft. Worth was one of the duties of his employment, and he was resuming that journey after the temporary stop at the railway station when he ran the machine over the plaintiff. Hence it cannot be said that the operation of the machine at the time of the injury was a departure from and an abandonment of the master's service.

Under the varying facts of different cases it is not always easy to determine whether a certain departure by the servant from instructions of his master, resulting in injury to another, amounts to such an abandonment of the service as to excuse the master from liability, or is merely an incident to the performance of an authorized service rendering the master liable. And this difficulty, rather than a difference of view as to the controlling principle involved, seems to be the occasion for apparently conflicting decisions in reported cases.

We conclude, further, that Ward's intention to continue his journey to his home in the automobile after mailing the papers at the post office did not fix and determine the legal character of his entire trip after leaving the warehouse as a trip exclusively for his own convenience, and not in the interest of the company, as insisted by appellant. And we overrule the further contention that the use of the automobile after 10 o'clock at night was a use after business hours, and therefore prohibited by the defendant in its instructions to Ward. If it was Ward's duty to assist in the preparation and mailing of the invoice during the night of the accident, which appellant does not deny, then we perceive no room for reasonable doubt that the trip was made within business hours, especially in the absence of any proof that the performance of such services at that hour of the night was forbidden by the defendant.

For the reasons stated, all assignments of error are overruled, and the judgment is affirmed.

#### On Motion for Rehearing.

The place where the car was stationed by Ward while waiting for Prince to return with his overcoat was between the alley and the railway station on a vacant plot of ground, and Brading was run over while the car was being run backward from the spot where it stood into the alley, and he was not out in the street when run over. This finding is made to correct the erroneous statement in our opinion on original hearing to the effect that Brading was run over on the street after he stepped from the passenger platform. But that error could have no bearing upon the conclusions reached on original hearing.

With that correction, the motion for rehearing is overruled.

#### IRWIN v. MOORE. (No. 9059.)

(Court of Civil Appeals of Texas. Ft. Worth. March 15, 1919.)

#### 1. APPEAL AND ERROR ⇨927(7)—REVIEW—EVIDENCE ON WHICH VERDICT WAS DIRECTED.

In determining the correctness of peremptory instruction for defendant, the Court of Civil Appeals must give plaintiff's evidence its strongest probative effect.

#### 2. BROKERS ⇨55(1), 56(1)—REALTY BROKER—RIGHT OF OWNER TO SELL.

Where owner of land did not give a broker exclusive right to sell, at any time before the broker procured and presented a purchaser ready, able, and willing to buy on the owner's terms, the owner had a right to sell the land himself or through another agent.

#### 3. BROKERS ⇨56(1)—REALTY BROKER—RIGHT OF OWNER TO SELL.

Where realty broker without exclusive right to sell, on bringing a prospective purchaser to the owner, learned that the owner had agreed to sell through another agent to an unknown party for a certain cash payment down, and had agreed to wait until the evening for the cash, but promised to sell to the broker's client if such cash payment was not made, the owner, despite his promise, had a right when the other party returned without the cash to accept a written contract and sell to them.

Appeal from Somervell County Court; S. G. Tankersley, Judge.

Suit by O. B. Irwin against T. W. (Buck) Moore. From judgment for defendant, plaintiff appeals. Affirmed.

Levi Herring and C. D. Spann, both of Glen Rose, for appellant.

E. A. Rice and F. E. Johnson, both of Cleburne, for appellee.

BUCK, J. Plaintiff, C. B. Irwin, sued T. W. (Buck) Moore for agent's commission in the sum of \$187.50, being 5 per cent. of \$3,750, the selling price of, and the price which plaintiff claimed defendant had agreed to take for, his 100-acre farm. Plaintiff alleged that defendant had listed the property with plaintiff to sell at the price stated, and that he had found a purchaser ready, willing, and able to buy at the price stated, and upon the terms which defendant agreed he would make to the purchaser. Defendant pleaded by way of general demurrer and general denial, and that he had listed the property with another real estate firm, Roden & Collings, who found a purchaser for defendant before plaintiff brought his client to see defendant. There were other pleas made by defendant not necessary here to mention. The court instructed a verdict for defendant as to plaintiff's claim, and for plaintiff as to defendant's plea in reconvention. Plaintiff has appealed.

[1] In determining the correctness vel non of the peremptory instruction given, it will be necessary for us to consider the proof offered by plaintiff as to his right to recover and to give the strongest probative effect to such evidence. Irwin testified: That during the latter part of August or the first of September, 1917, he had a conversation with defendant relative to selling his 100-acre farm. That defendant stated to him that he would sell the farm for \$3,750, of which amount \$1,750 was to be paid in cash, and the balance in equal annual payments for a period of five years with 10 per cent. interest. That defendant listed the property with plaintiff and agreed to pay him 5 per cent. commission for selling the same. That plaintiff immediately set about to find a purchaser, and after discussing the matter with several parties who were interested and were in the market to buy a farm, and after the negotiations with said parties had failed, about the last of September, 1917, he found one Mr. Coon Woods, who stated that he knew the place well and believed that it was worth the money asked. That a day or two after this first conversation Woods came to plaintiff and asked him if he thought Moore would sell the place with the growing peanut crop; to find out if he would do so and how much he would want for the crop. Plaintiff then saw defendant and told him of the conversation he had had with Mr. Woods, and that he believed Woods would give defendant \$4,500 for the crop and farm. That he (plaintiff) would not charge defendant any commission on the sale of the crop; that all he would expect would be a commission on

the sale of the land. That defendant told plaintiff that he would consider the matter and take it under advisement. That a day or so later Woods came to plaintiff and told him that he had made arrangements to buy the Moore farm and was then ready to do so. That plaintiff and Woods went out to the Moore farm, got out of the car, and walked through the farm in order that Woods might see a "wash" that ran through it. That while going over the place they found a crop of volunteer watermelons, stopped and ate one, and then went on to the house, where they found Mr. Moore, his wife, and another party out at the lot. That he told Moore that he had brought Mr. Woods out to buy his place and to come down in the morning and make him a deed. That Moore replied: "I guess you are too late, as Roden & Collings have just been here and said they had a client they believed would take the place. They stated to me that their client could pay as much as \$1,000 cash. I told them I would not accept that amount. Then they asked me if I would accept \$1,250 as a cash payment. I told them I would not. They wanted to know if I would accept \$1,500 as a cash payment. I told them I would not accept less than \$1,750 as a cash payment, and they stated to me that they would go back to town and see if their client could raise the other \$750, and if he could they would be back by night and bring the money and close the deal." The defendant then stated to Woods: "If they don't come back by night with the money to make the cash payment, I will come to town in the morning and make you a deed, Mr. Woods." That plaintiff then asked Moore what time Roden & Collings were to report, and Moore replied: "By night." That Woods then stated: "Well, Irwin, it will only be fair to give them until night." That plaintiff and Woods then returned to Glen Rose, and that plaintiff went out to the Moore place the following morning about 10 o'clock, as Moore had failed to come to town, as he had agreed on the evening before, and saw Moore and asked him: "Buck, what have you done? Did Roden & Collings bring the money?" That Moore replied: "No; they did not bring the money, but brought a contract for me to sign." That plaintiff then asked Moore if he signed it and Moore replied that he did. That he asked Moore if he knew whom he had sold to, and he said that he did not. There was some further conversation between defendant and plaintiff as to whether one Hubert Thomas was the client of Roden & Collings or not, and plaintiff said that he believed Thomas was the party, and, if he was, that he was one of his clients, as he had been talking to Thomas about the place and he was interested in it. That about a week later plaintiff saw defendant again in Glen Rose and asked him if he had found out to whom he had sold, and de-

fendant replied that he did not know but that he thought it was Hubert Thomas. That plaintiff then replied that he was entitled to his commission. That defendant further said: "Suppose that some one else in the printing office buys the land?" That plaintiff replied: "It makes no difference; I am entitled to my commission." That defendant then said: "I am not going to turn over my deed until this commission proposition is settled."

Woods' testimony in the main coincided with plaintiff's testimony, and he further stated: That he had made arrangements with a banker at Glen Rose to furnish him the sum of money necessary to buy the place, and that he was ready, able, and willing to buy the place, and was so at the time he testified. That, while he was willing to purchase the crop on the place, yet, on the occasion of the conversation with Moore at the latter's home, it was the farm he went out to buy.

The evidence further showed: That in the afternoon of the day when the conversation was had between Irwin and Woods, on the one hand, and Moore, on the other, at the latter's farm, that Roden & Collings returned to the farm and presented a contract of sale for defendant to execute. By the terms of this contract defendant was to receive \$3,750, less \$250 commission, payable to Roden & Collings, \$1,750 in cash and the balance in vendor's lien notes. That defendant was to furnish an abstract showing good title in him and was to have not to exceed 60 days in which to prepare the same. That Roden & Collings and defendant executed this contract. While Roden & Collings were mentioned in this contract as the vendees, the verbiage of the contract disclosed that in so entering into the contract they were acting for an undisclosed client.

[2] There is nothing in the evidence to show that the plaintiff had the exclusive right of sale of the land. It is apparent that defendant, at any time before the plaintiff procured and presented a purchaser ready, able, and willing to buy the land at the price and upon terms satisfactory to defendant, had the right to sell the land himself or through another agent. In fact, in the oral argument it was admitted by counsel for appellant that, if Roden & Collings or their client had returned with the money for the cash payment at any time during the day of the conversation between plaintiff and Woods and the defendant at the horse lot, defendant would have had the right to consummate the deal with Roden & Collings or their client, and that he would not in that event be liable for any commission to plaintiff. But it is urged that, since the cash payment was not

made by Roden & Collings or their client on that day, defendant had no right to extend the time for the cash payment and to enter into the contract of sale above mentioned, and that as defendant had promised, in the event the money was not presented by Roden & Collings on said day, that he would go to Glen Rose on the following day and execute a deed to Woods, plaintiff had fulfilled all the requirements which entitle him to his commission.

[3] We are of the opinion that under the plaintiff's showing defendant was not precluded from closing the deal with Roden & Collings or their client, the negotiations towards which had already begun and obligations arising out of which defendant had already assumed. If Roden & Collings' client had returned that afternoon with the money, it is admitted by appellant that the appellee would have been authorized to have accepted such client's tender, and to have refused to consummate the deal with appellant's client. We think that appellee would have had such right even though the money had not been actually paid by Roden & Collings' client until after the abstract of title had been furnished, the deed executed, and other details of the trade devolving upon appellee had been complied with by him. It can hardly be reasonably said that the evidence cited shows that it was contemplated by the parties that the money should actually pass from Roden & Collings' client to Moore on the day mentioned, but that the prospective purchaser or his agent was to return during the day with assurances satisfactory to Moore that the full cash payment required by the latter was to be paid upon the furnishing of satisfactory evidence of title and the execution of the deed. Moore accepted the written contract of Roden & Collings as satisfactory assurance that the terms demanded by him would be met by them or their client. Therefore we conclude that, so far as Irwin or Woods was concerned, and so far as they had the right to question the finality of the transaction between Moore and Roden & Collings or their client, the deal was consummated on the day specified. For discussion of the principles of law governing agency pertinent to the issues disclosed in this case, see *Edwards v. Pike*, 49 Tex. Civ. App. 30, 107 S. W. 588; *Case Threshing Machine Co. v. Wright Hdw. Co.*, 61 Tex. Civ. App. 481, 130 S. W. 729; *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Mechem on Agency*, vol. 2, §§ 2427 to 2457.

We conclude that the trial court did not err in giving the peremptory instruction, and the judgment is affirmed.

WALKER et al. v. ALEXANDER.  
(No. 8962.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 11, 1919. On Motion for Rehearing, March 1, 1919. On Appellants' Motion for Rehearing, May 10, 1919.)

## 1. INTEREST §18(2)—REAL ESTATE COMMISSIONS—"OPEN ACCOUNT."

Suit to recover real estate sale commissions is not one upon an "open account," within Vernon's Sayles' Ann. Civ. St. 1914, art. 4978, allowing interest on such accounts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Open Account.]

## 2. INTEREST §1—RECOVERABLE.

Interest, as such, cannot be recovered upon fixed amount due under express parol contract, but is recoverable only as damages.

## 3. APPEAL AND ERROR §58—JURISDICTION—AMOUNT IN CONTROVERSY—INTEREST AS DAMAGES.

Vernon's Sayles' Ann. Civ. St. 1914, art. 1589, subd. 3, giving Court of Civil Appeals appellate jurisdiction in certain cases where amount exceeds \$100, exclusive of interest and costs, applies to a real estate commission claim of \$100 and interest, since interest is recoverable as damages, and not strictly as interest.

## 4. STATUTES §267(2)—RETROACTIVE CONSTRUCTION—RULES OF EVIDENCE—PENDING ACTIONS.

Ordinarily, a statutory amendment affecting admissibility of evidence or probative effect of pleadings, affidavits, etc., affects suits pending at time of amendment, as well as suits filed thereafter.

On Motion for Rehearing.

## 5. STATUTES §267(2)—CONSTRUCTION—VENUE.

Acts 35th Leg. c. 176 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1903), making a verified plea of privilege prima facie proof of defendant's right to change of venue, applies to pending actions, as well as those thereafter instituted.

## 6. APPEAL AND ERROR §907(3)—FAILURE TO MAKE STATEMENT OF FACTS—PRESUMPTIONS.

Where no statement of facts accompanies record, trial court's finding that services were performed in a certain county is conclusive upon appeal.

## 7. VENUE §7—SUITS TO RECOVER FOR LABOR—COMMISSIONS—"LABOR."

Vernon's Sayles' Ann. Civ. St. 1914, art. 2308, subd. 4, as amended June 19, 1917 (Acts 35th Leg. c. 124), fixing venue of suits to recover for "labor" actually performed, applies to suit seeking recovery of commissions for selling real estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Labor.]

## 8. STATUTES §267(2)—CONSTRUCTION—PENDING ACTIONS—VENUE—"MAINTAINED."

Amendment of June 19, 1917 (Acts 35th Leg. c. 124), to Vernon's Sayles' Ann. Civ. St. 1914, art. 2308, subd. 4, providing that suits for labor performed may be "maintained" where such labor was performed, applies to cases pending then in county where services were performed, since "maintained" refers to cases already in existence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintain.]

## 9. APPEAL AND ERROR §1175(4)—DISPOSITION OF CASE—ENTERING JUDGMENT.

Where Court of Civil Appeals reverses sustaining of plea of privilege by defendant, which is only point that prevented recovery by plaintiffs, judgment will be rendered for plaintiffs in appellate court.

Buck, J., dissenting on rehearing.

Appeal from Jones County Court; J. F. Lindsey, Judge.

Suit by F. I. Walker and others against W. J. Alexander. From a judgment sustaining defendant's plea of privilege, plaintiffs appeal. Reversed, and judgment rendered for plaintiffs.

Joe C. Randel, of Hamlin, for appellants.  
Walter S. Pope, of Anson, for appellee.

BUCK, J. This is an appeal from a judgment of the county court sustaining defendant's plea of privilege to be sued in the county of his residence. Plaintiffs filed suit in the justice court, as shown by the citation, to recover against defendant the sum of \$100, alleged to be due in the way of a commission for procuring a purchaser for the sale of land belonging to defendant, and which had been placed in their hands for sale. Plaintiffs alleged the agreement on the part of defendant to pay plaintiffs for their services the specified amount of \$100. In the judgment in the justice court it is stated that the suit was for "commission of \$100 of date due, interest for \$1.00, total amount of damages \$101.00." Defendant's plea of privilege to be sued in the county of his residence was overruled in the justice court. Plaintiffs recovered in the justice court, and on appeal to the county court defendant again interposed his plea of privilege, which was sustained. In the county court, by oral pleadings, plaintiffs sued upon an express contract on the part of the defendant to pay them \$100 to procure a purchaser for said land, and they alleged they had found such purchaser, who was able, ready, and willing to purchase said land upon terms satisfactory to defendant, and that said purchaser and defendant entered into a written contract of purchase, and that defendant failed

to do the things required of him by the written contract, and that the prospective purchaser did not buy the land because of such failure. Plaintiffs sought to recover judgment for \$100, principal, and interest at 6 per cent. from May 16, 1916, in the total sum of \$108.

[1-3] At the threshold of the consideration of this appeal we are confronted with the question of the jurisdiction of this court. Article 1589, subd. 3, of Vernon's Sayles' Texas Civil Statutes, provides that the appellate jurisdiction of Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts, "of which the county court has appellate jurisdiction, when the judgment, or amount in controversy, or the judgment rendered, shall exceed one hundred dollars, exclusive of interest and costs." See *Ray v. S. A. & A. P. Ry. Co.*, 18 Tex. Civ. App. 665, 45 S. W. 479; *Green et al. v. Warren et al.*, 18 Tex. Civ. App. 548, 45 S. W. 608.

"Interest" is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money." Article 4973, Vernon's Sayles' Revised Statutes.

"Legal interest" is that interest which is allowed by law when the parties to a contract have not agreed upon any particular rate of interest." Article 4974, Vernon's Sayles' Revised Statutes.

Article 4977, Id., provides:

"On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties to the contract, interest shall be allowed at the rate of six per cent. per annum from and after the time when the sum is due and payable."

Article 4978, Id., provides that 6 per cent. interest shall be allowed on all open accounts from the 1st day of January after the same are made. This cannot be held to be a suit on "open account." *Wroten Grain & Lumber Co. v. Mineola Box Mfg. Co.*, 95 S. W. 744. There seems to be no statutory provision for interest upon a fixed amount due under an express parcel contract, and therefore interest *eo nomine* would not be recoverable as interest, but might be recoverable by way of damages. Interest by way of damages, while not an incident of debt, is allowed as a punishment for some fraud, delinquency, or injustice of debtor, or for some injury done by him to his creditors. *Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. 666; *Railway Company v. Jackson*, 62 Tex. 209; *Fowler v. Davenport*, 21 Tex. 626, 635; *Close v. Fields*, 13 Tex. 623.

In *Heidenheimer v. Ellis*, *supra*, the court said:

"It is frequently said in the decisions of the courts that interest is the creation of the statute. In a certain sense this is true, but as ap-

plied to one class of cases the phrase is misleading. Interest cannot be allowed *eo nomine*, unless expressly provided for by statute; but in many instances it may be assessed as damages when necessary to indemnify a party for an injury inflicted by his adversary, though the statute be silent upon the subject."

In *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11, it is said:

"Interest as damages may be allowed upon unliquidated demands whether they arise out of a breach of contract or out of a tort. *Sedgwick on Damages*, vol. 1, § 320. \* \* \* It has been generally held by the courts that the jury may allow interest upon damages arising out of the breach of a contract made by a carrier for the carriage and delivery of goods. \* \* \* Also upon damages arising from the breach of a contract for the sale and delivery of specific articles and for the breach of a contract of warranty of personal property. \* \* \* If one takes possession of the horse of another and withholds it from the owner, compensation for the value of the use of the horse during the time is a legal right, and no court would hesitate to instruct the jury to so find, and we can see no difference between the right to be compensated for detaining a horse worth \$100 and the right to be compensated for the detention of \$100, the value of the horse, in case he was killed or converted to the use of the taker."

From the above authorities, and others which might be cited, we are of the opinion that, if interest is recoverable in this case, it is not as an incident of the debt, interest *eo nomine*, but interest in the way of damages. If this conclusion be sound, and we think it is, the amount in controversy exceeded \$100, and this court has jurisdiction to entertain the appeal.

[4, 5] Defendant's plea of privilege to be sued in the county of his residence was in writing and duly verified, as was plaintiffs' controverting answer. Neither party offered further evidence upon the question of plea of privilege, and the court sustained said plea. It is provided by Acts 35th Leg. (1917) p. 388 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1903), amending article 1903 of the Revised Statutes, that a plea of privilege to be sued in the county of one's residence and containing the statutory requirements shall be sufficient if it be in writing and sworn to, and that when such a plea is filed it shall be *prima facie* proof of the defendant's right to change of venue. Said article, as amended, further provided that upon the filing of such controverting plea the court shall give a hearing upon the issue made.

As was said in *R. L. Ray et al. v. W. W. Kimball Co.*, 207 S. W. 351, recently decided by this court:

"The issue having been joined by the sworn pleas of defendants and plaintiff, the duty of the court to hear such issue is invoked. If no evidence is introduced to show that the facts alleged in the controverting plea are true, then

the court is required to sustain the plea of privilege."

Again it is said in the same case:

"The statute above noted makes the sworn plea of the defendants prima facie proof of the right to a change of venue, but does not make the controverting affidavit of plaintiff proof of anything."

Hence, if article 1903, as amended, applies, the court properly sustained the plea. But appellants urge that, under the article before the amendment, the burden of proof was on the defendant interposing the plea to establish the allegations therein contained, and that under the former statute the sworn plea did not constitute prima facie proof, or any kind of proof, of the truth of the allegations; that under the statute before amendment the filing of a sworn plea of privilege merely presented the issue. Appellants further aver that this suit is shown to have been filed February 10, 1916; the plea of privilege was filed in the justice court March 20, and overruled May 18, 1916, while the amended statute took effect July 1, 1917. The case was tried in the county court October 3, 1917. Article 2306, subd. 4, Vernon's Sayles' Texas Civil Statutes, was amended by the Thirty-Fifth Legislature (chapter 124); said amendment taking effect ninety days after adjournment, June 19, 1917. The section as amended reads as follows; the amendatory words being here written in italics:

"Suits upon a contract in writing, promising performance at any particular place, may be brought in the county and precinct in which such contract was to be performed: *Provided that in all suits to recover for labor actually performed, suit may be brought and maintained, where such labor is performed, whether the contract for same be oral or in writing.*"

Appellants claim venue of this suit in Jones county by reason of the amendment above set out, and cite such cases as *H. & T. C. Ry. Co. v. Graves*, 50 Tex. 181, *Texas Midland Ry. Co. v. S. W. Tel. & Tel. Co.*, 24 Tex. Civ. App. 198, 58 S. W. 152, *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 48 S. W. 931-1063, 93 Tex. 668, *Odum v. Garner*, 86 Tex. 374, 25 S. W. 18, and *McCutcheon v. Smith*, 194 S. W. 831, as supporting the contention that venue of this suit was fixed in Jones county by the amendment above quoted. Appellee cites such cases as *Baines v. Jemison*, 86 Tex. 118, 23 S. W. 639, as sustaining his contention that the amendatory act should not be given a retroactive effect so as to change the venue of pending cases. But we are not called upon in this appeal to determine the question as to whether or not the venue of the case might legally be fixed in Jones county. In the consideration of the case we do not get to the question as to whether the amendment to article 2306, su-

pra, should be held applicable to suits pending at the time of its passage, for we must first decide whether or not the court properly gave effect to the amendment to article 1903 (Acts 35th Leg. p. 338) by the terms of which the plea of privilege, duly verified, is made prima facie proof of defendant's right to change of venue. The record fails to disclose that plaintiffs offered any evidence that they had performed in Jones county the services for which they sought recovery. There is no evidence to overcome the prima facie proof made by defendant's plea of privilege.

In 86 Cyc. p. 1217, d (111), it is said:

"Rules of evidence are at all times subject to modification by the Legislature, and statutes making such changes are applicable from their passage, not only to causes of action arising thereafter, but also to actions accrued or pending at the time. Where, however, it was clearly the intention of the Legislature not to make the act retrospective, or, as in the case of evidence in criminal prosecutions, a retrospective construction would render the statute unconstitutional, it will be given only a prospective operation."

In *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265, it is said:

"It is fundamental that a person has no vested right to have a controversy determined by existing rules of evidence. Like other rules affecting the remedy, they are subject to modification and control by the Legislature."

Though the rule as stated by the Montana court may be subject to exceptions, yet we think the trend of authorities is in accordance with the statement from Cyc., above quoted. We think the general rule is that as to civil cases a statutory amendment affecting the admissibility of evidence, or the probative effect of certain acts, pleadings, writings, affidavits, etc., affects suits pending at the time of the amendment, as well as suits filed thereafter. Hence we conclude that, in the absence of any evidence offered by plaintiffs of facts which would give venue of this suit in Jones county, the trial court was authorized to accept the verified plea of privilege of the defendant as prima facie proof of the truth of the allegations therein contained, and that the court did not err in sustaining said plea.

The judgment is affirmed.

On Motion for Rehearing.

[6] Appellants urge that as the trial court found that the services rendered by plaintiffs were performed in the precinct and county where the suit was filed, and as the trial court may properly, as was evidently done in this case, defer action on the plea of privilege until the evidence has been introduced on the merits (*Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315; *Holmes v. Coalson*, 178 S. W. 634), we were in error in holding that

there was no evidence in the record tending to establish plaintiffs' claim that the services were performed in Jones county. No statement of facts accompanies the record. The court does find that "the services performed and rendered by the plaintiffs at the instance and request of the defendant, were rendered in precinct No. 5, Jones county, Texas." But the court further concludes as a matter of law that "W. J. Alexander's plea of privilege should be sustained"; also, in the decree of the court sustaining the plea of privilege, it is recited:

"And it further appearing to the court that none of the exceptions to exclusive venue in the county and precinct of one's residence, mentioned in articles 1830 and 2308 of the Revised Statutes of the state of Texas, exist in this cause, the court is therefore of the opinion and finds that defendant's plea of privilege should be sustained."

We have concluded that in the absence of the statement of facts, the finding of fact by the trial court that the services rendered by the plaintiffs were performed in the county and precinct where the suit was filed is conclusive as to that issue. *Garner v. Black*, 95 Tex. 125, 63 S. W. 918. In plaintiff's controverting answer to defendant's plea of privilege it was alleged that the labor performed and personal services rendered by plaintiffs were performed in said precinct and county. The court further found that defendant agreed to pay plaintiffs \$100 for their services in procuring for him a purchaser of his land, and that plaintiffs procured a purchaser who was ready, able, and willing to purchase the land upon terms satisfactory to defendant and that the consummation of the deal between the defendant and the prospective purchaser failed because defendant did not furnish a complete and valid abstract of title, as he had agreed to do. The court further found, as a conclusion of law, that plaintiffs were entitled to recover from defendant, under the facts in the case, the sum of \$108, the amount sued for.

[7] We have concluded that we erred in our former disposition of this case, providing it can reasonably be held that the amendment to subd. 4, art. 2308, Vernon's Sayles' Texas Civil Statutes, as amended by the Thirty-Fifth Legislature, is applicable. It will be noted that under said amendment the venue of suits to recover "for labor actually performed" is fixed in the county "where such labor is performed, whether the contract for same be oral or in writing." Are the services of a real estate broker, in securing a purchaser for land, "labor," as that term is used in this amendment? In *Words and Phrases*, p. 1320, it is said:

"The word 'labor,' in legal parlance, has a well-defined, understood, and accepted meaning. It implies continued exertion of the more oner-

ous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. 'Labor may be business, but it is not necessarily so, and business is not always labor. In legal significance, labor implies toil; exertion producing weariness; manual exertion of a toilsome nature.'

In *City of Topeka v. Crawford*, 78 Kan. 583, 96 Pac. 862, 17 L. R. A. (N. S.) 1156, 16 Ann. Cas. 403, it was held that to keep open, manage, and superintend a theater and sell tickets therein on Sunday was "labor," within the meaning of an ordinance prohibiting the performance of unnecessary labor on Sunday. The running of a pool room on Sunday was held to constitute a violation of the Penal Code, prohibiting labor on Sunday in *Ex parte Axsom*, 63 Tex. Cr. R. 627, 141 S. W. 793, 40 L. R. A. (N. S.) 179, Ann. Cas. 1913D, 794. The services of a superintendent in charge of dredging work were held to be in the nature of labor in *United States v. U. S. Fidelity & Guaranty Co.*, 139 App. Div. 262, 123 N. Y. Supp. 938, 943. The caption of the act amending this subdivision of article 2308 recites that it is an act "providing that all suits to recover for labor performed or any kind of personal services rendered may, at the option of the plaintiff, be brought and maintained where such labor is performed or personal services rendered." In *Sutherland on Statutory Construction* (1891) p. 279, § 211, it is said:

"But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extralegislativ. The language of an act should be construed in view of its title and its lawful purposes; broad language should be confined to lawful objects. The subject or object expressed in the title fixes a limit to the scope of the act, and provisions not germane, but foreign, to such subject will be excluded as unconstitutional and void."

So we have concluded that the term "labor," used in the amendment aforesaid, should be given an interpretation broad enough to include services of the character here involved.

[8] The next question to be considered is: Should the amendment to article 2308, *supra*, be held applicable to a suit pending at the time of its passage? We have concluded the change made by the amendment affects only the remedy, and not the substantial rights of the parties, and that the law as it existed at the time of the trial, rather than at the time of the institution of the suit or the accruing of the cause of action, should control. See *H. & T. C. Ry. Co. v. Graves*, 50 Tex. 181; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. 931, 1063; *Id.*, 93 Tex. 669; *Tex. Midland Ry. Co. v. S. W. T. & T. Co.*, 24 Tex. Civ. App. 198, 58 S. W. 152. In *Baines v. Jemison et al.*, 86 Tex. 118, 23 S. W. 639, it is said:



"Since the venue of a suit affects only the remedy, it is clear that it is in the power of the Legislature to amend the laws in relation to that matter, and to make the amendment applicable to causes of action that may have accrued before the passage of the act; and it may be that it would be competent to so change the law as to confer local jurisdiction of a suit already pending upon the court in which it was instituted, although such court did not have jurisdiction at the time the action was brought. But upon this question we need give no opinion. Admitting the power of the Legislature in such a case, its intention would have to be clear before the courts would give the statute such a retroactive effect."

See 36 Cyc. p. 1217, to the same effect.

In the case last cited, the Supreme Court distinguishes the case under consideration from that of *H. & T. C. Ry. Co. v. Graves*, supra, and notes that in the *Graves* case the plaintiff amended his petition, so as to avail himself of the privilege conferred by the new statute, and says:

"There the filing of the amended petition was the same as the institution of a new suit, and, since this occurred after the new law had taken effect, the point was correctly decided."

In the case at bar the pleadings were oral, except the verified plea of privilege by plaintiff and the controverting answer by defendant. This controverting answer was filed September 1, 1917, subsequent to the time when the amendment involved took effect. The other pleadings, being oral, are deemed to have been presented on the date of trial, to wit, October 23, 1917. Since in the county court the cause was tried de novo, we are of the opinion that, in holding that the county court of Jones county had jurisdiction of this cause by virtue of the amendment aforesaid, we are not in conflict with *Baines v. Jemison et al.* Since the amendment provides that suits for labor performed "may be brought and maintained where such labor is performed," we are further of the opinion that the amendment clearly indicates the legislative intent to make it applicable to cases for debt pending in the county where the labor or services for which recovery was sought were performed. The word "maintained" has been defined as meaning to support that which has already been brought into existence. See *Kendrick & Robert v. Warren Bros. Co.*, 110 Md. 47, 77 Atl. 461, 464; *Words and Phrases*, vol. 3, p. 210; *Greentree v. Wallace*, 77 Kan. 149, 93 Pac. 598. "Maintained" is defined in the *Standard Dictionary* as meaning "to hold or preserve in any particular state or condition."

[9] For the reasons stated we have concluded that we erred in affirming the judgment of the trial court, and that the judgment should be reversed. It further appearing from the court's findings of fact that under the evidence plaintiffs were entitled to recover, barring the sustaining of the plea

of privilege, of defendant the sum of \$108, we are of the opinion that judgment should here be rendered for plaintiffs in said amount, with costs of the suit and 6 per cent. interest from date of judgment. The motion for rehearing is granted, our former judgment set aside, and the judgment of the trial court reversed, and judgment here rendered for appellants in the amount named.

#### On Appellants' Motion for Rehearing.

Appellants seem to have construed the language in our opinion, granting appellee's motion for rehearing and affirming the judgment of the trial court, as stating our holding that plaintiff below in the county court set up a new cause of action. By the using of the language, "and being further of the opinion that as the cause originated in the justice court and no new cause of action could have been set up in the county court, have further concluded that this court erred in sustaining appellants' motion for rehearing," was meant that in the instant case, unlike that of *Railway Co. v. Graves*, cited, we were not permitted, in order to support the contention that the jurisdiction was in the county where suit was filed, to indulge the presumption that by amended pleadings, the plaintiff in the county court presented a new cause of action, and that hence the amended statute would apply.

In holding that the amendment to article 1903, V. S. Civ. Stats., Acts 35th Leg. p. 388, was operative at the time of this trial, though it went into effect after the suit was filed, we do not think we were inconsistent, because the majority also held that the amendment to subdivision 4, art. 2308, did not apply to actions pending at the time said last mentioned amendment became operative. The amendment to article 1903 merely deals with the question of evidence, the force and effect to be given to verified pleas of privilege, and, as pointed out in our opinion, statutory amendments affecting rules of evidence apply to pending actions as well as to future ones, unless the contrary be indicated by the terms of the act, while amendments affecting remedies and procedure are given a prospective application only, unless the retroactive application be clearly shown by the act itself.

In urging that the amendment to subdivision 4, art. 2308, supra, should be held to apply to pending actions, appellants cite the Supreme Court decisions of *Spence v. Fenchler*, 107 Tex. 443, 180 S. W. 601, and *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149. In the first case cited Judge Hawkins, speaking for the Supreme Court, uses this language:

"However, jurisdiction may be conferred upon a court by necessary implication as effectually as by express terms. It is an elementary rule of construction that, when possible to do

so, effect must be given to every sentence, clause, and word of a statute, so that no part thereof be rendered superfluous or inoperative."

In *Cox v. Robison* Judge Phillips says:

"It is plainly to be inferred that it was these conditions and circumstances that brought the subject to the attention of the members of the body. \* \* \* There is nothing in the proceedings that suggests that the convention intended this ordinance to have a prospective effect, while every evidence furnished by the journal is consistent with a purpose to give it a curative character and use."

Appellants also cite *Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1062, by this court; *People v. City of Syracuse*, 128 App. Div. 702, 113 N. Y. Supp. 707; *Aultman & Taylor Mach. Co. v. Fish*, 120 Ill. App. 314, and other cases upon this point; but the majority see no reason for changing their views heretofore expressed, and accordingly appellants' motion for rehearing is overruled.

Justice BUCK dissents as before.

#### STATE ex rel. RUMSEY v. JACKSON et ux. (No. 6230.)

(Court of Civil Appeals of Texas. San Antonio. May 22, 1919.)

##### 1. HABEAS CORPUS §99(3) — CUSTODY OF INFANT CHILDREN—WELFARE OF CHILDREN.

The welfare and happiness of infant children is the controlling factor in determining their custody.

##### 2. HABEAS CORPUS §99(4) — CUSTODY OF INFANT CHILDREN—IMPROVIDENT FATHER.

Father, who had no home, was thriftless and improvident, whose income was small and uncertain, who had been cruel to infant daughters and mother, and who had no one to care for daughters, was not entitled to their custody following death of mother, to whom the daughters had been awarded by divorce decree, as against maternal grandparents, who had supported them practically all their lives, had adopted them, had a good home, and were well able to support them.

##### 3. HABEAS CORPUS §99(3) — CUSTODY OF INFANT CHILDREN — RIGHTS OF FATHER — WELFARE OF CHILDREN.

Law and best interests of society demand that natural rights of father to custody of his children be made subservient to interest and welfare of children.

##### 4. HABEAS CORPUS §85(1) — CUSTODY OF INFANT CHILDREN—PRESUMPTION.

In father's habeas corpus proceedings to secure custody of children, whom he has never supported, and to whom he has been cruel, it will not be presumed that the best interests of the children will be subserved by placing them in father's custody.

##### 5. HABEAS CORPUS §85(1) — CUSTODY OF INFANT CHILDREN—EVIDENCE.

In father's habeas corpus proceeding to procure custody of children from maternal grandparents, in whose care children had been placed upon mother's death, following her divorce from father, evidence of the adoption of the children by the grandparents was admissible.

##### 6. TRIAL §255(7) — INSTRUCTIONS—NECESSITY FOR REQUEST.

In father's habeas corpus proceeding to procure custody of children from maternal grandparents, who had adopted the children upon the mother's death, father should have requested instruction that adoption of children did not confer the right of custody, if he had desired such instruction.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Application by the State of Texas, on the relation of A. T. Rumsey, for writ of habeas corpus against W. F. Jackson and wife. Writ denied, and relator appeals. Affirmed.

Chambers & Watson, Mauerman & Hair, and John H. Ragsdale, all of San Antonio, for appellant.

O. M. Fitzhugh and McCollum Burnett, both of San Antonio, for appellees.

FLY, C. J. This is an action to secure the custody of two girls, respectively 6 and 8 years old, through a writ of habeas corpus, instituted by A. T. Rumsey against the appellees, W. F. Jackson and Elizabeth Jackson; appellant being the father and appellees the grandparents of the two children. The cause was submitted to a jury upon a single issue, and upon the answer thereto judgment was rendered that the writ of habeas corpus be denied, and that the care, custody, and control of the two children, Manilla Rumsey and Frankie Rumsey, be awarded to appellees, and permission granted appellant to visit the children at all reasonable hours.

The evidence showed that appellant and Emma Dell Jackson were married on January 31, 1908, and from the union were born Manilla Rumsey, about 8 years of age, and Frankie Rumsey, about 5 or 6 years of age; that the grandparents had cared and provided for the children and their mother a large part of the time that she lived with their father. After the marriage, appellant, who was a school-teacher, taught at Beasley, Wharton county, then at El Campo, then at Yorktown, then in Comanche county, then in Brooks county, then in Freestone county, then he worked in a coal mine, then taught school in Pearsall, then ran a shoe shop at Dilley, then taught at Somerset, then at Bulverde and in Bandera county, and then went to Willow City and taught there. All this was done in a period of 8 or 9 years. A part

of the time appellant did nothing, and according to his own account never made over \$525 or \$550 a year. He seemed to be a chronic wanderer, shifting from job to job. His wife, after living with him for about 6 years, abandoned him and obtained a divorce from him. She afterwards married again, and in the early part of 1918 died. There was evidence tending to show brutal treatment of his wife and children, and that several times he struck his wife, once with a stick of wood. While living with his wife, they stayed a portion of the time with appellees. It was testified that he would not work and did not support his family. In the divorce proceedings, custody of the children was awarded to the mother, and appellees cared for and maintained them. He made no effort to obtain custody of the children until after the death of their mother, and contributed, probably, \$25 to their support after the separation, which occurred about 1915. After the death of the mother of the children, they were legally adopted by the appellees. It was admitted that appellees are first-class people, and that the children are being educated, well trained, and taken good care of by appellees. Both are going to school, are well treated, are contented and happy, and are receiving moral, Christian training, and are being educated in the public schools. Appellees have a home in the city of San Antonio, and over 100 acres of land in the country, and are well able to support and maintain the children. Appellant has no home, and is thriftless and improvident. Custody of the children was given by the mother to appellees, and they were asked to adopt them. The children have been with their grandparents practically all of their lives; the youngest having been fed from a bottle by them from her early infancy. They have been supported practically all of their lives by their grandparents.

[1-3] The only claim to custody of the girls shown by appellant was the fact that he was their father. He had not supported them, nor exhibited any great amount of affection. He is shiftless, and his income is small and uncertain. He has no home, and, judging of his future by his past, never will have. He has no one to whom the care and instruction of his children can be intrusted. He showed no tenable reason for removing the girls from a Christian home, where they are being tenderly cared for, to a wandering life with their improvident father. The welfare and happiness of the children must be the controlling factors in determining their custody. Applying that rule to the facts of this case, the judgment of the court is eminently just and proper. If, as stated in the case of *State v. Deaton*, 93 Tex. 243, 54 S. W. 901, the burden rested on appellees of showing that the best interests of the children will be sub-

served by the custody of them being given to their grandparents, the rule has fully met, and there can be no doubt that the moral, mental, and physical welfare of the children will be conserved and guarded by allowing them to remain where they are. There was but one issue in the case, that of the best interest of the girls, and that was submitted by the court to the jury. The natural rights of the father to the custody of his offspring, were made subservient to the interest and welfare of the children, as law and the best interests of society demand that it should be.

This case is even stronger in its facts in favor of the grandparents than were those in favor of the foster parents in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, which has set the precedent for cases of this character since its rendition. In that case, both father and mother sought the custody of their 2 year old daughter, and showed that they were in every way qualified to take care of the child, and had a home in which to place it; but the court gave the custody to the foster parents. The court said:

"Two homes are thus offered the child, who is in no wise responsible for this unfortunate controversy, and has not sufficient discretion to select. We hold, as a matter of law, that it is entitled to the benefit of that home and environments which will probably best promote the interest of the infant. The question as to whose custody will be most beneficial to the infant is one of fact, of which this court has no jurisdiction, but which is to be determined in the first instance by the district court, upon hearing all the evidence tending to shed any light upon these two homes and the people inhabiting them, including their entire connection with, affection for, and present and future ability to care and provide for this little child, in order that the court may be able to determine upon the whole case the difficult question of fact above stated."

That case has been followed in a number of instances. In the case of *Peese v. Gellerman*, 51 Tex. Civ. App. 39, 110 S. W. 196, this court approved and followed the *Legate Case* and held:

"After the child has become thoroughly fitted into its surroundings, and is attached to its foster parents, and has become endeared to them, it might be the refinement of cruelty to break up the tender relations and destroy happy associations, merely to carry out a sentimental theory about the brutality of disturbing the strongest, purest, and holiest love of a father for his daughter. It may be true, generally, that the father should have control of his child; but at times it is a delusion and a snare, and the law looks to the facts of each case, and looks to the peace, comfort, and happiness of the child, rather than to indulging in fancied theories about every father loving his child, and, regardless of circumstances, entitled to its custody."

In the case of *Schneider v. Schwabe*, 143 S. W. 265, this court held:

"There is no presumption that the promptings of parental affection will cause a father to tenderly care for his child in the future, when he has failed to so act in the past."

Again it said:

"While recognizing the natural right that parents have to the custody of their children, the children have rights that are higher and of more importance to state and society than the naked right of parents to their custody; and, if their interests can be better conserved by leaving or placing them in charge of some one who can better protect them from the evils that threaten the lives and destinies of the young, the state has the authority, and it is its bounden duty, to place them in that custody. No sentimentality should attend a proceeding of this character, but the permanent interest and welfare of the child should be the great aim and end to be attained."

That is the established doctrine of the courts of Texas, as well as other enlightened courts.

[4] Under the facts of this case the law did not presume that the best interests of the children would be subserved by placing them in the custody of a father, who had never supported them and who had been cruel and unkind to them. If there existed any such presumption, the uncontroverted facts completely destroyed it, and the court properly refused the charge requested as to such presumption. The claim that the moral fitness of appellant was the sole issue is untenable. He may have been morally fitted to have the custody of his children, and yet the welfare of the children might offer an insuperable barrier to his custody of them.

[5, 6] The sixth assignment of error is overruled. It was not improper to admit the evidence of adoption of the children by appellees, because it was a circumstance to show that they had a permanent home and would stand in the same relation as children of the body, so far as property rights were concerned. If appellant desired to have the jury instructed that the adoption of the children did not confer the right of custody, he should have requested such instruction. The only proposition under the assignment urges no objection, other than that adoption did not confer right to custody. No one has stated that it did, but it is a circumstance proper to be admitted. Appellant offers no authority to sustain his attack on the admissibility of the testimony. The three decisions cited by him have no bearing whatever on the only proposition under the assignment of error. There is nothing in the record to indicate that the testimony prejudiced appellant before the jury. Under the facts, independent

of the proof of adoption, no other verdict could be maintained, if the welfare of the children is to be considered.

The judgment is affirmed.

**WESTERN UNION TELEGRAPH CO. v. CAMPBELL. (No. 9004.)**

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 15, 1919. On Motion for Rehearing, March 29, 1919.)

**1. TELEGRAPHS AND TELEPHONES — SUFFICIENCY OF EVIDENCE.**

In an action against a telegraph company for delay in transmission of a death message, evidence held to support conclusion that for the purpose of receiving telegrams during night hours the telegraph operator of a railway company in a yard office was an authorized agent of the telegraph company, for whose negligence it was responsible.

**2. TELEGRAPHS AND TELEPHONES — IDENTITY OF PERSON TAKING MESSAGE FOR COMPANY — SUFFICIENCY OF EVIDENCE.**

In an action against a telegraph company for delay in transmission of a death message, evidence held sufficient to sustain finding that the person who received the telegram by telephone from the person sending it to plaintiff was one for whose negligence the telegraph company was liable.

**3. TELEGRAPHS AND TELEPHONES — RECEPTION OF MESSAGE BY AUTHORIZED PERSON — PRESUMPTION.**

A telegram received by a telegraph company over its telephone line, maintained for business purposes, was presumably received by an authorized person; a presumption becoming conclusive in the absence of contrary proof.

**4. EVIDENCE — MATTER OF COMMON KNOWLEDGE — USE OF TELEPHONE.**

It is a matter of common knowledge that the telephone is a means of communication of almost universal use.

**5. TELEGRAPHS AND TELEPHONES — LACK OF AUTHORITY TO RECEIVE MESSAGE — BURDEN OF PROOF.**

In action for delay in transmitting death message, the burden of proof is on the telegraph company, receiving messages by phone for transmission, to show that the person who answered the telephone and actually received the particular message was some person wholly unauthorized so to act.

**6. EVIDENCE — TESTIMONY OF STATEMENTS BY TELEPHONE.**

In an action against a telegraph company for delay in delivering a death message, testimony of plaintiff's son, who sent the message, detailing the statements of the party at the other end of the wire when he phoned the

message to an agent of the telegraph company for transmission, *held* not inadmissible as hearsay, irrelevant, immaterial, and prejudicial.

On Motion for Rehearing.

7. APPEAL AND ERROR  $\Rightarrow$  719(9)—QUESTIONS REVIEWABLE—EXCESSIVE VERDICT AS FUNDAMENTAL ERROR.

In an action for delay in transmitting to plaintiff a message announcing the death of his brother, error in that the verdict for \$1,120 was excessive *held* not fundamental so as to be reviewable by the Court of Civil Appeals under rule 29 (142 S. W. xiii), without an assignment of error.

Appeal from District Court, Cooke County; C. F. Spencer, Judge.

Suit by J. W. Campbell against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hamp T. Abney, of Sherman, for appellant. Garnett & Garnett, of Gainesville, for appellee.

CONNER, C. J. J. W. Campbell instituted this suit in the district court of Cooke county against the Western Union Telegraph Company for damages on account of mental pain suffered by reason of a failure on appellant's part to promptly transmit and deliver to him a telegram at Pampa, Gray county, Tex., announcing the death of appellee's brother at Gainesville, Tex. It was alleged in appellee's petition that by reason of such failure on the part of appellant he was unable to attend the funeral of his brother, and thereby suffered mental anguish for which the recovery was sought.

The case was tried by a jury and submitted on special issues. The verdict was favorable to appellee's contentions and judgment was given in his favor for the sum of \$1,120.

The question most urgently presented by the assignments is whether the telegram was, in fact, delivered to and received by an authorized agent of the telegraph company. The jury found that it was.

The evidence, we think, supports the conclusion that the appellant company maintained its general office for the reception of telegrams in the city of Gainesville proper, the office hours at this place being from 8 a. m. to 10 p. m. During other hours the yard office of the Gulf, Colorado & Santa Fé Railway Company in Gainesville was authorized to, and in fact did, receive telegrams for transmission over appellant's lines.

E. H. Campbell died at his home in Gainesville about 9:45 o'clock on the night of November 24, 1916. Hill Campbell, his nephew and son of appellee, about 5:45 of the next

morning called up over the telephone the yard office mentioned and what occurred is thus detailed:

"I got the number of the G., C. & S. F. yard office and called that number. The telephone operator asked me what I wanted and I told the operator I wanted that number. I asked the man that answered the phone if it was the G., C. & S. F. yard office, and he replied that it was. I asked him if he received messages for the Western Union Telegraph Company, and he said that they did. I told him that I had a death message to send, and he said to wait about 15 minutes, that they were getting a train out just then. At the end of the 15 minutes, I had been sitting by the fire, I went back. I had sat there with my watch in my hand anxious, and called again and asked if that was the G., C. & S. F. yard office. They said it was, and I asked if they would take a death message. He said for me to wait a minute, and then he said 'All right.' I first repeated my telephone number, and then told him it was to my father at Pampa. The message read: 'Uncle died last night 9:45, answer.' The paper handed me by Judge Garnett, attorney for plaintiff, contains the original message which I wrote down on an envelope at the time and telephoned it to the G., C. & S. F. yard office as detailed. I wrote the message down before I went and called the agent up the first time. The message read: 'J. W. Campbell, Pampa, Texas. Uncle died last night 9:45, answer. Hill.'"

"When I read this message to the man at the G., C. & S. F. yard office he repeated back to me the words I delivered to him over the telephone. I asked him to repeat it, and he did so. At the time I telephoned the message in I asked if I must come to the yard office to pay for it, or could I take it to the Western Union uptown office. He said it was all right to call at the Western Union uptown office and pay it."

Hill Campbell did not recognize the voice of the party at the end of the telephone at the yard office, and no other direct evidence identifies him. Appellant's telegraph operator, who was on duty on the night in question, denied that he received the telephone message or telegram in question. But he testified that the office force had been authorized by one of the higher officers of the railway company to receive messages for transmission, and that when a call for a message of the kind was received over the telephone he himself either went to take it or some one of the other members of the office force would take it and give the message to him. The evidence fails to disclose what others, if any, of the office force were on duty that night, it not appearing that any person other than the telegraph operator who served in that capacity testified. The operator was employed by the railway company, and his compensation for the transmission of messages from his office was in the way of tolls

received, such commission being paid by the manager of appellant's city office.

[1, 2] We think on the whole, as already stated, that the evidence supports the conclusion that for the purpose of receiving telegrams during night hours the operator of the railway company in the yard office was an authorized agent of the appellant, for whose negligence the appellant was responsible. A more closely contested point, however, is whether the evidence sufficiently supports the conclusion that the person who received the message in question was identified as one for whose negligence appellant was responsible. It is insisted, in effect, that inasmuch as Hill Campbell was unable to identify, by voice or otherwise, the party at the other end of the telephone at the time of the conversation detailed by him, and inasmuch as the operator denied having received the message, it must be assumed that some visitor or other person wholly unconnected with the office took the message, or at least that it cannot be said that the evidence preponderates in favor of the conclusion that the jury voiced in appellee's favor on this subject. But we have concluded that we must overrule appellant's assignments relating to this point. A jury might well think it improbable that at the time of night the message was transmitted over the telephone, and in view of the character of the conversation that occurred as detailed by Hill Campbell, any unauthorized person in the yard office would have taken the message and given the replies as detailed. The jury were not bound to believe the operator. It was its province to give the operator's testimony such weight and credibility as they thought it was entitled to, and his relation to the fault, made the foundation of this suit, is such as that we cannot say that the jury wrongfully disregarded, if they did so, his denial that the telegram in question was in fact received by him. Moreover, his testimony plainly supports an inference that if he did not receive the message some other person in the office, having at least limited authority, did receive it. See *Horn v. W. U. Tel. Co.*, 194 S. W. 387. In volume 1, § 53a, of the Blue Book of Evidence, by Mr. Jones, it is said, among other things, that:

"Those who install telephones in their places of business in connection with a telephone exchange, and use them for business purposes, impliedly invite the business world to use that means of communicating with them with respect to the business there carried on, and the presumption is that they authorize communications made over the telephone in ordinary business transactions. The decisions are not in accord, but the weight of reason and authority is in favor of the presumption. The reason is the same as that for the presumption that a business letter, properly directed and sent by mail, reaches the business office of the addressee, and is opened by him or his authorized agent. The presumption that the person who

answers is authorized to speak may be very slight or strong, according to the circumstances, but the statements of such persons should be admitted in evidence as prima facie the statements of one having authority to speak."

[3-5] We feel that we must approve the rule as stated by Mr. Jones, to the effect that a message received over a telephone line maintained by a business office for business purposes was presumably received by an authorized person, and that this presumption becomes conclusive in the absence of proof to the contrary. It is a matter of common knowledge that the telephone as a means of communication is of almost universal use, and it undoubtedly but rarely happens that the sender of a message is able to identify by voice or otherwise the party at the other end of the line. We think it may be said that the burden of proof is clearly upon the person or company so doing the business of receiving messages to show that the person who answered the telephone and actually received the message was some person wholly unauthorized to so act. The jury therefore, in this case, under the circumstances detailed, were authorized, we think, to find that the message in question was, in fact, received in the yard office by some person having authority to receive it and promise its transmission.

[6] There is an objection to the testimony of Hill Campbell detailing the statements of the parties at the end of the telephone line in the yard office on the ground that this testimony was "hearsay, irrelevant, and immaterial, and highly prejudicial." We think it manifest that the objections are without force, and there being no objection to the amount of the verdict and judgment, and the testimony on other issues being sufficient to support the judgment, it is ordered that it be affirmed.

#### On Motion for Rehearing.

[7] As stated in our original opinion, no attack was made by appellant upon the amount of the verdict and judgment in this case, but appellant now very earnestly insists that the verdict was excessive, and contends that the error in this respect is a fundamental one requiring determination on our part without an assignment of error.

Rule 29 (142 S. W. xiii), promulgated by the Supreme Court as our guide, confines us to a distinct specification of error and "to such fundamental errors of law as are apparent upon the record." We know of no definition of error "apparent of record" applicable to all cases. But it was said by our Supreme Court in the case of *Houston Oil Co. v. Kimball*, 103 Tex. 94, 122 S. W. 533, that—

"This does not mean that an error which can be ascertained by looking into the record and considering the evidence may be considered

without an assignment, for that would include every error which can be considered at all. Nothing can be considered as an error which cannot be made apparent by an examination of the record. Therefore the language of the statute must be given that construction which will make it consistent with its requirements in other respects. The language 'apparent upon the face of the record' indicates that it is to be seen upon looking at the face of the record (that is, the assignment itself), the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties. Perhaps the best expression is that it must be a fundamental error—such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily."

The contention that mere excessiveness in a verdict for damages, based upon negligence and mental pain, is fundamental or error apparent of the record, runs counter to our conception of the subject. Appellant cites *Railway Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214, in aid of its contention. But it does not affirmatively appear from the opinion in that case that there was no assignment of error pointing out the difficulty. Besides, in that case it appeared that the damages sought to be recovered were made up of separable items of elements, and the court found that there was no evidence beyond two of the items aggregating \$20, and the announcement in the opinion that error in assessing damages for those items or elements to which no evidence had been adduced constituted fundamental error was probably induced by analogy from those of our cases holding that a verdict with no evidence to support it is fundamentally wrong. But in this case it cannot be so said. The damages sought was for mental pain—not made up of separable items. The relation of the plaintiff and the deceased and other circumstances are shown from which a jury could infer that pain was caused by the defaults of appellant, and the amount of compensation for mental pain resulting therefrom was in a peculiar sense for the determination of the jury. See *Railway Co. v. McNamara*, 59 Tex. 255, and *Ward v. Cathey*, 210 S. W. 289, by this court not yet officially reported.

No circumstance indicating passion or prejudice on the part of the jury has been pointed out either originally or on motion for rehearing, and the courts have more than once affirmed judgments of similar sums in like cases. See *Western Union Tel. Co. v. McDavid*, 121 S. W. 894; *Western Union Tel. Co. v. Rabon*, 60 Tex. Civ. App. 88, 127 S. W. 580; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. St. Rep. 639.

Under such circumstances and in the absence of an assignment of error in the brief, we do not understand that our duty requires

us to search the evidence and exercise the necessary discrimination and judgment in order to determine that the verdict and judgment in this case is excessive in a specified sum.

On other questions presented in the motion for rehearing we retain the views originally expressed. The motion will accordingly be overruled.

**MARSHALL et al. v. CAMPBELL.**  
(No. 9025.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 18, 1919. Rehearing Denied April  
12, 1919.)

**1. WITNESSES ⇐177—TRANSACTIONS WITH PERSONS SINCE DECEASED—REBUTTAL.**

Where contestants introduced evidence of statements of testatrix as to proponent's cruelty to, demands upon, and threats communicated to, testatrix, proponent may, notwithstanding Rev. St. 1911, art. 3690, forbidding a litigant to testify as to transactions with a person since deceased, deny the evidence introduced.

**2. WITNESSES ⇐177—REBUTTAL.**

Where contestant was a daughter of testatrix, who was also the mother of proponent, testified that proponent stated that if the mother did not give her more money she would become an immoral woman, proponent is entitled to deny the statement.

**3. WITNESSES ⇐159(3) — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.**

Testimony by proponent and defendant in a will contest proceeding that she stayed with her mother, the testatrix, during a period of time in which she accompanied her mother to gospel missions, and on return found the house burglarized, etc., does not fall within the prohibition of Rev. St. 1911, art. 3690, relating to testimony as to transactions with persons since deceased.

**4. WILLS ⇐400—CONTEST—REVIEW—HARMLESS ERROR.**

In a will contest, admission of testimony by defendant, the proponent of the will, showing her intimacy with the testatrix and opportunity to exercise undue influence, held harmless, though such testimony was inadmissible, under Rev. St. 1911, art. 3690, relating to testimony as to transactions with persons since deceased.

**5. WILLS ⇐400—CONTEST—REVIEW—HARMLESS ERROR.**

Testimony by proponent, the defendant in a will contest proceeding, that she had addressed post cards for her mother, the testatrix, etc., held of a trivial nature, so that the admission of such testimony, if improper, did not warrant reversal.

**6. WILLS §165(1)—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS OF TESTATRIX.**

Evidence of declarations made by testatrix concerning the will and the acts of the proponent should be limited to the state and condition of the mind of the testatrix, and, unless there is a prima facie showing of undue influence or fraud, cannot be considered on those issues.

**7. WILLS §400—CONTEST—REVIEW—HARMLESS ERROR.**

In a will contest proceeding, an instruction on the use of evidence of the testatrix's declarations *held*, under the facts, harmless, if erroneous.

**8. WILLS §400—CONTEST—REVIEW—HARMLESS ERROR.**

In a will contest, where it appeared that contestants had entered into a written agreement with their mother relating to the estate, the submission to the jury of the question whether contestants had released all their rights *held* harmless, if erroneous, where the jury answered the question in the way the contract should have been construed by the court, if a question for it.

Appeal from District Court, Tarrant County; Bruce Young, Judge.

Proceeding by Mrs. Fannie Marshall, for herself and as guardian of the person and estate of Flora Peers, a person of unsound mind, against Mrs. Belle Campbell, to contest the will of Electa Ann Peers. From an adverse judgment in the county court, defendant appealed to the district court, and from a judgment there for defendant, plaintiffs appeal. Affirmed.

Ocie Speer, Marvin H. Brown and Williams & Smith, all of Ft. Worth, for appellants.

McLean, Scott & McLean, Capps, Canty, Hanger & Short, and David B. Trammell, all of Ft. Worth, for appellee.

BUCK, J. This is a proceeding to contest the will of Electa Ann Peers, instituted by Fannie Marshall, for herself and as guardian of the person and estate of Flora Peers, a person of unsound mind, originally in the county court of Tarrant county, Tex. The two contestants were daughters of the deceased, and the proponent or defendant was also a daughter of the deceased and a half-sister of the plaintiffs. The instrument purporting to be the last will and testament of the deceased was admitted to probate by the county court, and by the terms of the will all the property of the deceased, with some insignificant exceptions, was left to the defendant. From an adverse judgment in the county court the defendant appealed to the district court of Tarrant county, and after a trial upon special issues, resulting in a verdict and judgment for the defendant, the plaintiffs have appealed.

[1] Assignments 1, 2, and 3 complain of certain testimony in the nature of denials of defendant of acts of unkindness, violence, or cruelty by her to deceased. Plaintiff had introduced the testimony of Mrs. Emma Fitzgerald, otherwise known as Madam Wandera, who testified that Mrs. Peers, the deceased, had told her that—

"I am afraid to-night to turn my back to the door. I am afraid Belle will come in here and mash my brains out at any time. We have had several fights together. She has accused me of doing things and called me names."

She further testified that Mrs. Peers had told her that Mrs. Campbell had pulled her hair and had given her a good beating. There was other testimony of the same character, detailing alleged statements of the deceased as to the actions and conduct of the defendant towards her mother. Mrs. Campbell was asked if she ever struck her mother, to which she replied: "I never did; absolutely, no." She was also asked if she ever pinched her mother, or pulled her hair, or bit her, to which she replied: "No; I have combed her hair, I guess, a hundred times; but I never willingly or maliciously pulled a strand of it." She was also asked: "Did you ever lay a finger on her in violence in any way?" To this she replied: "Never; absolutely never; my hands always administered to her in absolute love; nothing else." These questions and answers thereto were objected to by plaintiffs on the ground that they were inadmissible and incompetent, under article 3690 of the Revised Civil Statutes, being testimony relating to transactions between the defendant and the decedent. The rule seems to be, under this and similar statutes, that where one party introduces the statements of the deceased as to transactions between the other party and the deceased the testimony of the other party is admissible to contradict or explain the particular transactions concerning which the purported statements of the deceased had reference. In *O'Neill v. Brown*, 61 Tex. 34, where the evidence of the deceased plaintiff on the former trial was admitted, it was held that the reason of the statute, which excludes one party from testifying in regard to transactions with another party who is dead, ceasing, the adverse party, also, was a competent witness. In *Runnels v. Belden*, 51 Tex. 48, it was held that where the plaintiff's depositions had been taken, and he had died, the suit being prosecuted to trial by the executor, it was error to exclude the testimony of a defendant on the trial touching the acts and declarations of the testator, about which the testator, the original plaintiff, had testified in his lifetime by depositions read in evidence. In this case Chief Justice Moore said:



"In such case, if the executor insists on putting the deposition of his testator in evidence, it does not violate, but accords with, the reason and spirit of the law, and its proper construction, to permit the other party to the suit to also give his version of the matters between himself and the deceased referred to in such deposition; and this seems to be the interpretation given elsewhere to similar statutes. *Mumm v. Owens*, 2 Dill. [U. S. Cir. Ct.] 475 [Fed. Cas. No. 9,919]; *Monroe v. Napier*, 52 Ga. 385."

In *Galvin v. Knights of Father Mathew*, 169 Mo. App. 496, 155 S. W. 45, it was held, in construing a statute similar to ours, that where one of the original parties to the contract or cause of action in issue and on trial is dead, and the other party thereto, under the statute, may not testify to transactions with the decedent, the objection to such testimony is waived where the other party introduces a letter written by the deceased concerning the same matter. See, also, *Hurley v. Lockett*, 72 Tex. 262, 12 S. W. 212. "The object and spirit of the statute is to place parties upon an equality, so that one shall not be permitted to testify to transactions cognizant to both, when the other can no longer be heard." But where the testimony of the deceased party has been preserved, and through it he may be heard, the disqualifying rule does not obtain. *Coughlin v. Haeussler*, 50 Mo. 126. In *Jones*, Blue Book on Evidence, vol. 4, § 781, pp. 734, 735, it is said:

"The very object of excluding the evidence concerning statements made by a man since deceased was to prevent garbled or untruthful versions of interviews with him being given by a party interested in establishing them to the detriment of the estate, when there was no opportunity of rebutting them by reason of the seal set on the lips of the decedent. To allow such evidence would be productive of that inequality which the law abhors. As we have just shown, that inequality may nevertheless be removed by the representative using the adversary as a witness. But there are other ways. The privilege of objecting to the competency of the adverse party is also deemed to be waived, if the representative introduces testimony as to the transaction or communication in question. This may be done by introducing the deposition of the deceased or incompetent person. This renders the adverse party competent to testify fully as to those transactions dealt with in the deposition, but he cannot go into other communications or transactions."

In section 782, p. 752, Id., it is said:

"The principle is that the living party shall not be heard to give his version of a transaction about which death has sealed the lips of the other; but, when the testimony of the deceased party is made available in the controversy, it would shock justice to deny the right of the living party to be heard as to the matters covered by the testimony. Hence objections to the competency of the adverse party

may be waived if the testimony of the deceased or incompetent person which has been preserved in the bill of exceptions is introduced, or if such testimony, taken at a former trial or hearing of the action, is presented by the representative."

We conclude that, inasmuch as the plaintiffs introduced in evidence the purported statements of the deceased as to certain alleged transactions between her and the defendant, the defendant, as a witness, was competent to testify as to those particular transactions. Appellee cites such cases as *Adam v. Sanger*, 77 S. W. 954, *Potter v. Wheat*, 53 Tex. 401, and *Williams v. Neill*, 152 S. W. 693, as sustaining the proposition that the evidence objected to does not come within the rule that a mere denial on defendant's part that certain transactions referred to in the statements of the deceased introduced occurred is not inhibited by article 3690 of the Revised Civil Statutes. But we do not find it necessary to decide this question, concerning which there seems to be some diversity of holding, and predicate our ruling on the ground that, plaintiffs having introduced alleged statements of the deceased with reference to certain transactions, the defendant was a competent witness as to those particular matters. Hence the first, second, and third assignments are overruled.

[2] While on the stand, plaintiff was asked, "Did you ever talk to your aunt, Mrs. Bridges, or any one else, about this will, this property, or about procuring any will of any kind from your mother?" To which the witness replied, "No, sir." Witness was also asked: "Mrs. Campbell, the question was asked and testified to by plaintiff, Mrs. Marshall, that you came to her house on one occasion and stated that unless you got more money that you would destroy yourself—go to a bad part of town. Did you ever make that statement?" To which the witness answered, "I never did." Her counsel then asked, "To her or to anybody else?" Witness answered, "Never." The objection to this testimony is that by the answers of the witness, to the effect that she never talked to any one else concerning the matters inquired about, she made an indirect reference to her mother, the deceased, and thereby in effect stated that she never talked to her mother concerning such matters, and consequently the testimony was inadmissible under article 3690, supra.

Plaintiffs introduced evidence of Mrs. Fitzgerald to the effect:

"Mrs. Peers evidenced a fear of what Mrs. Campbell might do with herself. She said Belle demanded money of her—so much she did not care to give it to her—and that Belle flew into a rage; and I asked her why she gave it to her, and she says, 'Belle would have gone astray, or something wrong, if she could not get the money one way or the other; she would

have got it, and I did not want her to do anything wrong.' Belle told her, 'If I don't get it from you, I can get it from others.' She said she had to give it to her. She did not tell me how her daughter Belle said she would get it, or where; but she said she could do it and would do it. She had friends that would give it to her. The reason I said she feared Belle would go astray is because that is what Mrs. Peers said herself. Mrs. Peers said, 'Emily, she would have gone astray or done wrong.'"

Mrs. Marshall testified that Mrs. Campbell came to her on one occasion and said that if her mother did not give her more money she was going down to the Acre; that the women in the Acre had more money than she had. If the testimony of Mrs. Fitzgerald as to what Mrs. Peers said to her includes a statement to the effect that Mrs. Campbell had threatened, if she did not get more money, to go to a part of the town frequented by immoral women, then the objection to the testimony would be controlled by what we have said with reference to previous assignments. If Mrs. Campbell's denial be limited only to the statements made by Mrs. Marshall as to what Mrs. Campbell had threatened to do, such denial would not come within the inhibition of article 3690; so that, in either event, we think the assignment should be overruled, as also the sixth assignment, involving largely the same question.

[3,4] The seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth assignments, urging objections to certain testimony of the defendant to the effect that she stayed with her mother during a certain period of time, that she went with her mother to the Union Gospel Mission, and on their return found that their house had been burglarized, that on one occasion she left her mother's house and returned home on account of sickness, that she took a trip to California in company with her mother, etc., we do not think present error. We do not think that any of these statements made by the witness come within the spirit of the inhibition contained in article 3690, *supra*. Moreover, the answers to the questions asked her were favorable to plaintiffs' contention, in that they tended to show the intimacy of the relation between defendant and her mother, their almost daily association, which would have afforded the opportunity for the defendant to exercise undue influence over her mother in the making of the will, which plaintiffs charged in their petition. Moreover, other witnesses, offered by plaintiffs, testified to practically the same facts detailed by defendant. Hence these assignments are overruled.

[5] In the fifteenth assignment objection is made to the answer of the witness that she did not know until the instrument was presented to the county court for probate

what was in her mother's will. The court, upon the objection of the plaintiffs' counsel and upon the request of the defendant's counsel, excluded other portions of the testimony of the witness to the effect that her mother never did discuss the will with her. Hence we overrule the fifteenth assignment.

The same ruling and the same observation is made with reference to the sixteenth assignment. We do not think any reversible error is shown by the admission of the testimony of the defendant to the effect that just before her mother left for Bluefields, Va., the defendant addressed certain post cards for her, one of which was to Mrs. Bert Marshall, and was in the handwriting of the defendant. The objection is to the testimony as a whole, while at least that part of it that the post card was addressed in the handwriting of the witness we do not think is subject to the objection urged that such act constitutes a transaction with the deceased. But, in any event, we consider the testimony admitted is of too trivial a nature to call for a reversal. Hence we overrule the seventeenth assignment.

[6,7] In the eighteenth assignment it is urged that the court improperly restricted the use and purpose of the declarations of the testatrix introduced in evidence to the question of the state and condition of the mind of the testatrix at and from the time of the execution of the will, introduced in evidence. In *Scott v. Townsend*, 106 Tex. 322, 166 S. W. 1138, our Supreme Court, in an opinion by present Chief Justice Phillips, says:

"How, then, under the issue, is the further essential fact, that the influence was successfully practiced, to the subversion of the testator's free agency, and produced the will as its result, to be established or disproved? His declarations that the will was thereby procured, or that the instrument was not his will, or his statements of like nature, are, of course, inadmissible, since his declarations are not competent to prove the fact of undue influence, or as direct evidence that it produced the will. But, where there is competent evidence of the exercise of undue influence, the issue as to whether it was effectually exercised necessarily turns the inquiry, and directs it to the state of the testator's mind at the time of the execution of the will, since the question as to whether free agency is overcome in its very nature comprehends such an investigation. \* \* \* As a means, therefore, of determining the mental state at such time, voluntary declarations, indicative of it, rest upon as sure a ground as any which the inquiry provides, and properly come within that class of unsworn declarations to which the law gives the character and probative force of original evidence upon certain issues, because, from their nature, they admit of no better or more reliable proof. The important consideration to be observed, however, \* \* \* is that the declarations be such as reasonably tend to disclose what the state of

the testator's mind was at the very time of his making the will."

In *Johnson v. Brown*, 51 Tex. 65, a testator's declarations were held admissible—

"not, of themselves, as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance, in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will, as evidence of an independent collateral fact, the state of feeling between the parties, and which would, in some degree, tend to prove the issue before the court."

In *Wetz v. Schneider*, 96 S. W. 59, it is said that the declarations of a testator are not admissible as evidence that he was unduly influenced in making the will, nor as evidence of the truth of the facts stated by him, but only as external manifestations of his mental condition. *Kennedy v. Upshaw*, 64 Tex. 411; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 612; *Campbell v. Barrera*, 32 S. W. 725; *Schouler on Wills*, 193; 11 Am. & Eng. Law (1st Ed.) 156.

In *Borland on Wills and Administration*, § 84, pp. 231, 233, it is said:

"Evidence of declarations made by the testator as to the execution or nonexecution of the will is not admissible as evidence of the truth of the facts stated, whether made before the date of the will or after, unless part of the *res gestæ*. But such declarations may be admitted for the purpose of showing the condition of the testator's mind, or state of his affections."

In appellant's first proposition under the eighteenth assignment, it is urged that the charge given was too restrictive and upon the weight of evidence, because such evidence was admissible upon the question of undue influence; and in the second proposition thereunder, it is urged that such declarations were admissible under the question of fraud alleged. While such declarations are admissible to show the testator's condition or state of mind, whether sane or insane, whether of testamentary capacity or not, whether subject to undue influence or otherwise (*Williamson v. Nabers*, 14 Ga. 286; *State v. Bennett*, 11 S. W. 264; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179, and other cases cited in notes 12 and 13 on pages 232 and 233 of the above-cited text), yet they are admissible only so far as they show or tend to show the condition of the testator's mind, the effect of undue influence or fraud, otherwise shown to have been attempted to be exercised on the testator's mind. But a *prima facie* showing as to the existence of undue influence or fraud must be made before the evidence or the effect thereof on the testator's mind would be admissible. So, at last, the scope of the inquiry and consideration on the part of the jury of such evidence is limited to the

question of what was the condition or state of mind of the testator at the time. We have concluded that no prejudicial error is shown by the charge given. This conclusion is fortified by the absence of any facts or testimony cited in appellant's brief that any undue influence or fraud was even sought to be exercised or practiced to induce the testatrix to execute the will in question. It is in evidence, though not referred to under this assignment, that Mrs. Martha C. Bridges, a sister of the decedent and aunt of the plaintiffs and defendant, said to the testatrix that she should "right Belle or a curse will rest on you"; that later Mrs. Peers told the witness, "I have righted Belle." Mrs. Bridges further testified:

"My sister knew what my idea was about righting Belle. I might have talked to my sister about this matter more or less a hundred times. I talked with her every time she would bring the matter up and I would express myself on it; but I never said anything to her as to how much or how little she should leave Belle. I did not think it was necessary to suggest to her to do justice by Fannie, because she had already done justice by herself, or made the law do it."

The evidence further shows that the father, Gen. J. M. Peers, left a will under which he devised his part of the community estate of himself and wife to his widow, the testatrix, vesting in her the sole authority to manage, control, and dispose of said estate, or any part thereof, as she might see fit; that after his death Mrs. Marshall, for herself and sister, Miss Flora Peers, demanded a division of the estate, and that in compliance with such demand, after the will was probated, Mrs. Peers gave to each of said claimants an undivided one-third interest in all of the real estate belonging to the community estate; that in accordance with the provision of the contract of settlement made by and between Mrs. Marshall, joined by her husband, and for the benefit of Miss Flora Peers, Mrs. Marshall received one-fourth of the entire rents from the community estate of J. M. and Electa Ann Peers up to the time of her mother's death and one-third thereafter; that at the time of the settlement Mrs. Peers deeded to Mrs. Marshall and to Miss Peers each a one-third interest in the real estate, which property, as we understand the record, was not disposed of under the will of Mrs. Peers. It thus appears that the two plaintiffs received substantially their proportion of the entire community estate of their father and mother, more than they would have received at that time, had the will of their father not been upheld. Hence we overrule appellant's eighteenth and nineteenth assignments.

[8] Under the twentieth assignment it is urged that the court improperly submitted

to the jury question or issue No. 6, as follows:

"In executing the contract introduced in evidence before you, was it the intention of the parties thereto to make final settlement and disposition of whatever interest the plaintiff, Mrs. Fannie Marshall, had in the estate of her father, and of whatever interest she might thereafter have in the estate of her mother, which said issue was answered by the jury, 'Yes.'"

It is contended that, as the contract of settlement was in writing, its construction became a question of law for the court, and not a question of fact for the jury. The plaintiff, Mrs. Marshall, testified:

"My mother made me a deed to one-third of the real estate, with certain limitations as to the rents, and under the same conditions made a deed to Flora to one-third of the real estate, and she reserved the rent from Flora's part during her lifetime. \* \* \* The real estate my mother left to my sister Belle was her one-third that she retained at the time she deeded one-third of the real estate to each Flora and myself at the time this settlement was made."

The contract of settlement provides, in part:

"In consideration of the foregoing, the said Mrs. Fannie Marshall, joined by her husband, B. Marshall, acknowledges receipt in full of all amounts she is entitled to receive from the estate of her said father and her said mother, and hereby expressly agrees to release any and all claims of any and all kinds whatsoever to any and all portions of said estate, except only that part to be conveyed to her, as hereinbefore specified."

If it be true that the court should have construed the said instruments, the contract of settlement and the two deeds of conveyance made thereafter in pursuance thereof, yet we are of the opinion that no prejudicial error has been shown, because, as we construe said contract, the agreement between Mrs. Peers and her two daughters was that Mrs. Marshall and the trustee for Miss Flora should each receive the portion of the community estate of J. M. and Electa Ann Peers, hereinabove mentioned, in full settlement of any claims either Mrs. Marshall or Miss Flora might have against Mrs. Peers, the sole beneficiary under the will, or against the community estate.

This conclusion also disposes of the twenty-first assignment, in which objection is made to the testimony of William Bryce, who witnessed the contract of settlement between Mr. and Mrs. Marshall and Mrs. Peers, to the effect that the contract contemplated a settlement of the whole estate. Plaintiff, Mrs. Marshall, specially pleaded that in the contract of settlement it was not contemplated by her that thereby she relinquished any portion of her expectancy to

the estate of her mother, Mrs. Electa Ann Peers, and that she only relinquished her interest in the estate of her deceased father. On behalf of Miss Flora Peers she pleaded that the latter was a person of unsound mind and wholly incapable of making and entering into a valid contract, and that, therefore, she was not barred by any such agreement as pleaded by defendant. It appears that the witness William Bryce was instrumental in effecting the settlement between the two daughters on the one hand and the mother on the other, and that, as before said, he was a witness to the contract. If the pleading of the plaintiffs be taken as alleging an ambiguity, then evidence would be admissible to solve the ambiguity; but apparently plaintiffs offered no such evidence. We are not prepared to say that the instrument was ambiguous, or that there is any sufficient ground to sustain appellants' theory as to the purport of the instrument in this respect. Hence the admission of the testimony of Bryce would become immaterial.

All assignments are overruled, and the judgment is affirmed.

#### CLARK v. SCOTT. (No. 8161.)

(Court of Civil Appeals of Texas. Dallas.  
May 10, 1919.)

#### 1. EXECUTORS AND ADMINISTRATORS 439 —ACTIONS—PARTIES.

In trespass to try title to deceased's homestead, it is not necessary to join administrator, especially where a previous suit had determined creditors and administrator had no interest in the property.

#### 2. TRESPASS TO TRY TITLE 32—PETITION —SUFFICIENCY.

Petition in trespass to try title to deceased's homestead *held* to state cause of action.

#### 3. APPEAL AND ERROR 1040(11)—HARMLESS ERROR—SUFFICIENCY OF PETITION.

Any error in overruling demurrers to petition in trespass to try title is harmless, where evidence and findings supplied any deficiency.

#### 4. APPEAL AND ERROR 1050(1)—REVERSIBLE ERROR—EVIDENCE.

In trespass to try title, any error in admitting judgment in a former case for purposes of establishing plaintiff's title *held* no ground for reversal.

#### 5. EVIDENCE 271(18) — SELF-SERVING DECLARATIONS—RECITALS IN DEED.

In trespass to try title, where there was an issue whether plaintiff's grantor had been married, admitting recitals in deeds given by her that she was widow and wife of a certain person is erroneous; they being self-serving.

**6. EVIDENCE** **⚡**353(3) — **DEEDS — RECITALS — EFFECT.**

Ordinarily recitals in deeds are evidence only against privies, and do not affect strangers.

**7. APPEAL AND ERROR** **⚡**1050(1) — **PREJUDICIAL ERROR—SIMILAR EVIDENCE.**

Error in admitting recitals in deeds as evidence against strangers is not reversible error, where similar evidence was introduced without objection.

**8. JUDGMENT** **⚡**712 — **EVIDENCE — ADMISSIBILITY.**

In trespass to try title, a previous judgment recovering land involved against others than defendant *held* admissible to establish plaintiff's title.

**9. APPEAL AND ERROR** **⚡**232(2)—**PRESERVING GROUNDS FOR REVIEW—OBJECTIONS.**

Where witness was asked as to testimony given in another case, objection that appellant was not a party to that suit and did not have a chance to cross-examine witnesses is insufficient to preserve point that question was incompetent because calling for hearsay testimony.

**10. MORTGAGES** **⚡**275 — **SALES — RIGHTS OF PURCHASER.**

Ordinarily purchaser of mortgaged property who assumes, or purchases subject to, the mortgage is estopped to deny its validity.

**11. MORTGAGES** **⚡**277 — **SALE OF LAND — RIGHTS OF PURCHASER.**

One purchasing property incumbered with a mortgage is not personally bound to pay debt unless he assumes it, but mortgage remains a lien against the land.

**12. MORTGAGES** **⚡**275 — **SALE OF MORTGAGED LANDS—RIGHTS OF PURCHASER.**

Grantee of mortgaged premises who has not assumed mortgage, and has purchased without reduction on account thereof, may dispute its validity.

**13. APPEAL AND ERROR** **⚡**931(4) — **PRESUMPTIONS—FINDINGS.**

In trespass to try title, where there was evidence to authorize finding that appellee grantee did not promise to pay mortgage on land conveyed, it will be presumed, in order to support judgment rendered, that court so found.

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Trespass to try title by Ross M. Scott against A. M. Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

L. L. Montgomery and Oscar H. Calvert, both of Dallas, for appellant.

Parks & Hall, of Dallas, for appellee.

**TALBOT, J.** Appellee sued the appellant to recover lands situated in the city of Dallas, Tex., which are particularly described in the petition. Samuel Peay is the common source of title. The petition is in the general form of trespass to try title, and in ad-

dition thereto contains allegations purporting to set forth appellee's chain of title and the title of the appellant back to the common source. The appellee specially alleged that from the 6th day of June, 1912, to the death of Samuel Peay, which occurred about March 16, 1914, the said Samuel Peay was a married man living with his wife, Maude Peay, upon the land in controversy as his homestead; that after the death of the said Samuel Peay his wife, Maude Peay, continued to occupy, use, and enjoy said property until the same "was sold by her and against her" and until her possession was delivered to appellee and those under whom he claims; that during the time the land was the homestead of Samuel Peay and his said wife they executed a "deed of trust lien thereon" to W. H. Hall, trustee, dated December 30, 1913, to secure Will Waltz in the payment of a note which was, prior to December 7, 1915, transferred by Waltz to appellant, and that appellant induced a substitute trustee, on the 7th of December, 1915, to sell under said deed of trust, at which sale the appellant became the purchaser, and is claiming the property under said trustee's deed; that at the time said trustee's sale was made an administration was pending upon the estate of Samuel Peay, deceased, and that C. D. King was administrator; that the defendant had not presented his claim to the probate court for approval or allowance, and therefore his power of sale given in said deed of trust was suspended and said sale ineffective and void; that subsequent to the death of Samuel Peay the said Maude Peay brought suit against the brothers and sister of Samuel Peay, who were his only heirs, and his administrator and recovered judgment on the 15th day of May, 1915, vesting the title to the land involved in her, the said Maude Peay; that she thereafter sold the land to R. P. Wofford, who conveyed to plaintiff Scott; that on the 27th of March, 1915, Maude Peay executed a deed of trust to David Murry, trustee, to secure appellant in the payment of a note, and that on the 3d of August, 1915, David Murry, trustee, sold the land under said deed of trust, at which sale the appellant was present, and induced the appellee, Scott, to buy the land and agreed that he should buy it; that appellee bought the land and at his instance and for him the deed was made to R. P. Wofford; that said sale was made prior to the sale under the deed of trust to Hall, trustee, without notice that appellant would rely upon and foreclose the Hall deed of trust, and that the latter sale was fraudulent as to the appellee and that appellant was estopped to claim title under last sale; that Samuel Peay and his wife claimed and owned said land under a deed dated May 20, 1913. The appellant, as defendant below,

filed and presented a plea of nonjoinder of necessary parties, on the ground that the administrator of the estate of Samuel Peay was not made a party plaintiff, general and special demurrers, and motions to strike out parts of the petition, and the appellant also pleaded a general denial and a plea of not guilty. These pleas, demurrers, and motions were all overruled, and appellant reserved his exception. The case was tried before a jury, and was submitted upon special issues. Upon the findings of the jury both the plaintiff and the defendant filed motions for judgment. The court overruled defendant's motion and rendered judgment for the plaintiff as prayed for in his petition, to which the defendant reserved his bill of exception. The defendant's motion for new trial was overruled, and he perfected an appeal to this court.

[1] The first contention is that the court erred in overruling appellant's plea of nonjoinder of parties; the proposition being that in an action of trespass to try title for land alleged to have belonged to a deceased person at the time of his death, and when there is an administration pending on the estate of the deceased prior owner, the heirs of the deceased, or persons claiming under them, cannot maintain a suit for the land unless the administrator is made a party to the suit.

It is sufficient to say in answer to this contention that it was alleged, and the jury found from the evidence, that the land in controversy constituted the homestead of the deceased, Samuel Peay, and his wife, Maude Peay, at the date of the former's death, and that his creditors and administrator had no interest in it. It was not liable for the payment of the debts of Samuel Peay, and formed no part of his estate subject to administration. Again, Maude Peay, as the surviving wife of Samuel Peay, deceased, sued and recovered, in a court of competent jurisdiction before the present suit was filed, the land in controversy from the administrator of the estate of Samuel Peay, deceased, and from the brothers and sister of the said Samuel Peay as his only heirs at law. This being true, it was not essential to appellee's right of recovery, he claiming under the said Maude Peay, that the administrator of the estate of Samuel Peay, deceased, be made a party to this suit, and the right of said administrator to administer said property be again determined under the facts. He was neither a necessary nor a proper party to the suit.

[2-4] Nor do we think the court erred in overruling appellant's general and special demurrers to appellee's petition. The allegations were not as full and complete as they might have been, but they are not so imperfect and incomplete as to fail to show a cause of action and authorize the introduction of the evidence necessary to establish the facts

upon which appellee's right of recovery depended. It is not directly alleged that Samuel Peay died intestate, or that Maude Peay was his only surviving heir, or that the land involved in the suit was the separate property of either Samuel Peay or Maude Peay, or that it was their community property. It does, however, appear that Samuel Peay was dead and that an ordinary administration of the estate was pending; that before the death of the said Samuel Peay he and Maude Peay were husband and wife, and that during their marriage they acquired said property by purchase, the deed being taken in the name of the husband; that they established their homestead upon the property and continued to reside upon it as such until the death of the said Samuel Peay; and that Maude Peay continued to occupy, use, and enjoy it after the death of her husband. There are also allegations to the effect that Samuel Peay died without issue and that Maude Peay as his surviving wife brought suit and recovered the property in controversy from his brothers and sister, who were his only heirs, and from the administrator of his estate. If Samuel Peay and Maude Peay were husband and wife, and the property in controversy their community property, and Samuel Peay died without issue, then his surviving wife, Maude Peay, under the law of descent and distribution of this state, was entitled to all of said property, and if at the death of Samuel Peay the property constituted the homestead of himself and wife it was not subject to administration in the probate court as asset of the said Samuel Peay's estate, his creditors had no interest in it, and his administrator owed them no duty in relation to it and had no power or authority to subject it to the payment of their debts. Under such circumstances Maude Peay could maintain an action against the administrator of Samuel Peay's estate, or other person setting up claim or title to said property, to quiet her title thereto, and the appellee in this suit, unless estopped or precluded by some act or conduct of his own, could question the validity of the sale of the property at which appellant bought and under which he set up title thereto. M. M. Parks, a witness introduced by appellee, testified without contradiction that Samuel Peay bought the property in controversy and paid for it with money acquired from the Texas & Pacific Railway Company in settlement of a suit instituted by the said Samuel Peay against that company to recover for personal injuries which were inflicted upon him during the time he was living with Maude Peay as his wife. This money was the community property of the said Samuel Peay and Maude Peay as husband and wife, and its investment in the property sued for constituted that property their community property. If, therefore, there was any techni-

cal error in the trial court's action in overruling appellant's demurrers, which is not admitted, the evidence and findings of the jury render such error unimportant and harmless. The appellant was not a party to the suit of Maude Peay against the administrator of the estate of Samuel Peay and his brothers and sister, and is not bound by the judgment obtained therein, but we think, even if it cannot be said that it was permissible for the appellee in deraigning his title to allege and prove said judgment, that its introduction in evidence furnishes no sufficient ground for the reversal of the case. The assignments of error complaining of the court's action in overruling appellant's general and special demurrers are overruled.

[5-7] The fifth assignment of error is that the court erred in permitting the plaintiff, Scott, to read in evidence to the jury certain recitals in deeds from Maude Peay to R. P. Wofford which described and identified the grantor in said deed, Mrs. Maude Peay, as "widow and wife of Samuel Peay, deceased." The reading of these recitals was objected to on the ground that the same were self-serving and not proof of the facts recited, and were prejudicial to the rights of the defendant and were not admissible against him. This assignment is not believed to be well taken. Appellee alleged that on the 19th day of May, 1915, Maude Peay executed a deed to one-half interest in the land sued for to R. P. Wofford, and that on July 10, 1915, she executed a deed to Wofford conveying the entire title. Under these allegations appellee was allowed to introduce in evidence two deeds from Maude Peay to R. P. Wofford, dated respectively May 19, 1915, and July 10, 1915; the first containing the recital describing and identifying the grantor, Mrs. Maude Peay, as follows, "widow and wife of Samuel Peay, deceased," and the second containing the recital describing and identifying the grantor, Mrs. Maude Peay, thus, "the surviving widow of Samuel Peay." Whether or not Maude Peay was ever the wife of Samuel Peay was a controverted issue in the case, and appellee relied upon proof of a common-law marriage to establish the relation of husband and wife between them. Now, "the general rule is that recitals in a deed are only evidence against privies, and do not affect strangers." *McCoy v. Pease*, 17 Tex. Civ. App. 303, 42 S. W. 659, 1 Greenl. Ev. § 23; *Williams v. Chandler*, 25 Tex. 11. The appellant was a stranger to the transactions and deeds here in question; the deeds were not ancient instruments; and if the recitals in question were not strictly admissible, their admission furnishes no sufficient ground for a reversal of the case for the reason, if for no other that similar evidence was introduced without objection. The record discloses that appellee, without objection, introduced a petition

filed by Maude Peay in a divorce suit instituted by her against Samuel Peay in the district court of Dallas county on the 17th day of December, 1913, containing allegations that she was the common-law wife of Samuel Peay and that they had, on or about the 1st of June, 1912, agreed to live together as husband and wife and thereafter carried out said agreement and lived and cohabited as husband and wife. The recitals in the deeds objected to were, in effect, a written declaration on the part of Maude Peay that the relation of husband and wife existed between her and Samuel Peay prior to the death of the latter, and to the same effect are the allegations of the petition filed by her in the suit to dissolve the relationship. The admission of the recitals in the deeds, therefore, must be regarded as harmless, or such an error as was not calculated to cause the jury to render an improper verdict. Furthermore, the appellant introduced in evidence, presumably by consent or without objection, a written statement made by Maude Peay on the 30th day of December, 1913, to the effect that she was not then and had never been the wife of Samuel Peay, that she was never married to Samuel Peay by any verbal agreement between them that they were husband and wife, and that she had not lived and cohabited with the said Samuel Peay as his wife. The recitals in the deeds referred to were therefore admissible perhaps to show, in rebuttal of the said statements introduced by appellant, that Maude Peay, at another and different time, represented and declared that she had been the wife of the said Samuel Peay.

[8] The sixth assignment of error complains of the court's action in permitting the appellee to introduce in evidence over the objections of the appellant a judgment rendered in the district court of Dallas county, Tex., on the 15th day of May, 1915, in the cause styled *Maude Peay v. Joe Peay et al.*, in which Maude Peay was plaintiff and Joe Peay, Hugh Peay, and Blanche Lily, the brothers and sister of Samuel Peay, deceased, and C. D. King, as administrator of the estate of said Samuel Peay, were defendants. The only proposition advanced under this assignment is as follows:

"Where a husband and wife own land as community property, and the husband executes a mortgage on the land and afterwards dies without issue, leaving surviving him his said wife and also his brothers and sister as his only heirs, and an administration is opened upon his estate, and the brothers and sister of the deceased husband claim said land as against the wife, and the wife brings suit in trespass to try title against the brothers and sister of her deceased husband and the administrator of his estate for the title and possession of the land, to which suit the said mortgagee of the husband was not a party nor privy to any party thereto, and the wife recovers a judgment for the title and possession of the land from such de-

fendants, and the wife afterwards sells the land, and the said mortgagee thereafter forecloses his mortgage on said land and buys it in, and the purchaser from the wife brings suit in trespass to try title against the said mortgagee, the judgment obtained by the wife in her suit against the brothers and sister of her deceased husband and his administrator is not admissible in evidence in behalf of the purchaser from the wife in his said suit against the said mortgagee."

The appellant not being a party to the suit and judgment mentioned, his rights under the deed of trust executed by Samuel Peay in his lifetime, and under which he claims, are not affected thereby, but we think the judgment was admissible in evidence to show title in Maude Peay, under whom appellee claimed, as against the surviving brothers and sister of Samuel Peay, deceased, and as against his administrator. The contention of appellant, as shown by the proposition advanced, is to the effect that the judgment was inadmissible for any purpose under the facts alleged and proved. In this contention we do not concur.

[9] The witness M. M. Parks, after testifying that he was a lawyer, and as such represented Mrs. Maude Peay in her suit against Joe Peay and others in which the judgment referred to in the discussion of the sixth assignment of error just disposed of was rendered, and after stating that a number of witnesses were examined in the trial of that case, was asked the following question: "What was the consensus of opinion of those witnesses about his, Samuel Peay, being married?" To this question appellant objected on the ground that he "was not a party to that suit, and did not have a chance to examine or cross-examine those witnesses or take part in it." The objections were overruled by the court and the witness answered: "Well, the places in which he had lived and the ladies and gentlemen who testified in the case, testifying that they lived there and roomed together and held themselves out as husband and wife, and they knew her as Mrs. Peay." The ruling of the court in admitting this testimony is made the basis of the seventh assignment of error. Manifestly, the answer of the witness is not complete and is not responsive to the question. The question, in our opinion, was improper, but it does not appear that it was objected to on the ground that it called for hearsay testimony or was not responsive to the question asked, and in the manner presented we would not be warranted, it occurs to us, in holding that the assignment of error points out reversible error. In reviewing the action of the trial court we are confined to a consideration of the very grounds of objection urged in that court.

[10-13] The next assignment of error is to the effect that the court erred in overrul-

ing appellant's motion for judgment upon the findings of the jury upon the special issues submitted, and especially upon their answer to the fourth issue. The fourth issue submitted and the instructions in relation thereto are as follows:

"You are instructed that on the 30th day of December, 1913, Samuel Peay executed a deed of trust to W. H. Hall, trustee, to secure \$175 note, covering the land sued for, and that another deed of trust was executed by Maude Peay to David Murry, trustee, on the 27th day of March, 1915, to secure a note for \$111.70, covering the land sued for. On the 3d of August, 1915, both of said deeds of trust and notes were owned by the defendant, A. M. Clark, and on the said 3d of August, 1915, said David Murry, trustee, acting by request of said Clark, foreclosed said last deed of trust and the land was then struck off to plaintiff, Ross M. Scott, upon his bid for the sum of \$117.50, which was paid by him to said trustee. Under this issue, you are instructed to find from the evidence whether or not, prior to making his bid, the said Ross M. Scott was notified or informed that this sale was made subject to the deed of trust herein mentioned, then held by the defendant, Clark. You are further instructed that the simple knowledge of the existence of the first deed of trust is not what is herein referred to, but such knowledge or information as would reasonably indicate to said Scott that he, as purchaser, would be required to pay first deed of trust, else the same would be foreclosed. If you find that he was so notified or informed, your answer shall be 'Yes.' If you find that he was not so notified or informed, your answer shall be 'No.'"

The jury answered this issue "Yes." The proposition of appellant under this assignment is that one who purchases property incumbered with a lien and assumes its payment, or takes subject to the lien, or deducts the amount of the lien from the purchase price, recognizes the lien and is estopped from denying the validity of the same. The findings of the jury are to the effect that on and prior to December 30, 1913, the date of the execution of the deed of trust under which appellant claims title to the property in controversy, Samuel Peay and Maude Peay, in virtue of a common-law marriage, were husband and wife and occupied and used said property as their homestead, and the question here presented is whether or not, under the evidence and the answer of the jury to the fourth issue just quoted, appellee is estopped to deny the validity of said deed of trust under which appellant claims, it having been executed and taken upon the homestead of said Samuel and Maude Peay. The following general principle of law seems to be well established: When a party buys mortgaged property, and, in the purchase thereof, assumes or purchases subject to the mortgage, he is, broadly speaking, estopped to deny the validity of the mortgage on any grounds whatsoever. If he expressly con-



tracts to take the property incumbered with the lien he is not thereby personally bound for the debt; but he cannot be heard to dispute the validity of the lien, and the property is bound for the debt. *Michigan Savings & Loan Ass'n v. Attebery*, 16 Tex. Civ. App. 222, 42 S. W. 569; 1 Jones, *Mortg.* §§ 736, 744, 749; 19 *Ruling Case Law*, § 140; *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456; *Association v. Bostwick*, 100 N. Y. 628, 3 N. E. 296; *Chadwick v. Beach Co.*, 43 N. J. Eq. 616, 12 Atl. 380; *Dean v. Walker*, 107 Ill. 544, 47 Am. Rep. 467. It is said the difference between the purchaser's assuming the payment of the mortgage and simply buying subject to the mortgage is that in the one case he makes himself personally liable for the payment of the debt and in the other he does not assume such liability. In both cases, however, he takes the land charged with the payment of the debt, and is not allowed to set up any defense to its validity. *Hancock v. Fleming*, 103 Ind. 533, 3 N. E. 254. It has also been held, though there is authority to the contrary, that an oral promise of assumption made to the grantor of land at the time of the conveyance is sufficient and may be enforced in equity by the grantor or the holder of the mortgage; that such promise is independent of the deed, and not contradictory thereof nor merged therein; that it is not within the provision of the statute of frauds prohibiting proof by parol of a contract not to be performed within one year or to answer for the debt or default of another. 19 *Ruling Case Law*, § 152. In the case at bar all the testimony bearing upon the question whether appellee assumed the payment of appellant's debt or bought subject to appellant's deed of trust, and under which he claims, was oral and is conflicting. As heretofore shown, the appellee purchased the property in controversy at a public sale thereof by David Murry, trustee, under and by virtue of the power and authority given in the deed of trust executed by Maude Peay on the 27th day of March, 1915, to secure a debt due by her to the appellant, and claimed title to said property by virtue of said purchase and deed executed to him therefor by R. P. Wofford; and the appellant purchased the property at a subsequent sale thereof by H. Dooley, substitute trustee, by virtue of a deed of trust executed by Samuel Peay, dated December 30, 1913. The appellee testified that before and at the time he purchased the property nothing whatever was said about another deed of trust having to be foreclosed before he got title to the land; that he never heard of any deed of trust on the property except the one under which he bought until after the sale was made; that before the sale by the trustee Murry no one notified him (appellee) of the existence of the deed of trust under

which appellant bought and claimed, or that the land was being sold by Murry subject to the deed of trust under which appellant claimed; that he had no suspicion that it would be so sold; that he thought when he bought at sale under deed of trust executed by Maude Peay that concluded the matter; that the first he heard of the deed of trust under which appellant claimed was after the sale had been made to him (appellee) and the purchase money paid; that he certainly would not have bought the property had he known it was going to be sold again under a prior mortgage. On the other hand David Murry, the trustee named in the deed of trust under which appellee bought, testified in substance that he sold the land under that deed of trust to the highest bidder; that appellee was the highest bidder; that the sale was made at the instance of Mr. Clark, the appellant; that it was well understood by appellant and appellee that the sale then being made by him was made subject to other indebtedness due appellant and the deed of trust under which appellant claims title to the property in this suit. He further said that after he posted the notices of the sale at which appellee bought he told appellee that he was to pay off the first deed of trust; that appellee came to see him a day or two before the sale and he then told him that the land was to be sold subject to the other deed of trust—the deed of trust under which appellant claims. The appellant, A. M. Clark, testified in substance that it was certainly agreed and understood at the time the sale was made at which appellee bought the land in controversy that such sale was made subject to the deed of trust under which he (appellant) bought and claimed; that on the morning of the sale he saw appellee in Mr. Murry's office; that appellee said, "Clark, I haven't got enough money to pay but one of these notes, and if you will let it wait awhile until we sell the property I will pay the other one;" that he (appellee) said to Murry, "I want you to help me sell it, and when we sell it I will pay the note; if I get the money beforehand I will pay it beforehand." He further said: "The Murry trustee sale was made subject to the other note and deed of trust. I am sure that the statement was made that the sale was to be made subject to the Waltz indebtedness. It was made before we went down there and after we went down there, too."

As has been seen, the jury found that appellee, prior to his bid and purchase of the property in controversy, was notified or informed that the sale of said property was made subject to the deed of trust under which appellant claims title; that the knowledge or information he then had was sufficient to reasonably indicate to him that he as purchaser would be required to pay the

first deed of trust—the one under which appellant claims—else said deed of trust would be foreclosed. Does this finding of the jury, in the light of the evidence, entitle appellant to judgment upon the theory that appellee assumed or bought subject to the prior mortgage under which appellant claims, and therefore estopped to deny that said mortgage was void because given upon the homestead of Samuel and Maude Peay? We conclude that it does not. The reasonable construction or interpretation of this portion of the jury's special verdict is that they simply concluded, and so found, that appellee, with knowledge of the existence of the prior deed of trust held by appellant, and with information that appellant would seek to foreclose it or require appellee to discharge the lien created thereby, by paying the debt which it was given to secure, bought at the sale made under the junior deed of trust executed by Maude Peay, and is not a finding to the effect that appellee purchased subject to the prior deed of trust under which appellant claims, in the sense that he assumed the payment of said deed of trust or recognized its validity. A grantee or purchaser of mortgaged premises who has not assumed the mortgage, and has purchased without any deduction from the price on account thereof, may dispute its validity. If, on the other hand, one purchases property subject to a mortgage and withholds from the purchase price the amount of the debt secured, he is estopped to deny the validity of the mortgage. But it is not incumbent upon such purchaser to pay a mortgage or deed of trust on the land which constituted no part of the consideration for the purchase. Again, it has been held that the rule that the grantee or purchaser of property incumbered with a mortgage or deed of trust lien is estopped to deny the validity of such instrument applies only where the instrument assumed is described in the deed of conveyance, and the agreement or assumption is made in the nature of a contract and for a valuable consideration. So a conveyance of real estate subject to a deed of trust executed by the vendor to secure the payment of a note does not, without words importing that the vendee assumes the payment of the note, subject the latter to any liability to pay it. *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456. It does not appear that there were words in the deed executed by Murry, trustee, to appellee from which by fair import an agreement to pay appellant's debt or that appellee bought subject to the deed of trust given to secure the same. Nor is there any evidence that the appellee deducted the amount of said debt secured, or any part thereof, from the amount of his bid, or that there was any consideration to support a purchase by appellee subject to said deed of trust or a verbal promise

on his part to pay the debt secured thereby. The issue whether appellee orally agreed to assume or pay the debt secured by the deed of trust given by Samuel Peay to appellant was not submitted to the jury, and no request for its submission seems to have been made or exception taken to the failure of the court to submit it. There was ample evidence to authorize a finding that no such agreement was made by appellee, and the presumption will be indulged in support of the judgment rendered that such was the conclusion and finding of the trial court. But it will be found, we think, that almost every case in which it has been held that an oral agreement on the part of one buying property incumbered with a mortgage or deed of trust to pay off and discharge such incumbrance was not a promise to answer for the debt of another within the statute of frauds involved a debt of one of the immediate parties to the transaction or contract. Thus, in the case of *Enos v. Anderson*, 40 Colo. 395, 93 Pac. 475, 15 L. R. A. (N. S.) 1087, cited in 19 *Ruling Case Law*, § 152, to support the proposition that an oral promise of assumption made to the grantor at the time of the conveyance is not within the provisions of the statute of frauds prohibiting proof by parol of a contract to answer for the debt or default of another is such a case. There the debt assumed was owed to one of the immediate parties to the contract, and it appeared that in consideration for certain property conveyed to them the defendants agreed to pay notes of the plaintiffs. In other words, it was the "defendant's" debt. No such case is here presented.

Our conclusion is that the record before us shows that appellee bought the property in controversy simply with knowledge of the existence of the prior deed of trust under which appellant claims and not expressly subject to said prior deed of trust; that, especially in view of the presumptive findings of the trial court, we conclude that appellee did not, before or at the time of his purchase, orally promise or agree to pay the debt secured by the trust deed under which appellant claims and upon which he relies for title, and that therefore appellee is not estopped to deny the validity of said deed of trust.

The other assignments of error fail to disclose reversible error, and will be overruled. The evidence, though conflicting, justified the jury's findings that prior to the death of Samuel Peay the relation of husband and wife, by virtue of a common-law marriage, existed between him and Maude Peay, that the property in controversy was their community property, and that at the time of the execution of the deed of trust by Samuel Peay, and under which appellant claims, said property constituted the homestead of Samuel Peay and his wife. Said deed of

trust was therefore void, and appellee, not being estopped to deny its validity, was entitled to recover.

The judgment is affirmed.

TEXAS PACIFIC COAL & OIL CO. et al. v.  
HOWARD et al. (No. 9161.)

(Court of Civil Appeals of Texas. Ft. Worth.  
April 19, 1919.)

1. MINES AND MINERALS ⇨48—OIL—"MINERAL."

Oil produced from wells is a "mineral" substance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral.]

2. INJUNCTION ⇨163(2) — TEMPORARY INJUNCTION — DISSOLUTION — DISPUTE AS TO RIGHTS—DRILLING OIL WELLS.

In a suit by the lessee of an oil and gas lease to restrain the purchaser of a part of the land omitted from the lease by mutual mistake from drilling an oil well, it was not an abuse of discretion to dissolve a temporary injunction, where litigation as to the title of the omitted land was pending on conflicting evidence; and irreparable injury might result to defendant by wells drilled on adjacent land by petitioner.

3. INJUNCTION ⇨137(4) — TEMPORARY INJUNCTION—DRILLING OIL WELLS—PROPRIETY OF REMEDY—DOUBT AS TO RIGHTS.

In a suit by the lessee of an oil and gas lease against the purchaser of a part of the land omitted by mutual mistake from the lease, to restrain him from drilling for oil, a temporary writ of injunction was not appropriate, it appearing that the rival claimants were acting in good faith, that their ultimate rights were uncertain, and that the interest of the public at large, arising from an early development of the region for oil, was at stake.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Suit by the Texas Pacific Coal & Oil Company and others against W. Howard and others for an injunction. From an order dissolving a temporary injunction, petitioners appeal. Affirmed.

W. J. Oxford, of Thurber, Scott & Brelsford, of Eastland, and Vinson, Elkins & Wood, of Houston, for appellants.

Earl Conner, of Eastland, Ritchie & Ranspot, of Mineral Wells, and Kay, Akin & Weldon, of Wichita Falls, for appellees.

CONNER, C. J. This appeal is from an order of the district court of Eastland county, dissolving a temporary writ of injunction theretofore issued upon the petition of the appellants.

This suit was filed on January 23, 1919, by the Texas Pacific Coal & Oil Company, which for brevity will hereafter be termed the Coal Company, and by the Prairie Oil & Gas Company, hereinafter designated as the Oil Company, against W. Howard, W. E. Jones, George J. Watson, R. D. Hinkson and others, on allegations to the effect that on March 10, 1917, said W. Howard entered into a contract with said Coal Company, whereby the company was given the exclusive right to explore for oil and gas on 160 acres of land constituting the W. Howard homestead tract in Eastland county. The said contract was in writing, but failed to correctly describe the land so leased, and that to correct the insufficient description said Howard, in October, 1917, executed a corrected lease of his said homestead; that as a matter of fact neither the original nor the corrected lease included a 1-acre tract of land out of the Mark Haley survey now claimed by the defendants; that the said 1 acre joined the other lands of the homestead tract and formed part thereof, but in writing the leases it had been omitted by the mutual mistake of all parties thereto.

The plaintiffs further alleged that some time later than the transactions above referred to, to wit, on October 26, 1917, the defendant Jones, acting for himself and other defendants, purchased from Howard all of the land forming and constituting the W. Howard homestead tract, including the 1 acre above referred to; that at the time of said purchase the said Jones and other defendants well knew that the leases from Howard to the Coal Company were intended to include the 1 acre, and that it had been omitted from said leases by the mutual mistake of the parties; but that, notwithstanding such information and knowledge, they caused Howard to execute to them conveyances of the entire homestead tract, which conveyances, it was averred, were subject to the prior leasehold right of the plaintiffs in action.

It was further alleged that defendants are asserting title to the said 1 acre of land, and are attempting to develop the same for oil and gas in violation of the rights of the plaintiffs; that such tract is within proven oil territory, and is very valuable; that great quantities of oil can be produced therefrom; and that, unless said defendants are restrained from further operations thereon, the plaintiffs will suffer irreparable injury and damage.

Upon presentation of plaintiffs' petition, Hon. Joe Burkett, judge of the district court of Eastland county, duly entered an order, commanding the issuance of a temporary writ of injunction as prayed for upon the plaintiffs giving good and sufficient bond in the sum of \$5,000.

The writ ordered was duly issued, and thereafter, on February 8, 1919, the defendants Jones and others filed their motion to dissolve, alleging, among other things, that they were the owners of said 1 acre, having purchased the same for a valuable consideration; that mention of this 1-acre tract was not made in the leases under which the plaintiffs claim, and denying any mistake in its omission from the plaintiffs' leases, and especially denying the mutual mistake alleged, and especially denying notice of any such mistake. The defendants further averred that they had, at great expense, purchased a standard rig, machinery, and tools, and had drilled a well for oil and gas on said 1-acre tract to a depth of 3,300 feet, and were still engaged in the prosecution of said well; that the 1-acre tract is located in the proven oil field of Eastland county, and that said well and improvements would greatly deteriorate if required to stand and remain idle; and, finally, they averred their readiness and ability to make bond in favor of the plaintiffs in any sum required by the court, conditioned that in the event of final recovery by the plaintiffs the value of the minerals extracted should be paid to them.

Upon the hearing of the motion, the court entered an order dissolving the temporary writ of injunction, but continued it in force pending the appeal, upon plaintiffs giving bond in the sum of \$50,000. The bond was filed in due time by the plaintiffs, and they have duly appealed from said order of dissolution.

In general terms it may be said that the evidence of the parties submitted on the motion to dissolve was in substantial accord with their respective allegations. More particularly it was shown that Howard's homestead tract was composed of four separate parcels of land. The 1 acre in controversy is one of the parcels constituting the whole, but it was acquired by Howard by a separate conveyance. Mr. Howard testified quite definitely to the effect that it was the purpose of all parties thereto to include his entire homestead tract in both the original lease of March 10, 1917, and in the subsequent corrected lease of October, 1917, and that the 1 acre of land in controversy had been omitted from both leases by mistake. His testimony and other evidence also tends strongly to show that appellees, before their purchase of the fee in the Howard homestead, had notice of the alleged fact that the 1-acre parcel had been leased together with the other parcels to the Coal Company, and that it had, through oversight or mistake, been omitted from the leases.

Upon the facts so stated, appellants insist that they are entitled, as a matter of law, to have appellees enjoined from a further prosecution of the oil well, begun and drilled, as by them alleged, until, at least, it

shall be otherwise determined, on final hearing. Appellants' contentions are thus stated, in the several propositions they present:

"(1) Where the facts show threatened acts which, if not prevented, will result in irreparable injury, or where it appears that such acts are in their character and tendency destructive to the inheritance or to that which gives it its chief value, an injunction will lie, notwithstanding a dispute, or even pending litigation, as to title.

"(2) The drilling of an oil well on oil land, and the threatened appropriation of the oil produced therefrom, constitutes irreparable injury, and an injunction will lie restraining such action, notwithstanding a dispute, or even pending litigation, as to title.

"(3) Where the title to oil property is in litigation, an injunction will lie to enjoin persons in possession from drilling oil wells thereon and extracting the oil therefrom, for such action is emphatically the taking away of the entire substance of the estate, and besides, there is in such a case no mode of estimating the injury that will ever approach substantial accuracy.

"(4) While a legal action is pending and being prosecuted in good faith for title to and possession of property, neither party will be permitted to destroy the property's value by appropriating to himself that which makes it valuable, and in such a situation equity, not being immediately concerned with the superiority of the rival claims, does not wait upon the adjudication of the question, but will restrain any action which in the end would make the property valueless in the hands of the successful claimant.

"(5) The evidence showing that the property in controversy was chiefly valuable as oil property, and that the defendants were drilling an oil well thereon, and were threatening to reduce to possession the oil and minerals thereunder, and the evidence further showing that the plaintiffs made a prima facie showing of title on the hearing to dissolve the injunction theretofore granted, the court erred in dissolving the injunction, notwithstanding there was pending litigation as to the title.

"(6) The drilling of an oil well and the threatened appropriation of the oil produced therefrom constitute irreparable injury, and a statement of such injury is sufficient in a bill for an injunction without allegations of insolvency. This being true, the willingness of defendants to execute a bond for the protection of appellants was no answer to the bill; and therefore the court erred in dissolving the injunction.

"(7) The right to an injunction is based upon the nature of the injury, and not upon the capacity of the parties to respond in damages.

"(8) A bill which alleges that the defendants are about to drill for and take oil from the premises alleged facts which per se constitute irreparable injury."

The following article and cases are cited in support of the foregoing propositions:

"Article 4643, Vernon's Sayles' Tex. Civ. Stats.; *Houston Oil Co. v. Village Mills*, 202 S. W. 725; *Houston Oil Co. v. Davis*, 154 S.

W. 337; *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Southwestern Tel. & Tel. Co. v. Smithdeal*, 104 Tex. 258, 136 S. W. 1052; *Erhardt v. Boaro et al.*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Thomas v. Marble & Talcum Co.*, 58 Fed. 488, 7 C. C. A. 330; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Dudley v. Hurst*, 1 Am. St. Rep. 876; *Mobile Co. v. Knapp* (Ala.) 75 So. 881; *Merced Mining Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262."

The article of the statute cited provides that writs of injunction may issue, not only where applicant may show himself entitled thereto under the principles of equity, but also:

"(1) Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

"(2) Where, pending litigation it shall be made to appear that a party doing some act respecting the subject of litigation, or threatens or is about to do some act, or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render judgment ineffectual."

And as construed in a number of our cases, notably in *Sumner v. Crawford*, supra, the statute has enlarged the remedy of injunction in this state to all cases falling within clauses 1 and 2 above quoted, regardless of whether the defendant was insolvent, or whether the applicant for the writ had a legal remedy by a suit for damages or otherwise. In equity, generally speaking, the fact that the defendant was solvent, and that the applicant had a legal remedy by way of a suit for damages or in some other way, was sufficient to authorize a refusal of the writ of injunction. We have, however, arrived at our final conclusion, attached no importance to the distinction noted between our statute as construed and the principles of equity relating to the subject of injunctions, for while it was alleged and shown that the defendants in this case were solvent and able to respond in damages, even in equity the writ of injunction is deemed an available and proper remedy where, as is alleged here, it would be difficult to ascertain the amount of damages with certainty, or where the threatened injury would be irreparable or goes to the destruction of the property or thing in controversy. Thus in *Sumner v. Crawford*, supra, it was held that a mandatory injunction was proper to compel the restoration of certain goods unlawfully seized which were necessary to an effectual and profitable disposition of the remainder of the general stock. The case of *Dudley v. Hurst*, supra, is similar in principle to the case of *Sumner v. Crawford*. There it was held proper to enjoin, pending litigation, the removal of certain machinery that had become a fixture to the soil. So that at last

the vital question is not so much whether the right to an injunction in this case is one given by our statute as whether the threatened injury is one to be classed as irreparable. If it is then, both by the statute and in equity, injunctive relief is generally available, provided the relief to which appellants show themselves entitled requires the restraint of some act prejudicial to them, or that would render the final judgment ineffectual.

Of the cases cited by appellants, the cases of *Houston Oil Co. v. Village Mills*, 202 S. W. 725, and *Southwestern Tel. & Tel. Co. v. Smithdeal*, 104 Tex. 258, 136 S. W. 1052, involved a threatened removal of standing timber and shade trees. The cases of *Erhardt v. Boaro et al.*, by the Supreme Court of the United States, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116, *Thomas v. Marble & Talcum Co.*, 58 Fed. 488, 7 C. C. A. 330, *Merced Mining Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262, are cases that involve a threatened removal of such minerals as gold, marble, or talc. All of these cases hold that the threatened acts would constitute irreparable injury, and that to restrain their performance a temporary writ of injunction was required in order to maintain the status quo until a final determination of the conflicting claims of the litigants.

[1] Oil is a mineral substance, and its removal would greatly impair the value of the land in controversy, which, as alleged and shown, is chiefly valuable for the oil, and the principle of the cases above mentioned was, in fact, applied in a case similar to this by the West Virginia Supreme Court of Appeals. See *Bettman v. Harness*, supra.

We are thus brought squarely up to the question whether the order dissolving the temporary writ of injunction theretofore issued in this case and the consequent denial of appellants for temporary relief by injunction constitutes error for which the judgment appealed from must be reversed. We have concluded that we must, for reasons hereinafter briefly stated, answer the question in the negative.

In arriving at the conclusion announced, we have not been influenced by the thought that the extraction of the oil, if any, under the land in controversy, would not destroy its chief value, nor yet because of any supposed want of power in the court. But the mere fact that injury is threatened does not in all cases entitle a complainant to injunctive relief. Nor does the mere existence of the court's power to grant such relief compel the issuance of the writ.

The right or power to issue the writ is one question. Whether such power shall be exercised in a given case is an altogether different one. While under our amended statute and the construction thereof by our Supreme Court relief by a writ of injunction is more freely available and less hedged

about by restrictions than formerly, the nature or character of the writ or remedy has not been changed. The writ as ever is a harsh one and peremptory. By means thereof the real owner may be denied the possession and use of his property at the instance of an adverse claimant in advance of an adjudication of the conflicting assertions of right. Hence it was and is under the general equity practice largely within the discretion of the court as to whether the writ of injunction should issue in advance of an ultimate determination of right. Thus it is said in 22 Cyc. p. 746:

"An injunction, whether temporary or permanent, cannot, as a general rule, be sought as a matter of right, but its granting or refusal rests in the sound discretion of the court under the circumstances of the particular case. Especially is this the rule in the case of a temporary injunction, where the granting of the injunction depends upon the determination of questions of fact and the evidence is conflicting."

Again, the author in *Ruling Case Law*, vol. 14, p. 307, says:

"The remedy by injunction is summary, peculiar, and extraordinary, and ought not to be issued except for the prevention of great and irreparable mischief. It is not *ex debito iustitiæ* for any injury threatened or done to the estate or rights of a person, but the granting of it must always rest in the exercise of a sound discretion, governed by the nature of the case."

[2] We have not felt ourselves able to say, under the existing circumstances of this case, that the trial court abused a sound discretion in dissolving the temporary writ of injunction. It may be admitted that the 1 acre of land involved in this suit was omitted by mutual mistake from valid leases under which appellants claim, but it needs neither argument nor authority for the proposition that appellants must fail if defendants purchased for a valuable consideration and without notice of the mistake, as they allege and adduced evidence to show. The defendants also alleged and offered evidence to the effect that after they had contracted to purchase the Howard homestead it was discovered from the opinion of the attorney who passed upon the abstract of title that the 1 acre in question was not covered by the oil leases mentioned, and they, appellees, thereafter sought out authorized officers of the appellant Oil Company (which had by purchase acquired a one-half interest in the leases of the Coal Company) and was by them assured that the 1 acre was not included in such leases, after all of which they purchased the machinery, pipes, etc., necessary for drilling a well before appellants gave any notice of the alleged mistake. We have no means of determining the weight the trial court gave to the evidence in support of these defensive allegations. He may have

been thereby impressed with a very strong doubt of appellants' final success in the suit and with a probability of the good faith and possible superiority of appellees' claim, and hence concluded that defendants ought not, under the circumstances, be further restrained. It was alleged and shown that before the application for the writ of injunction the defendants had drilled upon the land in controversy a well some 3,300 feet, and expended in the operation some \$35,000. A continuance of the injunction, of course, arrests any further action on their part. Thereby they are forbidden from even entering onto the premises mentioned and from in any way or manner interfering with the plaintiffs in their entry thereon.

The appellees alleged, and there is nothing pointed out which indicates that the allegation is not true, that a cessation of the drilling, and abandonment of the well during the intermediate period of the further litigation would very greatly damage the well, machinery, etc. Under the operation of the writ, appellees could not even enter upon the land for the purpose of protecting the well or machinery so that great damage, not easily ascertainable, might result to them from a continuance of the injunction. In discussing the subject of the temporary injunction it is said that the right asserted by the claimant must be clear and free from doubt, where the effect of the preliminary injunction will be more than merely a continuance of the status quo, or where the injunction will cause defendants greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction. 22 Cyc. p. 753.

If it be assumed, therefore, as it seems to us we must assume from this order, that the trial court was, from the evidence, left in doubt as to the result of a final trial of the conflicting claims, it was not an abuse of discretion on his part, to dissolve the injunction. For should it so happen that the appellees finally succeed in establishing the right to the acre of land in controversy, the damage to them might indeed be irreparable. The record shows that the appellants owned leased lands adjacent to the acre in question and nothing is here presented that would preclude them from drilling an adjacent well or wells and thereby exhaust the oil from the subject-matter of this suit. Should such a course be pursued it would be extremely difficult, if not impossible, for appellees to show the amount of their damage, if any, for, while much is unknown upon the subject, it is the generally accepted theory that oil, unlike gold and silver and other minerals in place, is transitory—flowing from one place under the surface of the earth to another—and that it can be definitely known whether oil is under a given spot only by drilling.

[3] Indeed, in our judgment, a temporary

writ of injunction is inappropriate under circumstances such as are exhibited in this case. Of course, it is not to be doubted that under the authorities an owner of land or of a leasehold interest would be entitled to and should receive injunctive relief as against a mere trespasser or wrongdoer. But in cases where, as indicated here, the rival complainants are acting in good faith, and where the ultimate right seems uncertain, other protective remedies would seem to be much more appropriate. It is not only in the interest of both parties, but it may be said to be also in the interest of the public at large that there shall be an early development of the oil in the section. All classes of correlated interests are thereby stimulated, and such considerations alone are deemed by the North Carolina courts sufficient to require the refusal of temporary injunctions against a threatened removal of minerals in place, such as gold, iron, etc. See *Mining Co. v. Fox*, 39 N. C. 61; *Falls v. McAfee*, 24 N. C. 236; *Parker v. Parker*, 82 N. C. 165. For additional reasons we think the rule should be applied in this case.

As it seems to us, notwithstanding the decision of the West Virginia court, a distinction is to be made between cases of minerals in place such as are involved in most of the cases herein cited by appellants and minerals of a fugitive character, as oil. For, in the class of cases first mentioned, it is certain that the minerals have a fixed place in the soil, and that they will there remain forever unless removed. In such case a temporary writ of injunction will clearly and effectively preserve the status quo, the principal object and functions of such writ, until the final determination and judicial designation of the true owner to whom the court will then be able to restore the property in its original form and with all of its natural and valuable qualities. But it cannot be so said as to fugitive substances beneath the soil. Our present knowledge is to the effect that its presence or location in any designated place is not fixed and certain; that oil that is under one person's land to-day may be beneath the land of another to-morrow; and to illustrate that A. may withdraw the oil from under the land of B. should A. be accorded the right of drilling adjacent wells on his own land. In such case, a temporary restraint of B. does not, as to him, preserve the status quo. On the contrary, such restraint may result in irreparable injury to or destruction of his own property. It may be suggested that in such case both A. and B. can be re-

strained until a final determination of their conflicting claims, but nothing presented in this record will justify us in fixing the distance that a flowing well will withdraw oil from adjoining lands, and it cannot be said that the court in endeavoring to settle and preserve the rights of a given tract of land should arrest all development in the locality by enjoining all owners of adjacent lands, regardless of their want of interest in the particular suit.

It may also be said that should appellees succeed in finally establishing their right to the 1 acre of land in controversy, and it thus be made to appear that the temporary writ of injunction in this case was wrongfully issued, they would then have a remedy for damages in an action on the injunction bond. But this, unless all learning on the subject be at fault, would involve great uncertainty and as a remedy would be inadequate. Appellees in such case could, of course, recover for any loss or deterioration, if any, of their visible property, such as their rig and drilling machinery. But to recover for loss of oil they would be required to prove that oil, in fact, existed under the land, and that they could and would have secured it had they not been wrongfully prevented. This fact it would doubtless be impossible to determine with certainty without an actual drilling test, and should such test be made and no oil found, it could not with certainty be said that oil did not there exist at the time of the issuance of the temporary writ of injunction. Nor in case of a drilling test and oil thereby be found could it be with certainty determined just how much of the original quantity may have been withdrawn by producing wells in adjacent territory. Should a continuation of appellees' well demonstrate the fact that no oil exists under the 1 acre in controversy, the subject-matter of the litigation will apparently be of little further interest to either of the parties. In that event it would be shown that appellants have lost nothing of any considerable value, appellees being the only sufferers. Should oil be produced, however, the court may protect the rights of the true owners, as finally established, by a receivership or by some other equitable procedure. So that it was not imperative on the part of the trial court that he should find that the threatened acts of appellees either required restraint or would render the final judgment ineffectual within the meaning of our statute.

We therefore conclude, on the whole, that the judgment should be affirmed.

**SWEETWATER ICE & COLD STORAGE CO. v. CONTINENTAL STATE BANK OF SWEETWATER. (No. 961.)**

(Court of Civil Appeals of Texas. El Paso. April 24, 1919. Rehearing Denied June 5, 1919.)

**1. BILLS AND NOTES ⇨147—DRAFTS—NEGOTIABILITY.**

A check on one bank payable to depositor, and not to order or bearer, and indorsed by the depositor for deposit only to its credit, and deposited in another bank, is not a negotiable instrument.

**2. BILLS AND NOTES ⇨147—DEFENSES—FAILURE OF CONSIDERATION.**

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 582, 584, a check on one bank payable to drawer, and not to order or bearer, and containing a restrictive indorsement for deposit only, and deposited in another bank, was non-negotiable and subject to the defense of failure of consideration in the hands of a third person to whom the deposit bank transferred it in payment of a draft.

Appeal from District Court, Nolan County; W. W. Beall, Judge.

Action by the Continental State Bank of Sweetwater against the Sweetwater Ice & Cold Storage Company. From a judgment for plaintiff, defendant appeals. Reversed, and rendered for defendant.

Royall G. Smith, of Colorado, Tex., and Templeton, Beall, Williams & Callaway, of Dallas, for appellant.

Ed. J. Hamner, of Sweetwater, for appellee.

**HARPER, C. J.** On May 19, 1917, the following instrument was deposited with Thomas Trammel & Co., bankers of Sweetwater, Tex., by appellant:

"Dallas, Texas, May 18, 1917.

"The Security National Bank of Dallas, Texas: Pay to Sweetwater Ice & Cold Storage Company (\$7,000.00) seven thousand dollars. Sweetwater Ice & Cold Storage Company, by W. H. Painter, Ass't Treas.

"Counter-signed: J. C. Thompson, Sec."

On the back thereof is the indorsement by appellant:

"For deposit only to the credit of Sweetwater Ice & Cold Storage Co., Sweetwater, Texas."

It was mailed by appellant to Thomas Trammel & Co., bankers, May 18, 1917, with a letter reading:

"Attached find check on Security National Bank, Dallas, for \$7,000.00, which kindly place to the credit of our account, forwarding duplicate deposit slip, and oblige.

"[Signed] Sweetwater Ice & Cold Storage Co."

It reached the hands of Thomas Trammel & Co. on the morning of the 19th of May, 1917, and a credit was by it entered for that amount on appellant's account. Thomas Trammel & Co. was county depository for Nolan county, having \$50,000 of county funds on deposit. On May 18, 1917, appellee received a draft for \$9,960.80 on Thomas Trammel & Co. from a correspondent for collection, drawn by Nolan county, in favor of one Shaw, trustee in payment of work done on courthouse, and upon same day presented it to Trammel & Co. for payment. The payment thereof was passed over to next day at request of Trammel & Co., for reasons not necessary to enumerate, which was done. Upon next day Trammel & Co. delivered the check in controversy and other credits and exchange to appellee in settlement of the county draft, and indorsed it as follows:

"Pay to the order of any bank, banker or trust company May 19, 1917. Previous indorsements guaranteed. [Signed] Thomas Trammel & Co., Unincorporated, Sweetwater, Texas."

Before it reached the bank in Dallas, Trammel & Co. failed, and payment for that reason was stopped by appellant, and this suit was brought by appellee to recover on it, against Nolan county, and appellant, Sweetwater Ice & Cold Storage Company, alleging the facts. As against Nolan county recovery was predicated upon the theory that the latter's draft had not been paid; therefore it was subrogated to the rights of Shaw. The cause of action as to the county was dismissed upon demurrer.

Appellant answered by general demurrer, general denial, and by special answer:

"(1) That the check or draft was on its face nonnegotiable; (2) that it was restrictively indorsed and did not clothe Thomas Trammel & Co. with even apparent title to it; (3) that the check in question was deposited for collection only with Thomas Trammel & Co., the title thereto being thereby reserved in it, prior to its actual payment by the Security National Bank of Dallas; (4) that on May 19, 1917, Thomas Trammel & Co., to the knowledge of plaintiff, was in a totally insolvent condition, which was wholly unknown to appellant, and its taking the check for deposit constituted a fraud; (5) that the acquisition by plaintiff of the check was neither in due course nor for value, but that it took the same in payment of a pre-existing debt; (6) that, the check being nonnegotiable, plaintiff could acquire no better right thereto than Thomas Trammel & Co. had, and that plaintiff could take the same only subject to any defense that could be made by defendant against Thomas Trammel & Co. By supplemental petition plaintiff pleaded that, when the check in suit was deposited with Thomas Trammel & Co., appellant immediately received credit therefor, and drew checks against same, as was its custom and the long and continued course of business and dealings between appellant and said Thomas



Trammel & Co., and that appellant thereby had a right to check against such deposit, so that thereby said Thomas Trammel & Co. became the owner of such check, which was subject to transfer, assignment, and passage of title by indorsement and delivery. By supplemental answer appellant pleaded that there was no agreement, either express or implied from the course of dealings between it and said Thomas Trammel & Co., that it should have any right or privilege to check immediately against any credit given it for checks deposited by it with said Thomas Trammel & Co., but that it, as well as all other solvent and responsible depositors with said bank of Thomas Trammel & Co., was given a provisional credit for such deposits, subject to be revoked and withdrawn by charging back the amount of such credit, in the event any such item so deposited was not collected, and that it was permitted purely as a matter of accommodation, and on account of its known solvency, ability, and willingness to make such bank whole against any loss that might otherwise occur, to check against such provisional credit, in anticipation of the collection of such items; that no checks or drafts drawn against such provisional credit given on the deposit of the \$7,000 draft had been either presented to or ever paid by Thomas Trammel & Co."

Trial was had with a jury, the cause submitted upon special issues, and upon the verdict rendered judgment was entered for plaintiff, Continental State Bank of Sweetwater, Tex., against Sweetwater Ice & Cold Storage Company for \$7,000, and interest. From which this appeal.

The issues submitted and the answers are as follows:

"Special issue No. 1: At the time the defendant, Sweetwater Ice & Cold Storage Company, deposited the \$7,000 draft of date May 18, 1917, drawn on the Security National Bank of Dallas, Tex., with the bank of Thomas Trammel & Co., did the said bank of Thomas Trammel & Co. give the defendant Sweetwater Ice & Cold Storage Company credit for said draft upon its account, if any, with the said bank? Yes.

"Special issue No. 2: At the time the defendant, Sweetwater Ice & Cold Storage Company, deposited the said \$7,000 draft with the bank of Thomas Trammel & Co., did the said defendant deposit the same as cash or for collection only? Yes.

"Special issue No. 3: At the time the defendant, Sweetwater Ice & Cold Storage Company, deposited said \$7,000 draft with the bank of Thomas Trammel & Co., did said defendant expect and intend that the same should be passed to its credit upon the books of said bank of Thomas Trammel & Co. subject to be immediately checked against by it, the said defendant? Yes.

"Special issue No. 4: At the time the said \$7,000 draft was deposited with the bank of Thomas Trammel & Co., was it the understanding or agreement, either express or implied, at that time by and between the defendant, Sweetwater Ice & Cold Storage Company, and said bank of Thomas Trammel & Co., that the same should be treated as a cash deposit, and checked against by the defendant as such? Yes. In

passing upon the intention of the parties to the transaction in regard to said draft in evidence before you, you are authorized to take into consideration all of the former banking transactions by and between the defendant, Sweetwater Ice & Cold Storage Company, and the banking firm of Thomas Trammel & Co., and all other facts and circumstances in evidence before you bearing upon said issues.

"Special issue No. 5: At the time the defendant, Sweetwater Ice & Cold Storage Company, deposited the said \$7,000 draft with the bank of Thomas Trammel & Co., was the said bank of Thomas Trammel & Co. insolvent? No. In regard to 'insolvency,' a bank is said to be insolvent when its assets and property are of such character and value that it is unable to meet its demands in the usual and ordinary course of business."

The appellant urges, first, that it was entitled to a peremptory instruction. The propositions are that the instrument sued on is nonnegotiable; therefore the holder, plaintiff, took it subject to all defenses the drawer, defendant, could make against it in the hands of Trammel & Co., including failure of consideration.

[1] That this is not a negotiable instrument is well settled, in that it is not payable to order or to bearer. First National Bank of Farmersville v. Greenville National Bank, 84 Tex. 40, 19 S. W. 334; Daniels on Neg. Inst. § 29; Ellis v. Hahn, 29 Tex. Civ. App. 395, 68 S. W. 336, so there could be no transfer of title by indorsement. And in this case it clearly appears that there was no intention to transfer the title by indorsement, for the indorsement repeats the face of the instrument, except that it was directed thereby, that it was deposited for credit only, which indicates that the person to whom it was delivered is merely the agent to receive the money. Daniels on Neg. Inst. (6th Ed.) § 698; Harrison v. Sheirburn, 36 Tex. 73; City Bank v. Weiss, 67 Tex. 331, 3 S. W. 299; Bank v. Bank, 106 Tex. 297, 166 S. W. 689, L. R. A. 1918E, 336.

[2] There are cases holding that on an indorsement for deposit of a check which is credited as cash by the bank which received it, and thereafter in same form is transferred to other banks, the title to the check is in the bank which holds it and has paid for it. This is the rule invoked by appellee to support the judgment entered. Ditch v. Western National Bank of Baltimore, 79 Md. 192, 29 Atl. 72, 183, 23 L. R. A. 164 and note, 47 Am. St. Rep. 375. In this note it is stated:

"While these cases do not entirely agree in holding such an indorsement to constitute a retention of title in the depositor, it may be said that they sufficiently establish the rule that such is the effect of the indorsement in the absence of any agreement or practice to the contrary."

Upon careful investigation we find that this conflict of authority has arisen in cases

where the instrument was negotiable. The question being whether in fact the title to the paper passed, and the instrument being negotiable by its terms, and nothing to indicate that its negotiability was to be destroyed except the restricted indorsement, it then could properly, as held in some cases, become a question of agreement between the parties, either express or implied, from the general course of business between them, whether the title in fact passed upon delivery, or whether the receiving bank simply became the agent for collection. The instrument being negotiable in form if title passed before maturity, for value, the holder would take it free from defenses between the depositor and the original obligee and could sue in its own name (Vernon's Sayles' Revised Statutes Texas, art. 582); but, the instrument sued on being nonnegotiable, after it was assigned it is subject to all the defenses which it would have been subject to in the hands of the previous owner (article 584, Vernon's Sayles' Texas Statutes). This is true even though the absolute title passed.

So, the uncontroverted evidence being that Trammel & Co. paid nothing for the instrument, a plea of failure of consideration by appellant as against the suit of appellee is a good defense to the cause of action.

If the above is the law applicable to the instrument sued on, it becomes immaterial whether the questions indicated by the court's charge above quoted were properly framed and the answers thereto constituted such definite findings of fact as to be the basis for a judgment or not. Believing that the appellee has no cause of action, the cause is reversed, and here rendered for appellant.

#### NATIONS et al. v. MILLER. (No. 906.)

(Court of Civil Appeals of Texas. El Paso. April 3, 1919. On Rehearing, May 9, 1919. Second Motion for Rehearing Denied May 29, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1003—NEW TRIAL $\S$ 72—REVIEW—SETTING ASIDE VERDICT.

Verdict, to authorize trial or appellate court to set it aside, must be against the preponderance of the evidence to a degree showing that manifest injustice has been done, at least it must be affirmatively wrong.

#### 2. PUBLIC LANDS $\S$ 173(18)—TITLE AS PURCHASER OF SCHOOL LANDS—SUFFICIENCY OF EVIDENCE.

Evidence in trespass to try title held sufficient to sustain findings that defendant purchaser did not actually settle free school land within 90 days after its award to him, as required, and did not reside thereon continuously for three years after actual settlement.

#### 3. NEW TRIAL $\S$ 105—NEWLY DISCOVERED IMPEACHING EVIDENCE.

Newly discovered evidence, when its object is to impeach the credit of the witness, is not a ground for grant of new trial.

#### 4. NEW TRIAL $\S$ 99 — NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

The grant or refusal of new trial on the ground of newly discovered evidence is largely in the discretion of the trial judge.

#### 5. PUBLIC LANDS $\S$ 173(19) — ACTION TO RECOVER FORMER SCHOOL LANDS—REMARKS IN OVERRULING MOTION FOR NEW TRIAL—GROUND OF RULING.

In trespass to try title to recover land, originally public free school lands, from the purchaser thereof and his lessee, remarks of the trial court in overruling motion for new trial, and the ground on which he based his ruling, the ground being that the purchaser did not settle on the land for a home, but settled on it as employé of his subsequent lessee, held not reversible error.

#### 6. APPEAL AND ERROR $\S$ 719(1)—REVIEW—ERROR UNASSIGNED.

The Court of Civil Appeals cannot take cognizance of an error not properly assigned, unless it be an error of law apparent on the face of the record, or a fundamental error.

#### On Rehearing.

#### 7. APPEAL AND ERROR $\S$ 173(2)—ISSUES IN LOWER COURT—FREE SCHOOL LANDS—FORFEITURE.

In trespass to try title to public free school lands by the purchaser on forfeiture thereof against the original applicant to purchase and his lessee, defendant appellants held unable, for the first time in the Court of Civil Appeals, to question the sufficiency of the procedure of the land commissioner in making forfeiture.

#### 8. PUBLIC LANDS $\S$ 173(21)—FREE SCHOOL LANDS — SUCCESSIVE PURCHASERS — FORFEITURE—LIMITATION STATUTE.

The fact of forfeiture of public free school lands by an applicant to purchase is material to the right of the purchaser on forfeiture to prosecute trespass to try title to recover the lands from the original purchaser and his lessee only as relieving him from being barred within a year by Rev. St. 1911, arts. 5458, 5459.

#### 9. APPEAL AND ERROR $\S$ 230—ERROR IN INSTRUCTIONS—WAIVER BY FAILURE TO OBJECT.

Under Acts 33d Leg. c. 59, in trespass to try title to recover former free school lands from the original purchaser and his lessee, if definitions in the charge of "actual settler" and "continuous residence" were erroneous, the error was waived by defendants' failure to object at proper time.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by F. P. Miller, Administrator, etc., against J. H. Nations and others. From

judgment for plaintiff, defendants appeal. Affirmed.

See, also, 146 S. W. 261.

Turney, Burges, Culwell, Holliday & Polard, T. A. Falvey, and C. L. Galloway, all of El Paso, for appellants.

Edwards & Edwards and Jno. L. Dyer, all of El Paso, for appellee.

**WALTHALL, J.** This suit was originally filed by appellee, F. P. Miller, and his wife, I. D. Miller, on the 7th day of July, 1910. On January 24, 1918, appellee, Miller, filed his first amended original petition, individually and as community survivor and as community administrator of the estate of himself and his deceased wife, upon which amended petition this case was tried. The action is one in trespass to try title brought by Miller to recover six sections of land, originally public free school lands, from W. P. Paschal and J. H. Nations, a lessee of Paschal. On May 18, 1906, Paschal applied to purchase said lands, and made the formal affidavit that he would settle thereon within 90 days. On June 26, 1906, all of said lands were duly awarded to Paschal by the land commissioner. On May 24, 1909, the commissioner on each of Paschal's applications entered, "Land forfeited for failure to reside thereon as required by law." On May 26, 1909, Mrs. I. D. Miller applied to purchase said land, and on June 10, 1909, same was awarded to her.

Paschal's purchase of the land, barring the issues of fact submitted to the jury as to settlement and residence thereon, it was agreed was in formal compliance with the law, the required payments on his obligation were duly made up to the time of the commissioner's forfeiture of his purchase, and have since been duly tendered. He was in possession of the lands at the time of the forfeiture. Mrs. Miller also, after the lands were awarded to her, fully complied with the law in the purchase of the lands, the settlements thereon, and in making the payments thereon up to the time of her death, and that F. P. Miller since her death has complied with the law in every particular. By an agreement in writing between the parties hereto, and introduced in evidence, every fact, apparently, affecting the title of either Paschal or Miller, was agreed to, to obviate the necessity of making proof thereof.

The case was tried with the aid of a jury, and on the jury's findings on special issues presented judgment was rendered for appellee, Miller, for the lands in controversy, and for the sum of \$144.87 as rents, with interest.

In answer to the two special issues of fact submitted to the jury, and the only two on which a controversy is presented here, without quoting the verbiage of the charge and

findings, the jury found: First, that Paschal failed to become an actual settler on section 28 (one of the sections in controversy and the one claimed as the home section) within 90 days after the 16th day of June, 1906, the date of the award of the lands to him; second, that Paschal failed to reside continuously upon said section 28 as his home during the period elapsing between the date of his settlement on said section (28), if he did settle thereon, and the 24th day of May, 1909, the date of the forfeiture of the land to him by the land commissioner.

As explanatory of expressions used in the issues submitted, the court in the charge defined "an actual settler" to be one who actually occupies and settles upon land intending to make it his home, and that by "residing continuously" is meant a substantial, unbroken residence upon the land as a home; but the continuity of one's residence is not broken by mere temporary absence from the land for short periods of time for the purpose of business or pleasure, providing that while absent the intention is maintained to return to the land as a home.

Appellants in the first five assignments of error insist that the verdict of the jury in the two findings of fact is clearly and palpably against the evidence, and that when such is the case, on special issues presented, it is reversible error for the trial court to overrule and refuse to grant a new trial based on that ground. The first three assignments have reference to the jury's findings on the first issue (settlement within the 90 days), and the fourth and fifth have reference to the jury's finding on the second issue (the three-years residence). The several assignments are each followed by propositions each using different forms of expression; but, as we view them, they all accentuate the one contention made under said assignments, that the evidence so clearly and unmistakably preponderates in favor of appellants on the issues tendered by the court as to show manifest injustice to appellants, and that it is error to refuse to grant a motion for a new trial based on such grounds. We will consider them together.

[1] We are referred by appellants and by appellee to a large number of cases relating to and stating the rule controlling trial and appellate courts in passing upon the question of the sufficiency of the evidence to sustain the verdict, or the finding of a jury on special issues, as presented in the assignments. Of the number of cases reviewed we have concluded that the Supreme Court in *Choate v. San Antonio & A. P. Ry. Co.*, 90 Tex. 66, 37 S. W. 319, clearly and succinctly states the governing rule applicable to the contention made here that we need refer to that one case only. In that case Judge Brown said a trial court is not justified in taking from the jury a question of fact ex-

cept in case the evidence is such that there is no issue made for the jury to determine. It is there held that a different rule applies to the granting of new trials by trial courts and Courts of Civil Appeals. The rule, then, is stated to be that, "although there may be sufficient evidence in a case \* \* \* to submit it to the jury, yet, if the verdict rendered thereon is against the preponderance of the evidence to that degree which shows that manifest injustice has been done, the trial court may and should grant a new trial. The judge should not invade the province of the jury, and take from it the decision of the question which properly belongs to it; neither should he abdicate the functions of his office, and permit the prerogative of the jury to be perverted to the accomplishment of wrong." The rule, as we understand it, does not authorize trial nor appellate courts to set aside verdicts of juries, merely because the evidence is conflicting, nor where the verdict seems to us to be against the great preponderance of the evidence, nor when the verdict does not appear to be right; but, as said by the Supreme Court in the case from which we have quoted to justify the setting aside a verdict it must be against the preponderance of the evidence to the degree which shows that manifest injustice has been done; that is, it must be affirmatively wrong.

In *Stroud v. Springfield*, 28 Tex. 650, after commenting on the evidence, and after stating there was great conflict in the evidence, and that the court was of the opinion that the jury found against the weight of the evidence, the Supreme Court said:

"From having seen the witnesses, and heard their testimony, and observed their manner of testifying, they were in a much better position to judge of the weight and degree of credit to be attached to their statements than we could possibly be by an inspection of the record. \* \* \* It is well settled in the adjudications of this court that a verdict will not be disturbed because a jury may have erred. In order to justify this court in setting aside such a verdict, it is not sufficient that it does not appear clearly to be right; it must appear to be clearly wrong."

The evidence covers about 75 pages of the record, entirely too lengthy to be repeated here. Now, what facts were submitted to the jury for them to determine from the evidence, briefly, in the first issue, (a) actual settlement within 90 days after June 18, 1906; (b) purpose of settlement to make it his home; second issue, (a) continuous residence for three consecutive years after actual settlement; (b) residence as his home. The actual settlement must necessarily have been made on section 28, and the continuous residence thereon commenced on or about the 15th day of September, 1906.

[2] We will briefly state a few features of the evidence: Paschal testified, and his affida-

vit of settlement states, that he made his actual settlement on the land (section 28, home section) on the 3d day of September, 1906, and we will consider his residence as beginning at that time. At that time, and for some time previous, and during the years following, he was employed by appellant Nations as ranch foreman, and receiving \$40 per month. He testified:

"Mr. Patterson made out my application for the purchase of the land. He is Mr. Nations' manager. When I took that land up, I leased it to Mr. Nations for fifteen years."

The lease contract is not found in the record, and the evidence does not show the purpose of the lease, its character, conditions, qualifications, or reservations of rights of use for residence to Paschal, if any there were. Much evidence was offered to show the times when and the values of certain improvements, such as a house, tank, and windmills, were put on the property; but, no evidence having been offered to show the terms of the lease contract, we do not know upon whom, under the lease, devolved the duty to make such improvements. Further, without quoting the evidence at this time, we think it clearly appears therefrom that about all of the improvements, such as the house, tank, windmill, etc., put upon the land, were either furnished or directly paid for by Mr. Nations; and, while Paschal said the things were charged up to him by Nations, the question of his indebtedness to Nations for them, and whether Paschal put the improvements on the land, or whether Nations did so for his employés to live in, as testified to by Quinn, and hereafter stated, would be for the jury to determine. It seems to us that the lease of the lands to Nations, taken in connection with the other evidence, tends to support the finding of the jury that Paschal, if he was on the land as claimed by him, was not there for himself, but rather that he was on the land for his employer, in the discharge of his duties to his employer. If he was on the land for another and not residing on the land as his home, the finding of the jury on the issue should be sustained. Numerically more witnesses testified in favor of appellants than appellee, but, when analyzed, their evidence shows interest, relationship, bias, and much inconsistency in the facts detailed, all of which were within the observation of the jury and the trial judge. Appellants do not point out, by brief or oral argument, any fact essential to appellee's cause of action upon which evidence was not offered; but the contention is made that the evidence so greatly preponderates in appellant's favor that manifest injustice is shown in overruling the motion for new trial. It is undisputed that Pat Quinn, appellee's principal witness, was working for Mr. Nations in September, 1906, and months previous

thereto, and that he was present and one of the parties who built the tie shack on section 28, the home section claimed by Paschal, and, at least, had an opportunity to know the facts to which he testified. He testified to having hauled the material to build the house, referred to as the tie shack, put upon section 28; assisted in the work then being done on that section; that he stayed on section 28 until the 28th of September, 1906; that during July, August, and September of 1906 he, with others, hauled a derrick up there, a windmill, and started a well; that Paschal did not give instructions as to where the derrick should be placed or the well sunk; that Nations, Patterson (Nations' manager), Paschal, and Shanks and himself were present and that Nations gave the instructions as to where to put the well, and, returning later, instructed that the well rig be moved 20 or 25 feet, saying, "Boys, it ain't on my land," and that the well was moved as he instructed. Quinn testified:

"From the time I went there until I left there on September 28th, in absolutely no respect did Pink Paschal (W. P. Paschal) live upon, occupy, or reside there; he lived at Helm No. 1, and had his family there. \* \* \* I left No. 28, on September 28th, and went down to block No. 80, about three miles south of there, and stayed there about four years. During that time I had occasion to go back on section 28 regularly. I ride that country all the time. In the fall of 1906 no one was living at the tie shack on section 28; it was vacant. During the year 1907 a party named Seegring was living there. During the year 1908 I didn't see anybody there. I don't know that Paschal ever went there to live in that tie shack; I never saw him there. He took his meals at Helm No. 1, and in El Paso. \* \* \* During 1906 and 1907 I had occasion to go to that tie shack. The door was always open; it looked like the cattle had stood round in there; I went inside. I was riding that country pretty near every day. During that time I would always see Pink Paschal either on the road or at Helm No. 1. \* \* \* After I left the place, on September 28, 1906, I am able to swear that Paschal did not live there. He never made his home there. He never had his family there. \* \* \* I built the house. It was a habitable house. It was such a house as a man could make a home in. \* \* \* The tie house was built for a home for the employes of Nations. Paschal was employed by Nations at Helm No. 1, as a foreman. His business was around the pasture, and No. 2 (the tie shack) was in the pasture."

We have stated only a brief portion of Quinn's evidence, as it is principally upon his evidence appellee relies to sustain the verdict of the jury. Much of what he said, especially as to Paschal's not being on the land, is contradicted by Paschal and other witnesses. To us it is evident that, if what Quinn said was true, Paschal did not settle upon the land as required by law, nor did he

reside upon the land as required by law. Nations did not testify.

[3,4] Much of appellant's evidence, especially on matters of dates, and Paschal's residence on the land, is conflicting, uncertain, and cannot be harmonized. We need not quote the evidences to show its inconsistencies. Appellant's sixth assignment is as follows:

"As evidence of the prejudice of Pat J. Quinn, the only witness introduced by plaintiff, which prejudice was not known to said defendant, W. P. Paschal, at the time of the trial of said cause, and was only learned by and through a letter (as appears through the affidavit of J. H. Nations filed in this cause on his motion for a new trial) delivered to defendant, J. H. Nations, on the ——— day of February, 1918, by said Pat J. Quinn, a true and correct copy of the original is hereto attached, marked 'Exhibit A,' and prayed to be taken and considered as a part of this motion. The original letter is in the hands of the attorneys for the defendants, and can be exhibited to the court or attorneys for plaintiff on request."

This ground of the motion is sworn to by Paschal. We have not found in the record the affidavit of Mr. Nations, referred to in the assignment. We do find a long, rambling, and almost unintelligible letter, dated February 1, 1918, addressed to Mr. J. H. Nations, and signed Pat J. Quinn. The ground of this assignment is prejudice of the witness, and the evidence desired goes to his credibility. It seems to be firmly settled as the rule in this state that newly discovered evidence (if the evidence here is newly discovered), when its object is to impeach the credit of the witness, a new trial will not be granted on that ground. The granting or refusal of a new trial on such ground also is largely in the discretion of the trial judge. The cases to which we are referred by appellee sustain this view. *Jones Estate v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 420; *Houston City Street Ry. Co. v. Sciacca*, 80 Tex. 356, 16 S. W. 31; *Scranton v. Tilley*, 16 Tex. 193; *H. & T. C. Ry. Co. v. Forsyth*, 49 Tex. 171; *Moore v. Temple Grocer Co.*, 43 S. W. 845.

[5] By the seventh assignment complaint is made because the trial judge, Hon. P. R. Price, in overruling the motion for new trial, made the following statement:

"That J. H. Nations had put the windmill on there; he had put the tank on there; and he had put the house on there; that Paschal was the man that received \$40 a month; that he had leased for the space of fifteen years; he had testified that for these improvements he owed Nations two thousand dollars; that from these facts the jury might have inferred that he did not settle on it for a home, but settled on it as an employe of J. H. Nations; that the story was so unusual as might warrant them in disbelieving his entire testimony."

It is claimed that the court's ruling on the motion was error because predicated on the question of intention and good faith, and not on the preponderance of the evidence as to settlement or residence on the land. It is asserted that intention and good faith on the part of Paschal in the settlement and residence on the land was not a material issue in the case.

Paschal's evidence discloses his claim of settlement and residence on the land was in compliance with the law governing sales of public school lands. His evidence, introduced by appellants, reads in part:

"I reside out here on what is called No. 2, along about Tobin. I resided out there in 1906. The ranch of mine is known as Ranch No. 2. That ranch is my home. It was my home in 1906. \* \* \* I made improvements on that section which I claimed as my home prior to the fall of 1906."

After a lengthy and detailed statement as to the putting in a well, windmill, the tie house, corrals, at the cost of about \$600, he said:

"In September, 1906, I lived on this place of mine called No. 2. I did not own any other home. I claimed this as my home. I lived there in 1907. I never did leave that place with a view of not returning. \* \* \* I was working for wages then. \* \* \* I leased all this property to Mr. Nations. He was paying me for all the property. \* \* \* I stated that Mr. Nations paid the wages of these men that did the building, and he bought the windmill for me and all these improvements; he charged that up to me. \* \* \* I have an idea about what I owe him. I cannot tell you exactly; the whole thing comes to a little over two thousand dollars—mighty near."

The above is but a small portion of the evidence introduced by appellants as showing that Paschal had settled on the land and was residing on the land as a home. The issue as to the purpose of the settlement was clearly made, and we think properly so, and was a material issue in the case. As we construe the case of *Salgado v. Baldwin*, 105 Tex. 508, 152 S. W. 165, we do not think we are in conflict with it. The statement of the trial judge does not disclose that his ruling was predicated on the question of intention and good faith, as claimed in the assignment, but says:

"From these facts [stated more fully in the evidence quoted] the jury might have inferred that he did not settle on it for a home, but settled on it as employé of J. H. Nations."

The evidence clearly and unmistakably shows that the windmill and the material of the tie house were furnished by Mr. Nations, and with the tank were put on the land by Mr. Nations' employés while working for him by the month, he directing the location of the well, and that before September 3, 1906, the date Paschal claimed to settle on the land

under his application to purchase, we think the remarks of the trial judge in overruling the motion, nor the ground upon which he based his ruling, are not reversible error.

Appellants' eighth assignment and its subjoined proposition read as follows:

"Because after the said land in controversy had been awarded to said defendant, W. P. Paschal, on his application to purchase the same, by the commissioners of the general land office of Texas, and after said commissioner had received and accepted and filed the affidavit of settlement made by said defendant, Paschal, and after the said commissioner had received the obligation from the said defendant to the said state for the purchase of said land, and the sum of money due the said state from said Paschal as a purchaser of said land, and the said commissioner not having canceled said purchase for a failure by the said Paschal to settle on said land within ninety days after the same had been awarded to him, and more than three years having elapsed after said settlement before this suit was filed, and more than one year having elapsed after the award to plaintiff, Miller, before he filed this suit, plaintiff is estopped from raising in this case the issue that said Paschal did not settle on said land within ninety days after the same was awarded to him as required by law, the first finding of the jury that the defendant personally did fail to settle on said land within ninety days after his said award cannot be considered as a basis for rendering judgment in this case in favor of said plaintiff and should be set aside and held for naught.

"Proposition: The issue as to the settlement on the land in controversy by W. P. Paschal, within ninety days after the same was awarded to him, can only be considered at the instance of the state and not by plaintiff. It was reversible error for the trial court to overrule and refuse to grant a motion for new trial and enter judgment on said finding of the jury when that said question was duly presented to in said motion by appellants."

To this it may be replied that the finding of the jury that Paschal did not settle upon the land within the 90 days required by law may be entirely disregarded, but it would not affect Miller's right to judgment because, in response to the second issue, the jury found that Paschal failed to reside upon the land as a home during the period elapsing between the date of settlement and May 24, 1909, when the land commissioner canceled. Upon this latter finding alone Miller was entitled to judgment.

[8] In the argument subjoined to the eighth assignment there are a number of reasons advanced as ground of reversal, the same being presented as fundamental errors. It is well settled that this court cannot take cognizance of an error not properly assigned, unless it be an error in law apparent on the face of the record, or, as it is usually termed, a fundamental error. *Searcy v. Grant*, 90 Tex. 97, 37 S. W. 320. Such errors have been several times defined by the Supreme Court

Wilson v. Johnson, 94 Tex. 272, 60 S. W. 242; Oil Co. v. Kimball, 108 Tex. 94, 122 S. W. 533, 124 S. W. 85; Oar v. Davis, 105 Tex. 479, 151 S. W. 794.

We do not regard the reasons advanced by appellant as presenting "fundamental error" within the meaning of that term as it is defined in the cited cases. Not being presented by proper assignments of error, they cannot be considered. Rule 23 (142 S. W. xii); Searcy v. Grant, supra; City of Beaumont v. Masterson, 142 S. W. 984.

Lest we be mistaken in our view that the errors now insisted upon are not fundamental, we have considered the same, and reached the conclusion that they present no reversible error.

Considering the record as a whole, it is apparent that no question was raised as to the manner in which the land commissioner made entry of the forfeiture of the Paschal purchase, and that it was the evident purpose of the written stipulation between the parties to eliminate all such questions, and try only the issues of fact relative to settlement and occupancy, which were regarded and treated by the parties as the controlling questions in the case.

Finding no reversible error, the case is affirmed.

#### On Rehearing.

In passing upon appellants' motion for rehearing it is deemed well to completely restate the rulings upon which the various contentions are overruled and the judgment affirmed.

The special issues and court's charge in connection therewith are as follows:

"Question No. 1. Did the defendant W. P. Paschal fail to become an actual settler on section 28 within ninety days after the 16th day of June, 1906, the date of the award to him? Answer this question 'Yes' or 'No.'"

"In this connection you are instructed to answer the same 'Yes' if you believe the affirmative thereof from a preponderance of the evidence; otherwise to answer same 'No.' By 'preponderance of the evidence' is meant the greater weight of credible testimony.

"An actual settler," as used in the issue submitted, may be defined as one who actually occupies and settles upon land intending to make it his home.

"Question No. 2. Do you find from a preponderance of the evidence that W. P. Paschal failed to reside continuously upon section 28 as his home during the period elapsing between the date of his settlement on said section, if he did settle thereon, and the 24th day of May, 1909, the date of the forfeiture by the land commissioner? Answer this question 'Yes' or 'No.'"

"In answering this question you are instructed that by 'residing continuously' is meant a substantial, unbroken, residence upon the land as a home; but the continuity of one's residence is not broken by mere temporary absence from the land for short periods of time for the purpose of business or pleasure, provided that while

absent the intention is maintained to return to the land for a home.

"In connection with question No. 2, you are instructed that in determining whether W. P. Paschal did or did not continuously reside upon said section 28, that you will not consider the fact that on the 24th day of May, 1909, the commissioner of the general land office canceled the purchase of the said W. P. Paschal to the land in controversy."

Both of these questions were answered "Yes." No special charges or issues were requested by appellants, and no objections were made to the charge. A third question submitted related to rental values.

The first five assignments question the sufficiency of the evidence to support the findings of the jury upon issues 1 and 2. These are overruled for the reason that, in our opinion, the evidence is sufficient. The evidence supporting the same is set out in the original opinion.

"The sixth assignment, complaining of the overruling of the motion for a new trial on account of newly discovered evidence in the form of a letter written by the witness Quinn to Nations, dated subsequent to the trial, is overruled for the reason stated in the original opinion.

The seventh assignment, which is submitted as a proposition, reads:

"Because the district judge, before whom this case was tried, to wit, P. R. Price, in overruling defendant's motion to set aside the findings of the jury in the said cause, made the following statement:

"That J. H. Nations had put the windmill on there; he had put the tank on there; that he had put the house on there; that Paschal was the man that received forty dollars a month; that he had leased for the space of fifteen years; he had testified that for these improvements he owed J. H. Nations two thousand dollars; that from these facts the jury might have inferred that he did not settle on it for a home, but settled on it as an employe for J. H. Nations; that the story was so unusual as might warrant them in disbelieving his entire testimony." This was error because the court predicates his ruling on the question of intention and good faith, and not on the preponderance of the testimony as to settlement or as to occupancy, as shown by bill of exception No. 1.

"The question of intention and good faith on the part of W. P. Paschal in the settlement and occupancy of the land in controversy was not a material legal issue in the case, and it is reversible error for the trial court to overrule and refuse to grant a new trial in consideration of that issue, when duly presented by the party injured on that ground."

This is overruled for the following reasons:

First. The judgment in this case is based on the jury's findings, and not upon remarks by the court in overruling the motion for new trial. The views expressed by the court in overruling the motion could have had

no possible influence upon the verdict of the jury.

Second. So far as the bill of exceptions discloses these were isolated remarks of the court, and there is nothing to indicate that his action in overruling the motion was predicated solely upon the theory indicated in appellant's contention. The record is insufficient to advise this court of all that was in the mind of the trial court when he overruled appellant's motion, and which operated to induce such action upon his part.

The eighth assignment, and its sole supporting proposition, is as follows:

"Because after the said land in controversy had been awarded to said defendant, W. P. Paschal, on his application to purchase the same, by the commissioner of the general land office of Texas, and after said commissioner had received and accepted and filed the affidavit of settlement made by said defendant, Paschal, and after the said commissioner had received the obligation from the said defendant to the said state for the purchase of said land, and the sum of money due the said state from said Paschal, as a purchaser of said land, and the said commissioner not having canceled said purchase for a failure by the said Paschal to settle on said land within ninety days after the same had been awarded to him, and more than three years having elapsed after said settlement before this suit was filed, and more than one year having elapsed after the award to plaintiff, Miller, before he filed this suit, plaintiff is estopped from raising in this case the issue that said Paschal did not settle on said land within ninety days after the same was awarded to him as required by law, the first finding of the jury that the defendant personally did fail to settle on said land within ninety days after his said award cannot be considered as a basis for rendering judgment in this case in favor of said plaintiff, and should be set aside and held for naught."

First proposition under eighth assignment of error:

"The issue as to the settlement on the land in controversy by W. P. Paschal within ninety days after the same was awarded to him can only be considered at the instance of the state and not by plaintiff. It was reversible error for the trial court to overrule and refuse to grant a motion for new trial and enter judgment on said finding of the jury when that said question was duly presented to in said motion by appellants."

The finding of the jury upon the issue of settlement within 90 days may be entirely disregarded, and the judgment nevertheless must be affirmed upon the jury's second finding.

What has been said disposes of every ground of error which is properly assigned, but in a lengthy argument appended to their brief appellants present additional grounds upon which a reversal is sought; and, in order to avoid the consequence resulting from a failure to properly assign the same, they are here presented as fundamental er-

ror. Many of the propositions asserted as fundamental error are academic, and as abstract propositions of law are correct. Some of them relate to the first issue, and we will not discuss those, for, as held above, the first issue may be disregarded, and the judgment nevertheless must be upheld on the finding in response to the second question.

The substance of the first contention is that this suit cannot be maintained by Miller because the land commissioner in his forfeiture of the Paschal purchase did not comply with the law, in that the indorsement of forfeiture was made upon Paschal's application instead of his obligation. Further, it was not shown that the commissioner made, or caused to be made, an entry of the forfeiture on the account of Paschal in the land office as required by the ruling in *Chambers v. Robison*, 107 Tex. 315, 179 S. W. 123. Further, it was not shown that the commissioner had mailed notice of the forfeiture to the county clerk.

The statement of facts contains a written agreement signed by counsel for the respective parties, the manifest purpose of which, we think, was to admit the regularity of all documentary evidence of title of both parties, and that it was intended to thereby concede the sufficiency of all such evidence of title, and dispense with its formal proof, and eliminate all questions except the issues of fact relative to settlement and occupancy. The agreement recites that it was to obviate the necessity of making proof; that on May 26, 1909, Mrs. Miller, in legal form and as required by law, applied to purchase the land, describing same; that the land *was duly and legally awarded to her* by the commissioner on June 10, 1909; that her purchase was *upon due and legal classification, appraisal, and advertisement*; that the award to her was now in good standing in the land office and was being recognized by that office; that ever since the award to plaintiff here the plaintiff has been recognized by the commissioner of the land office as being the owner of the land in controversy, and that, since the time of the cancellation of the award to Paschal, he (Paschal) has not been recognized as the owner thereof in the land office; that on May 18, 1906, Paschal applied to purchase the land, describing same:

"Said applications being all in due and legal form and duly executed, except that the application to purchase said section 28, township 1, block 81, by said W. P. Paschal, stated both that he was an actual settler upon and had settled upon said section, and that he would do so within ninety days, said application to purchase said section being hereto attached; that at the time said Paschal applied to purchase on the 18th day of May, 1906, said above surveys had been duly and legally classified, appraised, and



advertised; that afterwards, on June 26, 1906, all of the above-named lands were awarded by the commissioner of the land office to W. P. Paschal, by virtue of his application to purchase; that attached hereto is affidavit of settlement made by said Paschal, which may be introduced in evidence, the facts therein stated not being admitted; that on May 24, 1909, J. T. Robison, commissioner of the land office, on each application of purchase made by said Paschal, indorsed the following, 'Land forfeited for failure to reside thereon as required by law;' that, upon the forfeiture of said land so sold to Paschal, the same were awarded to Mrs. I. D. Miller, *after due and legal advertisement and appraisal, and notice of her filings to the county clerk of El Paso county, Texas, and all prerequisites of sale were followed by the commissioner of the land office and by her and by both were complied with.*"

[7] The certified copy of the application to purchase section 28 (Paschal's home section) attached to the agreement shows that the indorsement of the land commissioner as follows: "Land forfeited for failure to reside thereon as required by law. 5/24/09. J. T. Robison, Comr."—was made *on the obligation, and not on the application*, as stated in the body of the agreement. Considering the agreement as a whole, we think, and so hold, that a forfeiture was made by the commissioner in the manner prescribed by law, and, in any event, that appellants upon this record cannot for the first time in this court question the sufficiency of his procedure. In this connection we desire to say, further, that the regularity of the procedure of the commissioner in forfeiting is pertinent only in relation to the one-year statute of limitation. Rev. St. arts. 5458, 5459. This statute was construed by Associate Judge Brown in *Slaughter v. Terrell*, 100 Tex. 600, 102 S. W. 899, where this language was used:

"In order to ascertain what the Legislature intended by the enactment of this law we must consider the evil that existed and determine what the remedy was to be. Under the law as it previously existed, purchasers of school lands were liable to have their titles attacked by third persons who desire to purchase the land, and such persons might call in question the qualification of the purchaser as well as the performance of conditions prescribed by law; for example, that when the purchase was made the purchaser did not actually reside upon the land, or that he did not intend to make it his home, and thus, although the state recognized his right, the purchaser was constantly exposed to such attacks. This rendered such titles uncertain, and to remedy that evil the Legislature enacted the law now under consideration, which requires that any person who desires to purchase land theretofore purchased by another shall bring his suit to set aside the former purchase within twelve months of the award of it or he will be barred. Clearly this applies only to cases where the state recognizes the validity of the purchase

being attacked, and does not apply to a case like the present, where there has been a forfeiture of the former purchase by the land commissioner, and the land again put upon the market. There is no necessity for a suit by a purchaser of forfeited land; indeed, to so hold would be to say that the commissioner had the power to declare the forfeiture, although the award may have been made many years before that time, and the power to sell the land, but that the purchaser at the second sale could not get possession of the land because his suit could not be brought within a year from the award to the first purchaser which had been forfeited. Such an absurd result is a sufficient answer to the contention for that construction."

[8] Under the foregoing ruling it is clear that the fact of forfeiture is material to the right of Miller to prosecute his suit only as relieving him from being barred within the year. Now, the agreement on its face shows that the commissioner has in fact undertaken to forfeit the Paschal purchase; that the award to Miller is the one recognized by the land office; that the commissioner recognizes Miller as the owner, and since the cancellation has refused to recognize Paschal. These facts show that the commissioner has undertaken to forfeit and that the state refuses to recognize the validity of the Paschal purchase, and such purchase is not in good standing in the land office, and under the ruling in *Slaughter v. Terrell*, this relieves Miller from the bar of the one-year statute.

As to the contention that Miller failed to show entry of forfeiture upon the Paschal account in the land office and notice to the county clerk, this likewise is disposed of by the views expressed above. Furthermore, we have italicized portions of the agreement made by the parties which sufficiently show that proof of these facts was waived.

[9] Another error urged as fundamental, is that the definitions given by the court in its charge of "actual settler" and "continuous residence" are erroneous. If these definitions were incorrect, which is not conceded, the error therein was waived by appellants' failure to make any objection thereto at the proper time. Acts 1913, c. 59, p. 113.

We see no occasion to discuss the rule that no one but the state can raise the question of collusion, if any, between Paschal and Nations. The court submitted no issue in that respect. If, as appellants assert, collusion was injected by the definitions of "actual settler" and "continuous residence," then such error arose in the charge, and by their failure to object to the definitions appellants waived the same.

Upon the views expressed we are of opinion that none of the contentions made by appellants in their original brief or their motion for rehearing are well taken. We

therefore adhere to the order of affirmance and overrule the motion.

If appellants desire to file a second motion for rehearing, 15 days are granted in which same may be filed.

**JEFF BLAND LUMBER & BUILDING CO.  
v. GALVESTON, H. & S. A. R. CO.  
(No. 479.)**

(Court of Civil Appeals of Texas. Beaumont.  
April 28, 1919. On Rehearing,  
May 7, 1919.)

**1. MANDAMUS — 151(2) — COMPELLING RESTORATION OF RAILROAD TRACK—NECESSARY PARTIES.**

Where a railroad, with permission of the authorities, the Railroad Commission and the Attorney General, abandoned a portion of its track, and sold its right of way to a company, which sold to residents of the city, who built thereon, a company aggrieved by the abandonment cannot secure mandamus to compel replacement without making the city and present holders of the title to the abandoned right of way parties to the suit.

**2. RAILROADS — 57 — ABANDONMENT OF RIGHT OF WAY—RATIFICATION BY LEGISLATURE.**

The Legislature, by Acts 35th Leg. (4th Called Sess.) c. 27, § 4, could ratify effectually an abandonment and relocation by a railroad of a portion of its main line tracks.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Suit for mandamus by the Jeff Bland Lumber & Building Company against the Galveston, Harrisburg & San Antonio Railroad Company. From judgment denying the writ, plaintiff appeals. Affirmed.

Hardway & Cathey, of Houston, for appellant.

B. B. P. & G. Means and McMeans, Garrison & Pollard, all of Houston, for appellee.

**WALKER, J.** In this suit appellant sought a mandamus commanding the defendant to rebuild a portion of its railroad track which it had torn up and the right of way of which had been sold. This prayer was denied by the trial court, and from this judgment appellant has appealed.

In its second amended original petition, filed on the 12th day of July, 1917, the plaintiff (appellant) alleged that it and the defendant were corporations duly incorporated under the laws of Texas, and that it is the owner of certain property situated in the McGregor-Blodgett addition to the city of Houston, and was such owner prior to the 16th day of July, 1915; that prior to the

16th of July, 1915, the main line track of defendant railway company adjoined this plaintiff's property, and passed by and in close proximity to plaintiff's lumber yard; that plaintiff used this property for the purpose of conducting a lumber yard and bought most of its lumber from Eastern Texas and Western Louisiana, and that the defendant had branch lines or connecting lines serving this pine belt; that the San Antonio & Arkansas Pass main line track also adjoins plaintiff's property, but that no branch of this system extends into the pine belt; that plaintiff continuously shipped a large number of cars over the main line of defendant, and that it would suffer great loss if deprived of this service; that defendant maintained a depot in close proximity to plaintiff's property at Blodgett, and had maintained the same for many years prior to July, 1915; that, relying on the permanency of the location of defendant's main line and the improvements placed thereon by it at Blodgett, plaintiff had expended about \$25,000 in buying property and improving the lot adjacent to the depot and defendant's main line track; that on or about the 16th day of July, 1915, the defendant tore up and abandoned a portion of its main line track from Blodgett to Chaney Junction; that plaintiff objected and protested against the defendant tearing up and abandoning its track; that defendant is now supplying plaintiff's competitors the same service formerly received by it, greatly to plaintiff's damage; that, if defendant is permitted to tear up its track and is not required to rebuild the same, it will suffer irreparable injury, and it will leave plaintiff without railroad connection, and without railroad service to its industries by the defendant, and with no railroad connection except the S. A. & A. P., which does not serve the timber belt, and that the S. A. & A. P. is trying to abandon its track adjoining plaintiff's property; that many years before the institution of this suit the defendant and H. F. McGregor, who at that time owned the lands around Blodgett, entered into a contract, by the terms of which defendant was to build the depot at Blodgett and the other improvements; and that this contract was made for the benefit of those who bought property in the Blodgett addition, and by virtue of its purchase of Block No. 2 of the Blodgett addition that it had vested rights in said contract, and in the maintenance and operation of said main line track and switch connections and service over said switches and industrial track, and in the maintenance of a depot, plaintiff's prayer being as follows:

"Wherefore, premises considered, this plaintiff prays that this honorable court issue its mandamus commanding and compelling the defendant railroad company herein to rebuild, maintain, and operate that portion of its main line heretofore abandoned and to connect with

said terminal tracks, side tracks, and industrial spur track and to furnish this plaintiff service required of it heretofore, and to maintain a passenger depot as per its said contract, and that upon final hearing hereof a perpetual injunction be issued restraining the defendant from hereafter abandoning such portion of its main line or passenger depot and from severing its connections with said side tracks, spur tracks, and public unloading tracks, and from refusing to give to plaintiff such general service as herein prayed for. Plaintiff further prays for costs and for all general and special relief, in law and in equity, to which it is entitled by virtue of the premises."

To this the defendant answered by general demurrer and special exception and general denial, and further by special pleas, as follows: That since November 16, 1914, its freight trains were not operated over that portion of its line as it existed prior to July 16, 1915, in the vicinity of plaintiff's premises; that before abandoning its depot at Blodgett and before removing its track, it was advised by the Railroad Commission of Texas, on authority of the Attorney General, that there was no legal objection to the railroad company relocating a portion of its line; that after receiving this advice the depot was abandoned and the track removed; that afterwards, under authority of section 4, c. 27, of the Acts of the Fourth Called Session of the Thirty-Fifth Legislature, the Railroad Commission entered an order ratifying and confirming the actions of the defendant in abandoning its track and depot; that, after abandoning the track, it sold its right of way to the Houston Land Corporation, and it had resold the same to citizens of Montrose, who had built on it very valuable, costly, and beautiful residences; that the streets in Montrose addition were replatted after this sale, and the city of Houston recognized the change in the streets; that, after removal of the track, the city council had passed an ordinance forbidding and prohibiting the laying of railroad tracks in that section of the city.

The record does not show when plaintiff's original petition was filed, but, so far as we can determine, it must have been filed in July or August, 1915. The original suit by plaintiff was for an injunction restraining the defendant from abandoning this depot and removing its tracks. This injunction was denied on August 13, 1915. No further action seems to have been taken by appellant in the prosecution of its suit until the filing of its second amended original petition on the 12th of July, 1917, followed by a trial of this case on March 5, 1918. The sale of the right of way by defendant and the passage of the ordinance by the city of Houston and the replating of the Montrose addition all occurred before the filing of the petition asking for mandamus. This case was submitted to the court on an agreed statement of facts, and there is nothing in the record showing

that the present holders of the right of way had any notice, actual or constructive, of the pendency of this suit at the time they bought this property.

The following brief statement of the facts is taken from appellee's brief:

Years ago the Galveston, Harrisburg & San Antonio Railroad was built from Harrisburg, in Harris county, in a westerly direction, to San Antonio, and later was extended to El Paso. As first constructed, it did not enter the city of Houston, but afterwards, more than 30 years ago, it was extended into Houston by a line which left the main line a few miles west of Harrisburg, at a station called Stella, thence running in a northeasterly direction to the Houston & Texas Central Railroad, with which it formed a junction at a station called Chaney Junction. By this construction trains on the main line would reach the Grand Central Depot, by leaving the main line at Stella, thence over the cut-off to Chaney Junction, and thence over the tracks of the Houston & Texas Central to the Grand Central Depot. At the time of the construction of this short track, which may be called Stella-Chaney cut-off, the land through and over which it was built was out in the country, and sparsely settled. Whether it was then in the city limits of Houston the record does not show. In the course of time a greater portion of the land traversed by the cut-off became, if it was not before, a part of the city of Houston. Additions to the city were laid in lots, blocks, and streets, houses were built, and the streets laid out and graded across the railroad's right of way and track, the track being elevated through Montrose addition to the height of about four or five feet above the level of the surrounding country, and in the course of time lands that were waste or only agricultural lands became densely populated portions of the city of Houston. One of these additions was Montrose, which grew and flourished, as the proverbial green bay tree, another was Blodgett, another was McGregor's, and another was the James Bute addition, through all of which the cut-off ran. Then additions west of the railroad were laid out, among which were Rossmoyne, Hyde Park, and Fltze; and the tide of population flowed steadily in the direction of those additions until a large proportion of the city's population lived therein. In the meantime, as railroad traffic became heavier, and longer and more numerous trains over the cut-off and through said additions became a serious menace to the lives and comfort of the people who lived therein, or who had to cross the track, as well as those traveling as passengers upon the railroad, and those engaged in operating it, the high roadbed seriously interfered with proper drainage, and the expeditious and efficient handling of trains was retarded and hampered by reason of city ordinances, which prescribed a speed

limit of trains to six miles per hour. It was these conditions, which had become next to intolerable, that confronted the people and the railroad company prior to July 16, 1915. Relief was demanded by the people, and the necessity for it was recognized by the railroad company. Prior to said date the railroad company had constructed another cut-off from its main line to the Grand Central Depot, beginning at West Junction, some two miles west of Stella, thence running in the general direction of northeast to the station of Eureka, some two miles west of Chaney, where it formed a junction with the Houston & Texas Central Railroad, and it reached the Grand Central Depot with its trains by leaving its main line at West; thence over the cut-off to Eureka; thence over the Houston & Texas Central tracks to the depot. Afterwards the defendant purchased a portion of the Houston & Texas Central Railroad's right of way from Eureka to the Grand Central Depot, constructed its own railroad thereon, and now operates its trains on its own tracks from West Junction to said depot. The greater part of the track from West to Eureka was entirely outside the city limits, and crossed no city streets, and was not subject to the city speed limits, and while the distance was greater, trains, because unhampered by speed restrictions and street crossings, made better time than on the former cut-off, without the hazards and dangers of operation.

In November, 1914, the defendant, by permission of the Railroad Commission of Texas, ceased to operate freight trains over the Stella-Chaney cut-off through Blodgett and Montrose additions, and abandoned and removed its depot building at Blodgett, in the Blodgett addition. The abandonment of this depot was subsequent to an order of the Railroad Commission of Texas dated February 26, 1912, amending its mileage table, whereby the station of Blodgett was eliminated from its mileage table.

On or about July 16, 1915, the defendant ceased to operate passenger trains on the Stella-Chaney cut-off, and thereafter all traffic was carried on over the West-Eureka cut-off. Thereafter that portion of the track on the Stella-Chaney cut-off from the intersection with the San Antonio & Aransas Pass Railway, near Main street, through Montrose addition, a distance of approximately two miles, was taken up, and that portion of its roadbed and right of way was abandoned by the defendant; the portion so abandoned being within the city limits of the city of Houston, and including the former station of Blodgett.

On July 16, 1915, after the defendant had begun to move the track from the Stella-Chaney cut-off, the J. B. Farthing Lumber Company applied to the courts for an injunction to prevent the defendant from further removing the track, whereupon the defendant

agreed to discontinue, and it did discontinue, removing any further part thereof until the suit for injunction could be heard on its merits, but said suit was dismissed on July 23, 1915, whereupon plaintiff filed this suit, praying for a temporary injunction against the further removal of the said track and for mandamus to compel the rebuilding of that part already removed, whereupon defendant again discontinued the removal of said track until the temporary injunction, after a hearing, was refused, on August 3, 1915, when the defendant removed the balance of its track through Montrose addition.

On or about the 31st day of October, 1916, the Railroad Commission of Texas, upon the written application of the defendant, authorized defendant to take up and abandon that portion of its railroad track beginning at a point near Blodgett, and extending through Montrose addition, and to relocate its line by way of the West-Eureka cut-off. Prior to that time the defendant had torn up and abandoned said line through Montrose addition upon being advised by the Railroad Commission that there was no legal objection to its doing so, and it was in accordance with said instructions that the defendant, prior to the issuance of the written authority heretofore referred to, had abandoned said line. The Railroad Commission, in so advising the defendant that it had the right to abandon its station at Blodgett and to remove its tracks through Montrose addition, acted upon the advice of the Attorney General to the effect that there was no legal objection thereto.

After the abandonment of the road from Blodgett north through Montrose addition, the defendant sold and conveyed to the Houston Land Corporation, the owner of the Montrose addition, all of its roadbed and right of way through said addition. Upon acquiring the title thereto, the Houston Land Corporation replatted said addition, closed certain of the streets then existing therein, and opened additional streets through and over the right of way of the abandoned roadbed, and thereafter petitioned the city commission of the city of Houston for permission to close certain other streets in said addition, and to open up additional ones, across the said abandoned roadbed and right of way, which the city granted, and thereafter, after said additional streets had been opened and graded, formally dedicated the same to the city, and the same constituted and now constitute public streets in said city.

Since the abandonment of said roadbed and right of way and the removal of said track by defendant, and the dedication of said streets to public use, and the acceptance thereof by the city, and after incorporating said right of way and roadbed into lots, blocks, and streets, the Houston Land Corporation sold to various and sundry parties—some 12 or 15, or more, in number—portions of said right of way and roadbed, and some

12 or more citizens have constructed beautiful and costly houses upon said right of way and roadbed, and same are now being occupied as residences.

Appellant assigns the following propositions:

(1) A railroad company, after having constructed and operated a main line track, cannot legally abandon or remove any part of said track.

(2) A railroad company, after having once designated its route and depot grounds, and after having constructed its track along said route and operated its trains thereover, cannot legally change said route.

(3) The defendant, having abandoned and removed its track without authority in law, should, upon application of appellant for mandamus to compel the restoration of said abandoned and removed track, be compelled to restore the same.

As, on the facts in this record, we must affirm this case on appellee's independent propositions, we will not discuss appellant's assignments.

[1] The first independent proposition of appellee is as follows:

"The court properly refused to grant the peremptory writ of mandamus sought by appellant to compel the defendant to rebuild and operate its railroads from Blodgett northeastwardly through Montrose addition after the track had been removed and the road abandoned, for the reason that it is shown by the pleadings of the defendant and the undisputed proof that necessary parties whose interest would have been affected by a judgment compelling the restoration and operation of the railroad were not parties to the suit."

No contention is made by appellant that the present holders of this right of way bought the same with notice of the pendency of this suit. Its position is that the railroad company had no authority in law to sell this right of way; that the holders of this right of way, by their chain of title, were advised of the history of the property, and in law they are no more than naked trespassers, so far as the rights of the public are concerned, and for that reason they are neither necessary nor proper parties to this suit, and that, without regard to their rights and interest, a mandamus should issue compelling the railroad company to restore its track. This proposition has been before our courts many times. See *City of Austin v. Cahill*, 99 Tex. 189, 88 S. W. 542, 89 S. W. 552; *Chappell v. Rogan*, 94 Tex. 492, 62 S. W. 539; *Jefferson v. McFaddin*, 178 S. W. 717; *Fain v. McCain*, 199 S. W. 890; *Siddall v. Hudson*, 201 S. W. 1030.

In the last case above cited Judge Graves said:

"It has been a number of times held by our Supreme Court that upon an application for mandamus all known parties at interest should be summoned to come in and defend their in-

terests, and that third persons claiming an adverse interest, or that a conflict exists, in the subject-matter must be joined as respondents without regard to the validity of their claims"—citing a large number of cases, all of which fully sustain the rule announced by him.

Without the city of Houston and the present holders of the title to the old right of way being parties to this suit, this defendant was not in position to obey a mandatory order from the district court. All the necessary parties not being before the court, a mandamus was properly refused.

[2] If it be conceded that the abandonment of the depot at Blodgett, the removal of the track, and the sale of the right of way were unauthorized and illegal at the time these things were done, yet the Legislature subsequently validated these acts of the defendant by section 4, c. 27, Acts of the Fourth Called Session of the Thirty-Fifth Legislature, which is as follows:

"All changes, relocations and abandonments of parts of their lines by railroad corporations or receivers of any railroad in or adjacent to any city having a population according to the United States census of 50,000 inhabitants or over, heretofore made with the permission of the Railroad Commission of Texas or authorized by its written order, are hereby validated and made legal as fully as if made under the provisions of this act, and such permission or written order of the Railroad Commission of this state, given prior hereto, shall be full power and authority to a railroad corporation or receivers of any railroad to make such change, relocation or abandonment of parts of its line; providing that this act shall not affect any right or rights for damages that any person, firm or corporation may now have, may have had or may have in the future for damages caused by any such removal, change or abandonment."

After the passage of this act, the Railroad Commission entered the following order:

"(1) That said company has acted in good faith and under the authority of the Railroad Commission of Texas, and the statutes as it understood them, in the abandonment of the station of Blodgett and in the relocation of its tracks within the city of Houston, as shown by said petition.

"(2) That it was and is and will be to the public interest that said station be permanently abandoned and the said tracks be permanently relocated as directed in said application.

"It is therefore considered, ordered, adjudged, and decreed that the Galveston, Harrisburg & San Antonio Railway Company be and it is hereby granted authority permanently to abandon said station, and to relocate its said tracks within said city as directed in said application, and that its prior acts in the abandonment of said station and relocation of said tracks be and the same are hereby ratified and approved by the Railroad Commission of Texas."

There is no constitutional objection to an act of the Legislature authorizing a railroad

company to change the location of its main line tracks on the facts in this record, and what the Legislature could lawfully have authorized before the tracks were removed it could ratify afterwards, as was done in this case. *Thompson v. County of Lee*, 3 Wall. 327, 18 L. Ed. 177; *Morris v. State*, 62 Tex. 729, 739; *Nolan County v. State*, 83 Tex. 199, 17 S. W. 823; *Haynes v. State*, 44 Tex. Civ. App. 492, 99 S. W. 405; *Cooley's Const. Lim.* (7th Ed.) 541.

Finding no error in this record, this case is affirmed.

#### On Rehearing.

We find that we were in error in our original opinion in saying that the order of the Railroad Commission was entered after the validating act was passed. This order was entered on the 31st day of October, 1916. In all other respects the motion for rehearing is overruled.

### TRIPPLETT v. HENDRICKS. (No. 968.)

(Court of Civil Appeals of Texas. El Paso. May 22, 1919.)

#### 1. GARNISHMENT $\S$ 7 — DORMANT JUDGMENT.

A dormant judgment—one not kept alive by issuance of execution—will support a writ of garnishment.

#### 2. REPLEVIN $\S$ 125 — JUDGMENT AGAINST SURETY—NOTICE.

Judgment against sureties on a replevin bond follows as a matter of law, without notice to them, after judgment against their principal, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 269*.

#### 3. JUDGMENT $\S$ 504(3) — COLLATERAL ATTACK — PROCEEDINGS ON APPLICATION FOR WRIT OF GARNISHMENT.

The question of whether a judgment should have been for the amount of a replevin bond or for the value of the property replevied cannot be raised on collateral attack by surety, on application by plaintiff after judgment for a writ of garnishment.

#### 4. SEQUESTRATION $\S$ 16 — REPLEVIN — JUDGMENT.

The defendant and sureties in sequestration should have the privilege of returning the property, unless it is shown the property has been disposed of, or cannot be produced.

#### 5. SEQUESTRATION $\S$ 20 — DAMAGES — AMOUNT—PLEADING.

In a replevin action, plaintiff was not limited to the value alleged; the market value at the time of trial being the measure of damages.

#### 6. EVIDENCE $\S$ 43(2) — JUDICIAL NOTICE — GARNISHMENT $\S$ 162—BURDEN OF PROOF — SUBSISTING AND UNSATISFIED JUDGMENT.

Where application for writ of garnishment is filed at the same time as the main suit, or

prior to final judgment, it is ancillary to and part of the main suit, and the court will take judicial knowledge of the proceedings in the main suit and consider them together; but where the original suit is terminated at the time of the institution of the garnishment proceedings, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment without proof of a valid, subsisting, and unsatisfied judgment.

#### 7. GARNISHMENT $\S$ 88 — APPLICATION FOR WRIT—SPECIAL EXCEPTIONS—CONTRADICTORY ALLEGATIONS.

A special exception to part of an application for a writ of garnishment, alleging that "said judgment is still in force and satisfied," should have been sustained upon the ground that the allegations were contradictory.

#### 8. SEQUESTRATION $\S$ 20 — REPLEVIN BOND — TAXATION OF COSTS AGAINST SURETY.

The court cannot render judgment against a surety on bond in replevin to secure possession of sequestered property for the costs of the suit, but the judgment creditor is entitled to recover as against the surety such costs as may be incurred in proper proceedings to collect the judgment.

Error from Eastland County Court; Cyrus B. Frost, Judge.

Application by S. F. Hendricks for writ of garnishment against the Citizens' National Bank of Cisco, in which J. W. Triplett intervened. From an adverse judgment, the intervenor brings error. Reversed and remanded.

J. R. Stubblefield, of Eastland, for plaintiff in error.

Allen Dabney and Scott & Brelsford, all of Eastland, for defendant in error.

HARPER, C. J. Hendricks brought suit in the justice court against George Herring and J. M. Curtis for a bay mare, and alleged her value to be \$75; sued out writ of sequestration, and by virtue of the writ the constable took possession thereof. Curtis executed a replevin bond with J. M. Triplett (appellant here) and others as sureties, and retained possession. On March 20, 1911, the justice court entered its judgment for the plaintiff "that he recover the mare."

From this judgment Curtis appealed to the county court, Eastland county. On March 15, 1917, Hendricks, appellee here, filed in said county court affidavit for writ of garnishment against Citizens' National Bank of Cisco, wherein it is alleged that he, on March 20, 1912, recovered a judgment against J. M. Curtis and George Herring as principals and J. W. Triplett et al., sureties on defendant's replevy bond for the sum of \$140, "which said judgment is still in force and satisfied." Then follow other allegations required by

the statute, and prays for writ of garnishment against said bank. The writ issued and the bank answered that it had in its hands \$288 belonging to said Tripplett.

Tripplett intervened in the suit and filed general demurrer and special exception to the effect that the affidavit for garnishment shows that the judgment had been satisfied, and general denial, and specially pleaded:

"That the judgment [which is the basis for the writ] was rendered against him without notice to him and without his being a party to the suit; therefore, in so far as it adjudged costs against him, it is null and void.

"(2) That it is null and void because it having arisen in the justice court upon a petition to recover a horse, and nothing else, of the alleged value of \$75, and judgment then entered for the horse, and not for its value, and Curtis having appealed to the county court from said judgment, and that the issue of the ownership of the horse has not yet been determined, therefore it is not a final judgment.

"(3) That the county court was without jurisdiction to render a judgment for more than \$75, the alleged value of the horse."

The plaintiff filed special exception to the answer next above, which was sustained. Tripplett replevied the money in bank by filing bond.

Tried without a jury, and judgment rendered against Tripplett for the whole amount of the funds, \$288, and for costs of the garnishment proceedings from which the case was taken by writ of error to the Court of Civil Appeals of Second district and transferred by the Supreme Court of this district for review.

#### Opinion.

[1] The first question is, Was the application and affidavit for writ of garnishment sufficient upon general demurrer because there was no allegation that the judgment had been kept alive by issuance of execution? Appellant cites *Friedman v. Early Grocery Co.*, 22 Tex. Civ. App. 285, 54 S. W. 278, in support of his contention. Notwithstanding these decisions, we think a dormant judgment will support the writ. *Citizens' Bank & Trust Co. v. Rogers*, 170 S. W. 258, and cases there cited.

Again, it is urged that the court erred in sustaining an exception to the defendant's answer above quoted, upon the ground that the facts alleged, if proved, would establish that the judgment was void. The matters alleged, if proved, would not render the judgment void.

[2] Take the first plea, that the judgment was rendered against him without notice; judgment against the sureties on replevin bond follows as a matter of law without notice to them, after judgment against their principal. Article 269, *Vernon's Sayles' Texas Civil Statutes*; *Cabell v. Floyd*, 21 Tex. Civ. App. 135, 50 S. W. 478.

[3] As to the second, the question of whether the judgment should have been for the amount of the bond or for the value of the property replevied cannot be raised upon collateral attack. *Lester v. Gatewood*, 166 S. W. 389.

[4, 5] True, the defendant and sureties should have the privilege of returning the property, unless it was shown the property had been disposed of or could not be produced, and the latter may have been the reason for entering the moneyed judgment. *Herrera v. Marquez*, 132 S. W. 1143. This could only be inquired into upon appeal. And the plaintiff was not limited to the value alleged in justice court. The market value at the time of trial is the test: *Brunson v. Bank*, 175 S. W. 438.

Is the judgment supported by the evidence? The proposition is that this garnishment proceeding is not ancillary to the main suit, but is based upon a prior alleged judgment, and that since the defendant intervener has denied the allegations of the petition or application that issue was joined, and thereupon the burden was upon appellee to prove a valid and unpaid judgment, and that he has not met the burden of proof.

[6] In cases where the application for the writ of garnishment is filed at the same time as the main suit, or prior to final judgment in the main suit, it is ancillary to and a part of the main suit. *Kreisle v. Campbell*, 89 Tex. 104, 33 S. W. 852, and the court will take judicial knowledge of the proceedings in the main suit and consider them together. *Studebaker Harness Co. v. Gerlach Merc. Co.*, 192 S. W. 545. But where, as in this case, the original suit was terminated at the time of the institution of the garnishment proceedings, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment without proof of a valid, subsisting, and unsatisfied judgment. *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563.

The statement of facts fails to show that the judgment of the county court relied upon was introduced in evidence, nor does it contain any evidence of it, and neither is there any proof that if it exists that it is unsatisfied.

[7] In this connection the assignment that it was error for the court to overrule special exception to that part of the application which alleges that "said judgment is still in force and satisfied" is sustained upon the ground that the allegations are contradictory.


[8] Again, it is urged that the court was without authority to render judgment for the costs. The county court was not authorized to render judgment against Tripplett as a surety for the costs of that suit. *Henderson v. Brown*, 16 Tex. Civ. App. 464, 41 S. W. 406. But at this time that judgment is the basis

of appellee's claim, and the latter is entitled to recover such costs as may be incurred in proper proceedings to collect his judgment.

For the reasons assigned, the cause is reversed and remanded.

### ROUSS v. BRISCOE. (No. 6217.)

(Court of Civil Appeals of Texas. San Antonio.  
May 14, 1919. Rehearing Denied June 11,  
1919.)

CONTRACTS  189—CONSTRUCTION—AGREEMENT TO ASSUME DEBTS—MATTERS INCLUDED—TORTS.

Where a debtor executed a bill of sale to his creditor, who thereupon agreed to assume and settle all debts, the debtor is not entitled to reimbursement from such creditor of a sum paid by the debtor as damages for fraud; payment of damages for his torts not being contemplated by the agreement.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Suit by E. E. Briscoe against P. W. Rouss. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for defendant.

S. A. Early, of Corpus Christi, for appellant.

Anderson & Smith, of Corpus Christi, for appellee.

**MOURSUND, J.** This is a suit for alleged breach of contract because of the refusal of appellant to reimburse appellee for the amount he paid in satisfaction of a certain judgment recovered by W. G. Bain and J. N. Vanzant against him in the district court of Williamson county, Tex., on the 28th day of November, 1915.

Appellee was formerly a merchant at Granger, Williamson county, Tex., and appellant is a wholesale merchant in the city of New York.

Appellee had been buying goods from appellant for a number of years, and had become indebted to him in a large sum of money. In January, 1914, appellee sold his business at Granger to one J. A. Fagg, and as part consideration for the sale a note for \$750 was made, dated January 9, 1914, payable to E. E. Briscoe, appellee, one year from its date, and signed by J. A. Fagg, J. F. Maedgen, E. B. Hurst, W. H. Neely, S. T. Brinkley, W. G. Bain, and J. N. Vanzant.

On or about January 17, 1914, appellee indorsed and transferred said note to appellant in consideration of the crediting of the amount thereof upon his indebtedness to appellant.

On January 8, 1915, appellee was still indebted to appellant in a large sum of money, and was also indebted to various other mercantile creditors in large sums, and in order to effect a settlement of his business, a bill of sale was made by appellee, conveying his stock of merchandise to appellant. The bill of sale was made to F. A. Tucker, agent for appellant, and therein appellee recited the consideration as follows: "For and in consideration of the sum of fifty-five hundred dollars cash, paid to my creditors and for my benefit by F. A. Tucker." At the same time a "receipt and release" was executed by appellant, through Tucker, which reads as follows:

"The State of Texas, County of Nueces. Supplementary to and as a further consideration for a certain bill of sale of even date herewith, wherein E. E. Briscoe, of Nueces county, Texas, conveyed to F. A. Tucker, for my benefit, a certain stock of goods, wares and merchandise, I, P. W. Rouss, doing business under the name of Charles Broadway Rouss, of New York City, in the state of New York, hereby assume and agree to settle all debts against the said E. E. Briscoe, except that due on his homestead, the balance due on his cash register, any debts he may owe relatives or friends, and a note of \$1,000.00 due the City National Bank of Corpus Christi. On the last-named debt I am to pay two hundred and fifty (\$250.00) dollars, and no more. I also agree and acknowledge that the said E. E. Briscoe retains all accounts due him, both at Corpus Christi and Granger, Texas, one cash register, one iron safe, one roll top desk and chair, two electric ceiling fans out of the store this day conveyed to the said F. A. Tucker, and certain store fixtures at Granger, Texas. I also hereby fully release the said E. E. Briscoe from further liability to me on any and all obligations I hold against him.

"Executed in duplicate and signed by my authorized agent, F. A. Tucker, this 8th day of January, 1915. P. W. Rouss, by F. A. Tucker, Agent."

When the \$750 note matured, it was not paid, and appellant brought suit on it in the district court of Williamson county against all of the makers or signers and against appellee, as indorser.

All of the defendants in that suit answered, except J. F. Maedgen, against whom judgment by default was rendered.

Between the date on which said note was executed and the date of the trial of the case, J. A. Fagg had become a bankrupt, and he pleaded his discharge in bankruptcy.

Appellee answered in said suit, admitting the execution, sale, and delivery of said note to appellant, but pleaded his release from liability on his indorsement by reason of the contract made between himself and appellant on the 8th day of January, 1915, which is the same contract sued on in this case.

The defendants S. T. Brinkley, E. B. Hurst, and W. H. Neely answered in said



suit in the district court of Williamson county, and alleged that when they signed the note sued on it was payable to W. G. Bain or order, and that after they had signed it, and without their knowledge or consent, it was altered and changed in a material respect, and that the name of the payee, "W. G. Bain," had been erased and the name "E. E. Briscoe" had been inserted as the payee, and that said note was an altered and forged instrument, and prayed that they be discharged with their costs.

The defendants W. G. Bain and J. N. Vanzant adopted the answer of their codefendants, Brinkley, Hurst, and Neely, and alleged further that J. A. Fagg and E. E. Briscoe, appellee, entered into a conspiracy to defraud them, and altered or procured the alteration of the note sued on, and represented to them that S. T. Brinkley, E. B. Hurst, and W. H. Neely had signed the note, and that it was a binding obligation as to them, and thereby through said fraud and misrepresentation procured their signatures to the note, and prayed that, in the event plaintiff, appellant, should recover judgment for any amount against them, they have judgment over against the said J. A. Fagg and E. E. Briscoe, appellee, for a like amount.

The court rendered its judgment in that case that plaintiff, appellant, take nothing by his suit against the defendants S. T. Brinkley, E. B. Hurst, W. H. Neely, and E. E. Briscoe, appellee, and that plaintiff recover against the defendants, J. A. Fagg, J. F. Maedgen, W. G. Bain, and J. N. Vanzant the sum of \$979.69, with interest and costs, and that the defendants W. G. Bain and J. N. Vanzant recover over against their codefendants, J. A. Fagg and E. E. Briscoe, the said sum of \$979.69, with interest and costs.

Bain and Vanzant paid off the judgment recovered by the plaintiff against them, and sued out a writ of execution in their own favor on their judgment against J. A. Fagg and E. E. Briscoe.

Appellee satisfied the execution by paying \$1,045.27, and then instituted this suit for the amount thus paid by him, seeking to recover the same, with interest, from appellant upon the "receipt and release" agreement hereinbefore copied. While an accounting was prayed for, the suit, under the evidence adduced, was simply one for the recovery of said sum of money with interest. The court rendered judgment for \$1,220.60, presumably the sum prayed for with interest.

In making the foregoing statement, we have availed ourselves to a large extent of appellant's statement of the nature and result of the suit.

Appellant contends that in order for appellee to recover the sum he paid in satisfaction of the judgment in favor of Bain and Vanzant he must show that the judgment was for a bona fide debt he owed Bain and Vanzant at the time the contract was entered in-

to, and that appellant had notice of it. He further contends that the contract related only to appellee's legitimate mercantile debts, such debts as he himself was under contract to pay, and the existence of which he had disclosed to appellant. Appellee submits the following counter proposition:

"The word all 'debts' as used in the contract and release is a word of large import, including not only debts of record, judgments, and debts by specialty, but also obligations arising on an implied contract, and in its popular sense includes all that is due to a man in any form of obligation, of which appellant had notice."

Appellee testified that he sold the \$750 note to appellant, and received therefor a credit of \$750 on the sum he owed appellant. This occurred in January, 1914. He became liable to appellant as an indorser of the note. This liability was released in January, 1915, by the terms of the "receipt and release" executed by appellant, and appellee testified that his obligation as indorser was specifically mentioned at the time of the settlement. His testimony is as follows:

"In making this settlement with Mr. Rouss he took in consideration this note, in this way: Mr. Tucker offered it as an inducement to get me to sell to them at these considerations. The wording of the release also said this trade will release me from any liability on the note. I told Mr. Tucker, 'The note is good; one man on the note is worth \$25,000;' and he said, 'That will release you from it;' that was more than once spoken of by the agent, Mr. Tucker."

He does not testify, however, that he informed appellant's agent or appellant that there was a liability on his part to two of the signers of the note, Bain and Vanzant, existing by virtue of a fraud practiced on them by him, and that appellant would be expected to assume such obligation to said signers of the note. Nor did he tell either of them that the signatures of three other signers had been obtained in such a manner that they could not be held liable on the note. On the contrary, he told Tucker that the note was good, and that one man on it was worth \$25,000.

It was definitely adjudicated in the suit by appellant on the note that Brinkley, Hurst, and Neely were not liable on the note, and that appellee had practiced a fraud on Bain and Vanzant to procure their signatures, by reason whereof they had suffered damages in the sum of the judgment obtained against them by appellant. The sum which appellee recovered in this suit, therefore, was paid by him as damages for a tort perpetrated by him upon Bain and Vanzant, and if he is permitted to recover the same from appellant, he will not only have secured the credit of \$750, but will have made appellant repay him all the proceeds derived by appellant from the collection of the note. Thus appellee would lose nothing by his fraud, while

appellant would be made to pay for it. The result is so contrary to right and justice that a construction of a contract so as to legalize it should not be adopted if the contract is subject to any other reasonable construction. We have no doubt that the parties never contemplated that appellant should pay all damages recoverable against appellee for torts committed by him. Both parties in their propositions assume that the contract covered debts of which appellant had notice. If that be a correct test, appellee cannot recover in this case, for appellant had no notice of his fraud. The note did not mature until one day after the execution of the contract sued on, and suit was not filed thereon until in June, 1918. The recital in the bill of sale indicates that the debts to be paid by appellant amounted to \$5,500, and appellee testified he made it in consideration of the payment of \$5,500 to his creditors, and that appellant would release him from all liability due and owing to him. This shows that debts of which notice was given were contemplated by the parties. When both instruments are considered in connection with the facts leading up to their execution, and the description of the debts excepted, it is obvious that the word, "debts," was used to denote sums of money arising upon contracts, express or implied, growing out of the mercantile business conducted by appellee. Certainly it was never intended to import a sum which might thereafter be established by a court to be due as damages for a tort committed by appellee in the past.

We conclude that appellee is not entitled to recover in this case. The judgment is reversed, and judgment rendered for appellant.

### TEXAS & PACIFIC COAL CO. v. SHERBLEY. (No. 938.)

(Court of Civil Appeals of Texas. El Paso. May 15, 1919.)

#### 1. MASTER AND SERVANT ⇨259(2)—INJURIES TO SERVANT—PLEADING.

In an action by a servant against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), but who has not qualified, allegation that "the defendant, its agents and servants, negligently," etc., "turned the switch," is sufficient upon general demurrer under article 5246h, subd. 4, although a special exception pointing out that no particular servant was named, and that there was no allegation that the person or employé was acting within the scope of his employment, would be sustained.

#### 2. MASTER AND SERVANT ⇨168(3)—INJURIES TO SERVANT—NEGLIGENCE.

In an action by a servant for personal injuries against an employer amenable to the

provisions of Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), but not having qualified, recovery could be had, under article 5246h, subd. 4, for negligence of the employer in hiring an inexperienced and incompetent employé.

#### 3. MASTER AND SERVANT ⇨173—INJURIES TO SERVANT—INCOMPETENT SERVANTS.

In an action by a servant for injuries against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), but not having qualified, it is necessary, in order to recover on the ground of negligence of the employer in hiring inexperienced and incompetent servants, to allege and prove that the employer knew of the inexperience and incompetency of the servant, or should have known it.

#### 4. MASTER AND SERVANT ⇨271(1) — EVIDENCE—COMPETENCY OF FELLOW SERVANT.

In an action by an injured servant based on negligence of the master in hiring inexperienced and incompetent trapper boy, testimony that witness had not seen him trap before and testimony of the boy that he had not trapped before is proper and admissible.

#### 5. MASTER AND SERVANT ⇨271(3) — EVIDENCE—COMPETENCY OF FELLOW SERVANT—NOTICE.

In an action by an injured servant based on negligence in hiring an inexperienced and incompetent servant, declaration made by plaintiff to one occupying the position of vice principal regarding such servant that "he would get somebody killed by putting that boy on the trap" was admissible to show that employer had notice of the incompetency.

#### 6. MASTER AND SERVANT ⇨264(7)—PLEADING AND PROOF—INCOMPETENCY OF FELLOW SERVANT.

In an action by a servant for personal injuries, it was error to admit evidence of incompetency of another who caused the injury, in the absence of an allegation that the employer knew of such incompetency.

#### 7. MASTER AND SERVANT ⇨258(15) — INJURIES TO SERVANT—PLEADING.

In an action by a servant for injuries, an allegation "that it was the duty of defendant to properly light said mine, and that it failed to perform said duty, that, if it had been properly lighted, plaintiff might have discovered that the switch was turned wrong, and might have avoided injury," was not subject to general demurrer.

#### 8. APPEAL AND ERROR ⇨1062(1)—HARMLESS ERROR—SUBMISSION OF ISSUES.

Submission of ground of negligence, not supported by sufficient evidence, was harmless, where the jury found against such ground of negligence.

#### 9. EVIDENCE ⇨535 — OPINION EVIDENCE—POORLY LIGHTED MINE.

In an action by mine employé for personal injuries, based on ground that mine was not properly lighted, testimony of witness that the

mine was "poorly lighted" at that point of accident should not be admitted, unless the witness qualifies as an expert.

**10. WITNESSES — 352 — IMPEACHMENT — EVIDENCE.**

It was improper to allow a witness for plaintiff to testify that a witness for defendant in a personal injury suit told him that a doctor had said that his (defendant's) witness' testimony was worth \$1,500; such testimony having no tendency to impeach the witness, nor prove any fact pertinent to the issue.

**11. TRIAL — 251(8) — INSTRUCTION — APPLICABILITY TO ISSUES.**

In servant's action for injuries occasioned by the improper turning of a switch by another servant, in submitting the question of negligence as to turning a switch the charge should be confined to such single servant, and a charge, "Was defendant, through its employés or agents, guilty of 'negligence' \* \* \* in turning the switch in wrong manner, if it or they did so, and in failing to notify plaintiff as to how said switch was turned?" was improper.

**12. TRIAL — 191(11) — INSTRUCTIONS — ASSUMPTION AS TO FACTS.**

In servant's action for injuries, a charge: "What damage, if any, has plaintiff sustained by reason of the injuries alleged by him? In answering state the amount, if any, in figures, in dollars, or in dollars and cents, just as you find" — was improper, in that it assumed the liability of the defendant.

**13. TRIAL — 191(11) — INSTRUCTIONS — ASSUMPTION.**

In servant's action for injuries, a charge that as a guide in answering special issue jury should assess plaintiff's damages, if any they find he has sustained, at such sum, etc., held improper as assuming negligence.

**14. MASTER AND SERVANT — 204(1) — INJURIES TO SERVANT — ASSUMPTION OF RISK — EMPLOYERS' LIABILITY ACT.**

In an action against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), but not having qualified, assumption of risk is not a defense.

**15. MASTER AND SERVANT — 227(1) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — INTOXICATION.**

In an action by a servant for injuries, ordinarily intoxication is simply a fact for the jury to consider in connection with all the facts and attendant circumstances in determining whether an act done by him while under such influence was negligence.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Action by Fred Sherbley against the Texas & Pacific Coal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. J. Oxford, of Thurber, and Chandler & Pannill, of Stephenville, for appellant.

J. R. Stubblefield, of Eastland, and F. G. Morris, of El Paso, for appellee.

HARPER, C. J. Appellee, Fred Sherbley, brought this suit against the Texas & Pacific Coal Company for damages for personal injuries sustained by him in the mines of appellant while in its employ as a motorman operating an electric car on an underground railway in the mine.

For cause or causes of action he alleged:

"That on November 23, 1916, he was operating the motorcar and in the act of transporting along said railroad a number of coal cars, to be distributed to the working places of the various miners; that there are a number of main lines of track, and a number of switches which branch off from said main lines; that defendant placed an employé, known as a trapper, at a point in the main lines to operate the switches to the end that the train of cars might pass on to the proper track for their destination; that on this particular occasion plaintiff was instructed by Mike Collie, an employé of defendant, to pull some empty cars along the straight past the eighth night entry; that the said trapper caused the switch to be so adjusted that, if the car had continued on the track, it would have gone into the said eighth entry, when it was his purpose not to do so; that the trapper negligently and carelessly turned the switch in the wrong manner, and negligently failed to notify plaintiff how same was turned, and thereby caused the wreck of the motorcar and plaintiff's injury; that it was the duty of defendant, in order to avoid injury to the plaintiff, to select competent, careful, and painstaking fellow workers, and to retain in its employ only such; that defendant negligently and carelessly selected an inexperienced, negligent, and careless trapper, and retained him in his employ; that it was the duty of defendant to properly light said mine, and that it failed to perform said duty; that, if it had been properly lighted, plaintiff might have discovered that the switch was turned wrong, and might have avoided injury; that the said trapper, who was by the defendant placed at the switch, at the eighth night entry by defendant, negligently and carelessly turned the switch in the wrong direction and thereby caused the wreck of the motor and consequent injuries to plaintiff."

The defendant answered by general and special exceptions, which were overruled by the court, general denial, assumed risk, contributory negligence, and intoxication of plaintiff.

Trial to a jury, cause submitted upon special issues, and upon the answers thereto judgment was entered for plaintiff for \$10,000, from which this appeal.

It will be noted that three grounds of negligence are set up. The trial court submitted them in the following manner:

"(1) Was the defendant, through its employés or agents, 'negligent' as that term has been heretofore defined, at the time and place the plaintiff was injured in turning the switch in the wrong manner, if it, or they, did so, and in failing to notify plaintiff as to how said switch was turned? Answer: Yes.

"(2) Was the defendant, through its employés or agents, 'negligent' as that term has been hereinbefore defined, in selecting and retaining in its employment, if it did do so, an incompetent or inexperienced trapper, at the time and place which plaintiff alleges that he was injured? Answer: Yes.

"(3) Was the defendant, through its employés or agents, negligent as that term has been hereinbefore defined, at the time and place defendant was injured in failing, if it did so fail, to properly light its said mine? Answer: No."

[1] First, appellant urges that the petition is subject to general demurrer, as to the first allegation of negligence, because it does not allege that an agent of the defendant acting within the scope of his employment negligently turned the switch. In support of this proposition the rule declared by Subdivision 4, art. 5246h, Vernon's Sayles' Tex. Statutes, is invoked as applicable to corporations amenable to the provisions of the Employers' Liability Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), but not having qualified, which reads:

"In an action to recover damages for personal injuries sustained by an employé in the course of his employment, \* \* \* it shall not be a defense: \* \* \* Contributory negligence; \* \* \* negligence of a fellow employé; \* \* \* assumed risk.

"4. Provided, however, that in all such actions against an employer who is not a subscriber, as defined hereafter in this act, it shall be necessary to a recovery for plaintiff to prove negligence of such employer or some agent or servant of such employer, acting within the general scope of his employment."

It is alleged and proved that defendant was subject to the act and had not qualified. The allegations that "the defendant, its agents and servants, negligently," etc., "turned the switch," is sufficient upon general demurrer, but, if special exception had been directed to the pleadings pointing out that no particular servant was named, and the fact that there was no allegation that the person, employé, was acting within the scope of his employment in turning the switch, it should have been sustained. For that reason there was no error in permitting the proof that the person who operated the switch was an employé of defendant, and was acting within the scope of his employment in doing so. Nor is there any merit in the contention that the pleadings and evidence were insufficient to authorize the court to submit this as one of the grounds of negligence to the jury.

It is next urged in support of the general demurrer that the selection and employment

of an inexperienced trapper is not a ground for recovery under the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), because the appellant company is liable for the negligent acts of its employés committed within the scope of their authority, regardless of any care used in selecting them. This question is again presented for our determination under an assignment urging that the court erred in permitting plaintiff to introduce evidence as to the inexperience and incompetency of this same employé, upon the ground that there is no allegation that the defendant knew or should have known of his incompetency at the time he was employed. And it is again urged that, under the state of the pleadings and evidence, the court erred in submitting this as a ground of recovery.

[2] The negligent act which is charged in this count to be the proximate cause of this injury is charged to the employer and not the agent, to wit, the employment of an inexperienced and incompetent employé, and this is clearly included in the statute above quoted.

[3] But, in order for the appellee to recover for the negligence of the master in this respect, it is necessary to allege and prove that the master knew of the inexperience and incompetency of the servant, or should have known of it, to render him liable, and as to this there is neither allegation nor proof. *Labatt, Master and Servant*, § 1096; *G., H. & S. A. Ry. Co. v. Faber*, 63 Tex. 344; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605.

[4, 5] The seventh assignment complains of the court admitting testimony of witnesses over its objection, as to the experience and competency of the trapper boy, such as, "A witness had not seen him trap before," and the testimony of the trapper boy that he had not trapped before. This upon another trial would not be improper evidence under proper pleading, as indicated next above. And declarations made by plaintiff to Mike Collie, such as that "he would get somebody killed by putting that boy on the trap," would not be improper if Collie occupied the position of vice principal to the company, so that notice to him would be notice to the company of the incompetency of the trapper, in proof of notice and retaining the boy in the service after notice of incompetency.

[6] But in the state of the record before us it was error to admit the latter testimony.

[7-9] As to the allegations of improper lighting of the mine being subject to general demurrer, we think, is not well taken; nor could the fact that the court submitted this as one of the grounds of negligence upon which recovery might be predicated be reversible error, for this reason. But for the reason that this record does not show such definite proof that improper lights in any way contributed to the accident this charge

should not have been given, however, the jury found against negligence in this respect; so we could not reverse for that reason. As to the testimony of witnesses that the mine was "poorly lighted" at the point of accident, in view of another trial, we note that, unless the witness qualifies as an expert, it would be improper to admit testimony of this character, but witness should state facts upon which the jury might base a verdict that the mine was so improperly lighted as to constitute actionable negligence.

[10] The tenth is that Ed Taylor was a witness for defendant, and a witness for plaintiff was permitted to testify that Taylor told him that a certain doctor had said that his (Taylor's) testimony in this case was worth \$1,500. This was improper testimony; for it has no tendency to impeach the witness nor to prove any other fact pertinent to any issue in the case. See *Jones v. Texas Electric Ry. Co.*, 210 S. W. 749 (advance sheets).

[11] The eleventh and twelfth complain of the following charge:

"Was the defendant, through its employes or agents, guilty of 'negligence' as that term has been hereinbefore defined, at the time and place the plaintiff was injured in turning the switch in the wrong manner, if it or they did so, and in failing to notify plaintiff as to how said switch was turned?"

There was just one person who turned the switch, and the charge should be confined to him in submitting this ground of negligence.

[12] The fifteenth assigns error to that part of the court's charge upon the measure of damages which reads:

"What damage, if any, has plaintiff sustained by reason of the injuries alleged by him? In answering state the amount, if any, in figures, in dollars, or in dollars and cents, just as you find."

The objection is that it is upon the weight of the evidence, in that it assumed the liability of the defendant. This objection is well taken. *Strawn Coal Co. v. Trojan*, 195 S. W. 256.

The portion of the charge quoted is followed by:

"For your guidance in answering the foregoing special issue you are instructed to assess

plaintiff's damages, if any you find he has sustained, at such sum of money paid now as you may believe from the evidence will reasonably and fairly compensate him for the physical pain and mental suffering occasioned to him by reason of his alleged injury, if any, to this date, and if you believe from the evidence further that the plaintiff's injuries are permanent, and that his earning capacity in the future is impaired, and that he will suffer physical pain and mental anguish in the future, then at such further sum paid now as you may believe from the evidence will reasonably and fairly compensate him for his decreased capacity to earn money in the future, and for such physical pain and mental suffering as you may believe from the evidence he will sustain in the future by reason of his said injuries."

[13] The attack upon this is that it also assumes negligence, and that there is no evidence of decreased earning capacity. We think both are well taken.

[14] The eighteenth is to the refusal of special charge upon assumed risk. Assumed risk is not now a defense as to this defendant.

The nineteenth complains of the refusal of the special issue requested by defendant: "Was plaintiff intoxicated at the time he received his injury?"

[15] The question was properly submitted by the court in its relation to contributory negligence. The rule is that ordinarily intoxication is simply a fact for the jury to consider in connection with all the facts and attendant circumstances, in determining whether an act done by the party while under such influence was negligence. *I. & G. N. Ry. Co. v. Jackson*, 41 Tex. Civ. App. 51, 90 S. W. 918.

There are many other assignments, but, if they suggest error, they are not likely to occur upon another trial.

The questions of negligence of defendant and of contributory negligence of plaintiff are closely contested issues in this case, and we consider it very necessary that the case should go to the jury by such charges from the court as are free from suggestions that either party was guilty of such negligence as to be the proximate cause of the accident and consequent injury to plaintiff. To that end, for the errors pointed out above, the cause is reversed and remanded for a new trial.

**FT. WORTH & D. C. RY. CO. v. SPEER.**  
(No. 9037.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 29, 1919.)

**1. LIMITATION OF ACTIONS §55(7)—ACTION AGAINST RAILROAD COMPANY FOR FLOOD DAMAGE—OBSTRUCTION BY BRIDGE.**

Where the defendant railroad company's construction of a bridge as built was not unlawful and plaintiff's rights were not invaded by its building, but the bridge was an impediment to the stream, causing or increasing an overflow of plaintiff's land during heavy rains, the statute limiting actions therefor ran from the date of the flood.

**2. LIMITATION OF ACTIONS §55(7)—INJURIES FROM NUISANCE DEPENDING UPON ACCIDENTS AND CONTINGENCIES—SUCCESSIVE ACTIONS—LIMITATION RUNNING FROM INJURY.**

Where a nuisance is permanent, and continuing resulting damages should all be litigated in one suit, but when not permanent and dependent upon accidents or contingencies successive actions may be brought for injury as it occurs, and an action for such injury would not be barred by the statute of limitations, unless the full period of the statute had run against the special injury before suit was brought.

**3. WATERS AND WATER COURSES §178(2)—FLOODING OF LAND—NATURAL AND INCREASED FLOODING—INCREASE OF LOSS.**

Where it is shown that plaintiff's land would have been flooded by natural causes, but that the defendant's negligent construction of a bridge has increased the loss, the measure of damages is the increase of loss.

**4. DAMAGES §108—OVERFLOW OF LAND—DIFFERENCE BETWEEN VALUE IMMEDIATELY BEFORE AND IMMEDIATELY AFTER.**

The measure of damages to land caused by overflow is the difference in the value of the land immediately before and immediately after such overflow.

**5. DAMAGES §108—OVERFLOW OF LAND—PREVENTION OF PLANTING AND CULTIVATION—REASONABLE RENTAL VALUE.**

If the overflow of land be caused by defendants' wrongful act and plaintiff by reason thereof is unable to plant and cultivate his crop during the crop season, he is entitled only to the reasonable rental value of the land for said term, and not the probable value of crops, less cultivation cost.

**6. DAMAGES §112—DESTRUCTION OF PLANTED, GROWING, OR MATURED CROPS—REASONABLE VALUE AT TIME AND PLACE OF DESTRUCTION.**

Where crops have been planted and are growing or have matured and are yet on the land, plaintiff is entitled to recover for their destruction from overflow caused by defendant's wrongful act the reasonable value of such crops at the time and place of destruction.

**7. WATERS AND WATER COURSES §179(4)—NEGLIGENT CONSTRUCTION OF BRIDGES—DAMAGES FOR OVERFLOW—EVIDENCE—SUFFICIENCY.**

In an action for damages for the increase of an overflow by negligent construction of a railroad bridge, testimony showing overflow more extensive than those before construction, but not showing extent of increase or the amount of damage caused by such increase, is insufficient.

**8. TRIAL §207—NEGLIGENT CONSTRUCTION OF BRIDGES—DAMAGES FOR OVERFLOW—FAILURE TO GIVE INSTRUCTION AS TO EVIDENCE.**

In an action for flooding of lands by negligent construction of a railroad bridge, where testimony that lower bridges were similarly constructed was admitted over defendant's objection, it was error to refuse to charge that jury should not award any damages as having resulted from the condition of bridges below plaintiff's land.

**9. WATERS AND WATER COURSES §179(4)—NEGLIGENT CONSTRUCTION OF BRIDGE—DAMAGES FROM OVERFLOW—INCREASED OVERFLOW—EVIDENCE—INSUFFICIENCY.**

In an action against a railroad company for damages from overflow of land and crops resulting from negligent construction of a bridge, defendant was not liable for such damage as would have resulted from overflow had no bridge been constructed, and where the evidence was insufficient for the jury to determine what portion of the damage was caused by the increased overflow due to the bridge, they had no basis for determination of the amount of plaintiff's recovery.

**10. TRIAL §350(6)—SPECIAL ISSUE—MATERIALITY—FLOODING LAND.**

In an action against a railroad company for damages from increased overflow caused by the negligent construction of a bridge, the refusal to submit the special issue, "Were the overflows and damage complained of by plaintiff caused by heavy rains, such as would overflow and inundate plaintiff's said lands irrespective of the presence and condition of defendant's railroad track and bridge in question?" held error, even though the matter was covered in a general way by the court's charge.

**11. WATERS AND WATER COURSES §179(5)—RAILROADS—NEGLIGENT CONSTRUCTION OF BRIDGE—OVERFLOW—CONTRIBUTORY NEGLIGENCE—EVIDENCE CALLING FOR INSTRUCTION.**

In an action against a railroad company for damages from flooding of lands resulting from defendant's negligent construction of a bridge, evidence held not sufficient to require an instruction on plaintiff's contributory negligence in failing to remove obstructions consisting of trees and drift from the channel of a creek.

**12. TRIAL §352(4)—INSTRUCTIONS—PLEADING—ISSUES.**

Issues of railroad's liability for violation of Rev. St. art. 6495, by failure to provide neces-

sary culverts and sluices, held not to conform with petition, which did not follow wording of statute.

Appeal from District Court, Wise County; F. O. McKinsey, Judge.

Suit by Oran Speer against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, and McMurray & Gettys, of Decatur, for appellant.

Ocie Speer, of Ft. Worth, and J. V. Paterson, of Decatur, for appellee.

BUCK, J. This is a suit by plaintiff, Oran Speer, against the Ft. Worth & Denver City Railway Company for damages to his land and the loss of crops thereon, alleged to have been caused by the construction and maintenance of a bridge across Sandy creek, which runs through and across plaintiff's land. The petition alleged in part as follows:

"Plaintiff would further show that in constructing its said track and line of railroad defendant built the same across said water course and creek and constructed thereon a railroad bridge of heavy timber and materials at such a height and in such a manner as seriously and materially to impede and interfere with the flow of water down said stream and to divert the water therefrom, and to cause it to spread out over and to injure said land in the manner hereinafter shown; that in the construction of said bridge and structure defendant did not, as it was required by law to do, leave sufficient passway for the water to allow the passage thereof down said stream, as it was accustomed to do; that the heavy and numerous timbers placed by defendant in the channel of said stream not only partly and largely closed the channel thereof, but that they caused to gather at said point heavy drifts from the floating waters on said stream, thereby choking and closing the channel of said creek and further causing the water to be delivered as aforesaid."

It was further alleged that by reason of the general lay of the land and the course of the stream, said structure caused the water to overflow plaintiff's land on the south and west side of the creek, said land being known and described as the Hatchett tract, consisting of 55 acres, and also across the land on the east side of the creek, being 105 acres, described as the Riley tract, cutting away the banks and washing the land and making it less productive, and also destroying plaintiff's crops raised thereon. Plaintiff alleged that said lands were good agricultural lands, and, though the bridge had been built several years, that until the fall or winter of 1914 said land did not overflow so badly. But that the increased damage to the land and crops was caused by the

filling up of the bed of the stream and the cutting of the banks. Plaintiff further alleged his land was mostly used for a Johnson grass meadow, and that during the year 1915-1916 he lost the entire crop of hay by reason of the overflow.

Defendant answered by way of general demurrer, special exceptions, plea of limitation of 2 years, by general denial, and specially pleaded that long before defendant's line of railroad and bridge were constructed plaintiff's land had been subjected to overflows, causing the water to flow over plaintiff's land and to damage the soil and the crops, and that if plaintiff had suffered any loss by reason of overflows it was only such damage as naturally resulted from the lay of the land and the character of the stream, and that said losses did not arise by reason of any construction made by defendant.

The cause was tried before a jury on special issues, the jury finding:

(1) That the defendant did not, prior to November 2, 1914 (2 years anterior to filing of suit), and up to the time when its bridge across Sandy creek was removed, maintain in said bridge the necessary culverts and sluices as the natural lay of the land required for the drainage thereof.

(2) That plaintiff's land had been caused to overflow with water from Sandy creek by reason of defendant's failure to maintain in its bridge the necessary culverts and sluices.

(3) That plaintiff had lost a portion of his crop since November 2, 1914, by reason of said failure, and that \$1,200 would compensate him therefor.

(4) That plaintiff's lands had been injured by reason of defendant's said failure, and that \$600 was the measure of such loss.

Upon this verdict the court entered a judgment for plaintiff in the sum of \$1,800, from which defendant has appealed.

[1, 2] Appellant's first and second assignments of error are directed to the failure of the court to give specially tendered peremptory instructions for defendant. The first, on the ground that the evidence showed conclusively and without contradiction that the rains and floods causing the overflows were such as would have caused overflows and damage irrespective of the presence or condition of the railroad and bridge, just as such had occurred before the railroad and bridge were constructed. The second, on the ground that since the evidence showed that the bridge and railroad had been constructed, and were in the condition alleged at the time of the alleged damage, for many years prior to November 2, 1914, two years before filing of the suit, plaintiff's cause of action was barred by the statute of 2 years' limitation. We will discuss the second assignment first. The evidence tended to show that the bridge constructed by appellant was built upon large timbers or pilings, some 36 or 40

in number, placed in the bed of the stream, and that these pilings more or less interfered with the natural flow of the water down the channel of the stream, and caused to collect on the upper side of such obstruction trees and other drift. The result was that, the current of the stream being impeded, the bed of the stream more or less filled up with silt and sand. At times of heavy rains there was an increased tendency of the water to overflow and run across plaintiff's lands. The width of the stream ranged from 40 to 50 feet, and from the fact that later the railroad company did remove the obstruction, as well as from the knowledge possessed by the court in common with men of general intelligence and experience, it would seem that the pilings, as placed, were not of such a permanent nature as that they might not be removed at the outlay of a reasonable cost, and the injurious effect therefrom abated and remedied. In *M., K. & T. Ry. Co. v. Anderson*, 194 S. W. 662, in discussing the question of what should be regarded as a permanent injury, this court held that in case of damages from the diversion of the natural flow of the water by an obstruction built by a railroad, the injury is to be regarded as permanent, where the cost of remedying it would be so great as to justify the railroad in condemning the property and taking it under the power of condemnation, but if the injury can be remedied at a reasonable expense, it may be regarded as temporary, and the question whether the injury is permanent or temporary may be for the jury. In *Houston Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36, our Supreme Court laid down two rules, amply sustained by authority, which should be kept in mind in the determination of the question of limitation, involved in cases of this character:

(1) "When an act is in itself lawful as to the person who bases thereon an action for injuries subsequently accruing from and consequent upon the act, the cause of action does not accrue until the injury is sustained."

(2) "If an act is done which in itself is an invasion of the right of another, which being done, injury is the natural sequence, then limitation will run against the right to recover damages from the time the unlawful act was committed, though the injury may not have been discovered until within a period before suit less than would be sufficient to complete the bar of the statute."

In the instant case it does not appear that the construction of the bridge as built was unlawful, or that at the time of the building there was any invasion of the rights of the plaintiff or any injury to his land. It was only upon the occasion of heavy rains and consequent increased flow of water down the stream that the impediment created such an obstruction as caused the water to overflow plaintiff's lands and injure them and the

crops thereon. In *Railway Co. v. Anderson*, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350, our Supreme Court laid down the rule that where a nuisance is permanent and continuing the damages resulting from it should all be litigated in one suit, but when it is not permanent, but depends upon accidents and contingencies, so that it is of a transient character, successive actions may be brought for injury as it occurs; and an action for such injury would not be barred by the statute of limitations unless the full period of the statute had run against the special injury before the suit. See, also, *Railway Co. v. Brown*, 38 Tex. Civ. App. 610, 86 S. W. 659; *Railway Co. v. Helsley*, 62 Tex. 593; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061.

We conclude that the peremptory instruction for defendant was not called for by reason of limitation. The damage for which plaintiff sought recovery was the injury to his lands and crops within the 2 years' period.

[3-8] But the first assignment presents a more serious question. If the plaintiff was entitled to recover for damage to the soil as well as damage to and loss of his crops, the measure of his damage was the difference in the loss he did sustain and the loss he would have sustained by reason of overflows which would have occurred in the absence of the obstruction placed by the defendant. Where it is shown that land would have been flooded by natural causes, but the defendant's act has increased the loss, the measure of damages is the increase of loss. 8 Sedgwick on Damages (8th Ed.) § 942, pp. 57, 58. The measure of damages to land caused by overflow is also stated to be the difference in the value of the land immediately before and immediately after such overflow. *Owens v. Railway Co.*, 67 Tex. 679, 4 S. W. 593; *Railway Co. v. Green*, 44 Tex. Civ. App. 247, 99 S. W. 573, writ denied. If the overflow be caused by defendant's wrongful act, and plaintiff by reason thereof is unable to plant and cultivate his crop on the land during the crop season, he is entitled only to the reasonable rental value of the land for said term, and not the probable value of the crops, less cost of cultivation. 3 Sedgwick on Damages, p. 58. But where crops have been planted and are in the process of growth, or have matured and are yet on the land, the plaintiff is entitled to recover the reasonable value of such crops at the time and place of their destruction. The method of arriving at the value of growing crops is discussed in the cases of *Milling Co. v. Langford Bros.*, 32 Tex. Civ. App. 401, 74 S. W. 926, writ denied; *Railway Co. v. Bayliss*, 62 Tex. 570; *Railway Co. v. Hedrick* (Sup.) 7 S. W. 353.

[7] Both appellant and appellee set out in full the testimony of the plaintiff, and



after a careful examination of such testimony we have come to the conclusion that it fails to disclose evidence upon which a jury could properly base a verdict. The testimony shows that the plaintiff had owned the two tracts of land alleged to have been overflowed and injured for some 10 years prior to the trial, and that he had been acquainted with these lands and other tracts adjacent to Sandy creek for some 25 years, a period antedating the construction of the railroad line and the bridge in question; that prior to the erection of the bridge and placing of the piling thereunder the lands of the plaintiff were subject to overflow on the occasion of heavy or unusual rains, and that the lands and the crops thereon were damaged more or less. Plaintiff testified that in his opinion the damage caused to the lands and the crops by overflow were more extensive subsequent to the construction of the bridge than before, and that the overflow covered a larger area, but he failed to show to what extent the overflows were greater or the damage increased. It was incumbent upon him to do this in order to sustain a recovery. It would be impracticable, within the reasonable compass of this opinion, to set out his testimony in detail, as was done in the briefs filed herein, but after a careful examination of plaintiff's testimony and the testimony of other witnesses upon the question of the extent of the damages arising by reason of the increased flooding of the land due to the nature and character of the bridge in question, we feel constrained to hold that the testimony fails to give any certain or reliable basis for the recovery sought and the verdict rendered, and left the jury to wander through the domain of surmise and speculation in order to reach the verdict rendered.

Plaintiff did testify that during the year 1915 he had from 100 to 125 acres in Johnson grass meadow on the two places, and that in his opinion the crop would have averaged from one-half to one ton to the acre a year. He did not remember the exact price of hay that year but thought it was worth from \$6 to \$8 per ton, at that time and place, and in 1916 it was worth probably from \$7 to \$9 per ton at baling season, and during 1916 he was not able to mow the land at all. That in his opinion the Riley tract was worth prior to the overflow in 1915 from \$40 to \$50 an acre, and that subsequent to the overflow said land was worth around \$30 an acre. That from 15 to 16 acres of said tract was badly washed and was not as productive as before, and that all of said tract was washed more or less. But he failed to show what the increase of loss was by reason of the construction and maintenance of the bridge, and how much of said loss would have been sustained in the absence of the bridge. As we have

concluded that this case must be reversed for other errors hereinafter noted, we will content ourselves by stating that upon another trial the extent of the increased damage, if any, should be affirmatively shown.

[8] In the third assignment complaint is made of the admission of certain testimony of witness J. C. Champion as to the construction of bridges across Sandy creek other than the one alleged in plaintiff's petition to be the cause of the injury to his land and crops. He testified that he owned land west and south of the Hatchett tract; that for some 12 or 15 years he had cultivated the portion south of the Hatchett tract and did not get as good crops in 1915 and 1916 therefrom as in previous years; that the overflows on the land in 1915 were "a little larger than they had been; covered more ground and did more damage." He further testified that the bed of the creek was practically level "away above" his place, and that his land was considerably deeper than at the time he bought it, and that the bed of the creek had filled up some three or four feet. He was then asked on redirect examination, "Are those bridges, the ones south of the county bridge, set on piling?" The defendant objected to the question and the answer thereto on the ground that the answer was incompetent, irrelevant and immaterial, and that there was no pleading to support such testimony. The court overruled the objection, and the witness answered, in effect, that the bridges south of the one in question were set on piling, and the construction of them was similar to the one on the Hatchett place.

Under the fourth assignment error is directed to the refusal of the court to give the jury a specially requested charge, in effect, that they should not award any damages as having resulted from the structure or condition of any of the defendant's bridges below the lands belonging to plaintiff. While we are not prepared to say that the admission of the testimony complained of in the third assignment constituted reversible error, yet we are of the opinion that upon the admission of said testimony the charge refused, of which complaint is made in the fourth assignment, should have been given. It is true that the cause was submitted upon special issues, and that issues Nos. 1, 2, and 3 limited the injury and consideration of the jury to the question of whether the defendant had maintained in its bridge across Sandy creek the necessary culverts and sluices as the natural lay of the land required for the drainage thereof, and the question of the injury to plaintiff's lands by reason of overflows produced by any failure of defendant in this respect, yet we think that inasmuch as the tendency of the testimony of the witness Champion was to show that the bridges below the bridge on plaintiff's land

were constructed in the same manner, and that largely the same results followed from overflows, the requested charge should have been given.

[9] In the fifth assignment complaint is made of the refusal of the court to give the defendant's requested charge as follows:

"If you believe from the evidence that the rains, or any of them that fell during the period complained of by plaintiff, were such that plaintiff's said lands or crops, or any part of same, would have been thereby inundated and damaged irrespective of the presence or condition of the bridge in question, then you are instructed that even if you should believe further from the evidence that the presence or condition of the bridge in question held back or caused to be held back and diverted over plaintiff's said lands additional waters in sufficient amount to cause additional damage to plaintiff's said lands or crops in excess of the damage that would have resulted irrespective of the presence of said bridge; and if you find that the evidence before you does not show or enable you to determine therefrom what portion of the damage was proximately caused by the presence or condition of the bridge in question, you will not undertake to estimate and assess any damage based upon surmise or speculation in answer to special issues Nos. 5 and 6 in the court's charge, or either of said special issues."

If plaintiff's land would have been inundated in the absence of the bridge and his crops injured, as the evidence tends strongly to show, defendant would not have been liable for such damage as would have resulted had no bridge been constructed, and if the jury were not presented with evidence sufficient for them to determine therefrom what portion of the damage was caused by the increased overflow due to the construction of the bridge, they had no basis upon which they could determine the amount of recovery, if any, to which the plaintiff was entitled. The majority of the court, at least, consisting of Chief Justice CONNER and Justice DUNKLIN, are of the opinion that the refusal of this charge constituted reversible error. *Railway Co. v. Vogt*, 181 S. W. 841.

[10] The sixth assignment complains of the refusal to submit the following special issue:

"Were the overflows and damage complained of by plaintiff caused by heavy rains such as would overflow and inundate plaintiff's said lands irrespective of the presence and condition of defendant's railway track and bridge in question?"

The proposition under this assignment is, in effect, that the defendant was entitled to have submitted the special issue requested, it being an affirmative presentation of defendant's theory and defense, grouping the facts upon which it relied and calling for a finding thereon, even though the matter had been covered in a general way by the court's

charge. We sustain this assignment. *Railway Co. v. Foth*, 101 Tex. 133, 100 S. W. 171, 105 S. W. 322; *Yellow Pine O. Co. v. Noble*, 101 Tex. 125, 105 S. W. 318; *Traction Co. v. Adams*, 107 Tex. 612, 183 S. W. 155; *Railway Co. v. Kiersey*, 98 Tex. 590, 86 S. W. 744.

[11] The witness Dickson testified to facts which the appellant contends raised the issue of whether or not plaintiff should have, in the exercise of ordinary care, removed from the bed of the creek trees and other drift, which naturally impeded the flow of the water in its channel, and to provide barriers or brakes at the places where the waters cut through the banks of the creek. Defendant submitted an instruction, in effect, that it was the duty of the plaintiff to use such care as an ordinarily prudent person would use under similar circumstances to avoid injury to his property, and also submitted a special issue involving the question of plaintiff's contributory negligence in failing to remove drifts or provide barriers to hold back the water at the places where it cut through the banks of the creek onto his land. The court is of the opinion that the evidence, as set out in appellant's brief, is hardly sufficient to raise the issue of contributory negligence, though if such issue were raised by the evidence it would have been the duty of the court to give the charge requested and to have submitted the issue tendered. *Railway Co. v. Becht*, 21 S. W. 971; *Railway Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. 285; *Albers v. Railway Co.*, 36 Tex. Civ. App. 186, 81 S. W. 828; *Railway Co. v. Hapgood*, 184 S. W. 1075; *Railway Co. v. Arey*, 107 Tex. 366, 179 S. W. 860, L. R. A. 1916B, 1065.

[12] Other assignments are directed to the submission of the issue of whether or not defendant failed to provide culverts and sluices as the natural lay of the land required for the drainage thereof, and the submission of the issue of damages to the land or the crops by reason of such failure. It is urged by appellant that the pleadings failed to contain any allegation that defendant failed to provide the necessary culverts and sluices as required by article 6495 of the Revised Civil Statutes, upon the wording of which statute it appears the issues were framed. By reference to plaintiff's petition it appears that plaintiff intended to predicate his action upon the alleged violation upon the part of the defendant of this article, though he did not follow the wording of the statute nor allege in so many words that defendant had failed to provide necessary culverts and sluices. Moreover, it further appears that plaintiff did not directly, *eo nomine*, allege negligence on the part of defendant in the construction of the bridge, as it was built, and in the maintenance thereof, but that he meant to charge that the con-

struction and maintenance of the bridge as built was in violation of a statutory requirement, and hence negligence per se. We would suggest that upon another trial, if the pleadings of plaintiff be not changed in form, that the issues submitted be so framed as to conform more nearly to the allegations of the petition in this respect.

Other questions raised under subsequent assignments we believe to have been disposed of by what we have already said.

For the reasons given, the judgment of the trial court will be reversed, and the cause remanded.

**BURCHILL et al. v. HERMSMEYER.**  
(No. 9021.)

(Court of Civil Appeals of Texas. Ft. Worth.  
March 8, 1919. Rehearing Denied  
April 19, 1919.)

**1. EVIDENCE §441(9) — PAROL EVIDENCE — VARYING WRITTEN CONTRACT — SALE OF STOCK.**

In suit to recover money paid for stock in an oil company upon the ground that at the time the subscription contract, which was in writing, was entered into, the individual defendants orally agreed to return to plaintiff said money in the event oil was not developed, *held* that, aside from the allegations of fraud, evidence of the oral contract alleged was in violation of the rule that parol testimony cannot be received to vary, add to, or subtract from a valid written instrument.

**2. EVIDENCE §429 — PAROL EVIDENCE — TO ADD TO WRITTEN CONTRACT — EXCEPTION TO GENERAL RULE.**

Where plaintiff at time of execution of written instruments knew that oral contract was not embodied in the writing, he would, to bring himself within the exception to general rule that parol testimony cannot be received to vary valid written instrument, be required to allege and prove that omission was due to accident, mistake, or fraud of defendants; a mere charge that omission was fraudulent being insufficient.

**3. FRAUD §41, 50 — PRESUMPTION — PLEADING.**

Fraud is never presumed, but must always be proven, and the facts and circumstances relied on must be set out, so that in construing a petition it may be determined whether the facts and circumstances alleged amount to fraud.

**4. FRAUD §12 — ACTIONABLE FRAUD — EXISTING FACT OR PROMISE.**

The general rule is that a false representation, in order to authorize relief on that ground, must be of an existing fact, and not a promise of something to be done in the future.

**5. CORPORATIONS §80(11) — SUBSCRIPTION TO STOCK — RECOVERY OF PRICE PAID — FRAUD—PROMISE—BURDEN OF PROOF.**

To hold that oral agreement whereby defendants agreed to return to plaintiff money paid for stock in an oil company in case oil was not developed operated as a fraud, plaintiff must prove that defendants at the time they made the agreement did not intend to fulfill it, but to deceive plaintiff and induce him to advance the moneys which he seeks to recover.

**6. CORPORATIONS §80(12) — SUBSCRIPTION TO STOCK—FRAUDULENT REPRESENTATIONS —PLEADING.**

In action to recover money paid for stock in oil company, general allegations with reference to fraudulent representations as to existence of oil under the land *held* not to sustain judgment in plaintiff's favor.

**7. CORPORATIONS §80(4)—SUBSCRIPTION TO STOCK—STATEMENTS MADE SUBSEQUENT TO TRANSACTION.**

Where a subscriber seeks to recover money paid for stock on the ground of fraudulent representation as to existence of oil under company's land, that defendants represented that other oil companies were seeking to purchase their property was immaterial if made long after plaintiff had advanced the sums of money he seeks to recover.

**8. CORPORATIONS §80(1) — SUBSCRIPTION TO STOCK — FRAUD — SPIRITUALISTIC REVELATION.**

In an action to recover money paid for stock in oil company on the ground of fraudulent representation as to existence of oil under the land, *held* that the representations of the defendants to the effect that spirits had revealed through a medium the existence of oil in valuable quantities beneath the land in question must, under the circumstances of the case, be regarded as insufficient to form a basis for relief asked by plaintiff.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Action by H. C. Hermsmeyer against Belle M. Burchill and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Templeton & Milam, of Ft. Worth, for appellants.

W. A. Nelson and Slay, Simon & Smith, all of Ft. Worth, for appellee.

CONNER, C. J. This suit was instituted by appellee against appellants, Belle M. Burchill, Edna Burchill, and the Ft. Worth Oil Development Company, a corporation, to recover \$10,000 paid for stock in the oil company named. The right to recover is based upon two grounds: First, on the ground of certain alleged false and fraudulent representations, which will be hereinafter

er indicated; and, second, upon the ground that at the time the stock subscription contract, which was in writing, was entered into, appellants Belle M. Burchill and Edna Burchill orally agreed to return to the plaintiff the said \$10,000 in the event oil was not developed.

The case was submitted to a jury on special issues, which were answered favorably to appellee, and judgment was rendered accordingly in the sum for which he sued.

The record, statement of facts, and appellants' brief are all voluminous. For the most part, however, the assignments of error go to the action of the court in overruling general and special exceptions to appellee's petition, and to the failure of the court to sustain appellants' numerous objections to the evidence offered in support of the supposed objectionable allegations. We think, therefore, that we can probably more clearly dispose of the case by announcing our conclusions in a general way than to undertake a discussion of each assignment. So proceeding, we will first address ourselves to the questions which relate to the alleged oral contract.

To the petition and to the evidence it was objected that the effect of the oral contract was to vary and change, in material particulars, the terms of the written contracts which had been entered into between the parties. Appellee's advancements to appellants were at different times and in different sums, all aggregating the sum for which he sued. For some of these sums a brief written receipt was given which recited that the sums advanced were to be applied on stock payments, or to be applied on stock issued when called for, and at yet other times more formal instruments were executed. To the end that the force of appellants' objections may be more clearly seen, we will set out several of these more extended contracts. The first reads as follows:

"Ft. Worth, Tex., Feb. 10, 1916.

"This receipt witnesseth: That I, Belle M. Burchill, have this day received as trustee, as stated below, from H. C. Hermismeyer, the sum of one thousand (\$1,000.00) dollars, to be applied to the payment of one hundred (100) shares of stock in a corporation to be by her associates hereinafter organized for the purpose of prospecting for oil and developing an oil field on about thirty five (35) acres of land belonging to said Belle M. Burchill and Edna M. Burchill, situated in Tarrant county, Tex., near the eastern limits of the city of Ft. Worth, and known as a part of the old Burchill homestead, which land is to be hereafter conveyed to said proposed corporation. Said corporation is also to acquire leases on other lands in that vicinity for the purpose of drilling for oil, gas, etc.

"The said sum of \$1,000 which is this day paid is to be held by said Belle M. Burchill as trustee until said corporation is organized and

said stock is issued, when same is to be expended in the development of said field.

"Said H. C. Hermismeyer shall have the right, at his option, to acquire, if he so desires, an additional five thousand (\$5,000) dollars of stock in said corporation at any time prior to April 1, 1916, same to be paid for by him at par as same is taken; all stock to be non-assessable.

"The proposed corporation is to be organized and incorporated with a capital stock of not to exceed fifty thousand (\$50,000) dollars. The development of said field is to commence within sixty (60) days from this date and is to be tested for oil and gas on said premises by sinking thereon with reasonable diligence a well not to exceed twelve hundred (1,200) feet, but same may be stopped short of that distance if oil or gas be struck in paying quantities at lesser depth. [Signed] Belle M. Burchill.

"Edna M. Burchill."

On April 19, 1916, thereafter, oil not having been developed within 1,200 feet, as originally contemplated, appellee subscribed for an additional amount of stock, the subscription being evidenced by a written instrument which reads as follows:

"Know all men by these presents that we, H. C. Hermismeyer and William Hermismeyer, of Ft. Worth, Tarrant county, Tex., herewith subscribe eight thousand six hundred and fifty dollars for stock in the Ft. Worth Oil & Development Company, said stock to be issued to the above-named parties when paid for at par and non-assessable.

"Witness our hands this 19th day of April, 1916. [Signed] W. G. Hermismeyer.

"H. C. Hermismeyer."

The payment of the subscription last set out is evidenced by the following instrument executed on July 3, 1916:

"The State of Texas, County of Tarrant.

"Know all men by these presents that this agreement this day made and entered into by and between the Ft. Worth Oil & Development Company of Ft. Worth, Tex., party of the first part, and H. C. Hermismeyer, party of the second part, witnesseth that said parties have agreed and do hereby agree as follows, to wit:

"I. In consideration that the said second party shall pay to the Palo Pinto Oil & Gas Company the balance due it on well drilling by it for said first party near Ft. Worth, which balance is about four thousand (\$4,000) dollars, and in further consideration that said second party has heretofore paid said Palo Pinto Oil & Gas Company the further sum of three thousand dollars, which has been applied on the cost of said well, it is agreed that said second party shall have the right and option to demand of said first party that it issue and deliver to him stock in said Ft. Worth Oil & Gas Company equal in amount at its face or par value to the amount so paid by him to said Palo Pinto Oil & Gas Company, which being done, said second party shall be entitled to all the rights and privileges of a stockholder in said Ft. Worth Oil & Gas Development Company. Such demand for the issuance of said stock to him may

be made by second party whenever he desires to make same.

"II. It is further agreed that said second party shall, if he so desires, increase his subscription to the stock of said company to an amount not to exceed fifteen thousand dollars in all, and to demand the issuance of stock therefor at par value upon the payment of the amount so subscribed for.

"III. Whatever amount is so paid by said second party for such stock in excess of the amounts so paid to said Palo Pinto Oil & Gas Company, viz. about seven thousand twenty dollars, shall be expended by said first party in the development of its oil field near Ft. Worth and in the necessary expense of so doing, provided that no part of said amounts so paid and to be paid by second party shall be used to pay agents' commissions on sale of stock in said development company.

"Witness our hands this the 3d day of July, 1916. [Signed] Ft. Worth Oil & Development Company, by B. M. Burchill, President, Party of the First Part. H. C. Hermsemeyer, Party of the Second Part."

Plaintiff, after setting out in his petition the subscription contract dated February 10, 1916, above quoted, and after setting forth the alleged fraudulent representations which induced its said subscription, thus alleges the oral contract upon which he relies, viz.:

"Plaintiff further avers and alleges that he was induced and caused to pay over the \$1,000 by false representations of facts aforesaid and was caused to accept the receipt aforesaid because of the confidence which he had reposed in the defendant Belle M. Burchill that she would return his said money to him unless oil was discovered and had confidence in her to the extent that he did not require her to place said provision in the contract which she and her daughter signed, and avers and alleges that he would have had said oral agreement to return his said money written into said receipt had he not reposed such confidence in the said defendant."

The plaintiff, after setting forth several other receipts for other sums of money and the contract of July 3, 1916, above quoted, further referred to the oral contract in the following terms:

"Plaintiff would further aver and show unto the court that at the time that each of the aforesaid receipts were issued to him and any of said purported contracts entered into that he was completely under the influence and control of the said Belle M. Burchill by reason of the aforesaid false representations of facts and by reason of the aforesaid tricks, artifices, and frauds perpetrated on him, and that he reposed absolute confidence in the said Belle M. Burchill and paid no particular attention to the fact that said receipts were signed, part of them by the Ft. Worth Oil & Development Company, and for the same reason paid no attention to the fact that it was not specifically mentioned in each one of said receipts that plaintiff's money was to be returned to him in the event oil was not discovered, and here avers and alleges that the matter of leaving out the oral agreement on the part of the defendants with this

plaintiff to return his said money unless oil was discovered was the exact fraud defendants were undertaking to and did perpetrate upon this plaintiff by executing and delivering to him the aforesaid receipts."

[1] We are thus brought to the question of whether the plaintiff's allegations show a right to recover upon the oral contract as such. It is hardly to be doubted that the oral contract, declared upon in a very material particular, adds to the written contracts exhibited in the plaintiff's petition. Whether a written contract can be contradicted, varied, or added to by parol is a question that has been fruitful of many discussions. The general rule established by the authorities in its shortest form is that—

"Parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument."

See Jones, Blue Book of Evidence, vol. 1, § 434; Greenleaf on Evidence, vol. 1, § 275. The rule is thus expressed in *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing."

[2, 3] Aside, therefore, from the effect to be given to the plaintiff's allegations of fraud, hereinafter to be noticed, it seems plain that the oral contract, as alleged, is in violation of the rule announced by the authorities we have just cited. The full extent of Mrs. Burchill's and the oil company's obligations is evidenced by written instruments executed at the time, and plaintiff's full right, so far as the instruments themselves indicate, is to be measured by the same instruments in writing. The oral contract, as alleged, was clearly not collateral to the written contracts, but was so closely connected with the written contracts as to form part and parcel of them. In the effort to avoid the force of this construction of the transaction and to bring himself within one of the exceptions to the general rule so as to authorize proof of the contract by parol testimony, the plaintiff alleged that the

omission of the oral from the written contracts had been fraudulently brought about. But, aside from the effect to be given to the alleged fraudulent representations, to be hereinafter discussed, it is to be noted that the petition shows, and his own testimony more particularly discloses, that at the very time of the execution of the written instruments plaintiff then knew that the oral contract, if any, was not embodied in the writing; and plaintiff, to bring himself within the exception to the general rule, would be required to allege and prove that the omission was brought about by some accident, mistake, or fraud of the defendants. A mere charge that the omission was fraudulent on the part of the defendants is insufficient. Fraud is never presumed, but must be always proven, and in all cases of the kind the facts and circumstances relied upon as constituting the fraud must be set out so that in construing the petition it may be determined whether the facts and circumstances alleged amount to fraud.

[4] But, again referring to plaintiff's petition, it must be noted that the pleader makes some general reference to the "aforesaid false representations of the facts, and by reason of the aforesaid tricks, artifices, and frauds perpetrated on him," he was induced to impose absolute confidence in Mrs. Burchill and to disregard the omission of the oral contract from those written. We will therefore now consider what effect is to be given to the oral contract as related to the issue of fraud. The general rule is that a false representation, in order to authorize relief on that ground, must be of an existing fact, and not a promise of something to be done in the future. See *Bigham v. Bigham*, 57 Tex. 238, cited with approval in *Railway Co. v. Titterton*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39. In the latter case, however, an exception to the general rule was recognized. That case was one where the grantor in a conveyance to a right of way sought to cancel the conveyance on the ground of an unfulfilled promise to locate depot grounds, etc., on the plaintiff's lands. In disposing of the case our Supreme Court said:

"To the above rule [the general rule above noted], however, we think that there is a well-founded exception, though there is a conflict in the authorities upon the question. It has been distinctly recognized and announced by the Supreme Court, however, in this state. The exception may be stated as follows, and in reference to the case in hand: If the railway company, at the time it made the representations and promises before mentioned to the plaintiffs, did so with the design of cheating and deceiving the plaintiffs, and had no intention at the time of performing the promises, but used them merely as false pretenses to induce the plaintiffs to execute the deed, and if its conduct did have that effect, then we think that such acts and

declarations, coupled with its subsequent utter failure and refusal to perform the promises or assurances, would amount to such actual fraud as would authorize the plaintiffs to have the contract rescinded and the land restored to them. But, upon the other hand, if the promises or representations were made in good faith at the time of the contract, and the defendant subsequently changed its mind and failed or refused to perform the promises, then such conduct of the company, originally or subsequently, would not \* \* \* justify the rescission of the contract or the cancellation of the deed."

[5] To be operative, therefore, as an element of fraud, the burden, at all events, was upon the plaintiff below to show that the defendants at the very time they made the oral agreement, if they did so at all, did not intend to fulfill it, but, on the contrary, then, by so doing, intended to thereby deceive the plaintiff and induce him to advance the moneys he did advance. We have been pointed to no evidence which tends to so show beyond the fact that the promise has not been performed, and this, we think, is insufficient. We accordingly conclude that neither as alleged or proven can the judgment below be sustained on the theory of the oral agreement relied upon.

[6] It remains to be considered whether the general allegations and evidences of fraud presented by the plaintiff are sufficient to sustain the judgment in his favor. The general allegations were, in substance, that the defendants approached the plaintiff and talked to him of the glowing prospects of oil on lands which they owned near the city of Ft. Worth, and represented that a most eminent geologist had made a survey of the land and had reported that oil in paying quantities lay underneath the surface; that plaintiff knew nothing about the oil business and was not acquainted with the character of the country, the formation of the soil where oil might be found, nor with the degree of certainty which geologists might, by an examination of the land, give an opinion as to whether or not oil lay underneath in paying quantities; that defendants represented to plaintiff, as a fact, that the said geologist could tell when oil lay underneath the surface of the land; and that the United States government took the word of said geologist, who represented that he worked for the Standard Oil Company, and had informed defendants that oil lay underneath the lands in paying quantities. It was further alleged, in substance, that when the oil company was incorporated, the capital stock was paid for by the lands owned by defendants which had been estimated at a grossly excessive value; that the plaintiff had been induced to believe that the company would be honestly organized, and had been induced to believe the predictions of the geologist and assurances of the defendants as to the existence of oil on the land:

and that Mrs. Burchill "had gained his (plaintiff's) confidence to the extent that he believed that she was telling him the truth about the Spiritualistic predictions that oil underlay her said land." There were further allegations to the effect that defendants had represented that the Standard Oil Company and other companies had made an effort to secure their lands for the purpose of testing the field for oil, etc.

While, inferentially, the petition presents allegations of false representations that are material, as, for instance, that the geologist had investigated defendants' lands and had given opinions favorable to the existence of oil thereunder, and that the lands for the purpose of developing oil had been sought by the Standard Oil and other oil companies who might reasonably be supposed to so act because of a well-founded belief of the existence of oil under said lands, yet, in the nature of things, many of the allegations made relate to mere matters of opinion which are wholly insufficient to constitute a support for plaintiff's action. In the very nature of the subject it must be known that neither a geologist nor any other person can predict with absolute certainty the existence of oil underneath undeveloped tracts of land, and neither the opinion of the geologist nor of the defendants could legally have been accepted by plaintiff as an absolute fact, and, when we come to the evidence of this case, it is much less forceful than the allegations. The plaintiff testified at great length at the trial, but it does not appear from his testimony that the defendants' statements to the effect that the geologist had passed favorably upon the lands in question were false. They may, indeed, have given the most favorable opinions on this subject. So far as the record shows, the defendants themselves may have had the utmost faith in the existence of oil under their lands, and they may have believed with all sincerity in such fact.

The representations as to the value of the lands in procuring the charter for the incorporation cannot be accepted as a basis for fraud in this case. While it was shown by the evidence on the trial by several witnesses that the value of the lands was much less than that represented to the secretary of state, yet the opinions of the parties who made the several estimations were, at most, mere estimates. The lands for farming or ranching purposes or for a city addition may have been worth, in the opinion of witnesses, a given value, while a much greater value would be placed thereon by persons actuated by a belief of the existence of oil thereunder, and which it was proposed to develop. The question of the value of these lands could only be material in an action on the part of the state to annul the charter, or in an effort on the plaintiff's part to cancel his subscription contracts and for damages, but

this he has not sought to do, other than as is perhaps to be implied from his effort to recover the amount of money paid in by him.

[7] Plaintiff's allegation that the defendants represented that other oil companies were seeking to purchase their property for oil-developing purposes was immaterial, and should have been rejected for the reason that these statements on the part of the defendants, if made, occurred long after the plaintiff had advanced the sums of money he seeks to recover. And for the same reason, if for no other, the evidence of the plaintiff should have been rejected to the effect that at the instance of the defendant Belle M. Burchill he had visited a Spiritualist in Dallas, and therefrom had received encouragement.

[8] There was considerable other evidence relating to Spiritualistic communications as to the existence of oil underneath the lands in question, and we should perhaps notice the subject a little more particularly. We do not care to say that spirits from the great beyond may not visit and communicate with the living, nor that it is impossible for man's spiritual powers to be so developed and purified as to constitute a medium for communication with disembodied beings, for the phantasm of to-day is so often a reality of to-morrow. But these subjects belong to realms and powers that as yet must generally be classed as purely speculative, and not so established by evidences cognizable by the law which we are required to administer as to be classed as facts—as among proven things. Indeed, we think it may be said that a belief that the living, through the agency of a medium, can receive authentic information from the spirits of the dead, is, in the general acceptance of mankind, a species of delusion, and that such communications, in general acceptance, are of too unsubstantial a character to be received as representations of fact. We think, therefore, that the representations of the defendants, if any, to the effect that spirits had revealed, through a medium, the existence of oil in valuable quantities beneath the lands in question, must, under the circumstances of the case, be regarded as insufficient to form a basis for relief to plaintiff.

But if under any possible set of circumstances representations of the character mentioned could be made the basis of equitable interposition, the present suit presents no such case. There is no allegation that the plaintiff is mentally deficient or wanting in ordinary business acumen, nor evidence that the medium mentioned in the testimony did not, in fact, give the assurances imputed to him, or that defendants themselves were without confidence therein. Indeed, it is not shown that the test well undertaken by the parties to this litigation has been entirely abandoned. So far as the evidence called to our attention shows, the work may now be

continuing, and, while the oil has not been developed as near the surface as was contemplated, the truth of the spiritual prophecy that oil in paying quantities is to be found beneath the lands of the defendants may yet be demonstrated.

It should be further said on this branch of the subject that some of the spiritual revelations relied upon were made subsequent to plaintiff's subscription and payment for stock, and hence in no event could have been an inducement therefor. The communications detailed at greatest length and apparently most relied upon by plaintiff were those of Mr. Kaiser designated as a medium, who assured plaintiff that "the oil is there all right; he said he saw it, saw the oil there, and he was sure of that, and he thought it was down 600 feet." These assurances, however, as shown by the evidence, were given to plaintiff first in the absence of the defendants, and we fail to find any evidence that either of the defendants authorized or incited the medium named to make the statements. Indeed, it seems difficult to point out any theory sustained by the pleadings and evidence in this case which will support the judgment as actually rendered in plaintiff's favor.

As before observed, the plaintiff does not, in direct terms, seek to cancel his subscription contracts and recover damages because of a depreciated value of his stock in the corporation and tender a return of such stock. Nor is there any clear showing, so far as we have been called upon to consider the record, that the corporation is not a solvent going concern, or that its stock is worthless, or that the right secured by plaintiff in his subscription contracts to acquire additional stock at par is without value. On another trial the record should not be left in doubt on these matters; for it needs neither argument nor citation of authorities to support the proposition that plaintiff cannot retain the benefits, if any, of these subscription contracts and at the same time recover the money paid therefor.

We conclude that the judgment should be reversed, and the cause remanded for a new trial in accord with the views we have indicated.

Judgment reversed, and the cause remanded.

JENNINGS v. JENNINGS et al. (No. 947.)  
(Court of Civil Appeals of Texas. El Paso.  
May 15, 1919.)

1. WILLS  $\Leftrightarrow$ 164(5)—UNDUE INFLUENCE—EVIDENCE ADMISSIBLE.

On the issue of undue influence exerted on testatrix by her husband, evidence that he had

whipped her and used abusive language toward her, and was otherwise guilty of unkind treatment, was admissible.

2. EVIDENCE  $\Leftrightarrow$ 471(14) — CONCLUSIONS OF WITNESS—UNDUE INFLUENCE.

In contest of probate of a will of deceased wife of proponent involving issue of undue influence exerted by proponent, testimony of daughter that her father dominated her mother was a conclusion, and inadmissible.

3. WILLS  $\Leftrightarrow$ 165(2)—UNDUE INFLUENCE—IRRELEVANT TESTIMONY.

On the issue of undue influence exerted on testatrix by her husband, the proponent, evidence of a conversation 12 years before the execution of will, with reference to what part of her father's estate testatrix wanted, was irrelevant.

4. WILLS  $\Leftrightarrow$ 164(5) — UNDUE INFLUENCE—EVIDENCE ADMISSIBLE.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony that on the morning after her father's death proponent demanded his wife's share of the estate, was irrelevant.

5. WILLS  $\Leftrightarrow$ 166(2)—CONTEST—GROUNDS.

A wife's will in favor of her husband cannot be set aside upon evidence that upon one occasion during the 36 years of married life he objected to the purchase of some clothing.

6. WILLS  $\Leftrightarrow$ 164(1)—CONTEST—UNDUE INFLUENCE—EVIDENCE ADMISSIBLE.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony of a son that he did not know of existence of the will was inadmissible.

7. WILLS  $\Leftrightarrow$ 164(5)—CONTEST—UNDUE INFLUENCE—EVIDENCE ADMISSIBLE.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony with reference to proponent getting a stranger to prepare will, instead of a kinsman of wife's family, held irrelevant.

8. WILLS  $\Leftrightarrow$ 166(2)—CONTEST—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show undue influence over testatrix by her husband.

9. WILLS  $\Leftrightarrow$ 163(2)—CONTEST—UNDUE INFLUENCE—PROOF.

The burden is on contestant to prove undue influence was exercised by a husband over his wife at the time she executed her will in his favor.

Error from District Court, Stephens County; Thos. L. Blanton, Judge.

Application by E. Y. Jennings to probate the will of his deceased wife, Modena V. Jennings. G. C. Jennings and others contest the probate on the ground of mental incapacity and undue influence. There was judgment refusing probate in the county court, and a like judgment on appeal to the district court, and proponent brings error. Reversed and remanded.



J. R. Stubblefield and N. N. Rosenquest, both of Eastland, for plaintiff in error.

Chas. H. Veale, of El Paso, Scott & Brelsford, of Eastland, and W. C. Veale and C. M. Caldwell, both of Breckenridge, for defendants in error.

HIGGINS, J. Plaintiff in error, E. Y. Jennings, filed his application in the county court of Stephens county to probate the will of his deceased wife, Modena V. Jennings. Mrs. Herrington, Mrs. McNabb, Mrs. Mitchell, and Mrs. Lacey, married daughters of the proponent and deceased, joined by their respective husbands, and Grover C. Jennings, a son of proponent and the deceased, contested the probate of the will upon the ground of mental incapacity and undue influence. In the county court the case was submitted to a jury upon the issues mentioned, and a verdict returned in favor of contestants. Judgment was there rendered, refusing to probate the will. Upon appeal to the district court the case was submitted to the jury upon the issue of undue influence, and a verdict rendered in favor of the contestants. Judgment was there rendered that the will be not admitted to probate. From this judgment proponent prosecutes this writ of error.

#### Opinion.

It is assigned as error that the court erred in admitting certain evidence, and that the evidence is insufficient to show undue influence. The record discloses the following facts:

Proponent and Modena Veale, his deceased wife, were married in 1880, and lived together as man and wife for 36 years, and until she died on April 20, 1916. To them 15 children were born, of whom 13 survive. Five of the adults, as stated above, have joined in the contest of her will. They lived in Stephens county during their entire married life. They accumulated a community estate, consisting of land and personal property. Mrs. Jennings also had some separate property which it seems she inherited from her father. They lived upon their land about 10 miles from the town of Ranger. About February, 1915, Mrs. Jennings became afflicted with cancer, which resulted in her death. On November 27, 1915, Mr. and Mrs. Jennings together came to the town of Ranger, where they each executed their wills. They procured the services of Hon. J. R. Stubblefield, an attorney, of Eastland, Tex., to prepare the wills for them. By the terms of her will, Mrs. Jennings gave to her husband all of her personal property. All of her real estate she gave to Mr. Jennings for life, with remainder to their children. She invested him with power to sell and dispose of the land as he might see proper. It provided that after his death the real estate

should pass to their children and their descendants, share and share alike, as they would inherit under the law of descent and distribution; and if the real estate had been sold by the husband during his life, then that the proceeds thereof should descend and pass as the real estate. She appointed her husband as executor, and directed that no bond be required of him, and that no action be taken in the probate court except to probate the will and file an inventory and appraisal. Mr. Jennings' will gave his personal property to his wife; his real estate to her for life, with remainder to their children, and appointed her executrix without bond. Otherwise it was precisely the same as Mrs. Jennings' will. Mr. and Mrs. Jennings went to the office of the First National Bank of Ranger, and there signed their wills in the presence of F. W. Melvin and Rex C. Outlaw, whom they desired to witness the same. At the time of her death four of the surviving children of Mr. and Mrs. Jennings were minors living at home. Two of them were girls, 16 and 12 years old, and two boys, 14 and 8 years old.

There is not a scintilla of evidence in this record impeaching the mental capacity of Mrs. Jennings. To sustain the allegation of undue influence evidence was adduced by the contestants as follows: Some of the contestants testified that on various occasions, and long prior to the execution of the will, Mr. Jennings had whipped and assaulted his wife, used abusive language towards her, and was otherwise guilty of unkind treatment. Most of these matters related to instances long prior to the execution of the will, some of them being as remote as 12 years. A Miss Irene Gold was also permitted to testify that about 5 years before the death of Mrs. Jennings she heard proponent make the statement that on the evening before he had whipped his wife.

Contestant Mrs. Herrington testified she had lived at home for 23 years prior to her marriage, and that her father dominated her mother. This was objected to upon the ground that it was the opinion of the witness. Mrs. Mitchell, contestant, testified that 12 years prior to the death of her mother she heard this conversation between her father and mother:

"About the time my mother's father died, I heard my mother tell my father that she wanted some land nearer our home, as her portion of her father's estate. I heard her state that she did not desire the canyon land, which lay further from our home, as her portion of her father's estate. At the time she made this statement my father and mother were talking about my mother's part of her father's estate. My mother did not like it because my father went down to see my grandmother in reference to the matter. My mother always said that she did not want the canyon land as her portion of her father's estate."

Grandma Veale, the mother of Mrs. Jennings, was permitted to testify that when her husband died her daughter inherited a portion of his estate, and that the next morning after her husband's death proponent came to her house and demanded his wife's share of the property, and that she thereafter told Mrs. Jennings about Mr. Jennings' conduct, and that when she told Mrs. Jennings thereof the latter went into the kitchen and cried. Mrs. Herrington, contestant, was permitted to testify that she knew an instance in which her mother wanted to purchase some clothing and her father refused to permit her to do so. Contestant Grover Jennings testified that the first time he heard about his mother's will was about July 3, 1916, after the notices were posted. Grover Jennings also testified:

"Judge W. C. Veale is related to the Jennings family. He was related to my mother, who was a Veale before she married. Judge W. C. Veale was residing in Breckenridge at the time my mother is said to have made the will in controversy. At the time this purported will was made E. Y. Jennings resided 10 miles from Ranger, in Eastland county, and it was 25 miles to Breckenridge. It is about 12 miles from Ranger to Eastland. My mother was not intimate with Judge W. C. Veale during her lifetime."

[1, 2] We think that all of the testimony indicated above was improperly admitted, except that showing that proponent had whipped and assaulted his wife and abused her. All the rest of the testimony was inadmissible, and calculated to prejudice and inflame the minds of the jury against the proponent, except the testimony of Mrs. Herrington that her father dominated her mother, and this was a conclusion of the witness. Whether a man dominates his wife, or vice versa, is sometimes a very debatable question. Many a man fancies that he rules his wife when the reverse is the case, and a declaration by an interested contestant of her mother's will that her father dominated her mother is no more than the expression of an opinion, and inadmissible.

[3] It is not apparent that the testimony of Mrs. Mitchell, as to the conversation between her father and mother about 12 years ago, was at all relevant to the issue of undue influence. The fact that her mother stated that she wanted the land nearer her home as her portion of her father's estate, and did not desire the canyon land farther away, was surely not evidence of undue influence exercised 12 years later, when Mrs. Jennings executed her will.

[4] Neither does it seem that there was any relevancy in the testimony of Grandma Veale about Mr. Jennings' conduct when his wife's father died. Of course, such conduct

was reprehensible, and its natural tendency was to prejudice the jury against a man who would be guilty of such conduct, but it certainly did not tend to show that E. Y. Jennings dominated the mind of his wife when she executed her will, and caused her to make a will which represented his own rather than the wish of the testator.

[5] Neither is a wife's will in favor of the husband to be set aside upon evidence that upon one occasion during 36 years of married life he objected to the purchase of some clothing.

[6] The testimony of Grover Jennings that he did not know anything about the will was inadmissible. Under the facts in this case there was nothing suspicious about the circumstance that his mother and father did not see fit to advise him of the execution of their wills. It is certainly not an uncommon thing for parents to execute their wills without taking their children into their confidence.

[7] The testimony of Grover Jennings about Judge Veale was likewise irrelevant. It was calculated and doubtless intended that the inference should be drawn therefrom that proponent purposely refrained from going to a kinsman of Mrs. Jennings to have the wills drawn. There could have been no proper reason for the introduction of this evidence. It was shown by Grover Jennings himself that his mother was not intimate with Judge Veale, and that Jennings' residence was much closer to Ranger, where they went to see Mr. Stubblefield, than it was to Breckenridge, where Judge Veale resided. Mrs. Jennings' malady was a painful one, and her husband is not to be convicted of exercising undue influence because he saw fit to drive 10 miles to Ranger to get Stubblefield to prepare the wills, instead of driving his wife, suffering from a painful malady, a distance of 25 miles to Breckenridge, merely that a distant kinsman of her family should draw the same.

[8, 9] Under the views expressed, all of the testimony of the contestants indicated above was improperly admitted, except evidence of the whipping of the wife, other assaults and unkind language and treatment. It was inadmissible for the reason that it was irrelevant and immaterial to the issue of undue influence, was calculated to prejudice and inflame the mind of the jury against proponent, and induce them to base their verdict upon passion and prejudice rather than upon an unbiased consideration of the issue of undue influence. This alone would necessitate the reversal of this case, but we are of the opinion further that a reversal must also be had upon the ground that the evidence is insufficient to sustain the allegation of undue influence. The burden rested upon the plaintiffs of proving the same, and it must have

appeared that at the time Mrs. Jennings executed her will her action in so doing was dictated by undue influence then exercised by the proponent. *Barry v. Graclette*, 71 S. W. 309. There is no evidence that E. Y. Jennings did exercise such influence. If there had been any evidence of its exercise at that time, then the evidence of whipping, assaulting, and unkindness upon his part to his wife in the past would have been admissible as corroborating circumstances tending to show the domination of his will over hers, but in the absence of evidence showing the existence of undue influence exercised when the will was executed the other evidence loses its probative force, because there is nothing for it to corroborate. From one viewpoint, evidence of such conduct might be regarded as negating undue influence, but it is for the jury to draw its own conclusions therefrom. It is unnecessary to dwell upon the evidence in this record which tends to show that Mrs. Jennings' will was executed by her, of her own free will and volition, further than to say that all of the evidence upon the subject tends to show that such was the case. A wide latitude is permissible in the introduction of evidence to show undue influence, and the jury may properly take into consideration all of the facts and circumstances in the case, but where there is no fact or circumstance tending to show directly or indirectly that undue influence has been exercised, and the will executed under the dominating influence of another party, the jury is not at liberty to find against its validity. The will in this case cannot be considered unreasonable. There is an abundance of evidence that it was the free act and deed of Mrs. Jennings, but, as indicated above, it is unnecessary for us to detail and dwell upon this phase of the case, because the question before us is not whether or not there is sufficient evidence to show that it was a valid will, but the question is, Is there any evidence to show that in executing the same Mrs. Jennings was unduly influenced by her husband? In support of the evidence as to the insufficiency of the evidence, see *In re Burns' Estate*, 52 S. W. 98; *Barry v. Graclette*, supra; *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S. W. 394. This court would be well warranted, upon the record here presented, in reversing and rendering this case for the plaintiff in error, but a certain discretion in such matters is vested in the court, and the conclusion is reached that it would be better to remand the case for retrial. The views expressed will sufficiently indicate the action which should be taken by the trial court upon retrial, unless the contestants adduce additional evidence to meet the views here expressed.

Reversed and remanded.

## BIGHAM v. STAMPS. (No. 8095.)

(Court of Civil Appeals of Texas. Dallas.  
April 26, 1919. Rehearing Denied  
May 31, 1919.)

1. APPEAL AND ERROR ~~569~~(1)—STATEMENT OF FACTS—SIGNING BY APPELLANT'S ATTORNEY.

Paper purporting to be a statement of facts and stating in its beginning and conclusions that it is a statement of facts proved on the trial and indorsed, approved as statement of facts in the case, and signed by the trial judge and appellee's counsel, will be treated as a statement of facts in the case, though not signed by appellant's counsel.

2. BOUNDARIES ~~37~~(5) — EVIDENCE—AGREEMENT AS TO TIME.

Evidence held to justify finding against defendant's contention that boundary claimed by him had been fixed by agreement between him and plaintiff's predecessor which was binding upon plaintiff.

Appeal from District Court, Freestone County; A. M. Blackmon, Judge.

Action by A. D. Stamps against E. V. Bigham. Judgment for plaintiff and defendant appeals. Affirmed.

Dexter Hamilton, of Corsicana, for appellant.

Boyd & Bell, of Teague, for appellee.

TALBOT, J. [1] This is the second appeal of this case. The opinion on the former appeal is reported in 187 S. W. 733. It is a suit instituted by the appellee against appellant to recover a tract of land, a part of the D. Bratt survey, situated in Freestone county. The defendant pleaded not guilty. The statutes of limitation of five and ten years, and set up claim to only a part of the land in controversy. No evidence appears to have been offered in support of the pleas of limitation. The case was tried by the court without a jury and the trial resulted in a judgment for the appellee. At a former day of the present term we affirmed the judgment of the district court because no fundamental error was apparent on the face of the record and because we were then of the opinion that the statement of facts filed with the transcript in the case fails to comply with the statute which requires that such statement shall be agreed to by the parties and approved by the judge, or in the event of a failure of the parties to agree that a statement of facts shall be prepared and certified to by the judge filed in duplicate with the clerk of the trial court, and the original sent to the appellate court as a part of the record. Upon a consideration of appellant's motion for rehearing we reached the conclusion that we erred in declining to consider the statement of

facts, and set aside our judgment affirming the case.

The statement of facts sent to this court is signed by counsel for appellee only with the words, "Approved as the statement of facts," and signed by "A. M. Blackmon, Judge Seventy-Seventh Judicial District of Texas." The caption shows the style and number of the case, and recites:

"The following pages contain a full, true, and correct statement of all the material facts adduced in evidence at the trial of said cause."

There is a certificate that—

"It is agreed by and between the counsel for the plaintiff and the counsel for the defendant that the foregoing 35 pages contain a full, true, and correct statement of all the material facts adduced in evidence at said trial of said cause, styled and numbered in the caption hereof, and that the same is agreed to as the statement of facts in said cause."

This certificate, as above indicated, is signed by counsel for appellee only; the name of counsel for appellant being omitted. In our search for authority upon the question, after the opinion declining to consider the statement of facts for the reason stated was handed down, which will be withdrawn, we find that the Supreme Court of this state, in the case of *Schnelder & Davis v. Stephens*, 60 Tex. 419, has expressly decided that a statement of facts, certified to by the judge before whom the case was tried as an agreed statement, and which is only signed by counsel for one of the parties to the suit, may be considered on appeal, the presumption being that it was properly certified, citing *McManus v. Wallis*, 52 Tex. 534. We also find that in *Dwyer v. Testard*, 1 White & W. Civ. Cas. Ct. App. § 1229, it was held that where, in the beginning of the paper, it purported to be the statement of facts in the case, and concluded, "We agree that the above is a correct statement of the facts given in evidence on the trial of this case," and is signed by counsel for one of the parties, and is indorsed "Approved," and signed by the judge who tried the case the paper was "sufficiently authenticated to require it to be considered as a statement of facts." That case was distinguished from *Renn v. Samos*, 42 Tex. 104, in the fact that in the latter case there was nothing in the beginning or conclusion of the paper purporting to be a statement of facts to indicate that it was intended as such statement. In the case at bar the paper purporting to be a statement of facts is signed by counsel for appellee and indorsed approved as the statement of facts in the case. In its beginning and conclusion it is stated that it is a statement of the facts proved on the trial, and following the authorities cited it should and will be treated as a statement of facts in the case.

The controversy grows out of a dispute as to the true location of the boundary line be-

tween lands owned by the respective parties. The trial court filed the following conclusions of fact and law:

#### "Conclusions of Fact.

"(1) In September of the year 1898 the defendant, E. V. Bigham, and one J. C. Wells owned in common or jointly a tract of land in Freestone county, Tex., aggregating 287 acres, of which the land in controversy in this suit is a part.

"(2) In November, 1898, the defendant, Bigham, and the said J. C. Wells effected a partition of said tract of land, the defendant Bigham executing at the time a deed to J. C. Wells which embraced the land in controversy in this suit. Wells executed a deed to Bigham to all that portion of the 298 acres lying east of a line running south 30° east from the ell corner of the Bratt survey. The defendant, Bigham, erected a fence along the west line of the portion deeded him by Wells, and asserted no title or claim to any portion of the tract west of this line until about the year 1910.

"(3) In October, 1898, J. C. Wells conveyed the portion of the 287 acres received by him in the partition to J. C. Hagler, and in March, 1891, Hagler conveyed same to W. D. Anderson. The field notes in the deed from Wells to Hagler and from Hagler to Anderson covering and embracing the land in controversy herein, as well as the field notes in the original partition deed, were as follows: 'Second tract: Being a part of the Bratt survey and described as follows: Beginning at the N. W. corner of said survey; thence N. 60° E. 524 vrs. to a corner in the north line of said survey, being one of the ell corners of this tract; thence 30° E. 770 vrs. to a stake in the south line of this tract; thence south 60° W. 692 vrs. to a stake in the west line of the Bratt survey; thence N. 30° W. to the place of beginning.'

"(4) During the year 1910, W. D. Anderson having verbally contracted to sell the tract of land owned by him, as above described, to one Ben Pillans, he, Pillans, and the defendant, Bigham, employed a surveyor to establish and mark on the ground the boundary line between the land owned by Bigham and contracted for by Pillans. Pillans at this time had no deed to the land or no description of same, and did not know where the ell corner as called for in the partition deed was located. The surveyor employed to do the work had in his possession the old partition deed between Bigham and Wells. From the field notes therein contained he began at the N. W. corner of the Bratt survey and ran a line north 60° east for the distance therein called for, viz. 524 varas and stopped; this being the point at which Bigham was then contending the boundary line should be located. To embrace the land originally conveyed to Wells and then owned by Anderson, the line should have been projected to the 'ell corner' of the Bratt survey, or a distance of some 103 varas farther. Pillans, not knowing where the ell corner was, and not understanding the calls in the original partition deed, agreed that, if the land east of the point where the surveyor had stopped was not embraced and covered by Mr. Anderson's deed, and there was in fact an excess, or some land which had not theretofore

been divided, he would agree to divide such excess between himself and Bigham in the same proportion that the land had been originally divided between Wells and Bigham. Pillans never agreed to the location of a boundary line which would encroach upon, or take, any of the land embraced in or covered by the Anderson deed.

"(5) Plaintiff, A. D. Stamps, deraigned title to all the land in controversy in this suit.

"(6) The defendant, Bigham, nor those under whom he claims, have held the land in controversy for a sufficient length of time to mature title under any of the statutes of limitation."

#### "Conclusions of Law.

"(1) There being no question but that the land in controversy is covered and embraced by the partition deed to Wells, as well as by all the other deeds, including a deed under which plaintiff holds, and it being equally clear from the testimony that Pillans agreed to the proposed location of the line only in the event it did not encroach upon or take some portion of the land he had contracted to purchase from Anderson, i. e., only in the event it was in fact the true boundary line, and it further appearing that Pillans, nor those claiming under him, ever at any time thereafter ratified or acquiesced in the location of the proposed line, I conclude as a matter of law that his, Pillans' statement, then and there made, to the effect that he would agree to the line if 'the field notes of the Anderson deed showed to be the same as the surveyor was then using,' was insufficient to bind Pillans to the establishment of the line at the point contended for by defendant, and to thereby effect an unintentional conveyance, without consideration, of the land he then owned.

"(2) This being a suit in trespass to try title, and the plaintiff having deraigned title to the land in controversy, and there being no limitation in behalf of defendant, and no contract for the establishment of any division line as contended for by defendant, it follows that plaintiff should recover herein the land sued for."

[2] The contentions of the appellant are, in substance, that the evidence shows conclusively that the boundary line as claimed by him was agreed upon and fixed by him and the parties who owned the adjoining tract at the time of such agreement; that, the boundary line having been fixed by understanding of all parties interested in the land at the time, and having been thereafter acquiesced in by them, the boundary thus fixed will not be disturbed; that the trial court erred in finding in the second paragraph of his conclusions of fact that the defendant, Bigham, erected a fence along the west line of the portion of land deeded to him by Wells and asserted no title or claim to any portion of the tract west of this line until about the year 1910; and that the findings of fact contained in the fourth paragraph of the court's conclusions of fact (which paragraph is set out above) is wholly at variance with the evidence adduced in the trial of the case, the evidence all showing that the boundary line was un-

known to all parties, and that the sole purpose of the survey was to fix a boundary line.

On the former appeal we held that the evidence showed a valid agreement and location of the boundary line between the appellant and the predecessor in title of the appellee, and appellant now insists, in effect, that the evidence shown by the record on the present appeal is substantially the same as it was on the former appeal, and the judgment of the court below should be reversed, and judgment here rendered for the appellant. Much of the evidence in the record now is practically the same as it was on the former appeal, but a careful comparison of it with that shown by the statement of facts sent up on that appeal which is before us has led to the conclusion that it is materially different in important particulars, and that therefore we would not be warranted in disturbing the judgment of the district court. It is clear from the evidence that the survey made by appellant and Pillans shown in the trial court's findings was made for the purpose of fixing the boundary line. On the former appeal the evidence showed, and we held, that in making the survey it was found that there was an excess of land and that it was agreed between appellant and Pillans, which was binding on Anderson from whom Pillans had contracted to buy, that the line established by the survey should be the boundary line, and the excess divided two-thirds to appellant and one-third to Pillans, unless it should appear upon a later examination that the field notes in the deed made by Hagler to Anderson should be at variance with the field notes in the Wells-Bigham partition deed, which partition deed was used by the surveyor Stewart in running the line. The evidence also showed that Pillans sold the land to Tom Platt, and that at the request of both of them Anderson made a deed therefor to Platt, and without contradiction that the field notes contained in the Wells-Bigham partition deed were exactly the same as in the deed from Hagler to Anderson; that the terms of description in the original partition deed, in the deed from Wells to Hagler, in the deed from Hagler to Anderson, in the bond for title made by Anderson to Pillans, in the deed from Anderson to Platt, and in the deed from Platt to the appellee, Stamps, were precisely the same. The effect of the evidence also was to show, practically without contradiction, not only Pillans agreed upon the condition stated to the establishment of the boundary line as claimed by appellant, but that Anderson, who had executed to him a bond for the title to the land, agreed thereto or acquiesced therein, and under all the facts shown we were of opinion that it should be then held that the true division line between the lands of the parties was where it was established by the surveyor Stewart. The evidence in the record on this appeal is conflicting as to the terms and conditions upon which Pillans agreed that this

line should be the boundary line. The testimony of the appellant is substantially the same as on the former appeal, but the testimony of Pillans and Stewart, the surveyor who run the line, claimed by appellant to be the division line, varies somewhat from their former testimony, and is to the effect and justifies, it occurs to us, the findings of the trial court that Stewart, the surveyor, in running the line in question began at the N. W. corner of the Bratt survey and ran a line north 60° east for the distance called for in the partition deed between appellant and Wells, viz., 524 varas, and stopped; that to embrace the land originally conveyed to Wells the line should have been projected to "ell corner" of the Bratt survey, a distance of some 108 varas farther; that Pillans, not knowing where the "ell corner" was, and not understanding the calls in the original partition deed, agreed that, if the land east of the point where the surveyor had stopped was not embraced and covered by Mr. Anderson's deed, and there was in fact an excess of some land which had not theretofore been divided, he would agree to divide such excess between himself and Bigham in the same proportion that the land had been originally divided between Wells and appellant; that Pillans never agreed to the location of a boundary line which would encroach upon or take any of the land embraced in or covered by the Anderson deed. The deeds under which appellee claims described the land as follows:

"Being a part of the Bratt survey and described as follows: Beginning at the N. W. corner of said survey; thence N. 00° E. 524 vrs. to a corner in the north line of said survey, being one of the ell corners of this tract; thence S. 30° E. 770 vrs. to a stake in the south line of this tract; thence S. 60° W. 692 vrs. to a stake in the west line of the Bratt survey; thence N. 30° W. to the place of beginning."

The testimony of Pillans, as shown by the record now before this court, touching the agreement between him and appellant with respect to the boundary line, is as follows:

"I told Mr. Bigham [appellant] after the line had been run that in the event there was any gain in the land that it ought to be divided between us in the same proportion as the land was originally divided between him and Mr. Wells; that, if the field notes in Mr. Anderson's deed showed that, or was like the one we had, I would agree to the line. I told him that, if Mr. Anderson's deed did not call for this extra land, then it ought to be divided between us. No; I did not definitely agree to the establishment of the line as run. \* \* \* No; I did not state that I then agreed with Bigham on the line run. The understanding was that if Anderson's deed did not call for it then this land was to be divided, but if it did call for it, I would not agree to the line."

In answer to questions propounded by the court the witness said:

"Yes; I mean to say that I did not intend to agree to the partition line as then fixed, if the land between that line and the line where Mr. Bigham had theretofore had his fence was in fact embraced by her field notes in the Anderson deed."

In answer to the court's question:

"Then I understand that you meant on that occasion that the partition line as agreed to, or as run, would be agreed to by you only in the event it was not encroaching upon some of Mr. Anderson's land that you expected to buy from him"

—the witness said:

"Yes; if I had known that the line proposed was encroaching upon the land covered by the Anderson deed, I would not have agreed to same. No; I never did agree to the line."

The surveyor Stewart testified in this connection that he ran the division line; that the line as run was an agreed line between Bigham and Pillans, provided it agreed with the field notes of a deed that W. D. Anderson had to the land. He said:

"The papers that we had had two different calls on the same line—there were two different distances given, the shorter distance creating an excess. Yes; the excess was divided between the two, but I do not know in what proportion it was divided. I do know one got more than the other. Yes; I say that we were to see a deed that Mr. Anderson had, and the line as run was to be the true line if it agreed with the Anderson deed. The agreement was that the line run was to be the fixed boundary line between us; provided the field notes in the Anderson deed corresponded to the field notes of this partition deed from Bigham to Wells."

In answer to question asked by the trial court, this witness said he understood that it was Mr. Pillans' agreement that he would be bound by the line as fixed by witness provided it did not encroach upon the land embraced in that deed. This witness was asked by the court:

"Was it understood that this line would be abided by by Pillans in the event the deed held by Anderson showed the distance as called for in the partition deed, or was it agreed that he would abide by it provided the land on the east of the proposed line was not in fact embraced and covered by the Anderson deed?"

To which question the witness replied:

"My understanding was, if this land on the east was embraced in the Anderson deed, that Pillans was to go by what was covered by the Anderson deed."

And he further testified to the effect that as a matter of fact the Anderson deed did embrace the land in controversy.

We regard the controlling issues, as the case comes to us in the present record, as issues of fact, and that the findings of the trial court upon those issues was justified by the evidence. There may be some apparent incon-

sistent statements of the witnesses Pillans and Stewart as to whether it was understood and agreed that Pillans would be bound by the line run in the event the field notes in Anderson's deed were the same as the field notes in the partition deed between appellant and Wells or in the event the line did not encroach upon the land embraced in Anderson's deed, but we regard them as more apparent than real. At all events we do not think it can successfully be denied that there was substantial evidence to authorize the court to find that the agreement was that Pillans would be bound by the line run only in the event it did not encroach upon the land embraced in Anderson's deed and that it did encroach upon that land.

The appellee proved a regular chain of title from the admitted common source, and it results from what we have said that the judgment of the district court should be affirmed; and it is so ordered.

**Affirmed.**

**HOUSTON ICE & BREWING CO. et al. v. HARLAN et al. (No. 408.)**

(Court of Civil Appeals of Texas. Beaumont. May 13, 1919.)

**1. TRIAL  $\S$  133(1)—ARGUMENT OF COUNSEL—DUTY OF DISTRICT JUDGE.**

In view of rules 39, 40, 41, for the district and county courts (142 S. W. xx), requiring that counsel confine their arguments strictly to the evidence and to the argument of opposing counsel, it is duty of district judge to keep counsel within the record, and not to jeopardize appellants' rights by inferentially sanctioning highly wrought and inflammatory argument.

**2. APPEAL AND ERROR  $\S$  1060(1)—HARMLESS ERROR—ARGUMENT OF COUNSEL—MATTERS OF RECORD.**

In suit by married woman to set aside general warranty deed executed by herself and husband to a defendant, on ground that it was a mortgage, and had been executed under duress to prevent jailing of husband by a defendant for embezzlement, plaintiff's inflammatory argument, discussing in strong language matters not in evidence or based on matters not supported by evidence, was reversible error, especially where evidence was circumstantial, and jury found against defendant.

**3. APPEAL AND ERROR  $\S$  1060(1)—IMPROPER ARGUMENT—REVERSAL.**

Improper argument alone is sufficient to reverse the case.

Walker, J., dissenting.

Appeal from District Court, Jefferson County; W. H. Davidson, Judge.

Suit by Clara J. Harlan against Houston Ice & Brewing Company and others, wherein

the plaintiff's husband was made a party plaintiff by defendants. Judgment for plaintiffs, and defendants appeal. Reversed, and remanded for a new trial.

Barry & Burges, and Orgain, Butler, Bolinger & Carroll, all of Beaumont, for appellants.

Geo. C. O'Brien, W. R. Blain, and R. L. Durham, all of Beaumont, for appellees.

**WALKER, J.** The appellee Mrs. Harlan filed this suit in the court below against the appellants to set aside an instrument in the form of a general warranty deed, executed by her and her husband to Houston Ice & Brewing Company, of date 12th day of September, 1914. Her husband was not joined in the petition, she alleging that he refused to join. However, he was made a party plaintiff by the defendants. The plaintiff alleged in her petition and in her supplemental petition that the instrument was a mortgage given by her and her husband to secure an indebtedness due by her husband to the Houston Ice & Brewing Company in the sum of about \$2,000, and, if she was mistaken in this allegation, then she further alleged that she executed the instrument under duress, the Houston Ice & Brewing Company threatening to put her husband in the penitentiary for embezzling funds unless she joined him in the execution of this instrument.

The defendants answered denying the allegations of the plaintiff, pleading specially that the instrument was a general warranty deed given by the plaintiff and her husband in payment of \$2,578.65 on his shortage with them, leaving a balance due of \$96.42, and, if the instrument was executed under duress, further pleading estoppel against plaintiff, alleging that she had rented the property from them at \$20 per month for two months.

The case was submitted to the jury on special issues, and in answering the same the jury found that the instrument was a mortgage, and they further found that it was executed by Mrs. Harlan under duress. On these findings the court entered judgment for plaintiff for the title and possession of the land, canceling the deed of date the 12th day of September, 1914.

By proper assignments appellants complain because the court did not instruct a verdict for them on the issue of mortgage, and they also complain of the submission of this issue to the jury, and of the finding of the jury on this issue.

Reviewing the facts in this case, we find that Mrs. Harlan testified that her husband, P. E. Harlan, told her that he was short with the Houston Ice & Brewing Company, and that they had required him to settle with them, and had threatened to turn him

over to the bonding company unless he did so; that he had no property to use in this settlement except their home, and that it was necessary for them to deed this home to the Houston Ice & Brewing Company, as security for this shortage; that if they did this the company would give them a chance to redeem it, and unless they did so he would be turned over to the bonding company and be prosecuted, and would have to go to the penitentiary; that he had just had a talk with Mr. Autry at the Crosby Hotel, and Mr. Autry had told him that he could not hold the matter open any longer; that she thought about the matter several days, and she and her husband had the instrument prepared, and they signed and acknowledged it; that she and her husband went over to Houston to see Mr. Autry, and took the instrument with them; that she wanted to be convinced that her husband was short with the company before she delivered the instrument; that she told Mr. Autry all that her husband had told her, and asked him if her husband was really short; that Mr. Autry told her that he was; that she further asked him if he would be turned over to the bonding company and prosecuted and put in the penitentiary if she did not sign the instrument, and that she did not remember what answer Mr. Autry made her; that thereupon she and her husband delivered the instrument to Mr. Autry; that Mr. Autry agreed with her that the property could be redeemed, and, if he could sell the property for more than her husband's shortage, he would pay the balance to them, and that he was holding the instrument as security for Mr. Harlan's indebtedness. She further testified that either on that trip, or on a subsequent trip, she rented the property from Mr. Autry and paid two months' rent; that she had claimed the property as her home all the time, and had been living on the property since the execution of the deed, and that the defendants had never been in possession of any part of it; that she wrote the following letter:

"Mr. R. L. Autry, Sr., Houston Ice & Brewing Co.:

"As I promised to send \$20 for rent, cottage 1408 Liberty avenue, Beaumont, will find inclosed amount of same, but you did not state what month to begin with. Will ask you to mail the return receipt to me 1408 Liberty avenue and oblige."

That she also wrote this letter:

"January 2, 1915.

"Mr. R. L. Autry, Sr.:

"Inclosed find \$20 for rent December, 1914, on cottage 1408 Liberty avenue, Beaumont, Texas. I did not get it off yesterday on account of the post office being closed here. I trust that it is not troubling any one, and will try and not let it be repeated. There was a party said that they would like to get the prop-

erty on Liberty. I did not mention this place until I notified you, and don't know if this place was for sale. Again I apologize for not getting this a day sooner than a day late."

The following letter was introduced by defendant:

"Houston, Texas, Dec. 5, 1917.

"Mr. P. E. Harlan, Beaumont, Texas,

"Dear Sir: We inclose a statement of your account. You will observe that the balance, after crediting you with the amount which we agreed to allow you for the deed, is \$2,675.07, and, after allowing credit for the deed of \$2,578.65, the amount agreed upon, there is a balance of \$96.42, which is due.

"Mrs. Harlan sent us about the first of the month a postoffice money order for \$20.00, which covered the rent of the property described in the deed, 1408 Liberty avenue, Beaumont, for the month of November, and we wrote her December 3d, in acknowledging receipt of the rent, that the rent for December could be paid on the first of January. We are to-day paying the remaining unpaid notes of the series of 61 notes given by you to John R. Callahan in part payment of the property, and we wish to have a statement from you and Mrs. Harlan confirming the terms on which we are renting the property.

"These are that you will rent the property from month to month at \$20.00 a month, the renting to be terminable by either us or yourselves at the end of any month, and you to surrender possession of the property at that time. The next installment of rent, which is for the month of December, as stated, will be due on the first of January, 1915.

"We send you a carbon copy of this letter, and request that you sign and acknowledge the indorsement which is written on it, and have Mrs. Harlan do the same, and then return it to us.

"Yours very truly."

"We, P. E. Harlan and Mrs. Clara J. Harlan, hereby acknowledge that the amount credited above, \$2,578.65, is the true and correct amount which the Houston Ice & Brewing Company agreed to allow P. E. Harlan on his indebtedness to that company for the deed dated September 12, 1914, to the property which was formerly our home, being 1408 Liberty avenue, Beaumont, and we acknowledge that the balance owing by Mr. Harlan to the Houston Ice & Brewing Company, after allowing this credit of \$2,578.65, is \$96.42, and that this latter amount is justly due. We also acknowledge that the rent has been paid for the month of November only, and we agree to pay the Houston Ice & Brewing Association \$20.00 per month rent for said property as long as we occupy the same, the rent to be paid on or before the first day of each month for the month preceding, and agree to vacate the same at the end of any month when notified or requested by the Houston Ice & Brewing Association so to do.

P. E. Harlan,

"Mrs. Clara J. Harlan."

This indorsement was duly acknowledged by plaintiff and her husband in the form and manner required by law to bind a married



woman in the conveyance of her homestead.

P. E. Harlan, the husband of plaintiff below, testified on direct examination that the instrument was executed as security for his shortage with the Houston Ice & Brewing Company, but on cross-examination he testified:

"When I used the word 'security' I meant it was to wipe out and extinguish the debt and to get rid of it. It was to get rid of the debt. When I took the deed over to Mr. Autry I supposed that would settle the whole thing and settle the account."

When Mr. Autry testified that it was a bona fide sale; that Mr. Harlan was short in his account, and he took this property in settlement of \$2,578.65 of the debt, leaving a balance of \$96.42; that the instrument was in no way intended as a security for the shortage or for any part of it; that Mrs. Harlan never saw him but once, and that she did not say to him, nor did he say to her, that the property was taken as security for the debt. From her manner of testifying, we further find that Mrs. Harlan was a very intelligent woman, and, so far as shown by the record, she was in good health during the time covered by this transaction.

While Mrs. Harlan testified that she executed this instrument as a mortgage to secure the shortage of her husband, not only her testimony as a whole, but all the testimony in this record, convinces us that all the parties, at the time of the execution of this instrument, intended the same as an absolute conveyance.

To show that a deed, absolute on its face, is intended as a mortgage, the testimony must be clear and satisfactory. In support of this proposition, we cite *Mitchell v. Morgan*, 165 S. W. 883; *Frazer v. Seurean*, 128 S. W. 649; *Goodbar & Co. v. Bloom*, 43 Tex. Civ. App. 484, 96 S. W. 657; *Rotan Grocery Co. v. Turner et ux.*, 46 Tex. Civ. App. 584, 102 S. W. 932; *Stringfellow v. Braselton*, 54 Tex. Civ. App. 1, 117 S. W. 204; *Smith et ux. v. Eastham*, 56 S. W. 218; *Wedge-worth v. Pope*, 196 S. W. 621. This legal proposition has been before our courts so often that it will serve no good purpose to review these authorities. Having carefully reviewed all the testimony in this record, we find that the verdict of the jury holding that this instrument is a mortgage cannot be sustained under the settled authorities of this state.

Issue No. 1, submitted to the jury, is as follows:

"Do you find from a preponderance of the evidence that the grantors, P. E. Harlan and wife, Clara Harlan, and the grantee Houston Ice & Brewing Company, through its agent R. L. Autry, at the time of the execution and delivery of said deed, intended the same as a mortgage, or do you find that they intended the same as a deed?"

To this question the jury answered, "Mortgage."

Issue No. 2 is as follows:

"Do you find from a preponderance of the evidence that, in order to induce the plaintiff Mrs. Harlan to sign said deed, her husband, P. E. Harlan, prior to her signing the same, represented to her that unless she did sign said deed that criminal prosecution would be instituted against him, and that he represented to her that the said R. L. Autry had claimed that he, P. E. Harlan, was short in his accounts with the Brewing Company, and, further, that he represented to her that it was necessary for her to join in said deed as the only means of preventing such prosecution?"

To this question the jury answered, "Yes."

Issue No. 3 is as follows:

"If you shall answer 'No' to issue No. 2, then you need not answer any following issue, but if you answer 'Yes' thereto, then you are asked:

"Did the said Mrs. Harlan, at the time she executed said deed, believe said statements or representations made by her husband as inquired about in issue No. 2?"

To this question the jury answered, "Yes."

Issue No. 4 is as follows:

"Do you find from a preponderance of the evidence that such statements or representations made to Mrs. Harlan by her husband (if they were so made) so operated upon her mind or her fears or her emotions as to overcome her free mind and will in the execution of said deed?"

To this question the jury answered, "Yes."

Issue No. 5 is as follows:

"Do you find from a preponderance of the evidence (if you have found that such statements were made to the said Mrs. Harlan) that she, Mrs. Harlan, would not have executed said deed if such representations had not been made?"

To this question the jury answered, "Yes."

Issue No. 6 is as follows:

"Do you find from a preponderance of the evidence that R. L. Autry, at any time prior to the actual delivery of said deed to him, knew of the substance of the representations or statements made by P. E. Harlan to his wife, as inquired about in issue No. 2, if you find they were so made?"

To this question the jury answered, "Yes."

There is also complaint of the refusal of the court to give their peremptory instruction on the issue of duress, and they excepted to the submission of questions 2, 3, 4, 5, and 6, and to the answers of the jury thereto.

The testimony of Mrs. Harlan goes fully into the details of how and when and where this deed was executed, she testifying that she executed this instrument to secure this shortage of her husband, and that she would not have executed it to pay this shortage except for the fact that she wanted to save her husband from prosecution and disgrace; that she received nothing for it, and no bene-

fits from the same, except an understanding between her and the defendants that if she would execute it her husband would not be turned over to the bonding company, and would not be prosecuted, and that his embezzlement would not be exposed.

P. E. Harlan testified:

"Mr. Autry came over and told me something had to be done, and that was the only thing I had to offer. My account was overdrawn, and he said something had to be done, and the only thing I had to offer him was this property; so I told him I was willing myself to deed it over to him. \* \* \* We were down at the hotel together, and I told him everything I had was the property, and then I got in a buggy and we took a look at it. After Mr. Autry's visit, I told my wife about it. \* \* \* Mr. Autry gave me to understand that something had to be done immediately, and I told him it was all right. We were down at the hotel together, and I told him the only thing I had was the property, and then he got in a buggy, and we took a look at it. After Mr. Autry's visit I told my wife about it. It was that afternoon. I told her Mr. Autry had been over, and he said something had to be done, and that I didn't see any other way but that that property, we would have to give him the place. She didn't seem to be very well satisfied about it, and I said that was the only thing, and she said anything to help out she would be willing to do. I told her what Mr. Autry told me that is that I had to do something right away, and she said it was about the best we could do. \* \* \* Mr. Autry came over, and he told me something had to be done immediately."

On the 19th of February, Mr. Autry wrote the following letter to Mrs. Harlan:

"Houston Ice & Brewing Ass'n, Successors to  
Houston Ice & Brewing Co.

"Houston, Texas, February 19, 1915.

"Mrs. P. E. Harlan, 1408 Liberty Ave., Beaumont, Texas:

"Dear Madam: I have your letter dated February 10th. Our actions in dealing with Mr. Harlan speaks for itself better than words and promises.

"We admonished him often that he was not treating our company right, and not handling our business satisfactorily, and though he disregarded all warnings and all the advice given him, we continued to keep him in his position, paying him a stiff salary for many months. He is a man of wide experience, and if he now complains about have been given too much money to spend, and thereby being tempted to do wrong, he is playing a baby act that nobody can look upon with approval.

"When we agreed to take your former home property it was done to save him from disgrace because of his misappropriation of funds. We were very willing that he should sell the property elsewhere, and turn the proceeds over to us, and only took the property when he stated he had exhausted his efforts to sell it. Not only were we always willing to save him from loss, to to-day, if we could do him any substantial good, both Mr. Hamilton and I would be willing to do it, and the only question with us is whether he can utilize, and is willing to utilize,

anything we may do for him. You know it is impossible to help a man against his will; in fact, he has to do most of the helping himself, and all we can do is to lend our support.

"For you personally I am very sorry, and you have my full sympathy.

"I am always glad to be of service, and remain

"Very respectfully,

R. L. Autry."

Appellants concede, in their fifth assignment of error, that the moving cause for the execution of this instrument by Mrs. Harlan was—

"she did it for the purpose of saving her husband, P. E. Harlan, from disgrace, measuring as against the latter the loss of her home and the giving it up for the purpose of saving the good name of herself and husband, and that she stated after days of deliberation that she had decided it was best, all things considered, to execute said deed, and thereby save her husband from disgrace."

We have carefully examined the statement of facts, and we find that the submission of issues 2, 3, 4, 5, and 6 was not error on the part of the court, but that the testimony called for the submission of the same; hence we adopt questions 2, 3, 4, 5, and 6, and the answers of the jury thereto, as our findings of fact on the issue of duress.

As to what constitutes "duress" in this state has been before our courts several times. *Diller v. Johnson*, 37 Tex. 47; *Landa v. Obert*, 45 Tex. 547; *Obert v. Landa*, 59 Tex. 475; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297; *Phelps & Johnson v. Zuschlag*, 34 Tex. 380; *McGowan v. Bush*, 17 Tex. 199; *Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070; *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1106; *Perkins v. Adams*, 17 Tex. Civ. App. 331, 43 S. W. 531; *Shriver v. McCann*, 155 S. W. 320; *Burnett v. Continental State Bank*, 191 S. W. 172.

In *Landa v. Obert*, 45 Tex. 547, supra, Judge Moore, speaking for the court, said:

"Now, it is well settled that the fear of imprisonment which constitutes duress is fear of illegal imprisonment or imprisonment under such circumstances as, if carried into effect, would amount to duress by force. Hence the mere fear of imprisonment from a lawful prosecution cannot possibly be regarded as duress."

This case was reversed, and on the second trial the trial court sustained a general demurrer to the allegation of duress. On appeal a second time (59 Tex. 475), the action of the trial court in sustaining a demurrer was held error, and the case was reversed. Briefly stated, the facts in the *Landa Case* are as follows:

Obert was working for Landa running a gin, which position he had held for many years. Landa accused Obert of misappropriating funds and of stealing from him. He employed his lawyers to go and see Obert and get a settlement from him. His attorneys went to Obert and told him that he was

short; that Landa had caught him in his shortage; that this shortage amounted to many thousands of dollars; and gave him a short while to settle, something like an hour, threatening to have him arrested and prosecuted for embezzlement if he did not settle. To save himself from this prosecution, Obert canceled notes that he held against Landa, paid him quite a large amount in gold, and promised to pay an additional amount. When the settlement was finally closed between Obert and Landa, Landa gave Obert a statement, promising to pay the money back if he should be convinced that Obert had not stolen from him as manager of his gin. Obert was afterwards indicted and prosecuted for this embezzlement, and was found not guilty. He then brought suit against Landa for a rescission of the contract and a recovery of the money that he had paid to Landa. On the first appeal the case was reversed. On the second appeal a general demurrer was sustained to the allegations of duress, the Supreme Court saying:

"In such cases the question becomes one of consent, and it is whether the party made the agreement freely and advisedly, or was his consent obtained by the means just mentioned. In what has been said we have had reference to the case and the parties solely as they are presented in the pleadings of the plaintiff, and not as they may appear on the trial. As the judgment must be reversed, we may remark that on the former appeal the eminent judge who delivered the opinion appears to have adopted from the books, and to have applied to this case expressions which are properly applicable to a different class of cases. The language is as follows: 'There can be no pretense that the alleged threats import a purpose to make any unusual, harsh, offensive, or illegal use of the process, either civil or criminal, with which it is insisted appellant was threatened.'

"These expressions, as has already been shown, have their appropriate application to cases of imprisonment for debt, and others of a like character, if such there be, though they have been sometimes (and, as I think, inadvertently) applied to cases of a different character."

In *Medearis v. Granberry*, supra, Granberry instituted suit to recover nine acres of land against George Medearis and wife. The defendants answered, pleading that the deed was executed by them under duress, alleging that the same had been given in consideration that Granberry should not swear out a complaint and have their son, Stephen Medearis, arrested and tried for disposing of mortgaged property in Travis county, and that said consideration and no other prompted the execution of said instrument; that Granberry brought their son, Stephen Medearis, to their house, told them that Stephen had fraudulently disposed of property on which he had a mortgage, and that he was going to have Stephen arrested and sent to the penitentiary unless defendants made arrangements with them then and there to pay

said Granberry, and that under such threats from Granberry they executed the instrument to the land in question. In disposing of this case the court said:

"The court instructed the jury that among other defenses pleaded by Medearis and wife was that the instrument under which the plaintiff claimed title was executed for an illegal consideration, but that there was no sufficient evidence to justify a finding for Medearis and wife on that issue, and to find in favor of the plaintiff thereon. The court also refused a special instruction relating to the subject of duress, and to the effect that if the deed from Medearis and wife to the plaintiff Granberry was procured by a threat to the effect that, if they did not execute the deed he would prosecute their son for the violation of a penal law, to find for them as against the plaintiff. The refused instruction, while not as full and accurate as it might have been, was substantially a correct statement of the law in general terms, and, in the absence of any instruction on that subject, it was error for the court to refuse to give it. The general rule is that, in order to avoid a contract on the ground of duress, the threat must be against the party seeking to avoid the contract. However, there are exceptions to that rule, and one of the exceptions arises out of the relation of parent and child. Either may avoid a contract made to relieve the other from duress. 10 Am. & Eng. Ency. Law (2d Ed.) 330, and cases there cited. The plea interposed by Medearis and wife, quoted above, while not using the term 'duress,' and while very general in that respect, was sufficient, in the absence of a special exception, to present that issue, and each of the plaintiffs gave testimony tending to support the theory of duress."

In *Gray v. Freeman*, supra, the facts show that Sam Freeman, Sr., executed a deed of trust to A. A. Gray under the following conditions: Sam Freeman, Jr., had represented to Gray that he was the owner of a certain piece of land, and, by giving a deed of trust to Gray, had borrowed some money from him. On finding that the land belonged to Sam Freeman, Sr., Gray went to the old man, and told him that his son had committed a penitentiary offense, and, by promising his son immunity from imprisonment if the debt was secured, so worked on the feelings of the weak old man that he executed the note and mortgage on the land. The Court of Civil Appeals held that these facts constituted duress and sustained the judgment of the trial court in canceling the mortgage so executed. In reviewing many authorities on duress, Judge Fly in his opinion quotes with approval as follows:

"In a note to the case, herein cited, of *Bank v. Kusworm* [88 Wis. 188, 59 N. W. 564, 28 L. R. A. 48, 43 Am. St. Rep. 880], the following apt language is taken from an English decision, which, we think, expresses the law of this case: 'If a father is appealed to, to take upon himself a civil liability, with the knowledge that unless he does so his son will be exposed to a criminal prosecution, with a moral certainty of

conviction, even though that is not put forward by any one as a motive for arrangement, he is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity."

In *Thompson v. Hicks*, 100 S. W. 357, Chief Justice Fisher says:

"This is a suit by Thompson against Hicks to recover on a promissory note executed by the latter to the former, and to foreclose a lien upon a certificate of corporate stock given as collateral to secure the note. The defendant pleaded duress in the execution of the note, in that the plaintiff, in order to procure its execution and the transfer of collateral, threatened to prosecute him for making a false affidavit in a proceeding in bankruptcy. The court below instructed a verdict in favor of the plaintiff, unless the plaintiff's case was defeated by the defense of duress. Verdict and judgment below were in defendant's favor. \* \* \* In the twelfth assignment, and in others, the charge of the court in defining 'duress' is criticized as being incorrect. The charge upon this question is substantially in accord with the rule announced in *Gray v. Freeman* [37 Tex. Civ. App. 556] 84 S. W. 1105, where many of the authorities upon this subject are collected."

In *Shriver v. McCann*, 155 S. W. 320, Justice Hendricks cites *Gray v. Freeman*, saying:

"If appellee intended to avoid the new contract, on account of its execution having been procured under duress of imprisonment, measured by the law for the consideration of that issue, his pleading is irresponsible to that question, and neither was such an issue submitted to the jury. Appellee alleged a threat of criminal prosecution, but the character of the offense was not even mentioned, nor sufficient circumstances negating the idea of a freedom of contract. Judge Neill, quoting from the Supreme Court in the case of *Perkins v. Adams*, 17 Tex. Civ. App. 335, 43 S. W. 531, used this language as an expression of the rule: 'But it has been held by the Supreme Court, in cases where the threats of prosecution and imprisonment were made against the party sought to be held by the contract, that the rule to be deduced from the great weight of authority is that mere threats of criminal prosecution are not sufficient to avoid a contract, but there must be a reasonable ground for creating an apprehension in the mind of a man of ordinary courage and firmness that the threats will be carried into execution, and it must also appear that the threats operated directly upon the mind of the party so as to overcome his will. *Obert v. Landa*, 59 Tex. 475.' We note that Judge Henry, in the same case, *Obert v. Landa*, quoted by Judge Neill, again decided on another appeal, 78 Tex. 33, 14 S. W. 302, seems to have modified the rule in so far as it erects a standard of resistance to be that of a man of ordinary courage and firmness; and the Court of Civil Appeals in the case of *Gray v. Freeman*, 37 Tex. Civ. App. 561, 84 S. W. 1107, speaking through Justice Fly, distinctly modified that part of the rule by deciding that the resisting power of the individual 'under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress.'"

In *Burnett v. Continental State Bank*, 191 S. W. 174, Judge Hodges says:

"To constitute the duress here relied on the agents of the appellee must have made the threats of a criminal prosecution to which Burnett testified."

The following additional authorities are cited by appellee in her brief, which we believe sustain the charge of the court and verdict of the jury: *Merchant v. Cook*, 21 D. C. 145; *Leflore v. Allen*, 80 Miss. 298, 31 South. 815; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Hargreaves v. Korcek*, 44 Neb. 660, 62 N. W. 1086; *Bane v. Detrick*, 52 Ill. 27; *Bayley v. Williams*, 4 Griff. 638; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; *Heaton v. Norton Co. Bank*, 5 Kan. App. 498, 47 Pac. 576; *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946; *Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. 19; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447.

By the eighth assignment, appellants complain of the action of the court in refusing to give their special charge, as follows:

"You are instructed that the undisputed evidence in this case shows that, after the execution and delivery of the deed in question, Clara J. Harlan ratified her former act in making the conveyance, and for that reason you must return a verdict in favor of the defendants on the issue of the deed having been executed under duress."

Defendants requested the submission of special issue No. 1, as follows:

"After the execution and delivery of the deed in question to the Houston Ice & Brewing Company did Mrs. Harlan thereafter deliberately enter into a rental contract with that company by the terms of which she was to have the right to remain in said house on the payment of a rental of \$20 per month?"

—to which the jury answered, "No"; and also special issue No. 1a, as follows:

"Did she thereafter deliberately sign an instrument, and acknowledge it before H. P. Barry on December 11, 1914?"

—to which the jury answered, "No."

The defendants were not entitled to an instructed verdict on this issue. Viewing all of the facts in this record, it was clearly a matter for the jury. This was recognized by the defendants in asking the court to submit issues Nos. 1 and 1a, which issues were answered by the jury against them.

By the eleventh assignment of error appellants question the answer of the jury to these issues. We think the testimony amply sufficient to sustain these findings. Hence we adopt as a further finding of this court issues Nos. 1 and 1a, and the answers of the jury thereto.

By their assignments 12 to 24, inclusive, appellants complain of the argument of the Honorable George C. O'Brien, of counsel for appellees. We have carefully examined this argument, and find many things in it which have been condemned by the courts of this state. Having found that the testimony sustains the verdict of the jury on the issue of duress, we will further add that these findings are sustained by a very great preponderance of the testimony—a preponderance so great that in our judgment this argument, though subject to criticism, could not have affected the verdict of the jury.

We have carefully examined all other assignments made by the appellants and overrule them.

Finding no reversible error in this record, this cause is affirmed.

HIGHTOWER, C. J., having been of counsel in this case, did not sit in the disposition of same.

BROOKE, J. At the present term of this court an opinion was rendered in this case affirming the judgment of the trial court. Associate Justice WALKER delivered the opinion of the court. Chief Justice HIGHTOWER, having formerly been of counsel in the litigation, did not participate in the decision. In due time a motion for rehearing was filed by the losing party, and such motion for rehearing is pending now. The present writer, on consideration of the case on motion for rehearing, found that he was unable to agree to the correctness of the former disposition of the appeal. This situation having developed, and a third member of the court being necessary to a decision, Chief Justice HIGHTOWER certified the fact of his disqualification to the Governor, who thereupon appointed R. E. MASTERSON as one of the justices to sit in the case with the other members of the court. A majority of the court, as now constituted, now finds, upon consideration of the case on rehearing, that the court cannot assent to the former disposition of this appeal, and therefore this opinion.

[1, 2] Appellants' assignments of error, from the twelfth to the twenty-fourth, inclusive, complain of the action of one of the counsel, in his closing argument to the jury, in using, among other things, the following language:

"Keep that in mind as you go through all this testimony, you cannot sell a homestead for a debt. You might take a double-barreled shotgun and make the woman sign the deed; you might say that there stands the penitentiary doors open for her husband, and excite such fear in her mind so as to save her husband from the pen and disgrace, she signs, but the deed isn't worth the paper it is written on. He had two puppets that he had reduced to absolute slavery, and they were totally dependent upon him.

Look at their letters. Read their letters. Do you tell me that woman signed that deed in order to pay a debt for beer—or money that her husband had spent in their interest of employment? That he spoiled his body and blasts his soul, and that she turns around and says I will pay the debt because he owes it—I will pay the debt to keep my husband from disgrace and the penitentiary."

The objection was that the argument was improper, calculated to prejudice the jury against the defendant, and to cause it to consider matters in connection with the case other than the evidence, and had no basis in the evidence or evidence to support same, and which argument militated improperly against the defendants, and was calculated to cause the consideration of those matters not raised by the evidence and not properly to be considered in connection with the case; that said argument was then and there objected to by the defendants, and the objection by the court overruled, to which action of the court defendant then and there excepted.

There are two propositions under the twelfth assignment. The first is that it is reversible error for counsel in argument to go outside of the record and discuss matters not in evidence, or to base argument on matters not supported by the evidence; and, second, that inflammatory argument of counsel, unsupported by the evidence, constitutes reversible error.

We shall consider quite a number of cases in which improper argument has been used, and especially the elementary cases.

Rules 39, 40, and 41 for the district and county courts (142 S. W. xx) require that counsel shall be required to confine the argument strictly to the evidence and to the argument of opposing counsel. It is the duty of the district judge, under such requirement, to keep counsel within the record, and not to jeopardize appellants' rights by sanctioning, by inference, the highly wrought and inflammatory argument of counsel.

The case of the American Express Co. v. Parcarello, 162 S. W. 927, was a case appealed by the American Express Company, and on the original opinion affirmed; but, on a motion for rehearing, reversed and remanded for improper argument, which argument, in substance, was that there was no more reprehensible practice in the administration of justice than the taking of statements by railroad companies, bringing them into the courthouse, and when the witness took the stand to attack and denounce him as a liar. The argument was objected to, but the court remained silent. The court says:

"Can it be said, then, that the remarks of the counsel, when viewed in the light of the court's silence, did not have an improper influence upon the jury, as the same pertained to the vital issue in the case? The majority of this court

are of the opinion that said remarks made in the opening argument were calculated to have, and did have, such an influence; nor can it be said that the experienced counsel, in making the remarks, was indulging in idle talk. We feel constrained to say, as was said by Chief Justice Stayton in *Moss v. Sanger Bros.*, 75 Tex. 321, 12 S. W. 619: "The course pursued in this case was one that no court of justice ought for a moment to tolerate, and it certainly must be true that the judge who tried this case did not fully understand the language of counsel or he would not have permitted it, would have rebuked it, and ought to have punished its author."

The case of *Colorado Canal Co. v. Sims*, 82 S. W. 531, was a case reversed solely upon the grounds of improper argument. The court said:

"As to whether the negligence charged against appellant proximately caused the damages complained of, the testimony was conflicting, and of such a character that the jury might have found either way without their verdict being disturbed on appeal; for the court in an appropriate charge correctly presented the law upon the issues of fact."

The argument of counsel in the case was, in substance, that he did not want the jury to bring a verdict against the defendant, because it was a corporation, but God knows the irrigation companies of this country had swindled every man that had any dealings with them, and was then attempting to swindle and rob every tenant working under them, and that the evidence showed that this corporation was no better than any other. For the use of that argument, which was objected to and not withdrawn from the jury, the case was reversed. The court said:

"There can be no doubt that the use of the language complained of was as unwarranted and reprehensible as language could be. We can imagine nothing that would justify it, and there is nothing in the record that tends to show an intimation of anything to palliate it. Its only purpose could have been to prejudice the jury against the defendant, and influence them by such prejudice in finding their verdict. And we are not able to say, when the state of the evidence is considered, that the use of such language, not recanted by plaintiff's counsel, and unrebuked by the trial court, did not have the effect upon the jury in finding their verdict that it was evidently designed by plaintiff's counsel to have. This brings the case within the rule laid down in *Railway v. Musick* [33 Tex. Civ. App. 177], 76 S. W. 221; *Hunstock v. Roberts* (Tex. Civ. App.) 65 S. W. 677; *Ry. v. Burton* [25 Tex. Civ. App. 63], 60 S. W. 317; *Garrity v. Rankin* (Tex. Civ. App.) 55 S. W. 368; *Ry. v. Bryan* (Tex. Civ. App.) 28 S. W. 98—which requires a reversal of the judgment on account of the use of such language in argument and the failure of the trial court to grant a new trial on account of it."

We take occasion to observe that in the above case the court there said the evidence

was such that a verdict either way would have been supported by the evidence, and we will say now, dealing with the argument in the instant case, to which appellant's counsel was objecting all the time, which objections were being overruled, and which argument was not being withdrawn from the jury; and, under the record, we cannot say but that a verdict in favor of appellants, under the testimony in this case, would not be without support in the evidence, and would not be set aside, because we recognize that the issue as to duress was an issue for the jury, and if the issue was not such that the plaintiff was entitled to an instructed verdict. Clearly, a finding on behalf of the appellants by the jury would have been supported by that evidence which made of the question of duress an issue of fact for the jury.

In the above case there was no positive expression or foundation to the effect that the jury had been influenced in reaching its verdict; but the court held that inasmuch as the argument was calculated to influence the jury, and that it was not withdrawn from the jury, and that the evidence would support a verdict each way, that the case would have to be reversed and remanded. In this case there is an additional and stronger fact, in that the jury, by its finding upon the question as to whether or not the instrument was a mortgage or an out and out conveyance, showed that it reached a verdict against the whole of the evidence in the record; and if it was not the improper and highly wrought argument appealing to the passions and prejudices of the jurors, we are lead to inquire what occasioned these men of average intelligence to go so far astray in reaching an improper verdict? The finding makes a positive case that they have been influenced by the argument, which was improper, and, if the evidence was such that a finding either way on the question as to duress would be upheld, how can an impartial observer say that the jury was not influenced and prejudiced and unduly moved and forced, against cool and calm deliberation, to find against appellants on the question of duress?

In the case of *Hunstock v. Roberts*, 65 S. W. 675, which was a case affirmed in the original opinion, and reversed and remanded on rehearing for the reason that certain argument used was improper, the case was one of circumstances, and the argument, in substance, was that the property was worth about \$750, and that the plaintiff bid only \$25 therefor, which was credited on the execution, and that the action was an attempt to confiscate the property. In passing on this question the court said:

"In a case like this, when the issue depended more or less on circumstantial evidence, it is impossible for us to say that the jury were not influenced by such references and argument.

Counsel always takes the risk of forfeiting an otherwise good judgment when such course is pursued, and we think the rule ought to be enforced in this instance."

There was nothing to point positively to the fact that the jury had been influenced in reaching its verdict, but the argument was repeated some three times, over the objection of counsel and the admonition of the court; whereas, in this case, it was repeated time and time again, through the whole course of counsel's argument, over the objection of counsel for appellants, with counsel appealing to the court, and with the court permitting such argument to go to the jury.

The case at bar was also a case of circumstantial evidence, with circumstances of such a nature as, to our minds, would seem to ponderate against the finding of the jury as to duress; for, up to the time the deed was signed by Mrs. Harlan, she had not discussed with any of the grantees the question of wiping out the shortage by a conveyance of the homestead to the grantee. She testified that when her husband came and told her he was short, and something had to be done, that she told him she would sign the deed some time that evening under no other circumstances unless he was short in his account. This testimony shows that she was exercising discretion, and that there was only one circumstance under which she would sign the deed, and that was if her husband was short in his account. Clearly, this would show that she was not coerced or duressed, but was willing, if it was shown that he was short, that she would sign the deed. Harlan said, in the conversation he had with Autry prior to going to see his wife, with reference to the execution of the deed, that he did not remember anything being said with reference to the bonding company or Autry's turning the account into the bonding company, and what would be done if he did; that he did not think the bond was discussed at all, but that he was under bond at the time. In answering Mrs. Harlan's letter of February 10, 1915, after the deed had been signed, Autry wrote that they were willing that Harlan should sell the property elsewhere and turn the proceeds over to them, and that they took the property when he stated that he had exhausted his efforts to sell it. Harlan further testified that he took the deed over to Autry, and supposed that would settle the whole thing and settle the account; that there was nothing said about the prosecution between him and Autry. The record further reflects that Mrs. Harlan paid rent upon the property after the deed to the grantee; that she and her husband acknowledged the Houston Ice & Brewing Company as their landlord, and that she willingly signed said instrument, and did not wish to

retract it; that on January 2, 1915, Mrs. Harlan wrote Autry there was a party told her and her husband that they would like to get property on Liberty, but that she did not mention the place until she could notify Autry and find out if this one was for sale.

Autry testified that Harlan volunteered the giving up of the place to clear the account. He further testified Mrs. Harlan did not state to him in Houston that Mr. Harlan had said to her that she had to make immediate settlement of this, or else he would be turned over to the bonding company; that they did not discuss any bonding company at all; that it was not mentioned; that she did not tell him in Houston that Mr. Harlan had told her that if she did not execute that deed the matter would be turned over to the bonding company and that he would be disgraced; that he only had one conversation with her, and Harlan said that when she went with him to Houston that he did not remember whether she said anything to Autry about what he (Harlan) had told her in reference to being turned over to the bonding company; that he had no recollection of her stating that; and the further fact that though the deed was signed September 12, 1914, and the suit was not brought to set same aside until March 16, 1915, in which petition at that time it was not alleged that Mrs. Harlan was coerced or duressed into executing the instrument which is in suit, to our mind raises a strong case of circumstances that, in truth and in fact, the execution of the instrument was a voluntary act upon the part of Mrs. Harlan, and not occasioned by duress or coercion, and which is clinched by her voluntary statement, as reflected by the record, wherein she testified that she would sign the deed that evening under no other circumstances unless he was short in his account.

The case being one of so many circumstances, to our minds brings itself clearly under the opinion in *Hunstock v. Roberts*, supra; and, the question of duress depending more or less on circumstantial evidence, it seems to us that it would be impossible for us to say that the jury was not influenced by such persistent and consistent improper, prejudicial, and highly wrought argument as used by counsel in this case. If the jury showed upon one issue that it could not pass impartially on same, we could not say that it would impartially pass upon an issue where the evidence was merely conflicting, if it could not give appellant its rights when the evidence was wholly in its favor.

In the case of *Miller v. Burgess*, 136 S. W. 1174, the court, among other things, says:

"The first error assigned is to the following argument of appellee's attorney in his closing address to the jury: 'Gentlemen of the jury, why shouldn't this defendant, P. J. Miller, pay

to this poor working boy the amount of his note, when he (meaning Miller) lives on his ranch in Jones county and counts his white-faced Hereford cattle by the hundreds, and controls property and people like a feudal lord; when he owes to this plaintiff the amount of this debt, which represents hard, honest toil on his part.' This was objected to in behalf of appellant as inflammatory and prejudicial, and as entirely unsupported by any evidence in the cause.

"As shown by the bill of exceptions, the objections were overruled, and the argument permitted without interruption by the court, and without instruction to the jury not to consider it, although requested so to do by the defendant. It is in effect conceded, as indeed it must be from the record, that there is no evidence of the facts so stated in argument, and that it is inflammatory and prejudicial in character is evident. Appellee's answer to the assignment is that, 'in an action founded upon tort, where the amount of damages might reasonably be affected thereby, inflammatory language used by an attorney constitutes error; otherwise it does not, and should not'—the contention being that, inasmuch as the suit was upon a liquidated demand, and the amount to be recovered, if anything, being fixed, the argument could not have enhanced the verdict by contrast of the financial condition of the parties litigant.

"But we think the contention unsound. The vital issue was whether appellant signed the note upon which the suit was founded, and, while appellee's testimony may have preponderated in his favor on this issue, appellant's explicit denial rendered the issue sharply drawn, and the argument may well have affected the minds of the jury in consideration of this issue. As has been often determined, inflammatory argument, unsupported by any evidence in the record, constitutes error, where it tends to affect the issue of liability, as well as when its tendency is to augment the amount of damages. See *C. R. I. & T. Ry. Co. v. Musick*, 33 Tex. Civ. App. 177, 76 S. W. 219; *Electric Co. v. Black*, 40 Tex. Civ. App. 415, 89 S. W. 1087; *H. E. & W. T. Ry. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 807; *Ft. W. Belt Ry. Co. v. Johnson* [59 Tex. Civ. App. 105], 125 S. W. 387. In the present case we cannot assume that the purpose of appellee's counsel in making the argument was any other than to thus affect the issue of liability, for, as is now contended, no other issue was left for the determination of the jury."

In the case of *Railway Company v. Johnson*, 59 Tex. Civ. App. 105, 125 S. W. 387, the court says:

"Error is assigned to the matter shown in the following bill of exception, viz.: 'Be it remembered that on the trial of the above-entitled cause, and while the attorney for the plaintiff, Mr. Carlock, was making the closing speech for the plaintiff, he addressed the jury substantially as follows: "How easy it is for these two men (witnesses for the defendant) working together, knowing that this man received a serious injury, knowing if the company was responsible it was responsible through their negligence—how easy it was for them to concoct a story against this plaintiff, and say there are two of us against one, two of us against

Mr. Johnson, and our shrewd lawyer will get up there and argue to the jury, and the jury will go out and find for the defendant, and this man will hobble through life a cripple without a dollar." At which time, and before Mr. Carlock had finished the sentence, the defendant's counsel interposed an objection to this argument on the ground that it was outside of the record, and improper, and tended to prejudice the jury against the defendant, and awaken their sympathy for the plaintiff, and on which objection of the defendant the court took no action, and the defendant excepted to the failure of the court to sustain the objection and excepted to the action of the counsel in making the argument, and here presents this bill of exception No. 6, which it asks be approved and filed in this cause.' The bill of exception has been duly approved, and we think that under the circumstances of this case the argument of appellee's counsel therein complained of requires a reversal of the judgment.

"The issues were sharply conflicting. On the issue of appellee's alleged want of notice and of the intended movement of the cars, the testimony of both the pinman and the foreman is in direct contradiction of that of appellee on the same subject. If appellee had such notice, the contention of negligence on appellant's part would be greatly weakened, if not wholly destroyed, while the inference of contributory negligence on appellee's part would in that event be greatly strengthened. So that it was vitally important to appellee's case that the foreman and pinman should be discredited. No effort appears to have been made to impeach them in the regular way. No conflict or contradiction, no inherent improbability of story, in the testimony of these witnesses, is pointed out; and to some of us, at least, there appears to be no justification for the insidious charge that these witnesses had deliberately concocted a false story and committed perjury in the effort to maintain it. That the charge was veiled in the form of a suggestion renders it none the less prejudicial in character. Judgments have often been reversed because of similar language in violation of the rule which requires counsel in argument to confine themselves strictly to the record, and we could perhaps with profit quote from the authorities on this branch of the subject; but, inasmuch as appellant has emphasized another view of the argument, we will, for the present, content ourselves with a citation of some of the cases. See *Magoon v. Boston M. R. Co.*, 67 Vt. 177, 31 Atl. 156; *C. R. I. & T. Ry. Co. v. Musick*, 33 Tex. Civ. App. 177, 76 S. W. 219; *C. R. I. & T. Ry. Co. v. Jones*, 81 S. W. 60; *M. K. & T. Ry. Co. of Texas v. Huggins*, 61 S. W. 976; *Moss v. Sanger Bros.*, 75 Tex. 321, 12 S. W. 619; *Beville v. Jones*, 74 Tex. 148, 11 S. W. 1128; *G. & S. F. Ry. Co. v. Scott*, 7 Tex. Civ. App. 619, 26 S. W. 998. \* \* \*

"The argument was clearly inflammatory, and in view of the fact that the verdict was for \$8,000, \$3,000 more than appellee himself finally concluded could be supported, we cannot say that the jury were uninfluenced thereby. Reference in argument to the poverty or wealth of contending parties is almost if not quite universally condemned. \* \* \*

"In some of the cases cited the judgments were not reversed because of the improper ar-



argument, but in all such cases it will very generally be found that the court was able to say from the record that because of the court's instruction to disregard it, or for some other cause, the improper argument was without prejudicial effect."

In *Railway Co. v. Musick*, 33 Tex. Civ. App. 177, 76 S. W. 219, the following language is found:

"The first assignment of error relates to argument and to action of the court, which is thus shown by the following bill of exception: 'Be it remembered that upon the trial of the above-entitled cause, when R. M. Wynne, Esq., of the attorneys for the plaintiff, was presenting his argument to the jury, which was the closing argument in the case, he made the following statement to them: "Gentlemen of the jury, there never was a railroad company sued but what it made out a perfect defense, like the one in this case." To which statement and argument on the part of said counsel defendant then and there objected, as being out of the record and improper argument, and asked that the jury be instructed not to consider it. In answer to which objection the said counsel for plaintiff asserted that the argument was proper and within the record, and the court passed upon the objection as follows: "Colonel, I hardly think that the argument is proper." Whereupon Mr. Wynne said to the jury: "Gentlemen, I withdraw that statement, and ask you not to consider what I said; objected to." To which action of the court in failing to instruct the jury not to consider the argument, and in failing to sustain, pointedly and plainly, defendant's objection to said argument, the defendant then and there, in open court, excepted, and here tenders this, its bill of exception No. 1, and asks that same be allowed and made a part of the record in this case, which was accordingly done.' It is not even contended that the argument was justified by the facts proven on the trial, and that it was hence improper we think must be conceded. \* \* \* Upon this issue the evidence was sharply conflicting, if it did not preponderate in favor of appellant; and the evident tendency, if not the purpose, of the objectionable argument was to break down or to weaken appellant's evidence on this important issue in the case. The evidence also sharply conflicted on the issue of whether it was the duty of the operatives of the engine to give warning whistle in the absence of a flag in place, and upon the whole case, and, as it appears in the bill of exception, we have been unable to avoid the conviction that the argument was most harmful, especially in view of the probable inference of the jury, from the circumstances shown in the bill, that the court was by no means confident that the objection urged was well taken, and that the counsel named believed his remarks justified, notwithstanding his withdrawal thereof. We think the argument, on objection, should have been promptly and pointedly rebuked by the court, and the jury as pointedly instructed to disregard it. We think this case fairly within the principle of *Ft. Worth & D. C. R. Co. v. Burton* [25 Tex. Civ. App. 63], 60 S. W. 316; *Garritty v. Rankin* (Tex. Civ. App.) 55 S. W. 268; *Hunstock v. Roberts* (Tex. Civ.

App.) 65 S. W. 677. In the first two cases cited doubt is to be implied whether an instruction to disregard the objectionable argument discussed would cure the error; and in the last case the objectionable argument was in effect withdrawn, and the jury expressly told by the court not to consider it, notwithstanding which the judgment was reversed on this ground alone, the court saying: 'In a case like this, when the issue depended more or less on circumstantial evidence, it is impossible for us to say that the jury were not influenced by such references and argument. Counsel always takes the risk of forfeiting an otherwise good judgment when such course is pursued, and we think the rule ought to be enforced in this instance.' Appellee insists, however, that \* \* \* the error was harmless, as the verdict of the jury was not excessive, and is supported by, and not against, the preponderance of the evidence.' While we have not felt that we should disturb the judgment on the ground of its being excessive, although complained of as such, and although it is apparently at least liberal, in view of the fact that appellee had no bones broken, and that the physicians testifying expressed the opinion that appellee would finally get well, it is nevertheless to be noted that the argument complained of does not relate so much to an enlargement in the amount of the judgment. It seems more appropriately adapted to the issue of whether appellee was entitled to any judgment—to discredit appellant's testimony in support of an absolute defense; and it is on this ground that we base our conclusion, rather than on the ground of a tendency to inflame the minds of the jury, and hence possibly increase the size of the judgment. \* \* \* As assigned, we find no other error requiring a reversal."

In the case of *Railway Co. v. Black*, 40 Tex. Civ. App. 418, 89 S. W. 1088, the court says:

"In this state of the record, while defendant's counsel, R. E. L. Knight, Esq., was making his argument to the jury, in discussing the testimony of the witness Jack Goldman, in reference to the banana peel having been stepped on, he used substantially the following language: 'I do not like a witness like Goldman, who will make one statement to me on outside of the courthouse, and make another statement inside of the courthouse.' Plaintiff's counsel, in concluding the argument for the plaintiff, referring to this statement of Mr. Knight, used substantially the following language: 'That Mr. Knight knew that his conduct was not fair to the witness; that if he intended to intimate to the jury that the witness had made a statement to him (counsel) different from what he had made in the courtroom on the trial, that he should have laid the predicate to have contradicted him, and then got on the witness stand and testified, and not undertake to supply his lack of testimony by his statement as counsel; and added that they had laid one predicate to contradict Goldman by the witness Jones, but the jury had observed that the witness Jones had not been brought forward.' To this Mr. Knight, counsel for the defendant, stated in the presence of the court and the jury that the witness Jones was sick in bed and un-

able to come; whereupon counsel for the plaintiff retorted that, if that were true, he ought to have asked to have the case postponed until that witness' presence could have been secured, and that he (counsel for plaintiff) would not have opposed it; and then added: "That was an unfair argument for Bob to use (meaning Mr. Knight). If he wished to use an argument of that character, he should have waited until he had an able-bodied plaintiff to oppose him, and should not have used such an argument in a case like this, where the plaintiff is a poor girl, compelled to support a widowed mother, and where his client is a rich corporation." To this argument by plaintiff's counsel, defendant, by W. R. Harris, its counsel, then and there in open court objected, for the reason that it was highly prejudicial to the interests of defendant for plaintiff's counsel in his argument to get out of the record and comment upon the relative wealth of the contesting parties, and to comment upon the fact that plaintiff was not able-bodied, and was compelled to support a widowed mother, and verbally asked the court to instruct the jury that such remarks were improper, and not to consider same, which request was in an undertone to the court, and was not heard by the jury. The court overruled defendant's said objection, but not in a tone to be heard by the jury, and refused and failed to instruct the jury that such remarks were improper, and refused to instruct the jury to disregard the same, and the defendant then and there in open court excepted to the said remarks of plaintiff's counsel, and then and there excepted to the court's failure and refusal to sustain its said objection, and then and there excepted to the court's failure and refusal to instruct the jury that said remarks were improper and to disregard the same."

The court said:

"Now the question arises whether or not, in view of the evidence in this condition, the argument of the counsel, as stated, was of a nature calculated to influence the jury. As to whether or not, as a matter of fact, the jury was actually influenced, it is impossible to say; but whether, in view of the conflict in the evidence, it was of a nature calculated to influence the verdict, is probable. To insist to the jury that the plaintiff was a poor girl, and that the defendant was a rich corporation, was an argument, to say the least, of a nature that might be calculated to influence the jury to turn the scale in favor of the poor girl against the rich corporation. We might indulge in an extensive argument along this line, in order to demonstrate the effect and influence an argument of this nature might have upon the mind of the jury; but its unwise effect is so clear that demonstration is unnecessary. It is contended that the evidence tends to show that these facts existed. Suppose that to be true, that would not justify the argument. If the evidence should show that one of the parties was rich and the other poor, it would not authorize counsel, in discussing the case to the jury, to make use of that fact."

[3] We have been discussing the twelfth assignment of error, and, in order that it may be understood that counsel was continuing to use inflammatory argument and strong

language, we will state the language complained of in the thirteenth to twenty-fourth assignments, inclusive. In the thirteenth assignment of error this language is complained of:

"Mr. Autry knew that this was their puppet, so he comes over to Beaumont, as he says in his letter he had been after him a long time to settle up, and he comes here and meets him at the station, and then he says, we don't know why he met him at the station, we don't know what was said to him at these ten other times he had come over here to talk to him—no we couldn't get that out, objections were too profuse. Mr. Autry, with his sneering smile, dodged the questions, and astute counsel poured in confusion by his multiplicity of objections, so we cannot say what he said and what was done by him, and how he treated him for the year prior to this time when he called him up in that room."

This argument was duly objected to by defendant, and the objection was overruled by the court.

The fourteenth assignment complains of the following argument:

"I leave it to you as reasonable men to say whether or not, from all the circumstances and the manner of those parties, whether or not they had been putting the thumbscrews on this old fellow to make him settle. At any rate, he comes in, and Pete meets him down there, and Mr. Autry says: 'Come up to the hotel; come up in the room and shut the door'—and those things are settled right now. Why didn't they take him in a saloon? There are witnesses there, and somebody could testify, but nobody but Autry will be believed about this testimony here behind closed doors—with a man that is down. So he takes him in that room, and if he wasn't going to browbeat him and threaten him, why didn't he take him down there to one of his customers, and say: 'Come here and talk. I want a witness; I want somebody to see how fair I am to you. I don't want to take any advantage of an employé that is submissive and is under my domination?' Why didn't he sit down in the lobby of the hotel, where he could see somebody? Perhaps Pete would be too independent where there were witnesses. Pete might rebel down there in the hotel; Pete might speak out too loud; but he was there in the room, with the door closed."

The language used in this assignment was objected to by defendant, and the objection overruled by the court, and said remarks permitted to remain before the jury.

The language complained of in the fifteenth assignment is as follows:

"He took him out and they looked at the place. And Mr. Autry didn't go in the house! Why didn't he go in the house? There is a little woman that has been with Pete, and he has been in their employ for fifteen years. Why didn't he go in and tell this woman, shake hands with her, and say, 'Good evening, Mrs. Harlan'? (He writes after he has got his deed that he is sorry.) Why didn't he go in there and tell her he was sorry? Because he couldn't

face the woman that he was about to rob of the roof over her head! And he comes back, and old Pete follows him like a little puppy dog, and he says, 'Well, did your wife sign the deed?' And he says 'I can get her to sign the deed.' He knew that nine women out of ten would do the same thing. \* \* \* We don't know how long that conversation was. We don't know the bitter tears that may have been shed in that house that night. We don't know the groans and all the trouble and heartache that was there. There is in the threshold of the door where in the evening he was welcomed home, and there is the little nook where she watched when he came in sight, eloquent with the memories of married life—and she was to give it up! Yes; to save Pete!"

This argument was objected to by defendant on the ground that it was calculated to arouse the passions on the part of the jury, and its prejudice, and to cause it to consider matters other than evidence, and to be guided by sentiment rather than evidence in the case, and because of the fact that said argument was based upon matters not in evidence; to all of which argument defendants then and there in open court excepted, and the court overruled same.

The sixteenth assignment complains of this language:

"And what happened in Houston when she went over there? Here she was—trembling and abashed before this great man who held a whip over them, and had held it over them for fifteen years."

This language was objected to by defendant, the exception was overruled by the court, and the remarks permitted to remain before the jury.

The seventeenth assignment complains of language as follows:

"And when they brought this deed back, don't you see they were uneasy? Why? Because they were trying to get around that law which says you cannot take a woman's home for a debt. They are striving to get around it, and they write this very solemn letter. \* \* \* Those fellows were getting up those letters, manufacturing testimony to beat this testimony in court, and that is why it is self-serving and isn't worthy of your consideration. \* \* \* This transaction is not completely closed.

"What does this mean? It means, gentlemen, this transaction is not completely closed—Pete can go to the penitentiary yet! What did it mean? She knew. Yes, gentlemen, but the state of Texas says you don't have to give up your home yet."

This argument was not based upon evidence in the case, was calculated to prejudice the jury against the defendants, and to arouse the passions of the jury as against the defendants without cause, accredited defendants of manufacturing evidence other than the evidence before it; to all of which argument defendants then and there in open court excepted, and the exception was overruled.

The eighteenth assignment complains of the following language:

"It is in evidence that they gave him money to spend—that cropped out in their own letters here. He may play the booby act; but why, if they knew he was weak, did they give him any money to spend? You may blame Mr. Harlan for throwing away money or being short; you may blame him for embezzlement; but the Constitution of this state says that the wife shall have a home, irrespective of what the husband does. \* \* \* Gentlemen, they held a whip over their heads until they thought that they could get the property. And don't they acknowledge the unsoundness of their deed when they want to patch it up by letters and correspondence, drawn, possibly, by the ablest counsel in the city of Houston, trying to get from a poor little woman that which the Constitution says she shall have. \* \* \*"

This argument was objected to because calculated to arouse the passions and prejudice of the jury against the defendant, not based upon the evidence in the case, and it is likely to cause the jury to consider matters other than evidence in the case, which objections were overruled by the court.

The nineteenth assignment complains of the following language:

"They were sucking and pounding all the grit out of him because he was a self-convicted man, conscious of having done wrong. We will give him money to spend, and if he spends it, and we reap a benefit, we will avail ourselves of it, and if he strays over the traces we will say you have embezzled. They wanted a slave, gentlemen, and they had two slaves when they consummated this transaction—as completely as any nigger was a slave before the war. Or, if you don't sign it, if you don't give it to us, we will put Pete in trouble. It was done to save him from disgrace! Oh, how good!"

Objection was made the argument was beyond the record, had no facts in evidence to sustain it, calculated to arouse the passions and prejudice of the jury, which objections were by the court overruled.

The twentieth assignment is along the same lines, as is also the twenty-first, twenty-second, twenty-third, and twenty-fourth. We will produce the twentieth assignment of error, which complains of the following argument used by counsel for plaintiff in his closing argument to the jury:

"The letter says that they had it done to save him from disgrace. It was their duty, gentlemen, to report him to the grand jury, or to turn him over to the proper authorities, for you have got no right to compound crime, you have got no right to turn his wife out in the weather without a home. The Constitution of this state says so, and you know it, gentlemen. Yes; disgrace because of his misappropriation of funds! And 'only took the property when he said he had exhausted his efforts to sell it.' 'If you don't sell it I will sell it.' That is what they said to him, 'If you don't sell it, I will take it and I will sell it.'"

The above extracts will indicate what the exceptions were based on.

This court has, quite a number of times, held that improper argument alone was sufficient to reverse a case. We refer to the case of *Railway Co. v. Swift*, 204 S. W. 135; *Kirby Lumber Co. v. Youngblood*, 192 S. W. 1107. The opinion in this latter case was written by the late Justice A. E. Davis, of this court, in which case counsel, in substance, said that it did not matter so much who was technically at fault, whether the plaintiff or the defendant; that these big corporations ought to pay a man working for them for the loss he has sustained, and that if these corporations used these men to make their wealth they should give up part of their wealth to the injured employé to compensate him for injury. This argument was objected to by counsel, which objection was sustained by the court; but the argument was not withdrawn from the jury, and Judge Davis, in reversing the case, said:

"It is clear from the statements made by plaintiff's counsel that he could have no other object in view than to arouse the passion and prejudice of the jury. The argument was not based upon any evidence adduced upon the trial. It is true the trial judge admonished said attorney 'that he should in his argument keep within the record, and that the argument was improper'; but when the seeds of passion and prejudice are sown and fall in fallow ground, it is difficult, indeed, to destroy its effect, even by the most careful admonition and painstaking instructions; and when counsel, either in their argument to the jury or during the trial, in the presence of the jury, go outside of the record, and indulge in remarks that are clearly intended to arouse the passion or prejudice of the jury, and likely to influence them, such conduct not only authorizes, but requires, the trial court to set aside the verdict of the jury; and this should be done, even though the court may have instructed the jury to disregard such argument. Rules 39 and 41, District Court (142 S. W. XX); *Railway Co. v. Jarrell*, 60 Tex. 270; *Texarkana & Ft. Smith Ry. Co. v. Terrell*, 172 S. W. 742; *Moss v. Sanger Bros.*, 75 Tex. 323, 12 S. W. 619."

In the recent case of *Stark et al. v. Brown et ux.*, 193 S. W. 716, the following language was used, to which exception was taken:

"These corporations and big rich landowners want to buy up all the land in this county and hold it, and let it rot and keep the common people from getting any of it and let them rot."

Counsel objected to the argument, but such argument was not withdrawn from the jury, and the writer, in passing upon the case, used this language:

"There can be no question as to the object of counsel in using this language; whether or not it really influenced the minds of the jury we have no means of knowing. \* \* \* We have recently animadverted upon the practice of counsel going outside of the record, and using

language which could be used for no other purpose than to influence the jury, and in the recent case of *Kirby Lumber Company v. Youngblood*, 192 S. W. p. 1106, not yet officially reported, we took occasion to condemn such practice."

Many cases have been reported from the Supreme Court concerning argument appealing to the passions and prejudices of the jury, and that court has used strong language condemning such argument.

In the case at bar, where the whole evidence in the record was practically that of interested parties, and in the record there was a question of whether or not the instrument was a mortgage or was an out and out conveyance, and the language used by counsel was highly improper and inflammatory, and instead of being withdrawn from the jury, over timely objection, was permitted by the court to be and was considered by the jury, this is, indeed, in our opinion, a dangerous doctrine to be announced and placed of record, that such character of argument will be permitted to stand as not sufficient cause for reversal.

Without considering any other of the assignments of error, of which there are many in the record, outside of the assignments with reference to the improper argument, it is sufficient for us to say, without going into the matter extensively, but resting our opinion solely upon the improper argument presented to the jury, that the cause, of necessity, must be reversed and remanded for a new trial; and it is accordingly so ordered.

HIGHTOWER, C. J., did not sit.

HAYNIE et al. v. STOVALL et al.  
(No. 443.)

(Court of Civil Appeals of Texas. Beaumont.  
May 26, 1919. Rehearing Denied June 11,  
1919.)

1. HOMESTEAD §118(5)—CONTRACT FOR OIL LEASE—JOINDER OF WIFE.

Under Rev. St. arts. 1103, 1114, 1115, a contract to execute an oil lease on homestead property, in which contract the wife of the owner has not joined, is void.

2. EQUITY §57—EQUITY REGARDS AS DONE THAT WHICH OUGHT TO BE DONE.

Where an oil prospector agreed to accept an oil lease in terms fully set forth as a part of the contract within 5 days after releases were procured from one who held prior oil leases on the land, and such releases were obtained, the contract became executed under the maxim that, equity regards as done that which ought to be done, though the new lease was not formally executed.

### 3. APPEAL AND ERROR ~~6~~1052(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of parol evidence as to the terms of a written contract is not prejudicial error, where the writing is admitted in evidence, and its terms conform in all respects to the parol testimony adduced.

Error from District Court, Liberty County; L. B. Hightower, Sr., Judge.

Suit by S. M. Stovall and others against A. F. Haynie and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Stevens & Stevens, of Houston, and Thomas, Millam & Touchstone, of Dallas, for plaintiffs in error.

E. B. Pickett, Jr., of Liberty, for defendants in error.

WALKER, J. This suit was filed in the district court of Liberty county on the 24th day of July, 1916, by S. M. Stovall, J. H. Stengler, W. E. Canter, Amel Abel, I Carr, Hubert Taylor, and A. R. Dagle, residents of Liberty county, Tex., M. Smith, S. Guedry, H. G. Camp, and Bonita Baggett, a minor, appearing and acting herein by her grandfather, L. Carr, as her next friend, residents of Hardin county, Tex., against A. F. Haynie, J. G. Wofford, and W. M. Stephenson, to set aside, annul, and cancel the following contract:

"State of Texas, County of Liberty.

"Know all men by these presents: That this contract made and entered into this the 10th day of March, A. D. 1911, by and between Haynie & Wofford, and W. M. Stephenson, first parties, of Hardin county, Texas, and J. H. Stengler, S. M. Stovall, W. E. Canter, Ivan Carr, Amel Abel, Matilda Moor, H. Taylor, A. R. Dagle, M. Smith, S. Guedry, second parties of Liberty county, Texas, witnesseth:

"That in consideration of the covenants and agreements hereinafter contained, the said second parties hereby agree to execute a lease as per the printed form hereto attached and made a part hereof, as follows: Giving and granting unto said first parties the exclusive right to drill for oil and other minerals upon each of second parties' respective lands, to be for the same amount of land and upon the same terms as was heretofore given by them in 1910 to either W. M. Stephenson or T. O. Massey, and when the lease heretofore given by said second parties or either of them shall have been canceled by law, or shall have been properly released by other means, we, each of us, agree and do hereby bind ourselves to sign and duly acknowledge a copy of the said above-described instrument.

"Said first parties hereby agree, in consideration of the stipulations and agreement herein set out by said second parties, that they will attempt to secure the release of each of the second parties' land heretofore leased and now held by the Comet Oil Company, by peaceful means if possible, and if said Comet Oil Company shall re-

fuse to lease all of said lands now held by them upon demand, then the said first parties hereby bind themselves to employ a suitable attorney and file suit for cancellation of said leases and to pay said attorney's fees and all cost of suit.

"Said second parties agree to execute within five (5) days after the final securing of said above leases from the Comet Oil Company a new lease to A. F. Haynie or W. M. Stephenson who shall represent said first parties, said lease to be of the same terms and conditions as the original lease heretofore given to W. M. Stephenson or T. O. Massey in 1910, and to properly sign and acknowledge the same as required by law so as to make a good and sufficient lease, the fees to be paid by said first parties. [Seal.] J. H. Stengler. S. M. Stovall. Ivan Carr. H. Taylor. M. Smith. W. E. Canter. Amel Abel. Matilda Moor. A. R. Dagle. S. Guedry. Haynie, Wofford & Stephenson."

Plaintiffs alleged that defendants had wholly and entirely failed to comply with the terms and obligations of the above contract, and had failed to drill any well or wells upon the several tracts of land, to which said agreement related, according to the terms of the leases to which said agreement referred, and in all other material particulars and conditions defendants had completely failed to abide by and comply with the terms of said written agreement, and, having so failed, the said agreement is now a nullity, and should be so determined; and, further, that as the land owned by plaintiffs, S. M. Stovall, J. H. Stengler, W. E. Canter, Amel Abel, Hubert Taylor, and A. R. Dagle, covered by this lease contract, was at the time of the execution of said contract the homestead of the respective plaintiffs, and that their wives did not join in the execution thereof, for that reason the contract was wholly null and void.

Defendants answered by general demurrer, special demurrer, and general denial, and further that they had complied with all the conditions imposed upon them by the contract, and that plaintiffs had failed and refused to execute and deliver to them the leases as stipulated for.

Briefly stated, the facts are as follows: Previous to the execution of this contract, the Comet Oil Company held leases against plaintiffs' lands. The defendants had been negotiating with plaintiffs for some time for leases on these lands, and plaintiffs refused to lease to them until the Comet Oil Company leases were canceled. For the consideration stated in the contract, the defendants agreed to secure, either by suit or by peaceful means, the cancellation of the Comet Oil Company leases. This they did by suit, the district court of Liberty county rendering judgment on the 6th day of August, 1912, canceling all the Comet Oil Company leases. In attorney's fees and other cost items, the defendants expended about \$500

in canceling these Comet Oil Company leases. The defendants never requested the plaintiffs to execute the leases stipulated for in the above contract, nor did the plaintiffs tender such leases to the defendants. In explaining why this was not done, Mr. Haynie, one of the defendants, testified that he never said anything to any of the parties about giving the lease after the Comet Oil Company judgment was obtained, and "the truth is the boom died out" (referring to the oil excitement at the time the contract was made). The trial of this case resulted in an instructed verdict in favor of the defendants in error.

The following statement is taken from the brief of the defendants in error:

"During the trial it was admitted by defendants (plaintiffs in error) that the lands owned by S. M. Stovall, J. H. Stengler, Amel Abel, Hubert Taylor, W. E. Canter, and A. R. Dagle, which were affected by said written agreement of date March 10, 1911, were at that time the homesteads of each of said parties, and that at that time each of said parties resided on their said lands as their homestead with their families, and were still doing so at the time of this trial, and none of their wives had joined them in signing said written instrument of date March 10, 1911. And, as stated on page 7 of brief for plaintiffs in error, they, as defendants in the trial court, did plead that they had expended \$500 in procuring cancellation of the Comet Oil Company leases, and that, in the event it was shown that part of the land involved was the homestead or separate property of any of the wives of plaintiffs, then the defendants prayed for recovery of the value of such land, alleging that value to be \$200 per acre, or a total of \$10,000, but such pleas they abandoned, and during the trial made no proof whatever in any attempt to support such pleading."

[1] Under this statement, defendants in error advance the following proposition:

"A portion of the lands affected by the written agreement of date March 10, 1911, were at that time the homesteads of the several parties owning such lands and who signed such document, and their wives did not join in the execution thereof. Therefore the said agreement as to those lands was null and void, and clearly it was proper for the trial court to so adjudge and decree."

This proposition is a correct statement of the law on the facts of this case. As the wives of the plaintiffs named did not join in the execution of the contract of date March 10, 1911, and as this contract affected their homestead, it was void as to them. *R. S. arts. 1103, 1114, 1115*; *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169; *Staley & Barnsdall v. Derden*, 57 Tex. Civ. App. 142, 121 S. W. 1136; *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717, *L. R. A. 1917F, 989*; *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396; *Jones v. Goff*, 63 Tex. 248; *Dykes v. O'Connor*, 83 Tex. 160, 18 S.

*W. 490*; *Dority v. Dority*, 96 Tex. 217, 71 S. W. 950, 60 L. R. A. 941; *Ellis v. Bingham*, 150 S. W. 603; *Blakeley v. Kanaman*, 107 Tex. 206, 175 S. W. 674.

[2] The following questions were asked each of the plaintiffs:

"What agreement, if any, did you have with Mr. Haynie or Mr. Stephenson about their drilling, or undertaking to drill wells on the tracts that are covered by these several leases you were to make?" And: "When you made this agreement, had you been promised anything by Mr. Stephenson relative to when he would begin drilling a well on some one or more of those tracts after the Comet Oil Company leases were released?"

The following answer, in substance, was given by each of the plaintiffs to these questions:

"At the time Mr. Stephenson came down there they made this proposition, to wit, that if we would give them a lease upon this land they would immediately go to work drilling, put down a deep well there, and we said, 'Well, now, we can't do that from the fact that the Comet Oil Company has a lease on this land,' and they (the defendants, Mr. Haynie and Mr. Stephenson, who were present) agreed if we would give them a lease they would put down a well, a deep well there at once, and when we told them there was already a lease on the land they agreed that they would, if we would execute a lease to them, go to work and secure a release from the Comet Oil Company, and we agreed to do that, and we agreed to begin to execute a lease within 5 days after they had obtained this release from the Comet Oil Company, and they (meaning the defendants) were to begin drilling immediately, not to exceed 90 days from that date. They were to have 5 days from the date of the release of the Comet Oil Company's lease to have us execute a new lease, and 90 days from that time within which to begin drilling a well. The agreement of Mr. Stephenson for the defendants to so drill the well was the sole cause of us (meaning the plaintiffs) signing the contract."

These questions and this answer were duly excepted to by plaintiffs in error. The bill of exceptions shows that before this testimony was offered by defendants in error, the contract of date March 10, 1911, together with the form of lease which plaintiffs agreed to execute, had been introduced in evidence. This lease to be executed by plaintiffs contained the following clause:

"Said second party (meaning the first parties in the agreement) further agrees to begin drilling a well in the vicinity within ninety (90) days from date and to begin drilling a second well upon the adjoining lease controlled by them within ninety (90) days from the completion of the said first well, and to begin drilling a new well upon the adjoining properties every ninety (90) days thereafter until the above land shall have been drilled upon and in no event shall it be longer than one year from the completion of the first well drilled in the vicinity by the said first party or his assigns, until

operations for drilling a well upon this particular land shall have begun, and in the event of a failure to do so, this contract can be declared null and void as above provided."

Plaintiffs in error made the following objections to the admission of this testimony:

"That the contract above set forth is explicit in its terms and that the ground of objection to the evidence was that the proof sought to be elicited from the witness was an attempt to vary the terms of a written contract, which is in no wise ambiguous, and which expressly states the terms of the agreement as to its conditions subsequent and as to the several undertakings of the parties, and that the attempt as now made by this testimony is not to show a different consideration, but is an attempt to show an agreement to do different things than the defendant in this case agreed to do, and the testimony is further inadmissible because it attempts to vary the terms of a written agreement by parol evidence, and, further, that there is no allegation in the plaintiffs' pleadings of fraud, accident, or mistake as to the several undertakings of the parties."

The admission of this testimony is the only error assigned by plaintiffs in error, and under this assignment they advance the following proposition:

"While a different amount than that recited in the written contract may be proved as the consideration, yet when the consideration is contractual, or when the consideration is a written contract between the parties to do certain things, parol evidence is inadmissible to change the terms of such contractual consideration as to the time of its performance."

This is a correct legal proposition, but is not the law of this case. The contract which plaintiffs seek to have canceled sets out the understanding and agreement between the parties. The terms of the lease contract to be executed by plaintiffs are fully stated, in fact an exact copy of the lease contemplated in the contract, dated March 10, 1911, is attached to this contract. Plaintiffs bound themselves on the conditions set out in this contract to execute this lease. Plaintiffs in error obligated themselves to secure cancellation of the Comet Oil Company leases. The record shows that they did this, and when this had been done by them they were in position to ask for a specific performance of the obligation of plaintiffs, and in equity all the rights granted to them in the contract dated March 10, 1911, and more fully and completely set out in the exhibit attached to their contract, accrued to them. "Equity regards and treats that as done which in good conscience ought to be done." Discussing this maxim of equity, Pomeroy says:

"Another immediate and evident consequence of the principle is the equitable property created by mere agreements to purchase and sell lands. If the contract is made upon an actual valued consideration and complies in all re-

spects with the requisites prescribed by equity, then, as soon as it is executed and delivered, the vendee acquires an equitable estate in the land, subject simply to a lien in favor of the seller as security for payment of price, while the vendor becomes equitable owner of the purchase money. There is in this case, as in the last, an equitable conversion; the vendee's interest is at once converted into real property with all its features and incidents, while the vendor's interest is, to the same extent, personal estate." Pomeroy's Equity Jurisprudence, vol. 1, p. 621, § 372.

Discussing this maxim, the Supreme Court of Texas, in *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104, in an opinion written by Judge Gaines, says:

"It is also complaining that the court erred in not striking out, upon defendant's exception, so much of the petition as sought to enforce a lien upon the property therein described. This assignment is not well taken. The plaintiff averred a substantial compliance with the contract upon his part. This entitled him to have it enforced according to its terms to the extent that defendant had actually received cattle under it. A written agreement to give a mortgage, with which the party entitled thereto has complied, is treated in equity as a mortgage, and will be enforced as such between the parties to the original transaction."

In *Schenk v. Wicks*, opinion by the Supreme Court of Utah, 23 Utah, 576, 65 Pac. 732, one Albert J. White contracted in writing with one Shaw to convey to him, for the sum of \$2,000, then paid by Shaw, and the further sum of \$3,000, to be thereafter paid, an undivided one-half interest in fee in lot 5, block 9, plat F, Salt Lake City. Discussing this contract, the Supreme Court said:

"Under the executory agreement of October 4, 1890, Shaw, the vendee, acquired the equitable title to said premises, and the vendor acquired a lien on the equitable interest of the vendee for the payment of the note"—citing Pomeroy's Equity Jurisprudence.

In *Peay v. Selgler*, an opinion by the Supreme Court of South Carolina, 48 S. C. 509, 26 S. E. 890, 59 Am. St. Rep. 737, one Waller contracted to sell to one Jenkins certain lands. In a suit involving the construction of this contract, the court said:

"What is more to the point, when Jenkins made the contract and entered into possession, after having made the cash payment required, the relations between the parties became that of mortgagor and mortgagee, and in equity Waller had a lien on the land for the deferred payments."

[3] The decisions cited by us above, involving the homestead question, fully sustain the proposition that a lease to prospect and drill for oil, such as the plaintiffs contracted to execute in this case, involves an interest in the land, and is governed by the same rules as conveyances of real estate.

Hence, when the district court of Liberty county canceled the Comet Oil Company leases, plaintiffs in error had a contract as complete between them and defendants in error as if there had been a formal execution of the same. If we are correct in this conclusion, then there was no reversible error in the admission of the testimony complained of, because it exactly states the terms of the contract as written.

Though we have carefully examined all the authorities cited by plaintiffs in error, and have given full consideration to their able brief, we are not able to find any error in the action of the court.

The judgment of the trial court is in all things affirmed.

**CAWTHON v. CITY OF HOUSTON.**  
(No. 462.)

(Court of Civil Appeals of Texas. Beaumont.  
June 3, 1919. Rehearing Denied  
June 11, 1919.)

**1. EVIDENCE §31 — JUDICIAL NOTICE — CITY CHARTER.**

Courts will take judicial notice of the provisions of a city charter granted by the state Legislature.

**2. MUNICIPAL CORPORATIONS §741(1)—INJURIES—NOTICE OF CLAIM—NEGLIGENCE OF CITY COMMISSIONER.**

That plaintiff's injury was due to negligence of street and bridge commissioner of city, and that the commissioner had actual knowledge of the injury, did not dispense with written notice, under Houston City Charter, § 11, to mayor and city council, stating how injuries occurred, apparent extent thereof, amount of damages sustained, amount for which claimant will settle, present and past residence of claimant, and names and addresses of witnesses; the purpose of notice being not merely to notify city of the fact of the injury, but to give city the information required to be conveyed by the notice.

**3. MUNICIPAL CORPORATIONS §8 — CITY CHARTER—OPERATION AS STATUTORY LAW.**

Provisions of city charter specially granted to city by Legislature have the same force and effect as any other positive statutory law of the state.

**4. MUNICIPAL CORPORATIONS §741(3) — PERSONAL INJURIES—CLAIM FOR DAMAGES—WAIVER.**

Notice of injury to mayor and city council by Houston City Charter, § 11, cannot be waived by street and bridge commissioner, or by any commissioner or number of commissioners or member of city council, but, if subject to waiver, can be waived only by the city council and the mayor jointly.

**5. MUNICIPAL CORPORATIONS §741(1) — PERSONAL INJURY — NOTICE OF CLAIM — WAIVER.**

That injured party was invited to present claim for damages to city council, but failed to do so because of inability to get council together, does not constitute waiver of written notice of injury to mayor and city council required by Houston City Charter, § 11.

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by J. H. Cawthon against the City of Houston. From judgment sustaining general demurrer to plaintiff's petition, plaintiff appeals. Affirmed.

Rowe & Kay, of Houston, for appellant.  
W. J. Howard, of Houston, for appellee.

**HIGHTOWER, C. J.** This is an appeal from a judgment of one of the district courts of Harris county, sustaining a general demurrer to appellant's petition; appellant having been plaintiff below.

J. H. Cawthon, the appellant, sued the city of Houston, a municipal corporation, to recover damages for personal injuries claimed by appellant to have been sustained by him in consequence of negligence on the part of the city of Houston, and, since the trial court sustained a general demurrer to his petition, we deem it best to here let his pleadings be shown in full.

Appellant's petition, omitting the formal commencement, was as follows:

"I. That heretofore, to wit, on the 13th day of June, A. D. 1916, the said city of Houston, defendant herein, was acting under and by virtue of a special charter granted to it by the Legislature of the state of Texas, and was operating under what is known as the commission form of government, with a mayor and four commissioners constituting the representative authority of the said defendant, city of Houston. That on or about the said date the said defendant, city of Houston, owned and operated under the supervision and direction of one Matt Drennan, who is and was known as the street and bridge commissioner, a certain wagon operated and drawn by mules for the purpose of hauling sand, or anything else that the said commissioner or representative of the said defendant, the city of Houston, desired to be hauled; and that on or about the said date the plaintiff herein was hired by the said defendant, the city of Houston, acting by and through its said street and bridge commissioner, as a laborer at and for the price of \$2 per day, as a helper to the driver of one of the teams belonging to the said defendant, the city of Houston, which, at the time of the injury to the plaintiff hereinafter complained of, was engaged in the hauling of sand to be used by the defendant, the city of Houston, and by said means, as said sand was needed, was distributed to, in, and throughout different portions of the said city of Houston.



"II. That on or about the date hereinbefore mentioned the plaintiff, while in the employ of the defendant, the city of Houston, as aforesaid, and while working in the capacity aforesaid, under the immediate direction and control of a superintendent, one William Williams, who was in turn acting under the direction and authority of the said Matt Drennan, commissioner as aforesaid, was directed to go with the driver of one of said wagons and teams, which said driver was also in the employ of the defendant, the city of Houston, by and through its duly authorized commissioner and representative, to the city stables and barnyard of the defendant, the city of Houston, which said stables or barnyard were located and situated by and on Buffalo bayou, near the Sabine bridge, and within the corporate limits of the defendant, the city of Houston, where sand was being taken out of a sand bank, located as aforesaid, owned and operated by the defendant, the city of Houston, as aforesaid, to different portions of the said city of Houston by the means aforesaid; and the said sand was required by the defendant, the city of Houston, its agents, and representatives, to be excavated from said sand bank and placed in a sand pit to be shoveled therefrom into said wagons, which work the plaintiff was employed to do, and which he proceeded to do on said date of the injuries inflicted upon him; and at the place of excavation where this plaintiff was required and directed by those in authority from the defendant to take sand from said sand pit near said sand bank, and to load the same into his wagon for the purpose aforesaid, and at said time said sand bank at point from which the sand was so taken was a sand pit by a perpendicular wall of sand some 8 or 10 feet high; and in order to load the said wagon with said sand the plaintiff was required and directed, as aforesaid, to drive his wagon into the pit near said bank of sand, in order for the plaintiff to be able to reach and place said sand in his wagon as it was shoveled from said sand pit near said embankment.

"III. That on the date hereinbefore mentioned, and while in the discharge of his duty as required and directed in the loading of sand into his wagon, as aforesaid, said embankment, or a large portion thereof, consisting of about 5 square yards of sand, weighing over 3,000 pounds, suddenly caved in upon the plaintiff, knocking him down and breaking his right leg in two places below the knee, and injuring and spraining his left hip, and mashing and spraining his right foot and ankle; and the plaintiff was by reason of said sudden cave-in of said sand embankment caught thereby and covered with sand to such an extent that he had to be, by others present at the time, dug out of the sand so caved in, in order to save his life, and that said injury aforesaid caused plaintiff great physical pain and suffering for a long period of time, and from the results of which the plaintiff is still suffering; and that the character of the injuries sustained by the plaintiff by reason of said sudden cave-in as aforesaid are such that he will be a cripple for an indefinite length of time, if not for life, and that he is now, and he will be for an indefinite length of time, unable to perform any manual labor, or such labor as he was accus-

tomed to performing prior to the time of receiving said injuries, as aforesaid. That by reason of the breaking of his right leg as aforesaid, one of which breaks was at point in close proximity to the ankle, and at the point of said lower break, the leg, by reason of said injury, became much swollen and very painful in and about said right ankle joint, and that said condition will last an indefinite time, if not during the natural life of this plaintiff.

"IV. That the dangerous condition of said sand bank was unknown to this plaintiff, as he had been employed to do that character of work but a very short time before receiving said injuries as aforesaid, and said dangerous condition of said sand bank was not open to the observation of this plaintiff; but the dangerous condition of said embankment of sand was well known to the defendant, the city of Houston, by and through its duly authorized commissioner, representative, and superintendent, and the same was at the time of said caving in of said sand embankment, and had before been, open to the observation of the defendant, the city of Houston, by and through its commissioner or representative and superintendent aforesaid, and was and had been before said time well known as to the dangerous condition of said sand embankment, and that with said knowledge the said commissioner, representative, and superintendent negligently failed to give him notice of such dangerous condition of said sand bank, and failed to give the plaintiff any warning of the said dangerous condition thereof, to the plaintiff's great loss and financial damage as aforesaid.

"V. That by reason of said injuries to the plaintiff, the direct and proximate cause of all of which was the gross and inexcusable negligence of the defendant, the city of Houston, in conducting and overseeing the operation in the work which the plaintiff was engaged at the time of receiving said injuries, he was sent to a hospital—Baptist Sanitarium—and because of said injuries the plaintiff was compelled to remain in said hospital for six weeks, and during the said time the plaintiff was constantly under the care and attention of a physician, and while in said hospital he spit up blood for four days as a result of the injuries inflicted upon him as aforesaid, and plaintiff was sore all over for ten days after the infliction of said injuries, and as a result thereof, and the plaintiff lost, because of the infliction of said injuries upon him, two months' time; and since said period of time and the time of the filing of this petition plaintiff, as a consequence of said injuries, in order to get about, is required to use crutches, which condition is the result of the breaking of his right leg in two places below the knee as aforesaid, and because of the mashing and spraining of the right foot and ankle and the swelling and pain incident thereto, and because thereof the plaintiff is and has been unable to place said right foot to the ground or place any of the weight of his body thereon; and this plaintiff is informed, and from such information alleges, has good reason to believe, and he does believe, that said impaired condition of his right leg, ankle, and foot will probably continue during the remainder of his life, and, in any event, will and has lessened his physical capacity to earn a livelihood, at least two-thirds of what

it was prior to the receiving of said injuries as hereinbefore alleged.

"VI. That at the time of the infliction of the injuries to plaintiff he was 46 years of age, was healthy, physically active, and strong, and was earning at said time, and would have but for the said injuries inflicted upon him as aforesaid been able to earn, the sum of \$2 per day for performing the work he was then employed by the defendant, the city of Houston, to do, to wit, as a teamster's helper, or like employment; and that by reason of said injuries, caused as aforesaid, and resulting from the negligence and want of the exercise of ordinary care on the part of the defendant, the city of Houston, acting through its commissioner, representative, and superintendent as aforesaid, he was and has been rendered totally unable to perform any work for a term of two months, and the plaintiff is now by reason of his said physical condition unable to, and will never be able to, earn in money more than one-third of what he had previously been able to earn, during the remainder of his life, to his great financial damage.

"VII. Plaintiff further alleges that during the time he was confined to the hospital as aforesaid he suffered great physical pain and mental anguish, caused by the breaking of his right leg as aforesaid, and because of the fact that the bones of said leg were not only broken but splintered, and portions thereof protruded through the flesh, and by reason thereof said injuries took a long time to heal and place said leg in a condition whereby he could get about; and the plaintiff says that said great physical pain, sickness, and weakness incident thereto had and has had the effect of depleting his nervous system, and has greatly lessened his vitality, thereby tending to shorten his natural life, all of which was caused by the infliction of the injuries upon him in the manner and at the time aforesaid, to his great financial damage.

"VIII. Plaintiff alleges that but for said injuries inflicted upon him as aforesaid, and caused by the negligence or want of the exercise of ordinary care upon the part of the defendant, the city of Houston, its commissioner, representative, and superintendent as aforesaid, he would at the present time be able to earn in wages such an amount as he had previously earned in money as aforesaid; but that because and by reason of said injuries he will not be able to earn in the future more than one-third of the money that he had prior to receiving said injuries been able and accustomed to earning, all to his great financial damage.

"IX. Plaintiff alleges that on account and because of said physical pain and suffering resulting from the infliction of said injuries upon him, and because of his lessened capacity to earn a livelihood caused thereby, and because of the mental distress and anguish incident thereto and caused thereby, he has been damaged in the sum of \$15,000 as actual damages, for which the defendant thereby became liable.

"X. The plaintiff further alleges that the injuries inflicted upon him, as aforesaid, and in the manner and at the time aforesaid, and the consequent results thereof, were caused wholly by the negligence of the defendant, the city of Houston, its agents, servants, employés, and representative in charge of and superintending the

work in which the plaintiff was engaged at the time of the infliction of said injuries upon him, in failing to warn the plaintiff of the dangerous condition of said sand bank, although at said time they knew its condition, or by the exercise of ordinary care could have known of its condition, and it thereby became the duty of the defendant, the city of Houston, and those it had in charge over the said work, to give information to the plaintiff of the said dangerous condition of said sand bank, and to give him warning thereof, so that he being so warned might be able to protect himself therefrom; and the plaintiff alleges that the failure on the part of the said defendant, the city of Houston, acting through its commissioner and representative or superintendent in immediate charge of the work in which the plaintiff was so engaged at the time, to so inform and warn him of the dangerous position in which they had placed this plaintiff in order to perform the work aforesaid, and all of which negligent acts and omissions and failure to exercise ordinary care on the part of the defendant, the city of Houston, as aforesaid, and in the manner aforesaid, were the direct and proximate cause of the infliction of said injuries upon the plaintiff as aforesaid, to the plaintiff's great financial damage in the sum of \$15,000, as exemplary damages, all of which the defendant, by reason of its willful and wrongful conduct and injuries to plaintiff, became liable to pay."

The appellee, city of Houston, interposed the following demurrers to appellant's petition:

"I. Now come the defendants and with leave of court file this, their first amended original answer, and as in their original answer demur to plaintiff's petition that the same shows no cause of action against them, and of this they pray judgment.

"II. For further demurrer these defendants would show that by the provisions of section 11, art. 9, of the city charter of the city of Houston, it is provided that as a condition precedent to liability notice of claim for damages shall be given the city as therein provided, and plaintiff's petition wholly fails to show any such notice was given."

Appellee also, in its answer, specially pleaded the provisions of section 11, art. 9, of the city charter of the city of Houston, and alleged failure on the part of appellant to comply therewith, and denied any liability to him in consequence of such failure.

Thereafter, in answer to such demurrers and plea on the part of appellee, appellant, by supplemental petition, pleaded as follows:

"I. That the provisions of the city charter of the city of Houston pleaded by the defendant in paragraph II of its said answer have no application to an injury such as sustained by the plaintiff, wherein the acts of the defendant were the direct and proximate cause of said injury, as set forth by plaintiff in his original petition.

"II. That the provisions of the city charter of the city of Houston pleaded by the defendant in paragraphs I, II, and III of said answer were waived as a condition precedent or

a prerequisite to the defendant's liability in this cause, because the defendant, acting by its authorized agents and one of its commissioners, Matt Drennan, shortly after the plaintiff had sustained the injuries complained of in his original petition, and within 90 days after said injuries were inflicted, knowing and being fully advised as to the cause, nature, and extent of the plaintiff's injuries, visited the plaintiff for the purpose of offering, and did offer to the plaintiff, a written instrument for the plaintiff to sign, which paper related to the injuries of plaintiff and compensation in money to plaintiff by reason thereof, with authority from the mayor and commissioners so to do; and also said commissioners invited plaintiff to appear before the commissioners while in session with a view of adjusting and settling for a consideration said injuries, and which the plaintiff attempted to do, but was unable to get said commissioners together at the time agreed upon, although the said mayor and commissioners, at various and sundry times, agreed to take up the plaintiff's claim and see what could be done for him, all of which was within 90 days from the infliction of said injuries, and then and thereby the defendant waived said notice, and became estopped from the operation thereof in its favor.

"III. Plaintiff further pleading herein says that defendants are estopped from now here pleading the said charter provision requiring the plaintiff to give the said 90 days' notice of his claim for injuries, as alleged by him. (1) By reason of the facts alleged in his petition. (2) By reason of the foregoing facts herein alleged. (3) This plaintiff here and now alleges that said defendant's officers, knowing of plaintiff's injury as alleged, and knowing his ignorance of said charter provision, through its officers, Matt Drennan, one of its commissioners, and other officers and agents of the defendant, city of Houston, fraudulently put the plaintiff off from time to time, leading him to believe that they would compensate him for the injury sustained by him, until said 90 days had expired from the date of said injury, and by reason of which said facts the said defendant, city of Houston, and its officers, defendants herein, are now here estopped from pleading said charter provision or now claiming any benefit or right thereunder."

Upon presentation of the pleadings thus interposed by the parties, appellee's general demurrer was sustained, and appellant failing to amend, his suit was ordered dismissed, from which order he has properly prosecuted his appeal to this court.

The first and seventh assignments of error raise practically the same question, and are submitted together, they being as follows:

**First Assignment:** "The court erred in sustaining the defendant's general demurrer to plaintiff's petition, and in holding thereby that it was necessary, as a prerequisite to a recovery by the plaintiff, that the 90 days' notice pleaded by said demurrer be given said defendant of said plaintiff's cause of action after his injury; because it appears from the allegations in plaintiff's petition, and so admitted by the

defendant's demurrer, that said defendant was individually doing the work of hauling sand from defendant's own sand bank, in which capacity the plaintiff, as an employé of defendant, was injured at the time and in the manner complained of, and that therefore said provision of the charter of said city of Houston pleaded by the defendant does not apply."

**Seventh Assignment:** "The court erred in sustaining defendant's general demurrer to the plaintiff's petition, and in thereby holding and finding, as a matter of law, that notwithstanding the fact that the defendant was individually (and not by contract) doing the work in which the plaintiff, its employé, was injured through its negligence, and notwithstanding the fact that defendant knew and was apprised at the time of the injury, and long before 90 days thereafter, of the plaintiff's injury, and had notice required by the charter of said city of Houston, pleaded by the defendant's demurrer, in effect, that the plaintiff could not recover on account of not having pleaded the said 90 days' notice, and said city of Houston and its officers having full knowledge within said time of the time, place, manner, and extent of the plaintiff's injury, that therefore said notice was not necessary (a) because when defendant, a municipal corporation, was individually doing the work in which the plaintiff, its employé, was injured, and knowing of the time, place, manner, and extent of said injury, the said notice was not necessary; and (b) defendant, city of Houston, though a municipal corporation acting under a special charter, owning and operating a sand bank, in the operation of which plaintiff, its employé, was injured through the negligence of defendant, while in the operation of same, the defendant, city of Houston, thereby became liable to the plaintiff in the same manner and to the same extent as any private corporation would have been liable under like circumstances."

The foregoing assignments are submitted by appellant as propositions within themselves. They are followed by the following independent proposition:

"The purpose of the provision of the charter pleaded by defendant's demurrer was to give notice of the time, place, manner, and extent of any injury where the city might be liable; but when the city itself, through its officers, perpetrates the wrong complained of in individually doing the work of which the injury negligently caused by the city itself is the outgrowth, and already knows of the time, place, manner, and extent of the injury, the said notice becomes unnecessary and does not apply, as is held by the Supreme Court of this state."

The charter provision of the city of Houston interposed by appellant's demurrer as a defense to appellee's action is contained in section 11, art. 9, of the charter, and reads as follows:

"Sec. 11. Before the city of Houston shall be liable for damages for personal injuries of any kind, or for injuries to or destruction of property of any kind, the person injured, or the owner of the property injured or destroyed, or some one in his behalf, shall give the mayor

and city council notice in writing of such injury or destruction, duly verified, within ninety days after the same has been sustained, stating in such written notice when, where, and how the injury or destruction occurred, and the apparent extent thereof, the amount of damages sustained, the amount for which claimant will settle, the actual residence of the claimant by street and number at the date the claim is presented, and the actual residence of such claimant for six months immediately preceding the occurrence of such injuries or destruction, and the names and addresses of the witnesses upon whom he relies to establish his claim, and a failure to so notify the mayor and city council within the time and manner specified herein shall exonerate, excuse, and exempt the city from any liability whatsoever. \* \* \*

[1] The charter of the city of Houston, of which the section just quoted is a part, is a special one granted by the Legislature of this state, and the courts of the state are required to take judicial notice of its provisions.

It will be observed from appellee's petition, above quoted, that he did not plead the giving of the 90 days' notice required by section 11 of the charter as a prerequisite to his right to a recovery, but his contention on that point, substantially, is this: (1) That the city of Houston, at the time of his injury, having been engaged in doing the work of taking sand from its own sand pit by its own employés, and not by contract, must be held to have known of the injuries sustained by him as an employé in such work, and that therefore the 90 days' notice required by the charter provision was unnecessary; and (2) that if such 90 days' notice is a requirement and condition precedent to the bringing of a suit for damages against the municipal corporation, as to the work being done by appellee for the city, wherein it was the owner of and engaged in operating the said bank in such proprietary or private capacity, it in law is, and should be treated and considered as, an individual or private corporation, and as such it had the right to and did waive, by its acts and conduct of its officers and agents, as pleaded in appellant's supplemental petition, the giving of the 90 days' notice required by the charter.

In support of his contention that the charter provision just mentioned with reference to notice had no application to the cause of action asserted by him, and that it was unnecessary to give the written notice required by section 11, as above quoted, in order to fix liability against appellee, appellant has cited perhaps as many as a dozen cases showing decisions by the appellate courts of this state which he claims clearly sustain him, the first among them being that of the City of Houston v. Isaacs, 68 Tex. 116, 3 S. W. 693.

It will be seen from section 11 of the charter of the city of Houston just quoted that as a condition precedent to liability on

the part of the city for an injury of the character here asserted a written notice to the mayor and city council of the city of Houston by the claimant, showing several things, shall be made, and that such notice shall be given within 90 days after the time the claimed injury was sustained. It is required that the mayor and city council shall be given notice (1) of the claimed injury; (2) where and how it occurred; (3) the apparent extent thereof; (4) the amount of damage sustained; (5) the amount for which claimant will settle; (6) the actual residence of the claimant by street and number at the date the claim is presented; (7) the actual residence of such claimant for six months immediately preceding the occurrence of such injury; and (8) the names and addresses of the witnesses upon whom the claimant relies to establish his claim.

[2,3] It clearly appears from this provision of the charter that the giving of the notice in writing of these several things to the mayor and city council of the city of Houston is made a condition precedent to a right of recovery by any one injured, for which injury the city is claimed to be liable, and that a failure to so notify the mayor and city council within the prescribed time shall exempt the city from any liability whatsoever to any such claimant. Thus it will be seen that there is something more of which the mayor and the city council must be given notice than the mere fact of injury claimed to have been sustained, and the cause of injury and all of these things required by the notice to be given are important matters of information to the city where claims for injuries might be asserted against it. This provision of the charter, having been specially granted by the Legislature to the city, must be held to have the same force and effect as any other positive statutory law of the state.

As we construe appellant's petition with reference to his allegations of negligence, his contention is that the sand bank at which he was injured was in a dangerous condition and liable to fall upon any one working as he was, of which condition he had no knowledge or means of knowledge, but that this condition of the sand bank was known to one Matt Drennan, who at that time was the street and bridge commissioner of the city of Houston, and that Drennan, having such knowledge, ought to have informed and warned appellant of the danger that he would encounter in taking the sand from the bank as he was doing on the occasion in question, and that Drennan's failure to do so was negligence on his part, and being the agent or representative of the city in supervising the work of taking the sand from the pit, his (Drennan's) negligence was chargeable to the city, and that the city, through Drennan, had knowledge also of the dangerous condition of the sand bank, and that any

knowledge to Drennan, under the circumstances, was knowledge to the city of Houston, and that any negligence on the part of Drennan, under the circumstances, was the negligence of the city of Houston, simply because, as claimed by appellant, the city was doing this work through its own employes and not by contract, and that since Drennan knew that appellant was injured and how his injury was caused, it was unnecessary to give the city further notice of any character in order to fix liability for the injury sustained by appellant.

It will be noted that the requirement of the charter is, not that notice of such an injury shall be given to the street and bridge commissioner of the city, or any other servant or agent of the city, but that such notice as to everything mentioned shall be given to the mayor and city council of the city of Houston. No such notice was pleaded, as will be seen from the petition above, and the question is, Did the petition, in failing to allege the notice prescribed by section 11 above, state a cause of action against appellee?

Now it is the contention of appellant that the case of *City of Houston v. Isaacs*, supra, clearly is authority for the contention that, under the facts as disclosed in his petition, the provision with reference to notice contained in section 11 of the charter had no application, and that no such notice as there specified was required as a condition precedent to liability against the city. We shall not attempt to discuss the case of *City of Houston v. Isaacs*, but it will be apparent, upon examination of the opinion in that case, that it is not authority in support of appellant's contention here, and also that the other cases cited by appellant, most of which follow and approve *City of Houston v. Isaacs*, as we understand them, cannot be considered as authorities in support of his contention in this case. On the contrary, we have concluded that the cases cited by appellee, to wit, *Parsons v. City of Ft. Worth*, 63 S. W. 889, *City of Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704, *Luke v. City of El Paso*, 60 S. W. 363, and *English v. City of Ft. Worth*, 152 S. W. 179, are more nearly in point and relevant to the facts in this case, and that they support the action of the trial court in sustaining the general demurrer in this case, upon the theory that the failure on the part of appellant to give the notice required by section 11 of the charter to the mayor and city council of the city of Houston, within the time prescribed, exempted and acquitted the city of any liability whatever to appellant for the injuries sustained by him.

The remaining assignments in appellant's brief complain of the action of the court in sustaining the general demurrer for the reason, as claimed by him, that his supplemental petition clearly alleges facts which consti-

tuted a waiver on the part of the appellee of his failure to give the written notice required by the charter, and that it was within the power of the city to so waive such notice, and that therefore the action of the court in sustaining the demurrer was clearly erroneous.

In answer to this contention we say that it is very doubtful, in our minds, whether it was within the power of any of the officers of the city of Houston to waive the provision of its charter here in question, the same having the force and effect of a positive statutory law, because it is our opinion that such provision was intended by the Legislature as a protection for the citizens of the municipality, and by such provision of the charter certain things were required to be done by a claimant for damages against the municipality before any right to such damages could accrue, and positively further provided that in the event such things were not done by such claimant no liability whatever could be established against the city for any such claimed injuries, but that on the contrary, the city should be absolutely exempt therefrom.

[4] If, however, such notice could be waived, it could only be done by the very persons to whom such notice was required to be given, that is to say, the mayor and city council of the city of Houston, and not by the street and bridge commissioner, Matt Drennan, or by any member of the city council, or commissioner of the city of Houston, or by any number of such commissioners, but by them and the mayor of the city jointly.

We do not consider that any case cited by appellant in support of its contention of waiver can be construed as authority for the proposition that officers of a city, such as the city of Houston, acting under a special charter granted by the Legislature, may waive such express and positive provisions of a legislative enactment as are those contained in that provision of the charter here in question. But, if we are mistaken in the view that this provision of the city charter could not be waived, nevertheless we are of opinion that such facts as are alleged by appellant on this point are insufficient to show a waiver of the notice by the mayor and city council of the city of Houston.

We have already quoted in full appellant's supplemental petition, setting up the claimed waiver, and it is unnecessary to again quote the same, but, as we construe the same, it shows, substantially, that one of the commissioners of the city called upon appellant and offered him some written instrument to be signed by him which related to appellant's injury, and that such commissioner was authorized by the mayor and commissioners to visit appellant for this purpose, and that the commissioners notified appellant to appear before them while in session at some time, with a view of adjusting and settling

for his injury, and that appellant attempted to so appear, but failed to find the commissioners together.

[5] The reasonable interpretation of this pleading is that appellant was invited to present his claim to the city council of the city of Houston, but that because he failed to get the council together he could not do so, and, as argued by appellee, we are of the opinion that this pleading, instead of showing a waiver of the notice and the material information required in such notice, as prescribed by the city charter, negatives the idea that the mayor and city council of the city of Houston had waived the notice called for by the charter; but the reasonable inference, on the contrary, is that the mayor and city council were still insisting upon the information provided for by the charter.

After a careful consideration of this point, we have reached the conclusion that appellant's pleading did not state facts, as distinguished from conclusions of the pleader, sufficient to show a waiver by the mayor and city council of said provision of the charter.

What we have said, in effect, disposes of all the assignments of error, and it follows that they should be overruled, and the judgment of the trial court affirmed; and it will be so ordered.

Affirmed.

#### HOUSTON OIL CO. OF TEXAS et al. v. W. R. PICKERING LUMBER CO. et al.

(Court of Civil Appeals of Texas. Beaumont. May 15, 1919. Rehearing Denied June 4, 1919.)

#### 1. BOUNDARIES — 37(1) — SURVEYS — CONFLICTS—EVIDENCE.

Evidence held to support finding that there was no conflict between two surveys.

#### 2. BOUNDARIES — 6—CONFLICTING CALLS—COURSES AND DISTANCES.

If surveyor in locating survey was under belief that the northwest corner and west line were 136 varas west from where they were in fact located upon the ground, and located section in question under such mistaken belief, resulting in a conflict in the calls the calls for course and distance from the undisputed northwest corner and west line should be adopted.

#### 3. CORPORATIONS — 672(7)—PERMIT TO DO BUSINESS IN STATE—NECESSITY.

There being no allegation in plaintiff's petition or in defendant's answer and no evidence to the effect that plaintiff, a foreign corporation, is transacting business or has established a general or special office in the state, it was not necessary for plaintiff to prove that it had obtained a permit to do business in the state pursuant to Rev. St. 1895, arts. 745, 746.

Appeal from District Court, San Augustine County; W. T. Davis, Judge.

Trespass to try title by the W. R. Pickering Lumber Company and others against the Houston Oil Company of Texas and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Kennerly, Williams, Lee & Hill and Andrews, Streetman, Logue & Mobley, all of Houston, and R. E. Minton, of Groveton, for appellants.

Davis & Davis, of Center, and Wm. McDonald, of San Augustine, for appellees.

BROOKE, J. This was a suit in trespass to try title by the W. R. Pickering Lumber Company against the Southern Pine Lumber Company, the Houston Oil Company of Texas, the Kirby Lumber Company, D. C. Kenley, and C. C. Goodwin and wife, Ida Goodwin, J. W. Williams and wife, Florence Williams, William McDonald, and Sallie McDonald.

Plaintiff sued the Houston Oil Company of Texas, Kirby Lumber Company, Southern Pine Lumber Company, and D. C. Kenley for the title to, and possession of, the C. C. Goodwin survey; as to the defendants C. C. Goodwin and wife, Ida Goodwin, J. W. Williams and wife, Florence Williams, and William McDonald and wife, Sallie McDonald, plaintiff pleaded that said parties would be liable on their warranty in the event it failed to recover judgment for the title against the other defendants sued, and asked judgment over on said warranty in that event.

The Houston Oil Company of Texas, Southern Pine Lumber Company, and the Kirby Lumber Company filed general demurrers, general denials, pleas of not guilty, which the defendant Kenley also filed, together with a plea that such actions as may have been taken by him in connection with the subject of litigation were as the agent of the Southern Pine Lumber Company, wherefore he asked to be dismissed, with costs. The defendants, sued on their warranties, filed usual answer in trespass to try title.

The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiffs against all the defendants for the title to, and possession of, the lands in controversy, and against the defendant Southern Pine Lumber Company for the sum of \$2,181.21, damages for timber cut, and that plaintiff take nothing as against the defendants sued on their warranty. The judgment shows that the defendants, at the time of the announcement of said judgment, in open court excepted, and gave notice of appeal.

There was no dispute as to the fact that the plaintiff W. R. Pickering Lumber Company held a regular chain of title under the patent by the state, in 1911, to the C. C. Goodwin survey. The defendant Houston

Oil Company of Texas held a regular chain of title to G., C. & S. F. section No. 1, and the defendant Southern Pine Lumber Company and the Kirby Lumber Company held contract rights under it.

[1] The question presented was whether the Goodwin survey admittedly to section 1 was in conflict with same. The effect of the judgment entered was that it was not.

We will consider only two matters raised by the appellant on this appeal, as both parties have stated that the only issue to be tried was the issue of whether or not there was a conflict between the C. C. Goodwin survey and G., C. & S. F. section No. 1; and, in addition, there was a question raised as to whether or not the plaintiff, who was alleged to be a foreign corporation, and upon which said question there was no proof, should be permitted to bring this suit in Texas. With the exception of the fifteenth assignment of error only, all of the seventeen assignments discussed in appellants' brief are directed to the question of the sufficiency of the evidence to support the finding of the trial judge to the effect that there is no conflict between the two surveys.

The counter propositions to the first seventeen assignments of error, excepting the fifteenth assignment, are as follows:

"The true rule in the settlement of a boundary question is to follow the footsteps of the surveyor; and the findings of the trial court to the effect that the northeast corner of G., C. & S. F. section No. 1 is located 136 vrs. west of Francis Hill's N. W. corner, and that east line of the Green Lane survey as originally surveyed by Roberts in 1855 is 136 varas west of the Francis Hill west boundary line, and the south boundary line of said Green Lane survey as made by Roberts in 1855 is 310 vrs. north of the north line of the A. D. Bateman survey, and the judgment for appellee thereon being supported by abundant, competent, and credible testimony, there is no error in said findings and judgment."

(b) "The evidence, if accepted as true, showing that the surveyor, Whitton, though calling for the northwest corner of the Francis Hill as his beginning corner, was in fact 136 varas west from the point, when he ran south calling for Hill's west line, but in fact running on an old line 136 varas west of Hill's line, and the evidence on this point being sufficient to show that the surveyor acted under a mistaken idea as to the location of said Francis Hill northwest corner and west line, and there being a discrepancy of 136 varas (excess) in the call for distance from the second corner west as called for in the field notes of section 1, to the point actually marked and actually described as marked in his field notes, and a like discrepancy of 136 varas (excess) in the call for distance from the known northwest corner of section 1 east to the place of beginning, there is a conflict in said calls, in resolving which it was clearly the duty of the court to adopt the call for course and distance from the known and undisputed northwest corner of section 1, instead of the disputed call for the place of beginning."

(c) "There being no jury, and the trial judge having found from the evidence adduced that the northwest corner of G., C. & S. F. section No. 1 is located according to the original survey made by Whitton 136 varas west of the Francis Hill N. W. corner, said surveyor supposing that he was beginning at said corner, and calling for the same by mistake, and that the east line of said survey and of the Green Lane survey, as made by Roberts in 1855, are each 136 varas west of the Francis Hill west boundary line, and that the south boundary line of the said Green Lane survey as made by Roberts in 1855 is 310 varas north of the north line of the A. D. Bateman survey, and said findings being supported by abundant and competent and credible testimony, such finding of fact and the judgment of the court based thereon will not be disturbed on appeal."

[2] It is not necessary to discuss every one of appellants' assignments 1 to 17, inclusive, with the exception of the fifteenth assignment; neither do we deem it best to set out the testimony of the various witnesses in detail. Really, the way we view the assignments above mentioned there is no conflict in the testimony, and no dispute as to the true location of the northwest corner of G., C. & S. F. section No. 1, being at a stake in Kellogg's S. B. line, a large pine marked X bears east 5 varas, do. same mark bears 40 west 3 varas. The evidence of the surveyor Whitton, the original surveyor who made the original field notes of the said G., C. & S. F. section 1, if true, showed that in fact said surveyor, in locating such survey, was under the belief that the northwest corner and west line of the Francis Hill were 136 varas west from where they in fact are located on the ground, and located G., C. & S. F. section 1 under this mistaken belief. The evidence on this point is sufficient to support the court's conclusion that the surveyor, acting under this mistaken idea as to the location of the line and corner of the Francis Hill, ran out G., C. & S. F. section No. 1. This created a conflict in the calls, and if, in endeavoring to find the true line, from all the evidence, it was concluded that the call for the northwest corner and west line of the Francis Hill was a mistake, in our opinion it was clearly the duty of the court to adopt the call for course and distance from the undisputed northwest corner and west line of G., C. & S. F. No. 1.

The surveyor McLaurin testified:

"As to whether or not in making the survey I made any test on the ground for the central location of the G., C. & S. F. Railroad Company section 1, I will say I measured the north line of the section. George Rawls assisted me in making the test. The line was blazed out, and we could follow it, and he helped me to measure the line. \* \* \* I said that Mr. Rawls was surveyor for the Houston Oil Co. We had with us then the field notes of the G., C. & S. F. No. 1. Mr. Rawls and I made an actual measurement of that line. The line was somewhat in excess of the length called for in

the field notes of the G., C. & S. F. No. 1. It seems to me like it was 20 varas—right around 20 varas in excess. I cannot be exact right now. I didn't make any examination of the plat that was introduced in the trial of the case Saturday. This plat seems to represent the condition of the ground. I didn't make this plat. The C. C. Goodwin survey, as reflected by that plat, is bordered in red. In making the measurement of the G., C. & S. F. No. 1 we began at the northwest corner to the corner of this strip, the northwest corner of the C. C. Goodwin; it had a slight excess in it."

There is no dispute or contradiction as to the G., C. & S. F. No. 1 as located on the ground by Whitton having its quota of land, except for the sliding of the Green Lane north 310 varas from the place where he originally thought it was located, which sliding took out of said survey No. 1 a strip of land about 310 varas by 950 varas in size, which he intended to put back in section No. 1 by a resurvey, but which was never done.

To adopt as correct the field notes as written by the surveyor Whitton under the mistaken idea as to the location of the northwest corner and west line of the Francis Hill survey would have the effect of placing in said survey an excess of 136 by 2,370 varas, about 50 acres of land, in addition to the excess shown by the witness McLaurin's testimony to be now contained in said survey. In our judgment the call for the northwest corner of the Hill must absolutely control, without regard to the testimony of the surveyor who ran and established the original lines on the ground, who, following in his testimony his footsteps in making the survey, shows without contradiction that he, in fact, began on an old line 136 varas west of the Francis Hill northwest corner, believing it to be the Hill corner. We think that the known and undisputed corners will give the G., C. & S. F. No. 1 the course and distance called for in the grant, and will do no injustice, inasmuch as the result will be to give said section No. 1 its full quota of land, except the small conflict between said survey and the Green Lane, which, it would seem, has been the subject of previous litigation.

After a careful examination of the evidence and the authorities and of appellants' able brief, we have reached the conclusion, and which is the just conclusion and the only one which could have been reached, that the findings of the court upon these matters were supported by the evidence, and were based thereon, and said judgment should not be disturbed. Therefore the said assignments from 1 to 17 inclusive, save and except the fifteenth assignment, are all overruled. *Oliver v. Mahoney*, 61 Tex. 610; *Stafford v. King*, 30 Tex. 258, 84 Am. Dec. 304; *Lafferty v. Stevenson*, 135 S. W. 216; *Koch v. Poerner*, 55 S. W. 386; *Polk v. Reinhard*, 193 S. W. 637; *Boynton Lumber Co. v. Houston Oil Co.*, 189 S. W. 749; *Houston Oil Co. v.*

*Brown*, 202 S. W. 107; *Jones v. Burgett*, 46 Tex. 284; *Booth v. Upshur*, 26 Tex. 64; *Koepsel v. Allen*, 68 Tex. 446, 4 S. W. 856; *Simms v. Price*, *Dallam*, 618, 619; *Edrington v. Kiger*, 4 Tex. 93; *Oliver v. Chapman*, 15 Tex. 409; *Swinney v. Booth*, 28 Tex. 116; *Willis v. Lewis*, 28 Tex. 191; *Baker v. Clepper*, 26 Tex. 633, 84 Am. Dec. 591; *Wagner v. George*, 56 S. W. 948; *Wright v. Campbell*, 82 Tex. 389, 18 S. W. 706.

[3] The next assignment which we will consider is the fifteenth, as follows:

"The court erred in rendering judgment in favor of the plaintiffs, against any of the defendants herein, for the reason that the pleading of the plaintiffs alleges that the said plaintiff was a foreign corporation, with a permit to do business in Texas, and there is no proof in the record of the existence of the permit to do business in Texas."

The assignment is submitted as a proposition. The counter proposition is:

"There being no allegation in the plaintiff's petition, or in the defendant's answers, and no proof introduced by either plaintiff or defendants to the effect that plaintiff, a foreign corporation, is transacting business, or has established a general or special office in the state, it was not necessary for the plaintiff to either allege or prove that it had obtained a permit to do business in Texas, as the prohibition applies only to those foreign corporations desiring to transact or solicit business or establish a general or special office in the state."

We are cited by appellant to one authority; that is, *Rexall Drug Co. v. Butler Bros.*, 185 S. W. 989.

In the case of *Security Co. v. National Bank*, 98 Tex. 575, 57 S. W. 22, the Supreme Court of this state used the following language:

"The next question is, did the Court of Civil Appeals err in holding that the plaintiff in error was disabled to sue in our courts by reason of being a foreign corporation and of having done business in this state without complying with our statutes. The laws in question are found in articles 745 and 746 of our Revised Statutes, and, so much thereof as does not apply to the facts of this case being omitted, they read as follows:

"Art. 745. Hereafter any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other state, \* \* \* desiring to transact business in this state \* \* \* shall be and the same are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this state. \* \* \*

"Art. 746. No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed, the corporation had filed its articles of incorporation under the provisions of this chapter. \* \* \*



"The inquiry which first presents itself to our minds is, has the plaintiff in error done business in this state within the meaning of article 745? The plaintiff in error did not make the original loan. Its first connection with the transaction was the purchase of the bond which had been given by the Wichita Roller Mill Company to the loan and trust company, and the uncontroverted facts show that this transaction was effected in the state of Connecticut by an agent of the latter dealing directly with the plaintiff in error. Very clearly this was not a Texas transaction. The business was done in another state. When, however, the obligation had matured, the plaintiff in error brought suit and obtained a judgment upon it in this state. In the adjustment of its demand it then entered into a negotiation which resulted in the extension of the debt and the execution of the new security out of which the present controversy arose. The purpose of the statute was probably twofold—one to protect the people of the state from irresponsible foreign corporations by affording the means by which they could readily ascertain such information in reference to them as is ordinarily afforded by their charters; the other to place them upon the same footing as like domestic corporations by requiring them to pay a like fee for a permit to do business as is required of a domestic company for filing its charter. See Rev. Stats. art. 2439. It is to be presumed, therefore, that the business had in view, in making the requirement, was the ordinary business of the company—the business it was organized to pursue and which its charter empowered it to pursue. Had it been intended to prohibit a foreign corporation from collecting, extending, adjusting, or bringing suit for a debt contracted elsewhere, it would have been easy to have made that intention plain. If it was the purpose of article 745 to deny the corporation the comity which is usually extended throughout the states of the Union of bringing suits in the courts of this state, article 746 was wholly unnecessary. On the other hand, that article shows that such was not the purpose. It in effect merely denies the right of a foreign corporation to bring suit upon any cause of action arising after it had done business in the state without a permit, thus showing that it was regarded that bringing a suit in court was not doing business within the purview of article 745. If bringing suit to collect a debt be not doing business within the meaning of the provision in question, how can the adjustment of a debt be such business? The case of *Sullivan v. Sheehan* [O. C.] 89 Federal Reporter, 247, was very similar to this both in its facts and as to the law of Minnesota, which was there under construction. In that case the court say: 'The Minnesota statutes referred to by counsel, providing for the conditions upon which foreign building and loan associations may transact business in this state, and prohibiting under penalties the transaction of business by such foreign corporations unless those conditions have been complied with, I think necessarily refers to the ordinary business of such associations. Without complying with those conditions, such foreign corporation would not have the right, by its officers or agents, to come into this state, and there solicit subscriptions for its stock or solicit loans. The same rule applies to any foreign insurance company where similar conditions are required to

be complied with before it shall do business in this state, and the business referred to is its ordinary business of insurance. But companies of either of these kinds, if not transacting their ordinary business in this state, and not privileged to transact their ordinary business in this state, not having complied with the conditions of the Minnesota statutes, would not be prohibited, by any proper interpretation of such statute, from investing in the bonds of the state, or of municipal or other corporations of the state, nor from enforcing such bonds. The prohibition of the statute is only against transacting their ordinary peculiar business in this state so long as the statutory conditions are not complied with. The principal question in the case is whether the Chicago association, in contravention of the statute of Minnesota, did business within this state in obtaining the obligations in suit; whether the notes and mortgages in this case were obtained from citizens of this state, by an officer or agent of that company coming into this state and doing business here; or whether this business was transacted in Chicago by citizens of Minnesota, who went there to transact the business. I apprehend that the penalties which are denounced by statute against these companies in case they do business with residents of this state apply only to cases where such business is done within the state. Such a statute cannot possibly have an extraterritorial effect, so as to prevent a company of that kind, located in Chicago, from transacting business lawfully with a resident of Minnesota who should go to Chicago and transact business there. There is nothing in that statute that would prevent such a resident of Minnesota from going to Chicago, and there applying and subscribing for and acquiring stock of an association of this kind, and there obtaining, if he could, a loan from a corporation of this kind. I think there is nothing in this statute preventing him from there giving security upon property situated in Minnesota to secure such a loan. The prohibition is aimed at such companies as, by their officers or agents, come into the state of Minnesota—within the territorial limits of the state—to solicit and transact business, and cannot affect business which they perform outside of the state, where they have a right to transact business, merely because such business is transacted with a resident of the state of Minnesota.'

In *Keating Implement & Machine Co. v. Favorite Carriage Co. et al.*, 12 Tex. Civ. App. 666, 35 S. W. 417, the court said:

"The Favorite Carriage Company, a private corporation of Ohio, doing business at Cincinnati, recovered judgment against appellant and others in the sum of \$3,248, for the conversion of a lot of wheeled vehicles which had been sold on a credit by said carriage company to Culbertson, Wright & Co., a firm doing business in Ft. Worth, Tex., and afterwards returned to it in consequence of the insolvency of said firm. Having thus accepted the vehicles and canceled its debt, the carriage company placed them in the hands of Culbertson, Wright & Co. for sale on commission. Thereupon appellant caused them to be seized and sold under attachment as the property of said insolvent firm. The sole defense interposed to this action for conversion is founded upon the act of 1889 (page 87), re-

quiring any foreign corporation 'desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state,' to file with the secretary of state a duly certified copy of its articles of incorporation, and denying the right of any such corporation to maintain an action 'in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed' it had so filed its articles of incorporation.

"Appellant urged the defense by plea in abatement, on demurrer, and in bar. The plea in abatement was stricken out on motion and exceptions because it came too late. This action was proper, if, as the court held, such defense cannot be interposed in bar of the action. The contention of appellant's counsel seems quite plausible that this defense, like that of outlawry or alien enemy, is available in either form. 1 Chit. Pl. 446, 447. But if there was error in restricting it to a plea in abatement—which we need not decide—we are still of opinion that the pleadings would not have warranted a judgment in bar of the action. It was nowhere alleged that the Ohio corporation in question had ever transacted or solicited business or established an office in Texas, or that it had even desired to do so. It was not, then, alleged to be a foreign corporation of the class which the act of 1889 required to file articles of incorporation with the secretary of state. That act was not intended to apply, and does not in terms apply, to foreign corporations not undertaking to do business in this state, and could not be made to apply to such foreign corporations while engaged in interstate commerce. *Bateman v. Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931. The right of a foreign corporation to own property here is an undisputed one, and yet it would be an empty right, indeed, if a trespasser might seize and convert such property to his own use with impunity. *Mortgage Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384; *United Lines Tel. Co. v. Boston Safe-Deposit & Trust Co.*, 147 U. S. 431, 13 Sup. Ct. 396 [37 L. Ed. 231]. The only consequence of any failure of corporations to which the act applies to comply with its requirements is exclusion from our courts, which is in the nature of a penalty to enforce obedience to the law. As said by the Supreme Court of Arkansas in construing a statute of this class, it 'declares and limits the penalty of noncompliance. Having done so, the penal consequences cannot be extended beyond the boundaries so defined.' *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia* [60 Ark. 325], 30 S. W. 350 [28 L. R. A. 83]. Appellant sought to shield itself from the consequences of its own wrong by invoking the penal consequences of this law against the corporation whose property it had tortiously converted to its own use, and should, we think, be held to the same strictness in pleading as is required of one claiming a statutory penalty. A party who thus claims something for nothing should bring himself, both by pleading and proof, within the very terms of the penal statute. *Murray v. Railroad Co.*, 63 Tex. 407 [51 Am. Rep. 650]; *Railway Co. v. Cruse*, 83 Tex. 460, 18 S. W. 765; *Railway Co. v. Loonie*, 84 Tex. 259, 19 S. W. 385. The facts stated in the petition did

not bring the case within the terms of the act; hence the demurrer was properly overruled, as has been decided by this court. *Reed v. Walker*, 2 Tex. Civ. App. 92, 21 S. W. 687. Nor did the answer, including the plea in abatement, do it; for it only alleged that the carriage company was a foreign corporation, and that it had not filed its articles of incorporation as required by the act of 1889. The mere fact of its being a foreign corporation, and no other fact, was alleged to show that it was required to conform to the law in question. We doubt, also, if the court's findings of fact—the record containing no statement of facts—justify the conclusion that appellee carriage company was engaged in any other than interstate business. *Manufacturing Co. v. Freeman*, 113 U. S. 727, 5 Sup. Ct. 739 [23 L. Ed. 1137]. It is clear that it was engaged in that business, and that the single transaction in question was but an incident thereof. It seems to be conceded that it had the right to take the vehicles back in self-protection, but it is insisted that they should have been re-shipped to Ohio, and not sold here. Such requirement would seem to be unreasonable."

The Supreme Court denied a writ of error in the case just above quoted.

The only reference to the identity or business of the plaintiff contained in the entire record is contained in the first paragraph of plaintiff's petition, in the following language:

"W. R. Pickering Lumber Company, a private corporation, duly incorporated under the laws of the state of Louisiana, with a permit to do business in the state of Texas, hereinafter styled plaintiff."

There is no proof that said plaintiff is a corporation, or a foreign corporation, or that it is engaged in any sort of business, or has a general or special office within the state, or that the suit grew out of any business in which plaintiff is engaged, and no exceptions are directed to the plaintiff's petition on that score.

See *R. J. Allen et al. v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714; *Crews & Williams v. Gullett Gin Co.*, 189 S. W. 793; *Implement C. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972; *Brin v. Shirt Co.*, 43 S. W. 295; *Tel. & Tel. Co. v. Kellogg*, 62 Tex. Civ. App. 402, 132 S. W. 963; *Erwin v. Powder Co.*, 156 S. W. 1097; *King v. Monitor Drill Co.*, 42 Tex. Civ. App. 288, 92 S. W. 1047; *Gelser Mfg. Co. v. Gray*, 59 Tex. Civ. App. 617, 126 S. W. 610; *Stein Double Cushion Tire Co. v. Fulton*, 159 S. W. 1016; *Tyler v. Consolidated Portrait Frame Co.*, 191 S. W. 710; *Miller & Co. v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Latham & Co. v. Louer Bros.*, 176 S. W. 920.

We have gone over this record carefully, and, in our judgment, no error was committed by the trial court, and therefore the judgment is in all things affirmed.

## MERCHANTS' LIFE INS. CO. v. GRISWOLD. (No. 6007.)

(Court of Civil Appeals of Texas. April 23, 1919. Rehearing Denied June 4, 1919.)

1. CORPORATIONS  $\S$ 390(2)—POWER OF DIRECTORS—CONTROL OF BUSINESS AFFAIRS—LIMITATION OF CHARTER AND BY-LAWS.

While the directors of a corporation, subject to limitations of charter and by-laws, have as much control of its business affairs as an individual has over his own business, their power is no greater.

2. CONTRACTS  $\S$ 303(3)—BREACH—LIABILITY FOR DAMAGES—ACT OF GOD.

Neither an individual nor a corporation has the legal right to breach a contract for the reason that it may be to the financial interest of such party to do so, and either is liable for damages caused by a breach of contract, even though it be occasioned by the act of God.

3. MASTER AND SERVANT  $\S$ 23—BREACH OF EMPLOYMENT CONTRACT BY RETIRING FROM BUSINESS—LIABILITY FOR DAMAGES.

If one by retiring from business breaks a contract of employment, he is liable to employé for damages.

4. INSURANCE  $\S$ 85—EMPLOYMENT CONTRACT—BREACH—LIABILITY FOR DAMAGES.

Where the agent for life insurance company bound himself to engage in no other business during the life of his contract, traveled over his territory and spent both time and money in establishing agencies, which both parties contemplated would be done, and company did not quit doing business as provided in contract, but voluntarily amended its charter so that it could not thereafter continue the business under the contract of writing insurance on the assessment plan, and there could be no renewals or commissions thereon, it terminated the agency, and the company was liable for damages for breach.

5. CONTRACTS  $\S$ 10(2)—EMPLOYMENT—MUTUALITY.

A contract which bound an insurance company to employ an agent for five years, and bound the agent to work for that period unless the contract should be sooner terminated in one of the methods stipulated, and providing for compensation by a percentage on new and renewal insurance premiums, held not void for want of mutuality.

6. CONTRACTS  $\S$ 10(2)—EMPLOYMENT—RIGHT TO TERMINATE.

A contract between an insurance company and its agent was not rendered unilateral by a stipulation under which the agent could terminate the contract at his option by giving 90 days' notice in writing of his intention to do so, nor was the contract made thereby one at will on the part of the agent.

7. CONTRACTS  $\S$ 10(1)—VALIDITY—TERMINABLE AT OPTION—CONSIDERATION FOR OPTION.

A contract is not void because it is terminable at the option of one of the parties if there is a valid consideration for such option.

8. INSURANCE  $\S$ 73 — EMPLOYMENT CONTRACTS—CONSIDERATION FOR OPTION AGREEMENT—ESTABLISHMENT OF AGENCIES.

The time and money expended by a life insurance agent in establishing agencies, being contemplated by the parties, constitutes a sufficient consideration for the agent's option to terminate the employment contract upon 90 days' notice.

9. INSURANCE  $\S$ 85 — EMPLOYMENT CONTRACT—BREACH—CHANGE OF BUSINESS—OFFER OF RE-EMPLOYMENT.

In an action against an insurance company for breach of an agency contract to write insurance on the assessment plan, by ceasing to write such insurance an offer to the agent of a contract to write on the level premium plan, is material only in so far as it tends to reduce the amount of recovery by showing what he could have earned during the life of his contract and after its breach.

10. INSURANCE  $\S$ 85 — EMPLOYMENT CONTRACT—OFFER OF RE-EMPLOYMENT OF INFERIOR QUALITY—DUTY TO ACCEPT.

Where an insurance agent was under contract to sell insurance on the assessment plan, and the contract was breached by the company ceasing to sell such insurance and adopting the level premium plan, the agent was under no obligation to accept employment of an inferior quality under the latter plan until he had tried to obtain other satisfactory employment.

11. INSURANCE  $\S$ 85 — EMPLOYMENT CONTRACT—BREACH—NEW AGENCY CONTRACT—REFUSAL OF WORK—BAD FAITH OF AGENT—QUESTION FOR JURY.

In an action by an agent against insurance company for breach of an employment contract, whether the employé agreed to work for employer as agent under its new plan of insurance with inferior contract, and the company annulled the contract on account of agent's bad faith in going to work for another company, was an issue of fact for the jury, under the pleadings and evidence, which was sufficient to sustain a finding upon the issue for plaintiff.

12. DAMAGES  $\S$ 40(2)—BREACH OF CONTRACT—CONTEMPLATED PROFITS.

In a proper case contemplated profits may be recovered as damages for breach of contract.

13. DAMAGES  $\S$ 24—UNCERTAIN OR CONTINGENT DAMAGES—AMOUNT—EXISTENCE OF ANY DAMAGES.

The rule that damages which are uncertain and contingent cannot be recovered does not apply where the uncertainty is only as to the amount of loss suffered by breach of a contract, but where it is uncertain as to whether any damages resulted therefrom.

14. CONTRACTS  $\S$ 40(2)—BREACH—LOSS OF PROFITS—EVIDENCE.

Damages for loss of profits recoverable for breach of contract must be such profits as appear from the contract itself, and not the inability by reason of such breach to carry out some collateral or speculative venture, and the evidence must furnish some standard by which the amount of the profits which would accrue

but for the breach can be estimated with some degree of probability.

**15. DAMAGES ⇨190—BREACH OF EMPLOYMENT—CONTRACT—PROFITS—EVIDENCE OF PAST PROFITS.**

In an action by an insurance agent for breach of an employment contract where he had the exclusive right to represent the company in 42 wealthy and populous counties, evidence of profits the agent had made *held* a sufficiently accurate standard to enable the jury to estimate the amount of profit the agent would have received under the contract had employer not breached it.

**16. INSURANCE ⇨85—BREACH OF EMPLOYMENT CONTRACT—LIABILITY FOR DAMAGES—REASONABLY RESULTING DAMAGES.**

Where an insurance company breached its contract with its agent by ceasing to write the kind of insurance embraced in the employment agreement, it became liable to him for all damages reasonably resulting from such breach.

**17. DAMAGES ⇨40(2) — EMPLOYMENT CONTRACT—BREACH—ELEMENTS OF DAMAGES.**

In an action by an insurance agent against the company for breach of an employment contract, such profits as it reasonably appeared were a loss to the agent by reason of the company's breach of the contract were proper elements of damage.

**18. INSURANCE ⇨85 — EMPLOYMENT CONTRACT BY INSURANCE COMPANY—BREACH—RENEWALS—PREMATURE ACTION.**

Where an insurance company breached its contract with an agent both as to commissions on assessment policies that might have been written, and as to renewals thereof which would otherwise have accrued, the agent's suit for damages was properly brought for the breach, although before the stipulated termination of the contract, and it was not error to submit that the company was indebted to the agent on renewal contracts.

**19. APPEAL AND ERROR ⇨1062(1)—HARMLESS ERROR—BREACH OF CONTRACT—REFERENCE TO DAMAGE OR DEBT.**

In an action by an agent against an insurance company for breach of employment contract, compensation of which was based upon new and renewal assessment premiums, the court was technically in error in referring, in question submitted to jury, to compensation as a debt; but, where the verdict as to this item was neither more nor less by reason of the misnomer, the error must be deemed harmless.

**20. INSURANCE ⇨85—BREACH OF EMPLOYMENT CONTRACT—DAMAGES BASED UPON INSURANCE COMMISSIONS—EVIDENCE TO SUPPORT VERDICT.**

In an action by an insurance agent against the company for breach of an employment contract, where the amount of damages depended largely upon the number of policies written and which would have been written, and which would not have lapsed during the period of his contract, which amount in no case could have been reduced to a certainty, and which might have been most satisfactorily shown by experts,

evidence *held* such that the jury's verdict for plaintiff cannot be said to be unsupported.

**21. TRIAL ⇨121(2)—CONDUCT OF COUNSEL—STATEMENT AS TO DAMAGES.**

In an action for breach of employment contract, the statement of defendant's counsel that the evidence would sustain a verdict for \$25,000, there being nothing inflammatory in its character, was not misconduct, counsel having the right to present to the jury his deductions from the evidence.

**22. APPEAL AND ERROR ⇨1060(1)—TRIAL ⇨115(2)—HARMLESS ERROR—MISCONDUCT OF COUNSEL—STATEMENT AS TO ANSWER OF SPECIAL QUESTIONS.**

In an action for damages for breach of an employment contract, statement of plaintiff's counsel, "Remember, if you want the plaintiff to recover, answer the first question, 'No,'" *held* improper, since it ought not to be assumed that an impartial jury wanted to return a verdict for either party, but that they desired to return such verdict upon special issues as the evidence demanded, but such misconduct did not constitute reversible error where the jury must have known how such first question must be answered in order that plaintiff might recover.

Error from District Court, McLennan County; H. M. Richey, Special Judge.

Action by S. M. Griswold against Merchants' Life Insurance Company. Judgment for plaintiff, and defendant brings error. Judgment affirmed.

Locke & Locke, of Dallas, for plaintiff in error.

S. J. T. Smith, Alva Bryan, and J. N. Gallagher, all of Waco, for defendant in error.

**Findings of Fact.**

JENKINS, J. Plaintiff in error, which will hereinafter be referred to as the company, is a life insurance company, chartered under the laws of Iowa, and doing business in Texas under a legal permit. Prior to February, 1915, it was an assessment association, legally doing business in Texas on the assessment plan, under the name of the Merchants' Life Association. On February 9, 1915, it amended its charter, whereby it changed from the assessment to the level premium, or old line, plan, and changed its name to Merchants' Life Insurance Company, preserving, however, its corporate identity, with authority to carry out its previous contracts.

On April 1, 1914, the insurance company entered into a written contract with the defendant in error, who will hereinafter be referred to as Griswold, which, as far as it goes, is correctly summarized in the company's brief as follows:

"(1) The plaintiff was given exclusive control of specified territory.

"(2) The plaintiff agreed to devote all his time and ability to the work of the agency.

"(3) 'Subject to the provisions hereinafter contained, this contract shall continue for a period of five years.'

"(4) 'It is understood and agreed that the said second party (the plaintiff) shall have the option at any time of terminating the agency by giving the first party (the defendant) ninety days' notice in writing of his intention to give up the agency hereby established.'

"(5) 'The continuance of the agency was conditioned upon the production of a specified amount of business in each contract year and in each quarter of each contract year.'

"(6) 'Should the second party (the plaintiff) fail to live up to and fully comply with the terms, agreements, and conditions of this contract, then the said contract, at the option of the first party (the defendant), may be terminated by the first party giving the second party ninety days' written notice of its desire to so terminate the said contract.'

"(7) 'It is further understood and agreed by the parties hereto that should the laws of Texas be so amended hereafter, or should the party of the first part (the defendant) for any reason whatever deem it advisable to quit business in the said state of Texas during the life of this contract, then at and from the time the said association is no longer authorized to do business in the said state of Texas this contract shall be utterly null and void so far as any future business contemplated by the contract is concerned, but as to all the rights and liabilities of the several parties existing at the time of the said cessation of business the contract is to remain in full force and effect.'

"(8) 'It is further agreed that the contracts made on the first day of April, 1912, the first day of July, 1912, and the first day of January, 1914, are hereby terminated, except that so long as the second party (the plaintiff) writes the amount of insurance provided for in this contract, and remains the agent of said company, he shall be entitled to receive the renewal commission provided for in said contracts hereby terminated, during the period and under the terms and conditions that the renewal was to be paid under the original contracts.'

The contracts of April 1, 1912, July 1, 1912, and January 1, 1914, were substantially the same as that of April 1, 1914, under which this suit was brought. There was some difference as to territory and commissions.

The ninth paragraph of the contract provided that Griswold should receive "75 per cent. of the initial payment, being the membership fee, as provided in the articles of incorporation, upon all accepted applications, which shall be in full compensation of every kind and description which he or his sub-agents shall receive from said association, whether for commission, traveling or other expenses, except as hereinafter provided." This was afterwards increased to 80 per cent.

In a subsequent part of the contract it was provided that Griswold should have a renewal commission of 75 cents, for a period of five years, on each thousand dollars of insurance secured for, and accepted by, the company within the territory granted to him.

About February 15, 1915, the company notified Griswold to quit writing insurance on the assessment plan, and soon thereafter offered him a contract to write insurance for it under its changed or level premium plan. Griswold declined to sign said contract, and brought this suit for damages, alleging a breach of the contract of April 1, 1914, claiming as such damages the profits which he would have made under said contract, including his commissions on renewals but for such breach.

The cause was submitted to a jury on special issues; in response to which they found that the company was indebted to Griswold, on business actually written, \$5,000, and for damages on lost profits as to future business, \$20,000, and judgment was entered in accordance therewith. The evidence was sufficient to sustain these findings. Such other facts as are material to the issues here involved are stated in our opinion herein.

#### Opinion.

[1, 2] The first assignment of error herein is:

"The court erred in submitting to the jury its fourth special issue for reasons as follows:"

These reasons are subsequently set out in the company's brief as propositions and points thereunder, and need not be here stated.

The fourth special issue is as follows:

"Fourth Question: State in what amount, if any, plaintiff has been damaged by his inability to write new business under his new contract of April 1, 1914, and modified by supplemental contracts of December 30, 1914, and January 1, 1915, on and after the first day of March, 1915.

"In answering this question you may take into consideration the gross amount of commissions which, under all the facts and circumstances, you find the plaintiff might be reasonably expected to have received from business written or procured by him to be written under the terms of said contract and supplements, and any renewal commissions thereon, if any, less such expenses as you find he might reasonably have incurred in writing and procuring the writing of such business, and less such sums as you may find from the evidence he has received, and may reasonably be expected to receive, during the life of said contract as the result of other employment, after deducting therefrom the reasonable and necessary expenses incident to such employment.

"Answer to the fourth question: \$20,000.00."

The company's contentions under this assignment may be summarized as follows:

(a) The company did not breach its contract for the reason it was provided therein that the company might withdraw from the state if for any reason it should deem it advisable to do so.

(b) The directors had the power to withdraw from the state, and thus terminate the contract, if, in their discretion, they deemed it to the interest of the company to do so.

(c) The contract was void for want of mutuality.

(d) The company offered to continue Griswold in its employment, and he refused to accept same.

(e) Griswold accepted a new contract with the company, which by its terms abrogated the contract herein sued on.

(f) The evidence was insufficient to form a basis for an answer to said fourth issue.

We will discuss these propositions in the order named:

(a) As will be seen from the seventh clause of the contract as set out in our statement of facts, it was provided that if the company "for any reason whatever should quit business in Texas the contract should thereafter be null and void."

It is the contention of Griswold that, under the doctrine of *ejusdem generis*, it should be held that the company was permitted to terminate the contract by quitting business in Texas, only in the event it was rendered necessary to do so by adverse legislation or ruling of the insurance department of the state; that at least the contract is ambiguous, and therefore oral testimony was admissible to show that this is the meaning that the parties intended; and that the oral testimony admitted by the court (over the company's objection) sustained this contention.

It is unnecessary that we should pass upon this matter for the reason the company did not quit business in Texas, but was continuing to do business in this state to the time of the trial.

(b) It is true that the directors of a corporation, subject to the limitations in its charter and by-laws, have as much control over the business affairs of a corporation as has an individual over his own business, but not more so. Neither an individual nor a corporation has the legal right to breach a contract for the reason that it may be to the financial interest of such party to do so. On the contrary, a party who breaches a contract is liable in damages therefor, even though such breach may have been occasioned by the act of God. *Ins. Co. v. Watkins*, 183 S. W. 437; *Ry. Co. v. Boyce*, 171 S. W. 1094.

[3, 4] The company cites, in support of its contention as to the right of its directors to change its plan of doing business, *Ins. Co. v. Maclure*, L. R. 5 Ch. App. 737 (an English case); *Pellet v. Mfg. Co.*, 104 Fed. 502, 43 C. C. A. 669; *Wolfe v. Ins. Co. (D. C.)* 197 Fed. 188; *Id.*, 207 Fed. 262, 124 C. C. A. 648; *Ins. Co. v. Burman*, 141 Fed. 835, 73 C. C. A. 69; *Moore v. Ins. Co.*, 168 Fed. 496, 93 C. C. A. 652; and *Wheeler v. Ins. Co.*, 227 Fed. 369, 142 C. C. A. 65.

The last three cases were contracts terminable at will, and therefore have no application to the instant case. The *Wolfe Case* was one of general agency for a fire insurance company. The company did not terminate the agency, but only restricted the agent to risks that were not hazardous and which had proved unprofitable to the company. The right of the directors of the company so to do was clearly within the contemplation of the parties when the contract was signed. Applying this rule to the instant case, had the company instructed Griswold not to accept a certain class of persons for the reason that it did not consider them good risks, such restriction being in good faith, and not for the purpose of destroying the value of Griswold's contract, would not have been a violation of the contract, though it might have reduced Griswold's profits.

In the *Maclure Case*, *supra*, the court held that an insurance agent who held a contract whereby the company agreed to pay him £500 per annum for five years, and 10 per cent. commission on all business secured by him, could recover the full amount of his salary, but not the profits which might have resulted from business done by him but for the breach of the contract. The company breached the contract by voluntarily retiring from business. The decision appears to be based upon the idea that to compel the company to pay the agent for loss of his prospective commissions would, in effect, be to allow him to force the company to continue business for his benefit. The reasoning is unsound. No one can be forced to continue business for the benefit of an employé; but, if one by retiring from business should breach his contract with an employé, he would be liable to such employé for the damages occasioned by such breach. For illustration: Suppose a merchant should employ a clerk for 12 months at a stated salary, but at the expiration of six months should retire from business. Under the decision in the *Maclure Case* the clerk would be entitled to recover his salary for the remaining six months, less what he was able to earn for that time in some other employment. In other words, the clerk would recover such damages as he had suffered by reason of the breach of the contract. Why should he not be entitled to recover such damages if he was employed upon a commission basis instead of a salary?

We are not now discussing the character of evidence required to determine the amount of damages recoverable if the contract was on a commission basis, but only the legal principle that compensation will be allowed for breach of a contract. The question of recovery of prospective earnings or profits as damages for breach of contract will be discussed in a subsequent part of this opinion.

In *Pellet v. Ins. Co.*, supra, Judge Grosscup seems to have adopted the view expressed in the *Maclure Case*, viz. that to allow an agent to recover for commissions which he might have earned had the company continued business would be, in effect, to permit such agent to force the company to continue business for his benefit. This case was decided by a circuit court, Judges Seaman and Woods sitting with Judge Grosscup. The associate judges concurred in the result reached, but did not indorse the reasons given by Judge Grosscup. Judge Seaman, in his concurring opinion, based the same upon:

"(1) That suit was commenced while performance under the contract was continuing on the part of the plaintiffs, and under which they accepted benefits thereafter; (2) that the plaintiffs practically abandoned the contract by accepting inconsistent obligations before the alleged act of abandonment on the part of the defendant, and when performance by the latter was neither refused nor made impossible; and, on the case as a whole, (3) that the undisputed circumstances show the action to be prematurely brought as well as without substantial merit. Therefore the judgment is rightfully affirmed." 104 Fed. 512, 513, 43 C. C. A. 680.

The facts in the *Pellet Case* further differentiate it from the instant case, as appears from the following excerpt from Judge Grosscup's opinion:

"The plaintiffs in error conducted a general insurance agency, and represented, in addition to the defendant in error, five or six other companies. It is not claimed that, upon the strength of the making and continuance of the contracts sued upon, they enlarged their office expenses, increased their clerical force or other equipment, or in any way injuriously assumed liabilities, or made preparations, that would not otherwise have existed."

In the instant case *Griswold* bound himself to engage in no other business during the life of his contract with the company; he traveled over his territory, and spent both time and money in establishing such agencies, which it was contemplated by both parties, at the time the contract was made, he should do.

As hereinbefore stated, the company did not quit doing business in Texas, but, by voluntarily amending its charter so that it could not thereafter continue business on the assessment plan, it rendered itself incapable of carrying out its contract with *Griswold*, whose remuneration under the contract depended entirely upon a percentage of the first assessments paid by policy holders, and renewal commissions thereon. There could be no such assessments under the plan as changed.

*Newcomb v. Ins. Co.*, 51 Fed. 725, Id., 62 Fed. 97, 10 C. C. A. 288, was a case wherein, as in the instant case, the insurance company changed from the assessment or natural premium plan to the level premium plan, com-

monly known as old line insurance. The court said:

"It must be held, without doubt, that if the plaintiff was appointed an agent of the defendant company to solicit risks according to one method of insurance, and the company subsequently abandoned that mode of transacting business without his consent, and refused to permit the plaintiff to solicit risks according to such method or plan, then it, in effect, terminated the agency, and the act of the company in so doing was wrongful, unless, by the provisions of the contract existing between the parties, the company had reserved to itself the power of terminating the agency whenever it thought proper."

There was no such provision in the contract sued on. This suggests a sufficient answer to the argument that to allow an employé to recover profits, after the principal desires to quit business, is, in effect, to force the principal to continue business for the benefit of the employé. If the principal desires the privilege of terminating the contract by retiring from business, he should insert such provision in the contract; in which case the employé, of course, would be at liberty to accept or decline the employment on the terms offered.

[5] (c) The contract is not void for want of mutuality. It bound the company to give *Griswold* employment for five years, and it bound *Griswold* to work for the company for that period of time, unless the contract was sooner terminated in one of the methods therein stipulated. It was not terminated in either of such methods.

[6, 7] It is contended that the contract was unilateral, for the reason that *Griswold* had the right to terminate the same at his option by giving 90 days' notice in writing of his intention so to do. This did not constitute the contract one at will on the part of *Griswold*. He was bound to serve the company for 90 days after such notice. Besides, a contract is not void because it is terminable at the option of one of the parties, if there is a valid consideration for such option. *Taber v. Dallas County*, 101 Tex. 250, 106 S. W. 332; *Ry. Co. v. Eldredge*, 155 S. W. 1011; *Ry. Co. v. Scott*, 72 Tex. 76, 77, 10 S. W. 99, 13 Am. St. Rep. 758; *Half v. Waugh*, 183 S. W. 843.

[8] If the contract should be held to be terminable at the option of *Griswold*, the time and money expended by him in establishing agencies, the same being in contemplation of the parties when the contract was made, constitutes a sufficient consideration for such option.

[9, 10] (d) It is true that the company offered to employ *Griswold* to write insurance under the level premium plan, but this fact is material only in so far as it may tend to reduce the amount of recovery by showing what he could have earned in other employment during the life of his contract and after

the breach of the same. The contract which it offered him was essentially different from that which he had. It did not give him any exclusive territory, and he would have been subject to discharge at the will of the company. Griswold was experienced in writing assessment insurance and had been successful therein. He had but a limited experience in writing insurance on the level premium plan, and had not made a success in this kind of insurance. He was under no obligation to accept employment of an inferior quality, at least not until he had tried to obtain other satisfactory employment. *Buffalo Bayou Co. v. Lorentz*, 177 S. W. 1184; *Simon v. Allen*, 76 Tex. 398, 13 S. W. 296. After having tried other employment without success, Griswold offered to go to work for the insurance company under the contract offered him, and it refused to give him such employment.

[11] (e) The company alleges that Griswold did in fact agree to work for it after it changed its plan of insurance, under a contract which annulled the contract herein sued upon, and that its subsequent refusal to permit him to work for it was on account of his bad faith in going to work for another insurance company. This was an issue of fact under the pleadings and the evidence, to be determined by the jury. It was submitted under a special issue, and the jury found thereon in favor of Griswold. The evidence was sufficient to sustain this finding.

[12] (f) It is the contention of the company that the evidence as to what Griswold would have earned under the contract, had the same not been breached, was not sufficient to justify the submission of the fourth special issue hereinbefore set out. It is well settled in this state, as well as in other jurisdictions, that in a proper case contemplated profits may be recovered as damages for breach of a contract. This point was fully considered by this court in *Construction Co. v. Caswell*, 141 S. W. 1015, 1017.

[13] This is in fact conceded in the able brief filed by the company's attorneys herein, who are not only lawyers of great learning and ability, but may be classed as experts in the law pertaining to insurance, if it be proper in any case to apply the term "expert" to a branch of the legal profession. Their contention on this point is not that the verdict of the jury is excessive as to the amount found, but that the evidence as to the profits that would have been earned in writing future business is too uncertain to justify a finding as to any amount of such profits; that it furnished the jury no standard by which to estimate such profits, but necessarily required that their verdict should be entirely a guess in the field of uncertain speculation.

It is true that the determination of the amount which Griswold might have been able to earn under his contract, but for the breach

of same, is to some extent speculative and uncertain. But this is true in practically every case as to future profits which might have been realized under a contract but for the breach of the same. No one can tell with mathematical certainty what would have been the result of an event which never occurred. In the instant case Griswold may not live until the expiration of the time fixed in his contract; he may become disabled by accident or disease; for reasons satisfactory to himself, he might, by giving 90 days' written notice to the company, have terminated his contract; the agency which he had built up, and upon which he was in a large measure dependent for success, might have been destroyed by his agents accepting more remunerative employment; peculiarly bad trade conditions might have occurred, which would have prevented his writing the amount of insurance which he had obligated himself to produce, in which event his contract by its terms would have been automatically canceled. Uncertainties such as these necessarily exist more or less in all suits based upon loss of profits.

In *Wells v. Ins. Co.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 55, the court quotes with approval from *Dennis v. Maxfield*, 10 Allen, (Mass.) 138, as follows:

"These earnings or profits were therefore within the direct contemplation of the parties when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation. \* \* \* Would it be a valid defense, in the event of loss, to say that no damages could be claimed or proved, because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is that in such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach."

There is more uncertainty as to the amount of damages resulting by wrongful injuries, or from death by wrongful act, than as to breach of contract; but it has never been held that such uncertainty is a bar to a cause of action for the recovery of such damages.

The rule that damages which are uncertain and contingent cannot be recovered does not apply where the uncertainty is only as to the amount of loss suffered by breach of a contract, but where it is uncertain as to whether any damages have resulted therefrom. *Wells v. Ins. Co.*, supra; *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 590; *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723; *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315; *Myers v. Ry. Co.*,



43 App. Div. 573, 60 N. Y. Supp. 284; *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. 1036.

[14] It is true that damages for loss of profits to be recoverable for breach of contract must be such profits as appear from the contract itself, and not the inability by reason of such failure to carry out some collateral or speculative venture; also that the evidence must furnish some standard by which the amount of the profits which would have accrued but for the breach of the contract can be estimated with some degree of probability.

[15] We think the evidence in this case complies with both of these requirements. It is apparent that both parties to the contract contemplated that Griswold expected to derive some profit therefrom, and that such profits would result from the commissions received by him on insurance that he might be able to secure through his efforts and through the efforts of his subagents. He was an experienced insurance agent in this character of insurance. He had been writing insurance for the company from April, 1912, to February, 1915, when the company breached the contract. The amount of insurance written by him for each year during this time was shown by the evidence. At the time the contract was breached he had the exclusive right to represent the company in 42 wealthy and populous counties in this state. A distinguished American said upon a memorable occasion: "I know of no way of judging the future except by the past." Judgments thus formed are not always accurate, but they are sufficiently so to control the actions of reasonable men in the most important affairs of life; and we think this standard is sufficiently accurate to have enabled the jury in this case to estimate the amount of profits which Griswold would have received under his contract had he been permitted to carry it out.

[16] Our conclusions under the first assignment of error may be summed up as follows:

(1) The insurance company breached its contract with Griswold, by reason of which it became liable to him for all such damages as reasonably resulted from such breach. *Macgregor v. Ins. Co.*, 121 Fed. 493, 57 C. C. A. 613; *Lewis v. Ins. Co.*, 61 Mo. 534; *Israel v. Ins. Co.*, 111 Minn. 404, 127 N. W. 188; *Crowell v. Ins. Co.*, 99 Minn. 214, 108 N. W. 904; *Stowell v. Ins. Co.*, 61 App. Div. 58, 70 N. Y. Supp. 84; *Ins. Co. v. Ross*, 170 S. W. 1062; *Newcomb v. Ins. Co.*, 51 Fed. 725; *Id.*, 62 Fed. 97, 10 C. C. A. 288; *Smith v. Smith*, 116 App. Div. 165, 101 N. Y. Supp. 521; *Lovell v. Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 426; *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 170.

[17] (2) Such profits as it reasonably appeared were lost to Griswold by reason of the breach of the contract were proper elements of damage. See authorities hereinbe-

fore cited, and also *Dickinson v. Lyle*, 180 S. W. 904; *San Antonio v. Royal*, 16 S. W. 1102.

[18] The second assignment of error is as follows:

"The court erred in submitting to the jury its third special issue, for that this action is brought for the recovery of damages for an alleged breach of contract, and not for the recovery of renewal commissions owing under such contract, and said issue, therefore, is not relevant or material to any question presented by the pleadings."

The company's contention under this assignment is, in effect, that this is a suit to recover damages for breach of a contract, and it was therefore error to submit to the jury the question as to how much the company was "indebted" to Griswold on renewal contracts; that, "if the termination of the agency was wrongful, the plaintiff's right to receive his renewal commissions from time to time as they accrued was not destroyed thereby; but neither was that right converted into a right to receive in advance of their accrual the commissions that would become due if and when the premiums were paid."

Griswold alleged that many of the policy holders were induced by the insurance company to exchange their policies for level premium policies, under which no renewal premiums will become due. The company having breached its contract, both as to commissions on policies that might have been written and as to renewals which otherwise would have accrued, this suit was properly brought for damages, including such amount as would have accrued to Griswold but for such breach. *Wells v. Ins. Co.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33. In this case the court quotes with approval from *Dennis v. Maxfield*, 10 Allen (Mass.) 138, as follows:

"The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract." 99 Fed. p. 228, 39 C. C. A. 482, 53 L. R. A. 54.

[19] Griswold sued for loss of renewals as damages for breach of his contract. The court was technically in error in the third question in referring to such compensation as a debt, but we do not think that this could have influenced the jury to the injury of the company. Their verdict as to this item was neither more nor less by reason of this misnomer.

[20] The third assignment of error complains of the finding of the jury in response to the third question as being excessive. The answer was \$5,000. Attorneys for the company analyze the testimony on this point, and make a showing that the verdict should have been for only \$2,577.11. On the contrary, Griswold's attorneys claim that an analysis of the evidence from the viewpoint most fa-

avorable to the company shows that his renewal premiums would have amounted to \$8,311.25, and that a reasonable deduction from the evidence shows that he was entitled to recover on this item \$7,919.67. The amount of this item depends largely upon the number of policies written, and which would have been written, by Griswold, which would not have lapsed during the period of his contract. The amount of this item, which in no case could have been reduced to a certainty, might have been more satisfactorily shown by the testimony of experts. We are not able to say that the amount found by the jury is unsupported by the testimony.

[21] The fifth and sixth assignments of error complain of statements made by counsel for Griswold in his closing argument to the jury. One of these statements was that the evidence would sustain a verdict for \$25,000. There was nothing of an inflammatory character in this statement. Counsel had the right to present to the jury his deduction from the evidence.

[22] The other statement of counsel complained of was as follows: "Gentlemen of the jury, remember if you want the plaintiff to recover, answer the first question, 'No.'" This statement was improper. It ought not be assumed that an impartial jury wanted to return a verdict for either party, but that their desire was to return only such a verdict as the evidence demanded. One of the advantages in submitting special issues is to require specific findings by the jury on issues of fact, without reference to their effect on the judgment to be rendered thereon. However, it must necessarily often happen that the effect of an answer is so evident that an intelligent jury should not fail to understand the same. In such case, while the conduct of an attorney in stating such effect to the jury is not to be approved, it would not constitute reversible error. *Ry. Co. v. Fleming*, 203 S. W. 108. Such was the fact in the instant case. The first question was:

"When the plaintiff in this case telegraphed to the defendant on March 19, 1915, as follows, 'Send contract and supplies, am ready for work,' was he referring to work under the contract of which he had a sample form as introduced in evidence, given to him by the defendant while he was at Burlington, Iowa?"

The contract referred to in plain terms abrogated the contract sued on. Griswold did not deny, and could not have done so, that if his telegram referred to this contract he had no case. The jury could not have failed to understand that, unless they answered the first question "No," Griswold could not recover.

Finding no reversible error of record, we affirm the judgment of the trial court.

Affirmed.

GULF, C. & S. F. RY. CO. v. ANDERSON, CLAYTON & CO. (No. 8121.)

(Court of Civil Appeals of Texas. Dallas.  
April 19, 1919. Rehearing Denied  
May 31, 1919.)

1. CARRIERS ⇐134 — ACTION FOR LOSS OF GOODS—AGENCY—EVIDENCE.

In an action against a railroad company for the value of cotton destroyed by fire after having been loaded into one of its cars from the platform of a cotton compress company, to whom shipping instructions over defendant's line had been given, and while search was being made for one more bale on the platform to make the shipment complete, evidence held to sustain a finding that the compress company was defendant's agent for receiving and loading the cotton.

2. CARRIERS ⇐113—DELIVERY TO CARRIER—COMMENCEMENT OF LIABILITY FOR LOSS.

Where shippers having 100 bales of cotton on the platform of a compress company, which was the carrier's agent for shipment, gave orders for their shipment, and after 99 bales had been compressed, inspected, and loaded into two freight cars, a fire destroyed the 49 bales in the second car before the remaining bale could be found and before the bill of lading was signed, there was a sufficient delivery of the cotton to the carrier for transportation to make its liability as a carrier attach at the time of the fire.

3. CARRIERS ⇐113—LOSS OF COTTON BEFORE ISSUANCE OF BILL OF LADING.

Where, after all except 1 of 100 bales of cotton to be shipped had been delivered on cars of the railroad company for shipment, part of the cotton so delivered was destroyed by fire, that the railroad company kept an inspector to inspect cotton shipments, and would not issue a bill of lading until the entire shipment had been inspected, will not exempt the company from liability for the loss by fire, as the issuance of a bill of lading is not the sole criterion for the carrier's liability.

Talbot, J., dissenting.

Appeal from District Court, Dallas County;  
E. B. Muse, Judge.

Action by F. E. Anderson and others, composing the firm of Anderson, Clayton & Co., against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, Lee, Lomax & Smith, of Ft. Worth, and E. M. Browder and Locke & Locke, all of Dallas, for appellants.

C. M. Smithdeal, of Dallas, for appellees.

TALBOT, J. F. E. Anderson, M. D. Anderson, W. L. Clayton, and B. Clayton, composing the firm of Anderson, Clayton & Co. brought this suit to recover from the appel-

lant, Gulf, Colorado & Santa Fé Railway Company \$1,881.56, with interest from February 19, 1915, as the value of 49 bales of cotton alleged to have been delivered to the appellant at Ballinger, Tex., on February 9, 1915, and accepted by it for transportation to Houston, Tex., and which it is alleged should have been delivered to the plaintiff at Houston, Tex., on February 19, 1915. The defendant answered by general demurrer and general denial. At the close of the evidence the plaintiff and defendant each requested a peremptory instruction. That of the defendant was refused, and that of the plaintiff was granted; and, on the verdict of the jury returned in accordance with the court's instruction, judgment was entered in favor of the plaintiffs for \$2,147.46, being the principal and interest of the claim sued on at date of judgment, with interest thereon from November 9, 1917, at the rate of 6 per cent. per annum, and for all costs of suit. From this judgment defendant appealed to this court.

The following facts are deducible from the evidence:

The plaintiffs were a firm of cotton exporters, whose business was the purchase of cotton situate at compresses and the export of the same. Nicholson & Baker was a firm of what is known as f. o. b. buyers, whose business was the purchase of cotton at various interior points, the shipment or concentration of the same at compresses, and the sale of the same there to exporters. They resided at Ballinger, Tex., and the plaintiffs, Anderson, Clayton & Co., maintained a representative there, though the headquarters of the firm was at Oklahoma City, Okl. During the month of February, 1915, A. H. Carter was the representative and agent of plaintiffs, and engaged in buying cotton for them at Ballinger, Tex. About February 8, 1915, he bought from Nicholson & Baker 100 bales of cotton for plaintiffs. The cotton was then situated on the platform of the Texas Compress Company at Ballinger. Nicholson & Baker gave to plaintiffs an invoice for the 100 bales, in which the bales were specified by number. Plaintiffs received the samples for the bales of cotton accepted the invoice, and delivered a draft to be drawn by Nicholson & Baker on plaintiffs for the purchase price of the cotton, to which was to be attached a bill of lading from the defendant railway company, for the shipment of the 100 bales from Nicholson & Baker, Ballinger, Tex., to the order of Nicholson & Baker, Houston, Tex., with instructions to notify Anderson, Clayton & Co. The draft and its amount was based upon the weights and grades of the particular bales of cotton invoiced, as such weights and grades had been agreed upon.

On February 8, 1915, Nicholson & Baker delivered to the compress company shipping orders or instructions directing it to com-

press these 100 bales, mark them in a particular manner, and deliver them to the defendant for shipment, and at the same time deliver to A. H. Wiggle, the local freight agent of the defendant at Ballinger, a prepared bill of lading for signature by said freight agent, covering the 100 bales of cotton in question for shipment. The duties of Wiggle as local freight agent of the railway company were to receive and deliver freight of all kinds, to issue receipts, bills of lading, "and such other work of like character." The bill of lading prepared by Nicholson & Baker, and delivered to Wiggle, the defendant's agent, covering the 100 bales in question, was not signed and issued by him because, when it was presented, inspection of all the 100 bales of cotton had not been made in behalf of the defendant. The Western Weighing & Inspection Bureau was the agent of the defendant for inspecting cotton at different compress points in Texas, and J. H. Day was its inspector at Ballinger. The defendant would not accept cotton for shipment, and issue bills of lading for the shipment thereof, at Ballinger, until after the cotton was inspected by the Western Weighing & Inspection Bureau's inspector, J. H. Day. Mr Day's method of inspecting cotton, which was pursued in this instance, was to stand at the door of the railroad car as the cotton was being loaded and pass on each bale as it went into the car. The loading of the 100 bales bought by plaintiffs from Nicholson & Baker was begun, and 50 bales of the same, the usual number put into a car, were put into one car, and 49 bales into another car, of the defendant. The car containing the 50 bales which was completely loaded was switched by the defendant railway company from the track alongside the compress platform to a different track in the yard, so as to make room for other cars. The car into which the 49 bales had been put remained on the railroad track alongside the compress platform, open and awaiting the remaining bale expected to complete the shipment. The 99 bales put into the cars had been compressed, marked and inspected. This was the situation on the afternoon of February 9, 1915, and about 3:30 o'clock of that afternoon a fire broke out on the platform of the compress company, spread over its plant and to the car into which the 49 bales of cotton in question had been loaded, standing alongside said platform, and destroyed the same. At the time of the fire the hundredth bale had not been found. It was among about 8,000 or 9,000 bales of cotton on the compress platform, and the compress company, before and at the time of the fire, had three or four men trying to locate it, but they had not been able to do so. This bale had not been compressed, marked, or inspected.

There was testimony to the effect that, before the defendant railway company would is-

sue a bill of lading for the shipment of cotton, it required the compress company to issue what is known as a "compress clearance" certifying that the shippers had instructed a certain number of bales of cotton to be marked, compressed, and delivered to the railway company. This "clearance," according to the testimony of the superintendent of the compress company, is a notification to the railway company that the cotton is in the possession of the compress company and ready to be shipped, and all that remains to be done is to have the cotton inspected by the Western Weighing & Inspection Bureau. A. H. Carter, agent of appellees, testified that it was the custom of the railroad company to accept cotton for shipment on the compress platform at Ballinger. There was also testimony to the effect that the compress company loaded the cotton for the railway company and received therefor 2 cents a bale. The agent of the defendant had not signed any bill of lading prior to the fire, because, though he had received a report of inspection of one loaded car, containing 50 bales of the 100 bales of cotton to be shipped, he had received no report concerning the remaining bales, because the car containing the 49 bales needed another bale to complete the loading of the same and the shipment. Neither Nicholson & Baker, nor A. H. Carter, the representative of plaintiffs, nor the compress company on their behalf, made any request of the defendant railway company to proceed with the shipment of the 99 bales of cotton, or to issue any bill of lading for the 99 bales, until after the fire which destroyed the 49 bales, and neither the representative of the Western Weighing & Inspection Bureau nor the agent of the defendant had any information that the shipment was to be of any quantity less than 100 bales, or that that there was a desire to forward any part of the shipment until the whole was ready. The draft received by Nicholson & Baker from A. H. Carter, agent for plaintiffs, covering the 100 bales, would not have been honored, unless accompanied by a bill of lading for 100 bales of cotton issued by defendant, and they did not have a bill of lading covering 100 bales. Not having a bill of lading covering 100 bales of cotton, the draft originally issued was not collected by Nicholson & Baker, and they did not attempt to collect it.

After the fire and destruction of the 49 bales of cotton, and on February 10, 1915, the local freight agent of defendant at Ballinger, under instructions and by direction of its division freight agent, signed and delivered to Nicholson & Baker a bill of lading for the 99 bales of cotton, 50 of which had been loaded in one car and 49 in another, and Nicholson & Baker then returned to plaintiffs' representative, Carter, the draft originally issued for the 100 bales, which

were ordered shipped, and received in its place and stead a draft for the 99 bales covered by the bill of lading issued by defendant's local freight agent under instructions from the division freight agent. The bill of lading given for the 99 bales of cotton was dated February 9, 1915, but was signed and issued on February 10, 1915, and the local freight agent of defendant, who signed it, testified that he would not have issued this bill of lading, but for the instruction he received from the division freight agent, and that he had never before issued a bill of lading for property which had, in whole or in part, been destroyed by fire before the bill of lading was signed. This witness further testified that, so far as he knew, nothing more was to be done by the shipper in this case before the cotton would have been ready for shipment; that "there was no other place in Ballinger for compressed cotton to be loaded than the compress company's platform, but that the railway company did accept flat cotton on the railway company's regular depot platform." Upon this subject R. L. Bassett, superintendent of the Texas Compress Company, testified:

"The railroad company had no place, except the compress platform, for handling concentrated cotton."

At another place he said:

"The railroad company had another platform in Ballinger for shipment of cotton, and there was no reason, except additional expense to the shipper, why compressed cotton could not be shipped over the other platform."

He further testified:

"There was nothing else to be done to the 49 bales by the shipper to forward the shipment or prepare it for shipment, but the cotton could never go out until the shipment was finished. It was up to us to find the other bale, and if we could not find it the railroad would have refused to handle it, as the bill of lading called for 100 bales. I don't know whether the bill of lading had been signed, but presume it had been made out."

At the time in question J. S. Hershey, living at Galveston, Tex., was general freight agent of the defendant, and he testified without contradiction that the local freight agent of defendant at Ballinger and the division freight agent at Temple, Tex., got their instructions from him with reference to the reception of freight and the issuance of bills of lading, or from the department over which he (Hershey), as head of the freight department, had jurisdiction; that among the instructions given is item 15, Santa Fé System Circular 2249a, relating to handling of cotton, which is as follows:

"No receipt for cotton or cotton linters should be given to a shipper, or bill of lading signed, until the agent or his representative knows by

actual count and check that all of the cotton, properly marked as called for by receipt or bill of lading, has been received and placed on platform or other place designated by the agent, or in cars as directed by this company's agent. The inspection of cotton and cotton linters at Texas and Oklahoma compresses has been placed under the supervision of the Western Weighing & Inspection Bureau. Bills of lading covering these commodities must not be issued by you, except on inspection certificates of the bureau representative subject to the following instructions: Export, interstate, and international bills of lading will only be issued after the cotton has been compressed, inspected by a representative of the Western Weighing & Inspection Bureau, and either loaded into cars or placed in such position on compress platform as to enable careful inspection of the same as to condition."

He further testified that other instructions referring to the same thing are as follows:

"Bills of lading will not be signed until all the property is in the possession of the railroad company and under its actual control."

On cross-examination this witness said:

"If a man has said he has 100 bales of cotton, and when it comes to a show-down he has but 99, the agent would refuse to issue a bill of lading for 100 bales, but after receiving the 99 bales would issue a bill of lading for 99 bales, if it was acceptable to the shipper; that if they asked for a bill of lading for 99 bales that had actually been delivered and inspected, although his original tender was 100 bales, he would correct his request for 100 bales and bill of lading would be issued for 99."

J. H. Day, inspector, said that he inspected the 49 bales as they were being moved into the car, and that he accepted them on the track. The evidence fails to show any such negligence on the part of the appellant with respect to the origin of the fire or burning of the cotton as would render the appellant liable as warehouseman.

The only assignment of error presented in the brief is as follows:

"The court erred in the respect and for the reasons stated in the ninth ground of this defendant's objections to the action of the court in peremptorily instructing the jury to find for plaintiffs, and declining to instruct the jury to return a verdict herein for the defendant, which ground was as follows, to wit: 'The defendant excepts to the action of the court in refusing its specially requested charge directing the jury to return a verdict in its favor; for that the undisputed evidence shows that the 49 bales sued for were delivered to the defendant on account of a single shipment of 100 bales of cotton and no less, and that one bale of such shipment had not been delivered to the defendant prior to the fire, and that such 49 bales, as well as 50 other bales, were held by the defendant awaiting the receipt of the remaining bale necessary to complete the shipment, and that the defendant's duty with reference to said cotton was that of a warehouseman only, and not of a carrier, and for that it is neither al-

leged nor proved that the destruction of the cotton was due to any negligence of the defendant."

The charge requested by the defendant and refused by the court simply directed the jury to return a verdict for the defendant. The charge given by the court at the request of the plaintiffs reads thus:

"The uncontradicted evidence in this case shows that the 49 bales of cotton in question were delivered by the plaintiffs to the defendant for transportation; that said cotton, after it was delivered to and accepted by said railway company for transportation, was destroyed by fire; that its value at the time it was destroyed was \$1,835.50. Therefore you are instructed to return a verdict in favor of plaintiffs for the sum of \$1,835.50, with 6 per cent. interest thereon from February 9, 1915, to date."

The question to be decided is whether or not, from the circumstances related, the defendant's duties as carrier, and therefore as absolute insurer, had attached. After asserting that appellee's suit is based upon the theory that 99 bales of cotton were delivered to and accepted by the railway company on February 9, 1915, before the fire, for transportation, whereby it became liable as an insurer for the 49 bales, which were destroyed by fire, appellant advances, as a complete answer to appellant's suit, the propositions that a railway company is not liable as an insurer of goods ordered shipped by it until the entire quantity so ordered to be shipped is delivered to and accepted by it for shipment; that the entire quantity so ordered to be shipped in this case was 100 bales of cotton, but at the time of the fire 1 bale of the same had not been located, marked, compressed, and inspected, and had neither been delivered to nor accepted by defendant; that possession by the compress company of the 100 bales of cotton, or any part thereof, was neither possession of, delivery to, nor acceptance by the defendant railway company. Appellee contends that, since the undisputed evidence shows that the shippers had done all that could be done by them to complete the delivery of the cotton to the defendant for transportation before the fire, the trial court properly instructed the jury to return a verdict in favor of appellees; that, the uncontradicted evidence showing that 49 bales of the cotton, for the value of which this suit was brought, were delivered, along with other cotton, to appellant as a common carrier, accepted by its inspector, and loaded into its cars, the court properly instructed a verdict for appellees; that the uncontradicted evidence showing that appellant's station agent, who was authorized to bind it, with full knowledge of all the facts, signed the bill of lading, admitting that the appellant had received the cotton as a common car-

rier; and that this was acted on by all the parties to the transaction—the court did not err in instructing a verdict for appellees.

[1-3] The conclusion reached by a majority of the court is that the judgment of the trial should be affirmed. The general rule contended for by appellant to the effect that a railway company is not liable as a common carrier and insurer of goods ordered to be shipped by it until the entire quantity so ordered to be shipped is delivered to and accepted by it for shipment is not denied, but recognized as well established. The view taken is that this rule or principle of law was fully met and satisfied by the undisputed evidence in the case. The 100 bales of cotton were on the compress company's platform, and that company had been instructed by the shippers to deliver the same to the defendant for transportation. The defendant had built railroad tracks alongside this platform for the purpose of enabling it to receive and load into its cars for shipment from said platform compressed cotton. It had been notified of the intended shipment of the 100 bales, had placed cars alongside the platform into which the cotton was to be loaded, and 99 bales had actually been loaded, before the fire occurred which destroyed the 49 bales. This loading, as was the custom, was done by the compress company for the railway company, and for such service the compress company received its compensation from the railway company. The compress company, under the undisputed facts, was the agent of the defendant in the matter of delivering and loading the cotton, and, according to the testimony of the defendant's local agent and of the compress company's superintendent, nothing remained to be done by the shippers in furtherance of the shipment at the time of the fire. The evidence conclusively shows that the 100 bales had been put on the platform of the compress company, the only place at Ballinger where appellant received and accepted compressed cotton for shipment, and it is not denied that all of said cotton was on this platform and in the possession of the compress company at the time the shipping orders were given. The contention of appellant is that 1 bale of the lot had not been compressed, inspected, and delivered to it at the time the fire occurred, and therefore none of said cotton, notwithstanding 99 bales of the same had been inspected, accepted, and placed into its cars, and was in its custody as a common carrier. The evidence is, not that the 1 bale in question was not ready for delivery and inspection, but that it had not been discovered at the time of the fire, and, if misplaced or lost, it had been misplaced or lost by the compress company, which had been employed by appellant to do the loading of the shipment for it, and not through any act, want of care, or fault on the part of the shipper or his agent. It may well be asked:

"Wherein was the shipper responsible for the failure to find and load this bale? What could he have done, that he had not already done, to get it into the car? When he ordered the cotton shipped, he unquestionably meant to have it shipped immediately, and the same was then in the possession of the compress company, selected and employed by appellant to do the loading, and on the platform where appellant received and accepted compressed cotton for shipment. Mr. Day, the inspector, was not engaged by appellant to load, or have loaded, the shipments of cotton. His duty was simply to inspect and check shipments tendered to appellant. The 1 bale of the shipment here in question, which had not been found in the time of the fire, had not been inspected by him; but it does not appear that it was the fault of the shipper or his agent that this had not been done."

It seems manifest from the record that the 100 bales ordered shipped in this case had been accepted by appellant for transportation through its agent, the compress company, before the fire occurred which destroyed the 49 bales involved in this suit, and that it is inevitable that the appellant should be held liable for the destruction of said 49 bales. Therefore the contention of appellant to the effect that there is no evidence that the relation of agency existed between the compress company and the appellant, and that the compress company was acting for it in the matter of accepting and loading the shipment, is not supported by the record. That appellant kept on hand an inspector of its own selection to check and inspect shipments of cotton, and that there is evidence to the effect that it would not issue a bill of lading for a shipment until the same had been inspected by the inspector and reported by him to the railway station agent, may be admitted; but the issuance of a bill of lading is not the sole criterion of appellant's liability for the value of the cotton destroyed. "If the facts show a delivery of the cotton to the railroad for immediate transportation, as we believe they do, then its liability as common carrier had attached" at the time of the fire. *Railway Co. v. Hall*, 64 Tex. 615; *Railway Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Railway Co. v. Martin*, 12 Tex. Civ. App. 464, 35 S. W. 21; *Railway Co. v. Edwards & Co.*, 56 Tex. Civ. App. 643, 121 S. W. 570; *Arthur v. Railway Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590. In the first case cited the Supreme Court said:

"The question was: Had the defendant accepted the cotton; not had all been done that ought to have preceded acceptance? If the defendant had taken control of the cotton and put its agents to preparing it for shipment, it had accepted the cotton."

In *Railway Co. v. Edwards & Co.*, cited, as in the present case, the compressing of the cotton and the loading of the same in the cars were matters to be performed by the

compress company. This was necessary, and had not been done at the time of the fire which destroyed the 74 bales, for the value of which the suit was brought, and no bill of lading for the shipment had been issued. The cotton had been delivered to the compress company, and was on that company's platform to be compressed and shipped over the railway company's road. By the general usage the owner of cotton would give shipping instructions to the compress company, and no such instructions were given to the agent of the railroad after the instructions were given to the compress company. Before bills of lading were signed, the cotton was destroyed by fire while on the compress company's platform, and this court, speaking through Mr. Justice Bookhout, held that there was a delivery of the cotton to the railway company for transportation before the fire, and a writ of error was refused.

In the case at bar the facts show that the relation of agency existed between the compress company and the appellant, and that the compress company had possession of the one hundredth bale of cotton necessary to make the shipment ordered complete. These and other facts shown by the record establish beyond controversy the liability of appellant for the value of the cotton destroyed, and the judgment of the court below is affirmed.

Affirmed.

TALBOT, J., dissents.

MUDGE et al. v. HUGHES et al. (No. 6241.)  
(Court of Civil Appeals of Texas. San Antonio. May 22, 1919.)

1. COURTS ⇨478 — PROPERTY IN HANDS OF RECEIVER — ENFORCEMENT OF JUDGMENT — STATUTE.

Rev. St. 1911, art. 2146, authorizing suits against receivers without first obtaining leave of the court appointing such receivers, does not, in view of article 2137, confer upon one court the right to enforce a judgment out of property in the hands of receiver of another court, or to interfere with the custody and control of such property.

2. PROPERTY ⇨4 — WATERS AND WATER COURSES ⇨249 — IRRIGATION—NATURE OF WATER—REAL ESTATE.

Water in canals for irrigation purposes is real estate, and landowner's right to the use of a portion thereof is a servitude upon such real estate.

3. WATERS AND WATER COURSES ⇨232—IRRIGATION COMPANY — RECEIVER—WATER IN CANALS.

When court, appointing receiver for irrigation company, took into its custody the property

of the company, it took the water flowing into the canals as a part thereof.

4. COURTS ⇨478 — CONFLICTING JURISDICTION—POSSESSION OF PROPERTY—INTERFERENCE.

One court has no right to interfere with the possession by another court of property for which it has appointed a receiver.

5. RECEIVERS ⇨116 — CONTRACTS — ANNULMENT.

Contracts made by receivers under authority given by the court are in a substantial sense the contracts of the court, and cannot be annulled at the pleasure of the court.

6. COURTS ⇨478 — CONFLICTING JURISDICTION—MANAGEMENT OF CORPORATION.

In view of Rev. St. 1911, arts. 2132 and 2133, the district court of one county has no right to interfere with the management and control of the corporation being administered by a receiver appointed by district court of another county.

7. COURTS ⇨478 — CONFLICTING JURISDICTION—ACTION AGAINST RECEIVERS.

District court of one county has no jurisdiction of suit and to compel receiver of irrigation company to supply water upon terms other than those imposed by order of district court of another county appointing receiver, and to have such terms declared unreasonable, and to enjoin enforcement thereof, since an order granting such relief would constitute interference with the possession, control, and management of the receivers appointed by another court.

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Suit by John F. Mudge and others against A. A. Hughes and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Don A. Bliss, of San Antonio, for appellants.

Samuel Spears, of San Benito, A. K. Black, of Austin, and A. L. Montgomery, of San Benito, for appellees.

MOURSUND, J. Appellants filed suit in the district court of Bexar county in and for the Forty-Fifth judicial district of Texas against appellees, A. A. Hughes, who resides in said Bexar county, and E. F. Rawson, who resides in Cameron county, Tex., alleging, in substance, as follows: That appellants respectively own certain tracts of land, describing the same, situated in Hidalgo county, Tex.; that said tracts of land are situated within the semi-arid district of Texas, where the natural rainfall is insufficient to produce crops; that they owned, and still own, water rights appurtenant to their respective tracts of land entitling them to be supplied with water from an irrigation plant owned by the Valley Reservoir & Canal Company, a cor-

poration duly incorporated under the laws of Texas, as a public service irrigation corporation, which corporation had duly conveyed to appellants said water rights; that said conveyances embodied contracts between appellants and the said Valley Reservoir & Canal Company running with the land, the stipulations of said contracts setting forth the fixed charges and other rates to be charged for supplying water from said irrigation plant; that afterwards receivers had been appointed of the property of the Valley Reservoir & Canal Company, including said irrigation system, by the district court of Cameron county, Tex., and that the said appellees had been appointed said receivers; that appellees were unlawfully making certain demands upon appellants, and requiring appellants to comply with said unlawful demands as conditions precedent to allowing appellants to enjoy their said easements during the year 1919; that each and all of said demands were unreasonable; that appellees were unlawfully withholding from appellants the enjoyment of their said easements, to wit, their said water rights, because of the refusal of appellants to comply with said unlawful demands.

Among the unlawful demands, as alleged by appellants, was one requiring them to pay to appellees the amounts of the fixed charges on each and every acre of their lands that appellees claimed had accrued prior to the time of the appointment of any receivers by the said district court, being the fixed charges provided by their said contracts with the said Valley Reservoir & Canal Company for the years 1914, 1915, and 1916, which said fixed charges appellants alleged they did not owe, and were in dispute between them and the said Valley Reservoir & Canal Company prior to the appointment of any receivers of the property of the said Valley Reservoir & Canal Company, and which were in litigation as to all of the appellants, except appellant Paschen, in the district court of Hidalgo county, Tex., and the district courts of said Bexar county prior to any appointment of receivers of the property of the said Valley Reservoir & Canal Company.

Another was a demand that appellants pay to appellees the sum of \$5 per acre on each and every acre of their said lands for the purpose of making permanent betterments in the said irrigation system, and to pay one-half of the salaries of appellees as receivers of the property of the said Valley Reservoir & Canal Company during the year 1919, and this over and above the charges made for supplying water.

Appellants further alleged that the appellees, defendants, were also discriminating against appellants in favor of others who may have complied with said demands by a

certain date by undertaking not to allow appellants the enjoyment of their said easements in the event that the supply of water of said irrigation system should be exhausted by those who complied with said demands by said date, even though appellants should comply with said demands after said date, that is to say, appellees were giving a preference to those who should comply with said demands by said date.

Appellants further alleged that all of said demands as well as the said preference were unreasonable and unlawful.

Appellants alleged that the time was right at hand when the enjoyment of their said easements was necessary to enable them to make crops on their said lands during the year 1919; and unless they were allowed at once the enjoyment of their water rights they would be deprived of the beneficial enjoyment of their lands during the year 1919, whereby they would suffer great and irreparable losses, for which they had no adequate remedy at law.

Appellants offered to pay to appellees in advance the fixed charges stipulated in their water contracts with the said Valley Reservoir & Canal Company, to wit, \$4 per acre on each and every acre of land owned by all the appellants other than appellant Paschen in accordance with their said water contracts and \$3 an acre on each and every acre owned by appellant Paschen in accordance with his said contract; and they offered, further, to pay to appellees in advance the said charge of \$5 per acre demanded by appellees for the purpose of making permanent betterments in and on said irrigation system, and to pay on the salaries of said receivers in case the court should so require, and to comply with any and all reasonable rules and regulations that appellees had prescribed or might prescribe as to supplying them with water to irrigate their said lands from said irrigation system, and they offered to do any and all things they ought in equity and good conscience to do.

Appellants prayed for the issuance of a preliminary injunction restraining and prohibiting appellees from withholding from them the enjoyment of their said easements until appellants should comply with said unreasonable and unlawful demands during the pendency of the suit; and they prayed that, on final hearing, the court adjudicate each and all of said demands of appellees to be unreasonable and unlawful, and that a peremptory writ of mandamus issue compelling appellees to permit appellants to enjoy their said easements, to wit, their said water rights, in accordance with their said contracts, and that the appellees be perpetually enjoined and prohibited from requiring appellants to comply with said unreasonable and unlawful demands as a condition preced-



ent to appellants' being allowed to enjoy their said water rights. Appellants also pray for general relief.

Appellees first interposed a plea to the jurisdiction of the court to hear and determine the controversy between appellants and appellees in substance as follows: That they had been duly appointed by the district court of Cameron county receivers of the property of the Valley Reservoir & Canal Company, including the irrigation system of said corporation, in a suit numbered 3073 on the docket of said court, wherein the American National Insurance Company and the San Antonio Loan & Trust Company were plaintiffs, and the Valley Reservoir & Canal Company, John Clogner, W. F. Sprague, and others were defendants, entitled American National Insurance Company et al. v. Valley Reservoir & Canal Company et al., and were duly authorized by the order of said district court to continue the operation of said irrigation system, but under orders of the court; that they were operating and managing said irrigating system under orders of said court, and that they were making said demands alleged by appellants under an express order of said court, a copy of which order they attached to their said plea to the jurisdiction and made the said copy a part of said plea.

The paragraphs of said order which bear directly upon the matters complained of by appellants read as follows:

"(V) At the time of making such application the applicant shall pay to the receivers the sum of \$5 per acre on every acre in tract of land mentioned in his application, whether all of said land is to be irrigated or not, to be known as a fixed or maintenance charge; and, in addition to such fixed or maintenance charge, the applicant shall also pay to the receivers all charges then owing by him theretofore accrued under the previous orders of the court, and any irrigation contract which accrued thereunder up to July 7, 1917, but not thereafter accrued under the previous orders of the court and any irrigation contract which accrued thereunder up to July 7, 1917, but not thereafter under any such contract.

"(VI) When the provisions of the last two preceding paragraphs have been complied with, as to any land, such land shall be held to have been qualified for irrigation hereunder.

"(VII) All lands which have not been qualified for irrigation on or before December 31, 1918, as above provided, may be qualified thereafter and up to October 31, 1919, for irrigation during the period ending October 31, 1919, by the owner or his agent making the application and payments above provided for, and thereupon the owner, agent, or tenant of said land shall be entitled to receive water for the irrigation thereof, during the period ending October 31, 1919, upon complying with the other terms and provisions hereof."

"(IX) The rights of the owners to receive water for the irrigation of land, which shall be qualified after December 31, 1918, shall be subordinate to the rights of owners of land quali-

fied on or before said date, and they shall have priority in right among themselves in the order of their applications made subsequent to December 31, 1918.

"(X) No application for water service shall be received if at the time of application the capacity of the irrigation system, or what part hereof through which the land is to be irrigated, is sufficient to afford adequate service to the land already covered by applications, and in the event of shortage of water for the irrigation of land on applications filed after December 31, 1918, water shall not be prorated among all consumers, but shall be denied to lands qualified under such delayed applications in the inverse order in which such applications were filed with the receivers.

"(XI) Each time water is desired for the irrigation of lands the owner or his agent will make application to the receivers stating the number of acres to be irrigated, the crop or crops growing or to be planted thereon, and the number of acres in each crop, and at the time of making such application shall pay to the receivers \$3 per acre for every acre to be irrigated, to be known as a service or water charge, and which will be received as the rate or charge for the use of a head of water at the rate or on the basis of two hours per acre for the irrigation of all the land included in such application for water. If a longer use of the water than an average of two hours per acre is employed or taken by any applicant, he shall pay to the receivers for such excess time \$1.50 per hour or fraction thereof, except when, in the judgment of the receivers, such delay is due to improper or defective construction of the canal system under their control, or to insufficient headwater in the lateral from which the land is being watered. The charge for the use of water over time, as above provided, shall be known as an excess service on water charge."

"(XIII) No water shall be furnished to any applicant for irrigation unless at the time of making the application therefor he shall pay the service or water charge above provided, and also any and all charges owing by him under the terms and provisions hereof, and any previous order of this court, and any irrigation contract which accrued thereunder, up to July 7, 1917, but not thereafter under any such contract."

Appellees also filed a plea of privilege and a lengthy answer. Appellants filed exceptions to the plea to the jurisdiction and a long supplemental petition. We deem it unnecessary to state the contents of these pleadings, believing that the statement of the substance of the petition and the plea to the jurisdiction, copied largely from appellants' brief, will be sufficient basis for the discussion of the issues presented. The plea to the jurisdiction was sustained and the cause dismissed, after hearing the evidence. The court filed findings of facts 17 pages in length. These are not objected to and are adopted by us, but we deem it unnecessary to copy them in our opinion. The substance of the most important findings will be stated. The plaintiffs owned the land, with the water rights appurtenant thereto, as alleged in

their petition. The books in the hands of the receivers showed unpaid water charges and rentals as having accrued up to July 7, 1917, under the water contracts set up in plaintiffs' pleadings, against each of plaintiffs except Doll, and the receivers, as a condition precedent to furnishing water to plaintiffs except Doll, demanded payment of all water charges and rentals accruing under any irrigation contract up to July 7, 1917, and also the fixed charge of \$5 per acre provided for in said order of the court. No demand was made upon plaintiff Doll for the payment of contract water rents and charges. None of the plaintiffs have ever been parties to the receivership proceedings except Mudge, who filed a motion in 1918, for the purpose of procuring a cancellation of water charges for the year 1917. The intervention was disposed of by granting a cancellation as to charges with respect to 40 acres and refusing it as to charges for 80 acres. Notwithstanding such cancellation the receivers demanded of Mudge the payment of said charges as to said 40 acres as a condition precedent to furnishing him water for any of his lands. As a matter of fact the charges for 1917 upon the 80 acres had been paid in order to procure water, and for that reason the court declined to cancel the charges, and, there being no pleadings for the recovery thereof, the court declined to order the repayment of the sum. Mudge thereupon brought suit in the district court of Cameron county to recover such sum. Prior to the institution of the suit in which the receivership was granted, suits had been instituted by plaintiffs, except Paschen, in Bexar county and Hidalgo county for damages for failure to furnish water for the years 1914, 1915, and 1916, in which suits it was claimed by plaintiffs that they did not owe the charges for said year because of a failure of consideration, and also on the ground that any claim therefor was more than offset by their counterclaims for damages. A part of the lands of plaintiffs Doll and McCoy have been qualified to receive water under said order of November 21, 1918. In the order appointing the receivers the court directed them to take charge of all property of defendants in said suit and all choses in action; to receive rents and collect demands; to take possession of, keep, maintain, and operate all irrigation plants and properties of the defendants, under the direction of the court or the judge thereof. The receivers have never operated the irrigation system under the contracts pleaded by plaintiffs, but, on the contrary, under the orders of the court, the last of which was that of November 21, 1918, certain provisions of which have hereinbefore been copied.

The court's first conclusion of law is as follows:

"I conclude that since the defendants are in possession of said canal and reservoir properties, operating same under the express orders of the district court of Cameron county, made in cause No. 3073 as shown by the minutes of said court, that said district court of Cameron county has acquired exclusive jurisdiction of the matters in controversy herein, wherein relief is sought by mandamus and by injunction against the defendants, and that this cause should be dismissed from this court for such reason."

The correctness of this conclusion is challenged by appropriate assignments of error.

"All the authorities sustain the proposition that when a court of equity acquires jurisdiction of a cause, and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court appointing the receiver untrammelled in its administration of the same, as the law directs, regardless of whether the original appointment was or was not erroneous. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons, and has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims in behalf of which the conflicting jurisdictions are invoked." Vol. 23, R. C. L. p. 66.

This rule has been frequently followed by our courts. *Harrison v. Waterbury*, 27 S. W. 109; *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; *Ellis v. Water Co.*, 86 Tex. 111, 23 S. W. 858; *Palme v. Carpenter*, 51 Tex. Civ. App. 191, 111 S. W. 430; *Waters-Pierce Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 839; *Hammond v. Tarver*, 11 Tex. Civ. App. 48, 31 S. W. 841.

[1] In the last-cited case this court expressed the opinion that the action of another court constituting such interference with the possession of a receiver would be void. It is true that we have a statute (article 2146, R. S. 1911) which authorizes suits against receivers without first obtaining leave of the court appointing such receiver. The last clause of the article indicates that the Legislature had in mind causes of action consisting of a demand for money, for it is provided "that it shall be the duty of the court to order said judgment paid out of any funds in the hands of said receiver as such receiver." However, our courts, in some of the cases above cited have used expressions indicating that the statute permits suits to establish causes of action in general; but there can be no doubt that such article does not confer upon any other court the right to enforce a judgment out of property in the hands of the receiver of another court, or to interfere with the custody and control of such property. The only article which authorizes enforcement of a judgment

by another court is article 2137, and that relates only to judgments for money, and even then application must first be made to the court having the custody of the property. In the case of *Dillingham v. Russell*, supra, the court said:

"No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and is not open to revision by it if the court rendering the judgment had jurisdiction of the subject-matter and the parties. The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver, but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim."

The property of the Valley Reservoir & Canal Company and the La Lomita Irrigation & Construction Company is in the hands of receivers appointed by the district court of Cameron county, under orders of said court requiring them to take possession thereof and to maintain and operate the same. The two irrigation systems are being operated as one system under an order of the court, of which some of the most important provisions have been copied herein. Under such order the receivers have been authorized to make contracts which confer preferential rights on those complying, by a certain date, with the regulations prescribed by the court, and to refuse to make contracts unless compliance is made with certain regulations. These matters are mentioned at this time only sufficiently for the purpose of disclosing the nature of the custody and control exercised over the properties by the court appointing the receivers.

Some of the appellants as to all of their land, and some as to part, failed to procure water, and applied to the district court of Bexar county for relief. The suit is not one to establish title to property or to establish a claim for money, but is one in which certain demands made by receivers are alleged to be unreasonable. The prayer is that each and all of such demands be adjudged to be unreasonable, and that certain writs issue for plaintiffs' benefit. While there is a prayer for an injunction, the relief really desired is that of mandamus; for the negative relief that the receivers be restrained from making certain demands to be complied with before they would furnish water would not accomplish plaintiffs' purpose. The relief by mandamus requiring that water be furnished, notwithstanding the failure of plaintiff to comply with the demands made, would necessarily include the

relief that the receivers should not make such demands. Again, there is a prayer that the receivers be enjoined from discriminating against plaintiffs, and that they be required to treat all alike that own water rights, and pay the reasonable rates and comply with the reasonable rules and regulations that may be established. If, by mandamus, the receivers are required to furnish plaintiffs such water as they need, there need be no injunction concerning discrimination. The real purpose of the suit is to require the receivers to supply water to plaintiffs, and it is evident that any judgment which does not provide for the summary relief prayed for would fail to subserve the purpose for which the suit was brought.

In order to determine to what extent, if any, the district court of Bexar county was asked to trespass upon the jurisdiction of the district court of Cameron county, it will be well to consider the nature of the property rights possessed by the irrigation company, which were taken into the custody of the court. The receivers were directed to take possession of all property of the defendants, and to keep, maintain, and operate all irrigation plants and properties of defendants. Speaking of the property rights of an irrigation company, the Supreme Court of California, in the case of *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359, said:

"The right to the water in the pipes and the pipes themselves usually constitute an appurtenance to real property in such cases, and, if so, the water usually retains its character as realty until severance is completed by its delivery from the pipes to the consumer. The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. 'The right to water must be treated in this state as it has always been treated, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personality.' *Hill v. Newman*, 5 Cal. 446, 63 Am. Dec. 140. The right to have water flow from a river into a ditch is real property, and so also is the water while flowing in the ditch. *Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co.*, 60 Cal. 410. A wrongful diversion of water flowing in a ditch is an injury to real property. *Last Chance Water Ditch Co. v. Emigrant Ditch Co.*, 129 Cal. 278, 61 Pac. 960. The right to take water from a river and conduct it to a tract of land is realty. *South Tule Independent Ditch Co. v. King*, 144 Cal. 454, 77 Pac. 1032. The right to have water flow through a pipe from a reservoir to and upon a tract of land is an appurtenance to the land. *Standart v. Round Valley Water Co.*, 77 Cal. 403, 19 Pac. 689. An undivided interest in a ditch, and in the water flowing therein, is real property. *Hayes v. Fine*, 91 Cal. 398, 27 Pac. 772. A ditch for carrying water is real estate. *Smith v. O'Hara*, 43 Cal. 376; *Bradley v. Harkness*, 26 Cal. 77. And where one person

has water flowing in a ditch, and another has the right to have a part of such water flow from the ditch to his land for its irrigation, the right of the latter is a servitude upon the ditch, and is real property. *Dorris v. Sullivan*, 90 Cal. 286, 27 Pac. 216."

[2-4] This quotation aptly shows the nature of the property rights of the irrigation company and those of the plaintiffs. When the court took into its custody the property of the irrigation company it took the water flowing in the canals as a part thereof. No other court has a right to interfere with such possession. Appellants contend there would be no such interference even if the receivers should be required to deliver water from such canals to appellants. However, if the water is realty, it would seem that an order requiring the receivers to part with the possession thereof would be, in legal effect, making them relinquish possession of part of the property. It appears to us that the claim of a right to enforce a servitude upon the canals and ditches is one affecting the custody and possession of such canals and ditches.

[5, 6] In addition there is involved the question of interference with the management of the business of the irrigation company, which was undertaken by the district court of Cameron county through its receivers. If a court has the right to continue a certain business through its receivers, it appears to us that its right of management should be as free from interference by other courts as is its right of possession and custody. In this case the court undertook the management, through its receivers, of the irrigation system. It may have erred in making its provisions relating thereto. It may have made provisions which are unjust and unreasonable. Nevertheless it assumed the management, and directed its receivers to make contracts with persons for the furnishing of water, upon terms which would confer a preferential right upon those who complied with the prescribed regulations within a certain time. Contracts made by receivers under authority given by the court are in a substantial sense the contracts of the court, and cannot be annulled at the pleasure of the court. *R. C. L.* vol. 23, § 82, p. 77. While the order of the court was made in a proceeding to which plaintiffs were not parties, and therefore not conclusive of any rights they have, nevertheless it constitutes the warrant of authority for the contracts made by the receivers, and must be read into such contracts. It shows the extent of the control and management asserted by the court, and, we might say, the extent of the jurisdiction assumed by it. If it is permitted to continue a business, it must be granted the right to make contracts. If

other courts can direct the receivers to ignore the contracts and to ignore the order of the court on the alleged ground that it is void, it appears to us that great confusion would result. The right to control the receivers with regard to the management of the business necessarily excludes the right of other courts to interfere therewith, even as the right to possession excludes the rights of other courts to interfere therewith. Receivers are required by statute to give bond that they will obey the orders of the court which appointed them. Article 2132, R. S. 1911. They are empowered to do such acts respecting the property as the court may authorize. Article 2133. Certainly the district court of another county could not command them with respect to the very matters concerning which they have received orders from the court which appointed them. The effect would be that one court would command another how to manage property in its possession. Nor can we perceive that there would be any difference in principle if certain provisions of the order of the court under which the receivers are acting should be held void. The fact remains that, as to the management and control of said property the orders to the receivers are exclusively to be given by the court appointing them.

The appellants rely upon the case of *Bank v. Goolsby*, 12 Tex. Civ. App. 362, 35 S. W. 713. In that case prior to the appointment of the receiver the property had been sold and delivered to Goolsby. An attachment had been levied thereon in Hunt county, and Goolsby had made affidavit and bond under the statutes relating to trial of right to property. These instruments under the statute were filed in the district court of Hunt county, which had jurisdiction of the proceeding. Articles 7776, 7778, R. S. 1911. The court held that the property was thereby placed in the custody of the district court of Hunt county, and that it had the power to protect such custody. The district court of Hunt county acquired jurisdiction over the property one day before the district court of Marion county appointed the receiver and ordered him to take possession of the same. In this case there is no contention that the injunction applied for would be one in aid of or to protect the jurisdiction of the district court of Bexar county.

Appellants also rely upon the case of *R. R. Commission v. Alabama*, G. S. R. Co., 185 Ala. 354, 64 South. 13, L. R. A. 1915D, 98, in which it was held that a state court could mandamus receivers of a railroad company, appointed by the federal court, to enforce an order of the railroad commission providing for union stations. It was held that the proceeding did not involve the actual custody or control of the receivers over the property. The court quotes from the opinion in the

case of *Ft. Dodge v. Railway*, 87 Iowa, 389, 54 N. W. 243, in support of its holding, but the language quoted relates only to the contentions of lien creditors to the effect that the property in the hands of receivers constituted a trust fund to pay their debts, which could not be diverted to the construction of a crossing. As a matter of fact that case was filed in the very court which had appointed the receiver to take charge of the railway company's property in Iowa. In the Alabama case the court laid great stress upon the fact that those interested in the estate being administered by receivers could not object to the use of the funds for the purpose of complying with a statute of the state. The order would have the effect of exacting from the receivers compliance with a statute relating to rights of the public. The expenditure would perhaps make the trust estate less valuable, but those having an interest therein or claim thereto acquired such interest or claim with knowledge of and subject to the statutes. The purpose for which the court was administering the estate was to determine and adjust the rights of the persons who asserted claims to or equities in such estate. Such an order as was contemplated by the Alabama court would not affect the respective rights of creditors or claimants as between one another, and probably the court's conclusion is based entirely upon the theory that the interference from which the receivers are protected is such as would affect the rights of private ownership asserted in or to such estate. In other words, that the custody and control for the purpose for which it is granted by law is not interfered with. If such a distinction is permissible, the case in no way supports appellants' contention. If such a distinction is not sound, we are unable to reconcile that opinion with the views entertained by us.

We find in *High on Receivers*, § 374 (4th Ed.) the following statement:

"So when a railway is being operated by a receiver, appointed by a court of competent jurisdiction, mandamus will not lie against the company and its receiver to direct or control the operations of the road, the court appointing the receiver being fully empowered to determine all questions in controversy."

The case cited (*State v. Railway*, 35 Ohio St. 154) is not accessible to us.

[7] The views expressed by us have led us to conclude that an order granting an injunction or mandamus as prayed for, or which could appropriately issue under the pleadings, would constitute an interference with the possession, control, and management of the receivers, and that therefore the trial court was correct in sustaining the plea to the jurisdiction.

The judgment is affirmed.

HODGES et al. v. CHRISTMAS et al.  
(No. 985.)

(Court of Civil Appeals of Texas. El Paso.  
May 29, 1919.)

1. INJUNCTION ⇐136(2) — TEMPORARY INJUNCTION—TRESPASS TO TRY TITLE—INVASION OF POSSESSION.

In trespass to try title, where plaintiffs have been ejected from actual possession of land by defendants, possession will be restored and the original status of the property preserved by temporary injunction pending decision of the issue of title.

2. INJUNCTION ⇐36(1)—TITLE TO PROPERTY—POSSESSION.

An injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property.

3. INJUNCTION ⇐136(2) — TEMPORARY INJUNCTION—POSSESSION OF PROPERTY—ADJUDICATION OF TITLE.

It is not the function of a preliminary injunction to transfer possession of land from one person to another, pending an adjudication of title, except in cases in which the possession of another has been forcibly or fraudulently obtained by defendants, and the equities are such as to require that the previous possession be restored and original status of property preserved pending decision of issue of title.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Suit by J. G. Christmas and others against R. A. Hodges and others. From an order granting a temporary writ of injunction defendants appeal. Injunction refused. Case reversed and remanded.

Scott & Brelsford, of Eastland, R. B. Truly, of Ballinger, Sayles & Sayles, of Abilene, and Lightfoot, Brady & Robertson, of Austin, for appellants.

W. J. Oxford, of Thurber, Chandler & Pannill, of Stephenville, and J. R. Stubblefield, of Eastland, for appellees.

WALTHALL, J. This case presents an appeal from an order granting a temporary writ of injunction. Appellees, J. G. Christmas and others, brought this suit on October 3, 1918, in trespass to try title against appellants, and, after describing the land sued for by metes and bounds, and as being a part of the Emsy Miller survey in Eastland county, alleged that said land is chiefly valuable as a mineral property and for the development of oil and gas, and that appellants, without the consent of appellees, un-

lawfully entered upon said land and erected thereon a derrick and other suitable machinery and began drilling thereon for oil and gas; that, if said premises has oil and natural gas underlying same, appellants will continue drilling until same is reached, and will extract same from the earth and convert it to their own use and benefit, and that such conversion will be an appropriation of practically the whole corpus of said estate that is of any value; that appellants will thereby suffer irreparable injury and damage for which they have no adequate remedy at law.

Appellees prayed for a temporary writ of injunction restraining appellants from doing the things complained of. The petition was verified. The court set down the application for injunction for hearing, and directed that notice be served on appellants. Appellants made no general appearance, but limited their answer to the application for the injunction, and only in response to the fiat of the court indorsed on the petition and precept issued.

The answer contained a general demurrer and special exceptions: First, to the effect that, if the injunction prayed for be granted, it would, in effect, be a final settlement and disposition of the issues of the suit, which it was suggested could only be granted after trial on the merits and by final judgment; second, failure of petition to allege insolvency of appellees; third, that petition shows that appellants have a full and adequate remedy at law, to wit, action of trespass to try title and damages; fourth, a misjoinder of causes of action. The answer contained a denial, under oath, that appellees were and still are the owners in fee simple, including both the surface and mineral right thereto, to the 11.75 acres of land involved in the controversy, but that same theretofore belonged to the state, and is now owned by the state as a part of its public free school fund, subject only to the rights, titles, and interests of appellants by reason of its oil and gas permit, No. 2694, issued to appellant Hodges by the state of Texas, acting by its land commissioner, on July 31, 1918. They deny that the land sued for is any part of the Emsy Miller survey, deny the unlawful entry on the land, the ejectment of appellants therefrom, and the unlawful holding of possession of the premises from appellants to their damage in any sum, but claim a lawful entry and holding by reason of the said permit. The above portion of the special answer was sworn to. Appellants further answered that appellees were now drilling a well for oil or gas at a distance of about 200 feet in a southerly direction from the 11.75 acres of land in controversy; that, if the injunction prayed for is granted, appellants, by means of said well, will drain all the oil or gas that may be in or under the land in con-

troversy. Appellants alleged that other wells were being drilled in close proximity to the lands involved in this suit, and like results as to depletion of oil and gas would follow.

After hearing the evidence, the court granted the temporary writ of injunction, enjoined appellants from further operations, or in any way interfering with appellees' possession of said premises as complained of pending appeal, and declined to permit appellants to file an appeal bond to suspend the injunction writ pending the appeal.

This case comes to this court from the Ft. Worth Court of Civil Appeals by order of transfer. We have not been favored by a brief or printed or oral argument from either side. In addition to the petition and answer, the order of the court granting the injunction, and other proceedings had, the record contains some 53 pages of oral evidence introduced on the hearing, and copies of field notes of many surveys other than the ones directly involved in this controversy. The view we take of the issues presented here on an application for a temporary injunction, however, do not require a finding of the exact location on the ground of the Emsy Miller survey, nor whether the ground in controversy is within or without the boundaries of the Emsy Miller survey, and on such findings decide the respective rights of appellants and appellees, as would be the case on a trial on the merits.

Appellants admit that the title to the 160 acres in the Emsy Miller survey, as shown by the abstract used on the hearing, is in the appellees. Appellants admit that they are doing the things complained of, that is, drilling for oil and gas, and appellees allege that the drilling is on their Emsy Miller survey. The contention of appellants as to title seems to be one of fact and to the effect that the Emsy Miller survey on its most northerly line does not extend north to and coincide with the south boundary line of the Wm. Ahrenbeck & Bro. No. 2 by a distance of 210 varas so as to embrace the land in controversy, and that appellants have secured permits from the commissioner of the land office to prospect for petroleum and gas on the space of ground 210 varas in width north and south parallel with and having for its north line the south line of the Ahrenbeck & Bro. No. 2, and having for its south line the north line of the R. O. P. Sparks and the Emsy Miller survey. It was on such space of ground and by a supposed vacancy that their permit authorized them to drill for oil and gas.

[1] Appellees do not allege, nor does the evidence show, that they were in actual, peaceable possession of the land in controversy, and that appellants had forcibly, fraudulently, or in any way wrongfully invaded such possession, and thereby ejected appellees therefrom, and by any such means

obtained possession for themselves. Much evidence found in the record centers around the question as to whether the Emsy Miller survey, admitted to be owned by appellees, embraces the land covered by appellants' permit. While such issue and evidence would be most pertinent to a trial on the merits, we think on this hearing, on an application for a temporary writ of injunction, as neither the trial court nor this court can determine the question of title, the controlling issue is one of previous actual possession of the land on the part of appellees, and an invasion of that possession on the part of appellants by force or fraud, or by some character of wrongful entry, thereby ejecting appellees, and committing the acts of trespass complained of. Such facts, if they appear, would require that the possession of appellees thus wrongfully invaded be restored and the original status of the property be preserved pending the decision of the issue of title.

[2, 3] As held by Mr. Justice Pleasants in *Simms v. Reisner*, 134 S. W. 278, and by Mr. Justice Reese in *Jeff Chilson Townsite Co. v. Wiess & Kyle Land Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716, an injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property, and it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of title, except in cases in which the possession of another has been forcibly or fraudulently obtained by the defendants, and the equities are such as to require that the previous possession thus wrongfully invaded be restored, and the original status of the property be preserved pending the decision of the issue of title. True, the trial court in this case, as in one of the cases above referred to, did not order the possession of the land be delivered to the appellees, but he did by his order render appellants' possession worthless by restraining them from drilling for oil and gas as their permit authorized them to do. If appellees were in previous possession of the land in controversy, and were, by force or fraud, ejected therefrom by appellants, appellees, we think, would have the right to the relief granted irrespective of any remedy they might have at law, for the reason that the matters enjoined, if permitted, would be a continuous trespass upon the possession of appellees, and appellants' permit from the state to drill for oil and gas would not of itself give them possession as against a previous possession, and therefore would not be a complete defense.

For reasons stated, we think the trial court was in error in granting the temporary injunction.

The injunction is refused, and the case is reversed and remanded.

TEXAS ELECTRIC RY. CO. v. CRUMP.  
(No. 6057.)

(Court of Civil Appeals of Texas. Austin.  
March 12, 1919. On Rehearing,  
June 4, 1919.)

1. TRIAL  $\S$ 252(1)—INSTRUCTIONS—LACK OF EVIDENCE.

It is error for the trial court to submit to the jury an issue which is not supported by competent evidence.

2. STREET RAILROADS  $\S$ 118(1)—INSTRUCTIONS—ISSUES.

In an action by one injured while riding in an automobile which collided with a street car, an instruction submitting negligence of defendant held within the pleadings.

3. APPEAL AND ERROR  $\S$ 759—BRIEFS—ASSIGNMENTS OF ERROR.

In order to entitle a party to the benefit of a ground of error contained in a motion for new trial, it must be correctly copied as an assignment in the brief; that is, the assignment must be at least substantially the same as the grounds shown in the record.

4. APPEAL AND ERROR  $\S$ 754(2) — MATTERS REVIEWABLE—WAIVER OF OBJECTIONS.

One who asked a special instruction on contributory negligence, which would cure the omission of such issue from a paragraph of the charge, but did not assign error for the failure to give it, error of the court in omitting such issue from the charge, was waived.

5. DAMAGES  $\S$ 185(1)—PERSONAL INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries, evidence held to show damages.

6. NEGLIGENCE  $\S$ 121(2)—PRESUMPTIONS.

Negligence will not be presumed from the mere fact of accident or injury.

7. NEGLIGENCE  $\S$ 122(1) — CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

Contributory negligence will not be presumed from the mere fact of accident or injury.

8. NEGLIGENCE  $\S$ 138(2) — INSTRUCTIONS — RES IPSE LOQUITUR.

Unless the evidence shows a case without proof tending to show negligence, it is not error to refuse to charge that negligence cannot be presumed from the mere fact of accident or injury, but is a fact that must be proven as any other fact in issue.

9. TRIAL  $\S$ 260(1)—INSTRUCTIONS.

It was not error to refuse requested instruction covered by a given instruction.

10. APPEAL AND ERROR  $\S$ 231(9)—MATTERS REVIEWABLE—OBJECTIONS.

Complaint cannot be made that a charge submitted the issue of negligence generally, and did not specifically submit the acts of negligence pleaded for the first time on motion for new trial, where it was not objected to on that particular ground on the trial.

**11. STREET RAILROADS ⇨114(10)—COLLISION —SUFFICIENCY OF EVIDENCE—SPEED.**

In an action by one injured while riding in an automobile which collided with a street car, evidence *held* to sustain a finding that the street car was operated at a dangerous rate of speed.

**12. STREET RAILROADS ⇨117(11)—COLLISION —QUESTION FOR JURY.**

In an action by one injured while riding in an automobile which collided with a street car, whether the motorman saw the automobile in a position of danger in time to have slowed down and avoided the injury *held* for the jury.

**On Rehearing.**

**13. APPEAL AND ERROR ⇨722(1)—MATTERS REVIEWABLE—ASSIGNMENTS OF ERROR.**

An assignment, complaining of a charge in "that it makes the defendant liable for the injury alleged to have been sustained by the plaintiff without reference to any negligence on the part of plaintiff that could attribute (contribute) to what was the true and proximate result (cause) of plaintiff's injuries," the words in parentheses, not being in the ground of error contained in the motion for new trial, will be considered; the changes not being material.

**14. TRIAL ⇨252(7) — INSTRUCTIONS — EVIDENCE OF CONTRIBUTORY NEGLIGENCE.**

Instructions in a negligence case need not refer to contributory negligence, where there is no evidence raising the issue.

**15. NEGLIGENCE ⇨93(1) — IMPUTED NEGLIGENCE.**

Negligence of a driver of an automobile will not be imputed to one riding as a passenger.

Appeal from McLennan County Court; Jas. P. Alexander, Judge.

Suit by M. Crump against the Texas Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sanford & Harris, of Waco, for appellant.

Alva Bryan and G. W. Barcus, both of Waco, for appellee.

**BRADY, J.** This is a personal injury suit for damages arising out of a collision between a street car of appellant and an automobile in which appellee was riding at the time of the accident. Two grounds of negligence were alleged by appellee: First, that the motorman on the street car was, at the time of the accident, operating the car at a very high and dangerous rate of speed; and, second, that at the time of the injuries an employé in charge of such street car saw appellee in a position of peril in the automobile on appellant's tracks, and failed to exercise proper care to stop the street car, and negligently and wantonly propelled the car into and against the automobile in which plaintiff was riding as a passenger.

The case was tried before a jury, submitted upon a general charge of the court, and ver-

dict and judgment rendered for appellee in the sum of \$200.

[1] Appellant's first assignment of error complains of paragraph 11 of the court's charge because it is claimed that it was a charge on the weight of the evidence, in that there was no evidence of any negligence on the part of defendant in the record. The paragraph complained of is as follows:

"Now, you are instructed that if you find from the preponderance of the testimony in this case that on or about the 16th day of February, 1917, the defendant's agents or employes in charge of one of defendant's street cars ran said street car into and against the automobile in which plaintiff was riding, and that the acts of the employes in charge of said street car, in running against said automobile, if they did run against it, were negligence, as that term is herein defined, and that said collision was the direct and proximate result of such negligence, if any, on the part of said employes, and that as the direct and proximate result thereof the plaintiff was injured, then you will find for the plaintiff."

In our opinion, the charge is not open to the objection embodied in this assignment. We agree with appellant that it is error for the trial court to submit to the jury an issue which is not supported by competent evidence, but the proposition is not applicable to this case. There was evidence that the car was being operated on one of the public streets of the city of Waco, approaching a switch on appellant's tracks, very fast, and at the rate of 20 miles an hour, from which the jury might reasonably have inferred that the car at and just before the accident was being operated at a high and dangerous rate of speed, under all the circumstances. There were also facts in evidence from which the jury might reasonably have inferred that the motorman in charge of the street car saw the automobile in which appellee was a passenger, in a perilous position, on or near the switch on appellant's tracks, and that he failed to exercise ordinary care to stop or slow up the street car in time to have averted the injuries. There was evidence tending to show the contrary in both particulars, but this was a fact question for the jury, as was also the question whether such acts or failure were negligence. In this state of the record, it cannot be said that there was no evidence to justify the submission of the issue of negligence, as is asserted in such assignment; and it is therefore overruled.

[2] The second assignment is to the effect that the court erred in submitting the same paragraph of its charge, because it is not supported by any pleadings, and because there is no evidence whatever supporting this issue.

What we have said in disposing of the first assignment applies to the second, and the latter is also overruled.



The third assignment complains of the same paragraph of the charge, because it places a greater burden on appellant than is required by law, in this:

"That it makes the defendant liable for the injuries alleged to have been sustained by the plaintiff, without reference to any negligence on the part of plaintiff that could attribute (contribute) to or was the direct and proximate result (cause) of plaintiff's injuries."

[3, 4] It is well settled that, in order to entitle a party to the benefit of a ground of error contained in a motion for new trial, it must be correctly copied as an assignment in the brief; that is, the assignment must at least be substantially the same as the ground shown in the record. We have examined the transcript, and find that appellant has, in the assignment, made material changes in and additions to the ground as contained in the motion for new trial. Therefore we are of the opinion that this assignment should not be considered; but if it should be considered, we think it should be overruled, because the record discloses that the objections now presented in the assignment in the brief were not the objections made in the motion for new trial. Furthermore, the objection, as actually made below, was contradictory and was confusing, if not unintelligible. It may be added that at most this objection did not point out affirmative error in the court's charge, but a mere omission to qualify or limit it so as to preserve or safeguard appellant's plea of contributory negligence. Appellant asked a special instruction on contributory negligence, curing the alleged omission, but does not assign error in its brief for the failure to give it, and for this additional reason the assignment would have to be overruled, if considered by us. For the reasons indicated, the third assignment will not be considered.

[5] The fourth assignment asserts that the court erred in submitting paragraph 13 of the charge on the measure of damages, because there is not one scintilla of evidence in the record showing damages sustained by appellee.

In view alone of the facts recited in the statement under this assignment in appellant's brief, we are at a loss to understand how such an assignment could be presented. The statement shows that appellee was cut on the forehead, temple, and jaw, one of the wounds having to be stitched up, and the other injuries pulled together with adhesive plaster; that there were wounds on appellee's throat, scalp, and nose; that he remained in bed for at least two days; that his knees were skinned and his breast hurt; that he did not eat anything for eight days; and that because of the pain in the breast he could not walk for three or four weeks. We think it is manifest that there was at least a scintilla of evidence in the record showing injuries;

and it should be added that there are additional facts in the record, not deemed necessary to be set out, but which are, in our opinion, ample to sustain the verdict of the jury. It is true the injuries were not serious and probably not permanent, but the verdict was small. Regarding the assignment as without merit, it is overruled.

The fifth assignment is to the effect that the trial court erred in not giving special charge No. 5 requested by appellant, which was as follows:

"You are charged that negligence cannot be presumed from the fact of an accident or injury, but is a fact that must be proven as any other fact in issue."

[6-9] It is doubtless the law that negligence on the part of either the plaintiff or defendant will not be presumed from the mere fact of accident or injury. Where the evidence shows a case without proof tending to show negligence, such a charge as above requested would be proper. Indeed, if there is no proof supporting the issue of negligence, it would not be a fact question for the jury, but a proper case for a peremptory instruction. The authorities cited under this assignment are cases of that nature. In view of the issues made by the evidence in this case, we do not think appellant was entitled to the charge requested. It embodied a correct principle of law, but was not called for by the facts of this case. If appellant is right in its contention in the argument made under this assignment, it was entitled to a peremptory instruction. Furthermore, the jury were, in effect, instructed by the eleventh and twelfth paragraphs, in connection with the entire charge of the court, that before they could find for appellee they must determine that appellant was guilty of negligence in one or more of the particulars alleged in the petition, and that as the proximate result thereof appellee was injured. The charge is not open to the objection that it was reasonably calculated to lead the jury to believe that they were free to presume negligence from the mere fact of the accident or injuries. Therefore we conclude that it was not reversible error to refuse to give the charge in question. The assignment is overruled.

The sixth assignment complains that the trial court erred in not giving appellant's special charge No. 1, which was a request for a peremptory instruction. In our opinion, the evidence raised issues of fact for the determination of the jury, and it was therefore not error for the trial court to refuse to peremptorily instruct for appellant. The sixth assignment is overruled.

The seventh and last assignment asserts that the trial court erred in not granting appellant a new trial, because the verdict of the jury and judgment of the court are contrary to the law and evidence, in that appel-

lee alleged specific acts of negligence, and the issue submitted to the jury was a general charge on negligence, and not confined to the specific acts pleaded; that there were no pleadings to authorize the court's charge to the jury, nor any evidence justifying the submission of the issues.

[10] For at least two reasons we think this assignment must be overruled. In the first place, appellant did not complain of the court's charge, because it submitted the issue of negligence generally, and did not specifically submit the acts of negligence pleaded by appellee; and this assignment is really an attack upon the charge of the court. Our statute provides, in effect, that a charge of the court will be regarded as approved, and any objections thereto waived, unless prior to it being read to the jury objection is made, pointing out wherein the charge is erroneous. The manifest purpose of this statutory provision is to enable the trial court to correct its errors before the law of the case is given in charge to the jury. As stated, no such objection was made to the charge, and it was too late to raise the point in a motion for new trial.

[11, 12] Furthermore, the claim in this assignment that neither the pleadings nor the evidence justified the submission of the issue of negligence is not sustained by the record. We have pointed out, in briefly discussing other assignments, that, in our opinion, there were proper pleadings and sufficient evidence to make negligence a fact question for the jury. One witness testified that the street car just before and at the time of the accident was going very fast, about 20 miles an hour. The accident occurred at the switch on appellant's tracks on one of the traveled public streets of the city of Waco, and we think this evidence was sufficient to raise the issue of negligence pleaded by appellee that the street car was being run at a high and dangerous rate of speed. The testimony of appellee's witnesses also shows that the street car knocked the automobile some 40 or 50 feet back down the street; that the automobile was on or near the street car track for a distance of 75 yards, going in opposite direction to the street car, with the lights burning on both, and nothing to prevent the motorman from seeing the automobile for that distance. The motorman himself testified that when he first saw the automobile he was a half block away from it; but he claimed that it was in the clear at that time, and that the driver suddenly turned the automobile onto the track when he was but a short distance away from the street car. He further stated that he could have stopped the car if the automobile had been on the track 100 feet away. The testimony of both the driver of the automobile and appellee is that they were on the track, with lights burning on the car, facing the approaching street car at the time they first

saw the street car, which was then probably 30 or 40 yards away, or about 100 feet. There is no evidence that there was any obstacle preventing the motorman from seeing the approaching automobile for at least that distance. Under these circumstances, it seems clear that it was a question of fact for the jury whether the motorman saw appellee and the automobile in a position of danger on or near its tracks in time to have slowed down the street car, and have avoided injuring appellee. It follows that this assignment must also be overruled.

There being, in our opinion, no reversible error shown in the record, the case will be affirmed.

#### On Rehearing.

[13] In the original opinion we declined to consider the third assignment of error, for the reason that the assignment did not correctly copy the ground of error shown in the motion for new trial, and that there had been material changes and additions made. Upon reconsideration of this matter, we have concluded that this holding gave too much weight to the literal requirements of the rules. Fairly considered, the additional words contained in parentheses were merely explanatory of the meaning of certain terms used in the original ground of error, and were evidently intended to make plain the meaning of the same. Therefore we have decided to consider the assignment.

We have concluded to adhere to our former holding that the objection to the court's charge urged in the third assignment of error pointed out a mere omission, inasmuch as the question of contributory negligence, under the facts and circumstances of this case, was a purely defective matter. Indeed, appellant recognized that such was the case by asking a special instruction on contributory negligence to cure the alleged omission. This charge was refused, but appellant has not assigned any error upon the court's failure to give it, and therefore we think the supposed error, in not safeguarding this defense in the main charge, was waived.

[14, 15] If we should be mistaken in this holding, there is another consideration which is deemed a complete answer to the proposition under the third assignment. We have examined the statement of facts, and believe that there was no evidence raising the issue of contributory negligence on the part of appellee. As to the driver of the automobile, Lanham Hix, the issue of contributory negligence was substantially and seriously raised by the evidence. At the request of plaintiff, the court charged the jury that, although they might believe that the driver of the automobile was guilty of negligence, such negligence, if any, could not be imputed to the plaintiff. No error is assigned upon the giving of this charge, which seems to be in accord with the settled law of this state.

Railway Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; Lyon v. Phillips, 196 S. W. 995; Railway Co. v. Gibson, 83 S. W. 862. This being the law, the negligence of Lanham Hix must be disregarded, and the question is wholly relegated to the negligent acts of appellee contributing to his injuries. We have been unable to find any evidence tending to show that he was guilty of negligence. There is affirmative evidence to the effect that when the driver of the automobile got upon the street car track, and appellee saw the approaching street car, he immediately warned Lanham Hix, the driver, and told him to get off the track.

For the additional reason that the evidence did not raise the issue of contributory negligence by appellee, the third assignment of error is overruled.

We have considered the other questions presented in the motion for rehearing, and are of the opinion that they are without merit. However, appellant has requested us to file our findings of fact by which negligence on the part of appellant is shown by the evidence, and has asked us to set out the evidence.

In the original opinion, we stated that the witness Lanham Hix testified that the street car was running very fast, and about 20 miles an hour, and that this was sufficient to support the inference of negligence as found by the jury. It is not deemed necessary to set out the evidence tending to support the issues of negligence, as this would entail the recital of much of the evidence showing the facts and circumstances surrounding the collision, which would be an unreasonable burden. It is sufficient to say, and we find, that there was evidence to support the findings of the jury upon these issues.

We have also been requested by appellant to show specifically from the court's charge wherein the jury were told that "they must determine that appellant was guilty of negligence in one or more of the particulars alleged in the petition," as was stated by us in the opinion. We did not state that the jury were expressly or in terms thus instructed. What we said was that—

"Furthermore, the jury were in effect instructed by the eleventh and twelfth paragraphs, in connection with the entire charge of the court, that before they could find for appellee they must determine that appellant was guilty of negligence in one or more of the particulars alleged in the petition, and that, as the proximate result thereof, appellee was injured."

The basis of this statement was that the court in the first six paragraphs of the charge fully and fairly set forth the respective pleadings of the parties, and in the seventh referred the jury to the pleadings for a fuller description of the issues. This, together with the remainder of the charge, we considered,

and still think, directed the jury's attention to the particular grounds of negligence alleged by appellee, as a basis for determining the question of negligence by appellant.

Motion is overruled.

# KIRBY LUMBER CO. v. DAVIS. (No. 451.)

(Court of Civil Appeals of Texas. Beaumont.  
May 7, 1919. Rehearing Denied  
June 4, 1919.)

## 1. RAILROADS $\S$ 276(2) — NEGLIGENCE — LICENSEE—DUTY OF CARE.

A lumber company owes a licensee on its log train no duty with respect to the condition of its track, cars, or other instrumentalities; its sole duty being to exercise ordinary care in the operation of the train.

## 2. RAILROADS $\S$ 276(2) — NEGLIGENCE — LICENSEE—DUTY OF CARE.

Where a logging company permitting a licensee to ride on its logging train creates a new danger after he is on the train, by making up its train in a manner not before used by it, it must assume with reference to such new hazard the responsibility of exercising due care to protect him from injury resulting by reason thereof.

## 3. RAILROADS $\S$ 282(16) — INJURY TO LICENSEE—FINDINGS.

A finding that defendant's logging train, on which plaintiff was permitted to ride, was negligently operated, considering the condition of track, the manner of coupling, and the speed, held to warrant judgment in plaintiff's favor, though the jury had answered that the speed of the train was not excessive.

Appeal from District Court, Newton County; H. T. Davis, Judge.

Suit by A. L. Davis against the Kirby Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Andrews, Strutman, Logue & Mobley, of Houston, for appellant.

J. B. Forse, of Newton, and C. D. Ferguson, of Houston, for appellee.

WALKER, J. A. L. Davis, appellee, sued the Kirby Lumber Company, appellant, in the district court of Newton county, Tex., for damages on account of personal injuries sustained by him on or about the 21st day of December, 1915. The cause was tried to a jury, and submitted on special issues. On the answers of the jury to the special issues, judgment was rendered in favor of appellee for the sum of \$1,000, and from this judgment appellant has appealed to this court.

The plaintiff alleged, in substance, that the

defendant on and prior to December 21, 1915, owned and operated in the exercise of its corporate powers a logging railroad from Call Front to Call, in Newton county, Tex.; during the period of the operation of said logging railroad the employes, agents, and officers of the defendant in charge of the trains, operated upon and over said road, habitually and customarily, and openly, notoriously, and continuously, carried persons and passengers in and on said trains from point to point along said road, which custom and practice was known to and acquiesced in by the defendant; that on December 21, 1915, the plaintiff in good faith and in pursuance of said custom went aboard one of the trains of defendant at Call Front for the purpose of being carried to or near Bon Wier, and with the knowledge and consent of the employes, agents, and officers of said defendant in charge of said train, took passage thereon in the caboose attached to the said train, by reason whereof the plaintiff agreed and undertook to transport plaintiff to his destination; that while plaintiff was a passenger on said train, and was being transported by defendant as aforesaid, a portion of the train, including the caboose in which plaintiff was riding, was derailed, and as a consequence plaintiff sustained the personal injuries which were made the basis of his complaint.

It was further alleged by the plaintiff that at and above the point of derailment the tracks and roadbed declined and lay on a down grade, curved sharply, and were rough and uneven, and that immediately above the point of derailment were frogs and switches, and that the rails of the track on the outer edge of the curve were not elevated, and the roadbed was not inclined toward the outer edge, and that immediately below the point of derailment the grade reached its lowest point, and the road began an upgrade, ascending a hill; that the rear portion of the train which plaintiff was riding, was defectively, insecurely, and unsafely coupled to the remainder of the train by a cable or chain, or both, and that the drawheads of said cars were not coupled otherwise, and that the defendant, with knowledge of such conditions, propelled and operated the train, which was long and heavily loaded, on and over the tracks at a fast and excessive rate of speed, and while so doing the coupling broke, and the caboose and other cars were derailed.

Appellant summarizes its pleading as follows:

"In so far as the answer of the defendant is material to be considered upon this appeal, it may be stated that the defendant pleaded the general denial."

The special issues submitted to the jury, together with their answers, are as follows:

"Question No. 1. Was the rear portion of the train that plaintiff was riding on defectively or unsafely coupled to the remainder of said train by a cable or chain, or both, and not otherwise?"

To this question the jury answered "Yes."

"Question No. 2. Was the coupling of said train as set out in question No. 1 'negligence,' as that term has been defined to you?"

To this question the jury answered "Yes."

"Question No. 3. Did the defendant, with knowledge of the manner in which said train was coupled, operate it over its track at the time of the injury?"

To this question the jury answered "Yes."

"Question No. 4. Was such act upon the part of defendant negligence?"

To this question the jury answered "Yes."

"Question No. 5. Was the defendant operating said train, at the time of the injury, at an excessive rate of speed?"

To this question the jury answered "No."

"Question No. 6. Give in figures the number of miles per hour said train was traveling at the time of the injury."

To this question the jury answered: "30 miles per hour."

"Question No. 7. Was the running of the train at an excessive rate of speed at the time of the injury negligence?"

To this question the jury answered "No."

"Question No. 8. Was the act set out in question No. 1, or the act set out in question No. 3, or the act set out in question No. 5, the proximate cause of the plaintiff's injury?"

To this question the jury answered: "Yes, 1 and 3."

"Question No. 9. Was the plaintiff, at the time of the injury, a licensee upon the train of the defendant?"

To this question the jury answered "Yes."

"Question No. 10. What sum of money, if paid now, will compensate the plaintiff for the injury sustained?"

To this question the jury answered: "\$1,000."

"Question No. 11. Were two of the cars in the train upon which the plaintiff, A. L. Davis, was riding coupled together by means of a cable and chain or either of them?"

To this question the jury answered "Yes."

"Question No. 12. Was the defendant, Kirby Lumber Company, negligent in operating said train over the track in the condition in which you find it to have been and at such speed as you find said train was running, with two of its cars coupled together (if you have answered that two of its cars were so coupled together) by means of a cable and chain, or either of them?"

To this question the jury answered "Yes."

"Question No. 13. If you have answered in response to No. 12 above that defendant was negligent in operating its train, was such negligence the proximate cause of plaintiff's injury?"

To this question the jury answered "Yes."

Briefly stated, the facts are as follows:

Plaintiff, on the day of the wreck, went to the defendant's camp at Woodmyer, and boarded the engine at the roundhouse or shop. Afterwards, the engineer took charge of the engine and ran it a distance of about

100 yards to a spur, on which the caboose was standing, and coupled the engine to the caboose. At this point plaintiff got off the engine and boarded the caboose. Other people were getting on the caboose at that time, and it was well filled when plaintiff got on. Mr. Woods, defendant's superintendent, was present. The engine and caboose then proceeded to a make-up spur about a mile from the camp, and the caboose was left on the main line while the engine went to a set-out spur and made up the train of log cars, returning with the cars and coupling onto the caboose about 25 minutes later. The superintendent was also present at that time. In this train of log cars were two fastened or tied together with a cable or chain. This cable was taken from the caboose. During this time plaintiff was in the caboose and had no knowledge of the cable coupling. The cars which were coupled by the cable were placed in the body of the train, in front of the caboose, which was the rear car in the train. The train, consisting of an engine, about 32 loaded log cars and the caboose, thus made up, proceeded towards Call, and had gotten a short distance beyond Woodmyer when the wreck occurred. The road from Woodmyer descended into a valley between two hills, forming steep grades, and the wreck occurred at the bottom of the valley at a curve in the track. It was shown that before the log cars were coupled to the caboose there was a slack of a foot or more in the cable coupling.

As to the nature and effect of this chain coupling, B. P. Parker, a witness for the plaintiff, testified as follows:

"I am familiar with the character of log cars used by the Kirby Lumber Company at that time. They were practically the same as we used here; they were skeleton log cars. I am also familiar with the character of couplings on those cars that were in use then. They are a link and pin coupling. They used a link with two pins to make the coupling. A pin was fastened to the link in each drawhead. One of those links is between 8 and 10 inches long. The idea of the link is to hold the drawheads as close together as possible so that there won't be any slack. That link tends to hold the drawheads together. When coupled in that manner, it would not be possible for the drawheads to pass each other and jamb. The drawhead is fastened to what I believe they call reachers. If, instead of being coupled by the link and pins, those drawheads were fastened together by a wire cable of about three-fourths of an inch in diameter, and also by a toggle chain and the cable wrapped through the drawhead and tied onto the reacher, we would call that a bad-order coupling; that is the railroad term. If that character of coupling is made, there would be more slack in the coupling, or a greater distance between the drawheads when a pull is made than there was before the pull was made, because they can't tie a cable by hand tight enough but what the power of locomotion will make the distance a little more. If there was

a distance of slack of one foot or 18 inches, and the train was going down hill, as to what would be the action of one drawhead on the other, will say, if it is absolutely straight track, the drawheads will just go up against each other, and of course that would retard the motion of the rear train. If it is not on a straight track, but going around a curve, that would make a difference in the action of the two drawheads; the drawheads would have a tendency to want to pass each other; if they did pass each other, it would throw a terrible strain on the wheels, and would exert pressure on the rail. The pressure would be on both rails; the pressure would be outward on each rail. There would be a probability of that pressure being sufficient to break the rail; it would depend on the condition of the rail. A rail is like any other steel; it crystallizes sometimes. Sometimes they will snap right in two, and sometimes they will bend a good ways and won't break. In cases where there are broken rails, the first car that reaches it is not necessarily derailed; I have known whole trains to go over a broken rail and not have a derailment. It is possible for part of a train to go over a broken rail and a subsequent portion of the train be derailed by reason of it. As to whether or not chain-ups of the character mentioned are usually made in the middle of the train, will say, I never tram-roaded any, but on railroads we put them in the rear of the train; it is always considered a dangerous proposition."

It was also shown that there was a broken rail at or near the place of the wreck. A portion of the train, consisting of several logs cars and the caboose, became detached, and all but the two head cars of such portion were derailed. Plaintiff's witnesses stated that the front car of the detached portion was coupled by the cable to the rear car of the front portion of the train. This was sharply denied by defendant's witnesses, their testimony tending to show that the coupling which broke was a link and pin, but the engineer said there was a cable coupling on one of the cars.

Another sharp conflict in the evidence was with reference to the rate of speed at which the train was running at the time of the wreck, and as to whether such rate of speed exceeded the customary speed at that point. Plaintiff's witnesses estimated the rate of speed at 35 or 40 miles per hour, and as being in excess of the usual speed. Defendant's witnesses on that point stated 18 or 20 miles an hour at the time of the wreck, but that in coming down the hill from Woodmyer, the speed was 30 miles an hour, and that the speed and operation of the train on that occasion were the same as usual at that point. In answer to question No. 6, the jury found that the speed was 30 miles an hour.

After the verdict was returned, each party filed a motion asking that judgment be rendered in its favor. On hearing these motions, the court rendered judgment in favor of plaintiff, and overruled appellant's motion. Appellant filed many exceptions to the

court's charge, but all these have been waived by it, and no error is assigned to any proceeding in the trial of the case, except to the action of the court in granting the motion of plaintiff for the entry of judgment, and in overruling the motion of defendant to enter judgment in its favor on the answers of the jury.

[1, 2] Appellant's first proposition is as follows:

"The jury having found that the plaintiff was a licensee on the defendant's log train, the defendant owed the plaintiff no duty with respect to the condition of its tram track or the condition of its logging cars or other instrumentalities; the sole duty owed by the defendant to the plaintiff being to exercise ordinary care in the operation of the train."

As an abstract legal proposition, we think this is correct. However, this proposition is not the law of this case. The jury found that the plaintiff was a licensee. In order for the plaintiff to recover in this case, his rights must be measured by the duties owed him as a licensee by the appellant. He accepted the condition of the track and the train as he found them. The appellant was under no obligations to the plaintiff to depart from its usual methods of operating its train because of the presence of the plaintiff, but the plaintiff was riding on this train before this defective coupling was made, having ridden something over a mile. There is nothing in the record to show that this cable coupling was customarily or ordinarily resorted to by the appellant. Having undertaken to carry the plaintiff as a licensee, the law required the appellant to exercise ordinary care in making up its train, ordinary care being measured by the usual custom, method, and manner used by the plaintiff from time to time in making up its log trains.

When the licensor creates a new danger, after the licensee comes on the premises, it must assume, with reference to such new hazard, the responsibility of exercising due care to protect the licensee from injury resulting by reason thereof.

As said by Chief Justice Gaines in *Washington v. M., K. & T. Ry. Co.*, 90 Tex. 314, 38 S. W. 764, in order to entitle a licensee to recover, he must prove:

"That the derailment was the result of a want of due care, either in the equipment or operation of the train, on part of the agents or servants of the company."

Also the rule is further announced by Judge McMeans in *Houston Belt & Terminal Co. v. O'Leary*, 136 S. W. 601:

"It has been often held that, where a person is rightfully upon the premises of another, even as licensee, he has the right to require of the proprietor that he so conduct himself as to not injure him through his act of negligence. This

rule has been applied and followed in many cases in this state where a licensee has entered upon the right of way of a railway company, and, while using, with ordinary care, the track for purposes of his own, is injured by the affirmative negligence of the railway company or its employés."

In answer to questions Nos. 1 and 2, the jury found that the use of this cable coupling was negligence. In answer to question No. 3, they found that the defendant, with knowledge of the manner in which the train was coupled, operated it over its track. To question No. 8 the jury found that this cable coupling was the proximate cause of plaintiff's injury. Also the jury answered "Yes" to question No. 11, it being as follows:

"Were two of the cars in the train upon which the plaintiff, A. L. Davis, was riding coupled together by means by a cable and chain, or either of them?"

—and answered "Yes" to question No. 12, this question being as follows:

"Was the defendant, Kirby Lumber Company, negligent in operating said train over the track in the condition in which you find it to have been and at such speed as you find such train was running, with two of its cars coupled together (if you have answered that two of its cars were so coupled together) by means of a cable and chain or either of them?"

[3] Though the jury had answered that 30 miles per hour was not an excessive rate of speed, yet in determining whether the train was negligently operated at the time of the injury, considering the manner of its coupling, it was the duty of the jury to consider this speed. Hence, in answering question No. 12, in determining the negligence of the defendant in operating its train, the jury properly considered the condition of the track, the rate of speed, and the manner in which the cars were coupled together, and, having considered these different elements and having found that the defendant was negligent therein, there being no exception to this question, the appellant is bound thereby.

As we understand appellant's brief, it concedes, in effect, that the judgment should be sustained if the answer to question No. 12 is not explained and limited by the answers of the jury to the preceding questions, appellant saying:

"If we were dealing with question No. 12 alone, the answer of the jury would perhaps be sufficient to support a judgment in the plaintiff's favor."

Giving this effect to all the issues submitted to the jury and their answers thereto, we do not think the effect of the answer to question No. 12 can be so explained as to relieve appellant of liability.

Finding no errors in this record, this case is affirmed.

HART-PARR CO. v. KRIZAN & MALER.  
(No. 6041.)

(Court of Civil Appeals of Texas. Austin. Feb. 26, 1919. On Motion for Rehearing April 9, 1919. Rehearing Denied June 4, 1919.)

1. TRIAL  $\Leftrightarrow$  240—INSTRUCTION—ARGUMENTATIVE CHARACTER.

A requested instruction, containing a correct proposition of law, but also containing matters strongly argumentative, and being a very partisan presentation of the issue, was properly refused.

2. FRAUD  $\Leftrightarrow$  20—MISREPRESENTATIONS—INDEPENDENT INVESTIGATION.

If the purchasers of a thrashing machine signed the contract on information which they, or either of them, gained by an independent investigation, judgment should have been rendered for the seller in the purchasers' action for damages on account of misrepresentation.

3. CONTRACTS  $\Leftrightarrow$  94(5)—MISREPRESENTATIONS—AVOIDANCE OF CONTRACT.

To avoid a contract for fraud or misrepresentation, it is not necessary that the fraud should have been the sole cause of making the contract, but sufficient if the fraudulent representation was relied on to the extent that it was a material factor in inducing the making of the contract.

4. DAMAGES  $\Leftrightarrow$  159(4)—ACTION FOR MISREPRESENTATIONS—TESTIMONY OF LOSS OF PROFITS.

In an action by the purchasers of a thrasher for damages from misrepresentations inducing the purchase, testimony as to loss of profits held admissible in view of the allegations of the petition, against which general demurrer alone was filed.

5. DAMAGES  $\Leftrightarrow$  159(8)—FRAUD—TESTIMONY UNSUPPORTED BY PLEADING—EXPENSES INCURRED.

In the purchasers' action for damages from misrepresentations inducing the sale of a thrasher, testimony as to the value of items of expense alleged to have been paid by the purchasers held inadmissible in the absence of allegation that the amount paid was the reasonable value.

On Motion for Rehearing.

6. FRAUD  $\Leftrightarrow$  52—ACTION FOR FRAUD—EVIDENCE.

In an action by the purchasers for misrepresentations inducing a sale to them of a thrasher, testimony of a purchaser that, immediately after rejecting the thrasher, he signed a written order for another containing the same stipulations, which he read and understood, held properly excluded in the trial court's discretion, as being a collateral matter.

7. EVIDENCE  $\Leftrightarrow$  208(6), 222(1)—ADMISSION—ABANDONED PLEADING.

An admission made by a party against his interest is admissible in evidence whether made

in court or out, and whether by the pleading on which he goes to trial or an abandoned pleading.

8. EVIDENCE  $\Leftrightarrow$  208(6)—ADMISSION—ABANDONED PLEADING.

In the purchasers' action for damages from misrepresentations inducing the sale of a thrasher, the original answer of the purchasers in the seller's suit to recover on the notes given it, held not admissible as tending to show the purchasers were not entitled to recover for certain items.

9. EVIDENCE  $\Leftrightarrow$  208(1)—ADMISSION—PLEADING—INCONSISTENT DEFENSES.

An admission or statement made under one allegation in a pleading is not admissible in evidence as an admission where inconsistent defenses are pleaded.

Error from District Court, McLennan County; H. M. Richey, Judge.

Suit by Krizan & Maler against the Hart-Parr Company. Judgment for plaintiffs, and defendant brings error. Reformed and affirmed.

Love & Fouts, of Houston, for plaintiff in error.

Rogers & Earle, of Waco, for defendants in error.

## Statement of the Case.

JENKINS, J. Plaintiff in error, through its agent, S. M. McCracken, sold defendants in error a thrasher, for the agreed consideration of \$930—cash \$300, notes \$630—retaining a mortgage on the thrasher. The plaintiff in error subsequently foreclosed its mortgage, and sold said thrasher for \$375, and collected the remainder by suit against defendants in error.

Defendants in error brought this suit for damages, alleging that the thrasher was worthless to them for the purposes for which it was bought, and that they were induced to buy same through the fraudulent representations of said agent; that said thrasher proved to be worthless for the purposes for which it was bought; and that after testing the same they promptly returned it to the depot at which it was received, and notified plaintiff in error of that fact.

Defendants in error claimed as damages the price they paid for the thrasher, the money expended in attempting to operate it, and profits which they would have made if it had been as represented.

Plaintiff in error answered by general and special exceptions, general denial, and alleged that the thrasher was sold under a written contract, which limited their liability as therein set out, and denied that there had been any breach of warranty, as contained in said written contract.

Defendants in error, by a supplemental petition, alleged that their signatures to said

written contract were obtained by certain false and fraudulent statements of said agent, whereby they were prevented from reading said contract, but were led to believe that it was only an order for a thrasher, stating the price and terms of payment.

#### Findings of Fact.

In response to special issues submitted by the court, the jury found:

(1) That the signatures of defendants in error to the written contract were procured through the fraud of plaintiff in error's agent.

(2) That said agent did not read or explain said contract to defendants in error.

(3) That the thrasher was materially defective for the purposes for which it was ordered.

(4) That defendants in error did not refuse to allow plaintiff in error's expert agent to attempt to remedy the defects.

(5) That the reasonable market value of the thrasher at the time and place of its delivery was \$375.

(6) That the reasonable market value of the machine ordered by defendants in error was \$1,224.40.

(7) That plaintiff in error's agent guaranteed that the freight would not exceed \$90.

(8) That the oats wasted in attempting to operate the machine were of the reasonable market value of \$60.

(9) That the profits lost while trying to operate the machine, and before defendants in error could get another thrasher, were \$300.

(10) That defendants in error were induced, in part, to sign the written contract by the representations and statements of O. R. Westmoreland.

(11) That defendant in error Maler was induced, in part, to sign the written contract by the statement of plaintiff in error's agent that if he did not do so the thrasher would be sold to defendant in error Krizan, and that he (Maler) would not be a partner therein.

Judgment was rendered for defendants in error for the amount found in their favor, as above indicated.

The evidence sustains the findings of the jury.

#### Opinion.

Plaintiff in error has filed 40 assignments, many of which present the same issue in different terms, but with substantially the same meaning. We shall not attempt to discuss these numerous assignments separately, but will group them in accordance with the points presented.

The first, second, third, fourth, and twenty-first assignments complain of the action of the court in overruling plaintiff in error's demurrers to defendants in error's petition, wherein is pleaded special damages. Five of

these demurrers are denominated special demurrers, but they are in fact general demurrers to special paragraphs of defendants in error's petition and supplemental petition. We overrule all of these exceptions.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments are in effect that the court erred in entering judgment on the verdict of the jury for the reasons: (a) Said verdict does not afford a sufficient basis for such judgment; and (b) the findings of the jury are not in response to any issue raised by the pleadings or the evidence. We overrule each of those assignments, for the reason that the evidence was sufficient to raise each of the issues submitted to the jury, and the pleadings of defendants in error were sufficient as against a general demurrer. We will say, however, in this connection, that the allegation that defendants in error were induced to sign the contract by reason of the fraudulent representations of plaintiff in error's agent were not as definite as they should have been, and might have been subject to a special demurrer in this respect; and that, while the evidence is sufficient to support a finding that defendants in error were induced to sign the contract by reason of the fraudulent representations of plaintiff in error, there is no positive statement by either of them that they were so induced to sign the same. Had the jury found that defendants in error were not induced to sign the contract by reason of such representations, but by other facts appearing in the record, the evidence would have sustained such finding.

The thirteenth and fourteenth assignments of error complain of the charge of the court in submitting the issue of fraud, for the reason that the pleadings and the evidence are not sufficient to raise such issue. What we have said in the foregoing part of this opinion is sufficient to dispose of these assignments, and for the reasons stated we overrule the same.

Assignments of error Nos. 13 to 26, inclusive, complain of the action of the court in submitting the issues set out in our findings of fact, for the reason that neither the pleadings nor the evidence was sufficient to raise such issues. We overrule each of these assignments.

The twenty-seventh, twenty-eighth, and twenty-ninth assignments complain of the action of the court in not peremptorily instructing the jury to return a verdict for plaintiff in error. It follows from what we have said herein that this instruction was properly refused.

[1] The thirtieth assignment of error, as to the refusal of the court to give a requested instruction, contains a correct proposition of law, and ought to have been given, but for the fact that the requested charge also contains matter that is strongly argumentative, and is a very partisan presentation of



the issue upon which said charge was requested.

The thirty-first and thirty-second assignments of error are as to the refusal of the court to submit to the jury the following questions:

(1) "Did the plaintiffs or either of them, prior to signing the written order for the thrasher in controversy, make an investigation or obtain information as to the character or efficiency of said thrasher, other than information obtained from, or statements made by, defendant's agent McCracken? You will answer this question 'Yes' or 'No,' as you may find the facts to be."

(2) "In the event you have answered special issue No. 1, requested by the defendant, in the affirmative, you will answer the following question: Were the plaintiffs or either of them influenced in any manner to purchase the thrasher in controversy or to execute the order therefor, by reason of any investigations made or information obtained as to the character or efficiency of said thrasher referred to in special issue No. 1? You will answer this question 'Yes' or 'No,' as you may find the facts to be."

[2] Plaintiff in error makes a correct proposition of law under its thirty-first and thirty-second assignments, which is that, if defendants in error signed the contract upon information which they or either of them gained by an independent investigation, judgment should have been rendered for plaintiff in error. But this is not the issue presented by the question asked in said special requested instruction No. 2. The question there propounded is, "Were the plaintiffs or either of them influenced in any manner?"

If the words "in any manner" had been omitted, and the jury had answered these questions in the affirmative, the findings would have been equivalent to saying that defendants in error were not induced to sign the contract by reason of the fraudulent representations of plaintiff in error's agent, which would have been contradictory of their finding to the first issue submitted to them, and would have necessitated a reversal of the case. With these words included in the question, an affirmative finding would not have been stronger in plaintiff in error's favor than were the findings to the tenth and eleventh special issues, viz. that defendants in error were induced "in part" to sign the contract by reason of the matters stated in said questions.

[3] It is not necessary, in order to avoid a contract on the ground of fraud, that such fraud should have been the sole cause of making the same. It is sufficient if the fraudulent representation is relied upon to the extent that it was a material factor in inducing the making of the contract, and without which the same would not have been made. *Buchanan v. Burnett*, 102 Tex. 495, 119 S. W. 1141, 132 Am. St. Rep. 900; *Ry. Co. v. Jowers*, 110 S. W. 951; *Ry. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1196, 1197; *Hindman v. Bank*, 112 Fed. 981, 50 C. C. A.

623, 57 L. R. A. 115; *Tooker v. Alston*, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 822; *Stackpole v. Hancock*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 821; *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 683; *Roberts v. French*, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 657, 25 Am. St. Rep. 611; *Bank v. Fletcher*, 158 Mich. 162, 122 N. W. 540, 85 L. R. A. (N. S.) 862; 12 R. C. L. § 112, p. 358.

There was evidence tending to raise the issue of an independent investigation. However, we doubt if such evidence was sufficient to bring this case within the rule announced in *Patterson v. Bushong*, 196 S. W. 962, *Newman v. Lyman*, 165 S. W. 186, and *Cresap v. Manor*, 63 Tex. 488. As the submission of this issue was not properly requested, it is not necessary for us to decide this point.

The thirty-third assignment of error, in reference to the representation of Westmoreland, rests upon the ground that the fraudulent representations made by plaintiff in error's agent must have been the sole inducement for defendants in error to sign the contract, and the same is overruled upon the authorities cited in reference to the thirty-first and thirty-second assignments, supra.

The thirty-fourth, thirty-fifth, and thirty-sixth assignments are that the verdict is not supported by the evidence. These assignments are overruled for reasons stated in our findings of fact.

[4] We overrule the thirty-ninth assignment of error, with reference to permitting testimony as to loss of profits. Loss of profits may be recovered in a proper case, and we think defendants in error allege such a case, especially as against a general demurrer.

We have thus overruled all of plaintiff in error's assignments of error, except the thirty-seventh, thirty-ninth, and fortieth, each of which we sustain for the following reasons:

[5] It was error to permit testimony as to the value of certain items of expense alleged to have been paid by defendants in error, for the reason it was not alleged that the amount paid was the reasonable value thereof. *Traction Co. v. Bradshaw*, 185 S. W. 952. It is elementary that no evidence is admissible which is not based upon pleading.

It was error to refuse to permit plaintiff in error to prove by defendant in error, Krizan, that immediately after rejecting the thrasher purchased from plaintiff in error he signed a written order for another thrasher, which contained the same stipulations and limitations as the order involved in this case, and that he read and understood the conditions of same before he signed it. This testimony was admissible on the weight of the testimony of Krizan that he did not read or have read the contract here involved, and did not understand its contents, and would not have signed the same had he done so. In view of the testimony, both positive and cir-

cumstantial, contradicting the testimony of the witness on this issue, we cannot say that the rejection of such testimony was harmless.

We think the court erred in not permitting the defendants in error to read in evidence the original answer of defendants in cause No. 67393, which was a suit to recover on the notes given for the thrasher involved in this case. This evidence was offered to show that the contentions of plaintiff in error in that case were different from those in the instant case. It was admissible as affecting the credibility of defendants in error, and their good faith as to the contentions herein made by them.

For the reasons stated, the judgment of the trial court herein is reversed, and this cause is remanded.

Reversed and remanded.

#### On Motion for Rehearing.

At a former day of the present term of this court we reversed and remanded the judgment of the trial court herein upon three points, namely: First, for refusing to permit plaintiff in error to prove by Krizan, defendant in error, that he signed a written order for another thrasher, as stated in the opinion herein; second, in not permitting defendants in error to read in evidence the original answer of defendants in cause No. 67393, as stated in the opinion herein; and, third, in permitting testimony as to the value of certain items of expense alleged to have been paid by defendants in error.

[6] As to the first point we were of the opinion that the testimony was admissible as tending to impeach Krizan. Defendants in error in their brief herein did not reply to this assignment of error. They have, however, in their motion for a rehearing called our attention to some authorities upon the subject, an examination of which has convinced us that we were in error.

In the first place, the purchase of the second thrasher, for which the defendants in error gave a written order, was a collateral matter, and in such cases the admission of testimony with reference to such matters is largely within the discretion of the court, and we do not think that the court abused its discretion in refusing to allow the parties to go into this matter. The offered testimony with reference to the same would have shown that defendants in error purchased a Case thrasher in Dallas soon after rejecting the thrasher which they bought from plaintiff in error. As to why they signed a written order for said thrasher similar to the one that they signed in this case might have been shown for various reasons, such as their familiarity with the thrasher last bought, their knowledge of the parties that they were buying it from, etc.; and it might also have involved the issue of fraud in obtaining their signature to the second order. The trial court properly exercised its discre-

tion in refusing to open up these collateral matters.

In 17 Oyc. p. 275, it is said:

"\* \* \* That a person is more apt to do than not to do, under similar circumstances, what he has done before. It is equally deducible from experience that, in proportion as volition is eliminated, identical conduct results from similar stimuli, and that, as in other parts of the natural world, similar causes produce like results. The doing of similar acts or the occurrence of similar events is to that extent probative on an issue as to whether the particular act was done by the same person or like occurrence happened at another time. But experience also demonstrates that the inference is in itself a weak one; that men do not invariably, or even in the great majority of instances, do as they have done before, where the conditions are apparently similar, and that, still more often, the absence of a former element or the presence of a new factor in a psychological or physical combination of causes suffices to produce a very different result. \* \* \* Judges have also realized the practical inconvenience of trying a number of collateral issues at the same time."

In *Beakley v. Rainier*, 78 S. W. 702, the court said:

"The fact that a defendant has made a particular contract with a third person does not tend to show that he has made a similar contract with the plaintiff."

In *Stuart v. Kohlberg*, 53 S. W. 596, the court said:

"A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact." Citing *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725; *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350; *Newhall v. Appleton*, 102 N. Y. 133, 6 N. E. 120; *Roberts v. Dixon*, 50 Kan. 436, 31 Pac. 1063; *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708.

Defendants in error also cite in their motion for rehearing *Ry. Co. v. Cabell*, 161 S. W. 1087; *Kelley v. Davis*, 138 S. W. 1186; *Levy v. Lee*, 13 Tex. Civ. App. 510, 36 S. W. 311.

[7-9] As to the second point, defendants in error in their original brief herein likewise did not reply to the same. We gathered from the brief of appellant that the objection to this testimony was that it was an abandoned pleading. An admission made by a party against his interest is admissible in evidence, whether made in court or out, whether by the pleading upon which he goes to trial, or an abandoned pleading. That an abandoned pleading may be read in evidence in a proper case, see *Prouty v. Musquiz*, 59 S. W. 568; *Coles v. Perry*, 7 Tex. 109; *Wright v. Mortgage Co.*, 54 S. W. 368; *Jordan v. Young*, 56 S. W. 762; *Ry. Co. v. Wright*, 27 Tex. Civ. App. 198, 64 S. W. 1001.

An examination of the abandoned pleading

offered in this case, as shown by the bill of exception, does not show that defendants in error made any statement or admission therein contrary to any contention which they are making in this case. In that case, which was a suit upon the notes given by defendants in error for the thrasher, in their original answer, after alleging that the machine was worthless, they pleaded as an offset \$300 paid by them and freight paid on the machine. In their amended answer in that case they abandoned their offset. The contention of plaintiff in error is that, inasmuch as they claimed these items as an offset in that case, and did not plead the other items of damage herein, namely, loss of profits and of oats, etc., that the inference was that these additional items are an afterthought. This inference does not follow from the facts stated. As defendants in error suggest in their motion for rehearing, they might not have plead these items in that case, for the reason that the suit was pending in Houston, Tex., and their witnesses to establish such claim lived in McLennan county. But whatever might have been their reasons, the fact that they did not plead these items in that case is not admissible as tending to show that they are not entitled to recover for such items in this case. As to reading pleadings in evidence, whether the same be abandoned pleadings or not, an admission or statement made under one allegation in the pleading is not admissible where inconsistent defenses are pleaded. *Ry. Co. v. De Walt*, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877.

Defendants in error in their motion for rehearing have offered to remit the amounts recovered for such items as they were not entitled to recover for on account of not having alleged the reasonable value thereof. These items are fan box, \$5.25; coal, \$8; and engineer, \$15; amounting in the aggregate to \$28.25.

Defendants having offered to remit as to these items, the judgment of the trial court is here now reformed so that the amount of the judgment will be for \$28.25 less than that rendered in the trial court. As thus reformed, the judgment of the trial court is affirmed.

Motion granted.

Reformed and affirmed.

# **BARNETT v. PRUSSIAN NAT. INS. CO.** (No. 2132.)

(Court of Civil Appeals of Texas. Texarkana.  
May 14, 1919. Rehearing Denied  
May 29, 1919.)

## **INSURANCE—665(4)—FIRE INSURANCE—LOSS —EVIDENCE.**

In action on fire policy on goods and fixtures in a store for partial loss by fire which

covered an area six feet square and did not burn through the floor, evidence held sufficient to support findings as to loss and damages sustained.

Appeal from District Court, McLennan County; H. M. Richey, Judge.

Action by Elmer Barnett against the Prussian National Insurance Company. Judgment for plaintiff, and he appeals, on ground that recovery is insufficient. Affirmed.

W. L. Eason, of Waco, for appellant.

Thompson, Knight, Baker & Harris and Will C. Thompson, all of Dallas, for appellee.

LEVY, J. The suit is on a fire insurance policy issued by appellee company to the appellant, a merchant, in the sum of \$2,500 on a stock of dry goods and groceries, and \$500 on the fixtures in the store. A fire occurred on August 28, 1916, destroying some of the insured property and damaging to some extent a portion of the rest of it. The defendant company answered by denial, and pleaded in bar a breach of certain stipulations in the policy respecting appraisal of the loss. The case was submitted on special issues, and the jury findings involved in the assignments of error are: (1) That the actual cash value of the plaintiff's stock of merchandise immediately preceding the fire was \$4,667.88, and immediately after the fire was \$3,111.89; and that (2) the cash value of the fixtures immediately before the fire was \$600, and immediately after the fire was \$400. The court rendered judgment on the verdict in favor of the plaintiff, who appeals.

The first and second assignments of error challenge the above findings of fact made by the jury as to the amount of loss and damage sustained on the stock of merchandise and on the fixtures. The appellant insists that the uncontradicted evidence authorizes a finding of greater loss and damage than was determined by the jury. It is believed that these findings of the jury are not so contrary to the evidence as to require the same to be set aside. The facts as to the condition and the value of the goods were testified to, and from such evidence the jury could make their own conclusion as to value and loss, as in their province to do. For instance, it appeared in evidence from the written contract between the plaintiff and A. J. Jarrell that the plaintiff was to get the stock of dry goods at invoice price with 10 per cent. off, in the aggregate sum of \$5,400. There was testimony that the stock "was a very inferior stock" and "was a poor stock." The witness Roddy testified as follows:

"I believe that that stock of goods when I saw it would sell for about 33½ cents on the dollar—maybe 35 cents on the dollar. \* \* \* From the examination I made of the stock while I was in there I could tell the condition of that

stock prior to the fire as though I had been in there before the fire, or as though no fire had occurred. My recollection is that the fire did not hurt the dry goods nor the shoes nor the clothing. The shoes were in the original boxes on the shelves and were not hurt by the fire, and so was the other stuff. From 83½ to 85 or 86 cents would represent the value of the goods if the fire had not occurred, so far as my judgment goes—that much on the dollar."

As to the size and area of the fire there was testimony showing that "six feet square would cover the burned area. The fire did not burn through the floor." There was evidence showing that the goods burned up would inventory \$102.05 on the basis of 10 per cent. added to the invoice price. And there was also evidence concerning the value of the groceries and concerning the worn condition and value of the fixtures.

We have considered the assignments predicated error upon alleged misconduct of the jury, and conclude that the trial court's judgment in this respect should not be set aside. The judgment is affirmed.

**HICKS v. GULF, C. & S. F. RY. CO. et al.**  
(No. 433.)

(Court of Civil Appeals of Texas. Beaumont.  
May 10, 1919. Rehearing Denied  
June 4, 1919.)

**1. RAILROADS ⚡260—PERSONS INJURED ON TRACK USED BY OTHERS.**

A servant employed upon a train making trips over another company's road is entitled to presume that such company performed its duty to keep the track in a safe condition, and is entitled to damages for injuries received by reason of its failure in such respect.

**2. RAILROADS ⚡136—CONTRACTS.**

Railroad companies may make contracts in their private character for the use of road, as distinguished from their public character of common carrier.

**3. RAILROADS ⚡275(2) — "LICENSEE" — PERSON ON MOTOR CAR OPERATED OVER TRACK.**

Where a railroad gave a lumber company written permission to use its tracks, receiving no consideration therefor, lumber company not being a common carrier, a servant of the lumber company, while riding on one of the lumber company's motorcars, was a mere licensee (quoting Words and Phrases, First and Second Series, Licensee).

**4. RAILROADS ⚡275(1) — INJURIES TO LICENSEE ON MOTORCAR OPERATED OVER TRACK.**

A railroad company owes to a mere licensee, riding on a motorcar operated over its track, no

affirmative duty in regard to fencing its right of way so as to keep stock off of the track, or the condition of the track, the licensee assuming all the risks incident to the operation of the car.

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Suit by C. R. Hicks against the Gulf, Colorado & Santa Fé Railway Company, in which the defendant made Kirby Lumber Company a party, and prayed judgment over against it for such amount as may be recovered by the plaintiff against the railway. From an adverse judgment, the plaintiff appeals. Affirmed.

Smith & Crawford and John Hancock, all of Beaumont, for appellant.

F. J. & C. T. Duff, of Beaumont, and Andrews, Streetman, Logue & Mobley, of Houston, for appellees.

**WALKER, J.** This suit was filed in the district court of Hardin county, Tex., against appellee Gulf, Colorado & Santa Fé Railway Company, seeking recovery against it for damages received by appellant on November 28, 1915, while riding on a motorcar operated over the line of appellee by the Kirby Lumber Company. The Gulf, Colorado & Santa Fé Railway Company made the Kirby Lumber company a party to the suit, and prayed judgment over against it for such amount as might be recovered by appellant against the railway company.

The plaintiff sued only the Gulf, Colorado & Santa Fé Railway Company, and in his petition alleged, in substance, that he, as an employé of the Kirby Lumber Company, was riding on a certain motorcar then and there being operated by the Kirby Lumber Company over the tracks of the Gulf, Colorado & Santa Fé Railway Company under a certain written contract between said railway company and the Kirby Lumber Company. Said car was derailed through contact thereof with a cow on said track, and in said derailment plaintiff sustained certain personal injuries, which were the result of negligence upon the part of said railway company in failing to keep in repair its right of way fences, which it had permitted to become so out of repair as to permit live stock to come onto the railroad track; it being further alleged that the presence of the cow in question on the track was due to the alleged defective condition of the right of way fences, this being, as found by the court, the only ground of negligence alleged in plaintiff's petition.

The case was tried without a jury, and the trial court filed findings of fact and conclusions of law. No statement of facts is in the record.

For the purposes of this opinion, we give the following findings of fact by the court:

(a) That on the 28th day of November, 1915, the plaintiff, C. R. Hicks, was in the employ of the Kirby Lumber Company as a tie inspector helper, his duty being to mark railroad cross-ties.

(b) That on that date, and for a long time theretofore, the Kirby Lumber Company had a certain tie contract with the Atchison, Topeka & Santa Fé Railway Company, by and under which the said Kirby Lumber Company manufactured and sold and delivered to said Atchison, Topeka & Santa Fé Railway Company railroad cross-ties at prices in said contract specified.

(c) That on said date, and for some time theretofore, the said Kirby Lumber Company had a certain motorcar contract with the Gulf, Colorado & Santa Fé Railway Company, of which the said Hicks had no actual knowledge, which said contract is in words and figures, omitting formal portions, as follows, to wit:

"Whereas, the Kirby Lumber Company desires to operate upon the rails and track of the Gulf, Colorado & Santa Fé Railway Company motorcars; and

"Whereas, such use of the motorcars would be a great saving to said Kirby Lumber Company, and greatly expedite its employes in traveling from one of its lumber and tie camps to another, and said lumber company has applied to the said railway company for permission to so operate said motorcars upon the track of the railway company between Beaumont and Longview, between Gary and Grigsby, between Silsbee and Somerville, between Bragg and Saratoga, and between Kirbyville and Bonwier, and such use will be without cost or expense to the Kirby Lumber Company:

"Now, therefore, know all men by these presents:

"That the Kirby Lumber Company, in consideration of the above-recited facts, does hereby obligate itself to pay any or all damages to either persons or property that may be caused by the use of the aforesaid motorears, or any of them, upon the track of said railway company; and the said Kirby Lumber Company does hereby waive any obligation or duty of said railway company, which might otherwise exist, to give notice to its employes operating said motorcars upon the track of said railway company of the approach of trains, cars, engines, or handcars, by bell, whistle, or otherwise; and said Kirby Lumber Company further agrees to adopt such means as will enable its employes, while operating said motorcars upon the track of the railway company, as aforesaid, to keep advised of the approach of trains, regular, extra, or special, cars, engines, handcars, or motorcars, and to avoid injury thereby.

"Said Kirby Lumber Company hereby takes notice and is advised that trains, cars, engines, or handcars, or motorcars, are liable to pass over the track of said railway company at any time.

"It is further agreed that the railway company may at any time revoke the above permission to operate said motorcars upon its track without previous notice.

"In testimony whereof witness our hands this 10th day of October, A. D. 1914."

(d) That on said date, to wit, November 28, 1915, the plaintiff, C. R. Hicks, in company with two other Kirby Lumber Company employes, was riding on one of the said Kirby Lumber Company motorcars over a portion of the tracks of the Gulf, Colorado & Santa Fé Railway Company described in said motorcar contract, the said Hicks and the other two employes of the Kirby Lumber Company referred to being at that time on their way from Silsbee, Tex., to Plantersville, Tex., at which last-named place there were certain railroad cross-ties to be inspected and marked; and while so riding on said motorcar over said tracks during the nighttime, said motorcar being at the time operated with due care, at a point near the station of Thorp, in Montgomery county, as said motorcar was turning a curve, it suddenly came in contact with a cow upon said track, as a result of which contact the plaintiff has been pecuniarily damaged, the extent of which damage I find it unnecessary to definitely determine in view of my conclusions of law upon the other facts found herein.

(e) That at or near the point where said motorcar came in contact with said cow the defendant, Gulf, Colorado & Santa Fé Railway Company, had permitted the fences inclosing its right of way to become out of repair to such an extent that stock were able to pass onto the right of way and track of said railway company, and said fences had been so out of repair for such length of time and under such circumstances that the defendant, Gulf, Colorado & Santa Fé Railway Company, ought reasonably to have known of that fact.

On these facts the court concluded as follows:

That the plaintiff, while riding upon the motorcar of the Kirby Lumber Company at the time and place and under the circumstances referred to, was a mere licensee upon the tracks of the Gulf, Colorado & Santa Fé Railway Company, and that said Gulf, Colorado & Santa Fé Railway Company did not owe to plaintiff, as such licensee, any duty to repair the fences inclosing its right of way, and that, owing no such duty to the plaintiff, its failure to repair such fences would not be negligence towards the plaintiff, and that, this being the sole ground of negligence alleged in the plaintiff's petition, the plaintiff is not entitled to any recovery against said Gulf, Colorado & Santa Fé Railway Company.

Appellant's first assignment of error is that the court erred in finding and concluding that appellant was a mere licensee upon the tracks of the appellee railway company.

As we have no statement of facts before us, in determining whether or not the court erred in concluding that the plaintiff was a mere licensee we are restricted to the court's findings, which, in so far as they relate to this assignment, are confined to the motorcar contract, by the terms of which permission was accorded to the Kirby Lumber Company to operate motorcars upon the railway company's track, and the other findings copied herein. Under these findings, the railway

company was under no obligation of any character to permit the Kirby Lumber Company to operate a motorcar upon its tracks, there being nothing in the public charter of the railway company requiring it to give this permission to the Kirby Lumber Company.

[1] In defining the relation between himself and the railway company, the appellant has cited us to Trinity & Sabine Railway Co. v. Lane, 79 Tex. 648, 15 S. W. 478. The Supreme Court states this rule as follows:

"The defendant company, by accepting its charter, assumed the obligation to keep the track in safe condition for the operation of trains over it, and to do this is a duty it owes to all persons who are permitted by it to travel upon or operate trains over it. The plaintiff being employed upon the train of another company, which was making trips over the defendant's road, as the evidence shows, was entitled to presume that this duty would be performed, and, having been injured by reason of the failure to perform it, he is entitled to recover of defendant damages for his injuries."

This rule, as thus stated by the Supreme Court, is undoubtedly the law of Texas; and if this motorcar contract brings this case within the rule announced in the Lane Case, then appellant was not a licensee on the track of the railroad company, and the railroad company would be liable to him on the facts as found by the trial court. Except where the contract was mutual or the track was being used by invitation, in all the cases called to our attention where the owning company has been held liable for injuries to the servants of another company using its tracks by virtue of some sort of trackage agreement or contract, the track was being used in the charter rights of the owning company. In other words, one common carrier was using the tracks of another common carrier. Such contracts, whether mutual or a mere license, are made by a railroad company in its character of common carrier, and it is liable as such. Unless the contract is mutual, or the track is being used by invitation, we believe that the duty of the owning company to the operatives of the using company is determined by the purposes for which the track is being used. When a railroad company is contracting as and in its character of common carrier, it is liable to all persons operating trains over its track, to the same extent as if they were its own servants.

[2] However, it has long been the public policy of our laws to permit railroad companies to make contracts in their private character, as distinguished from their public character of common carrier. As said by Judge Brown in M. K. & T. Ry. Co. v. Carter, 95 Tex. 477, 68 S. W. 164:

"A railway company, when not contracting in its character of common carrier, has the same right of contract as other corporations or persons."

[3] Such is the nature of this motorcar contract, and appellant's case rests upon the duties owed him by the railroad company in its private character. The reading of the contract will disclose that the Kirby Lumber Company had applied to the railroad company for permission to operate cars on the railroad company's track, and that the railway company had granted such permission, revokable at will, without prejudice of any kind. There is no element of advantage or mutual interest or implied invitation involved in the contract. It expresses a consideration moving to the Kirby Lumber Company alone, to wit, the saving which would result to the Kirby Lumber Company and the expedition of its employes in traveling from one of the lumber company's tie camps to another.

Words and Phrases, second series, vol. 3, p. 126, gives the following definition of a licensee:

"A mere licensee is one who is clothed with no right, and to whom no invitation has been extended, but who is upon the premises of another by permission or acquiescence."

And again:

"A licensee is one who goes upon the land of another for his own purposes only."

Judge Reese, in Mack v. H. E. & W. T. Ry. Co., 134 S. W. 847, thus defines a licensee:

"We recognize fully the rule in this regard as to licensees; that is, persons who are not trespassers, but are upon the premises of another merely by his permission, expressed or implied, and not by any express or implied invitation."

Mr White, in his work, Personal Injuries on Railroads, § 870, lays down the rule that, in ascertaining the relation which an injured person bears to the owner of the premises where the injury was received, it is generally held to be a reliable test, in determining the duty owed by the owner to inquire whether or not the injured person at the time of the injury had business relations with the owner of the premises which would render his presence of mutual advantage to the two, or whether his presence was for his own convenience or on business with others than the owner of the premises. In the absence of some relation which inures to the mutual benefit of the owner of the premises and the injured person, or to the former alone, there is generally held to be no implied invitation on the part of the owner.

In the case of Lovett v. G., C. & S. F. Ry. Co., 97 Tex. 436, 79 S. W. 514, a decision by the Supreme Court, it appears that certain independent contractors had arranged with the railway company to get gravel out of the railway company's pit and load it upon the railway company's cars, and for that purpose had employed the plaintiff Lovett and others. The contract between the railway company

and the independent contractors did not require the railway company to carry the employes of the independent contractors to and from the gravel pit, but these employes had for a long time been in the habit of riding to and from the pit on the engine and cars of the railway company. This was done with the permission of the authorized agents of the railway company. It was held by the Supreme Court that the plaintiff, who was injured while so riding, was not a passenger, but was simply a volunteer, riding with permission of the plaintiff, gratuitously given, at a place selected by himself, and that the servants of the railway company owed him only the duty of taking ordinary care not to injure him, and, subject to that duty, had the right to operate the train as the exigencies of the business of their employment required. The railway company stood under no obligation to carry them, and merely permitted them to ride. They were, under such circumstances, held by the Supreme Court to be merely licensees and not passengers.

In *G., C. & S. F. Ry. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 370, one Evans had a contract with the railroad company for feeding employes engaged in construction work. Plaintiff was a cook in the employ of Evans, and was in the habit of riding to and fro on the railroad company's train, in the caboose attached to the construction train, with the consent of the railroad company; and at the time of the accident he was riding in the caboose, with the knowledge and consent of the conductor in charge of the construction train. It was held, in an opinion by Judge Reese, that the plaintiff, under these facts, was a mere licensee.

Except in so far as the motorcar license contract gave appellant a right to be upon the tracks of the railroad company, he had no right whatsoever to be there. Without this contract, he was unlawfully upon the track, and would have been a mere trespasser. Appellant pleaded this contract as the basis of his right to recover. His right can rise no higher than the source of the right. His presence there was permissive. The fact that this permission was in writing in no way changes or modifies the relation between appellant and appellee. "A written license, although under seal, has only the same effect as a parol license." 25 Cyc. 642.

It cannot be said that the Kirby Lumber Company, under the terms of the motorcar contract, acquired any greater rights than those of a mere licensee upon the railroad company's track. The rights of appellant, an employe of the Kirby Lumber Company, operating a motorcar under this contract, were no greater than the rights of the Kirby Lumber Company itself. We think the following authorities fully sustain the court's conclusion of law that appellant was a mere licensee

on the tracks of the railway company: *St. Louis S. W. Ry. Co. of Texas v. Spivey*, 97 Tex. 143, 76 S. W. 748; *De la Pena v. I. & G. N. Ry. Co.*, 32 Tex. Civ. App. 241, 74 S. W. 58; *S. A. & A. P. Ry. Co. v. Montgomery*, 31 Tex. Civ. App. 491, 72 S. W. 616; *G., B. & K. C. Ry. Co. v. Harrison*, 104 S. W. 400; *Lovett v. G., C. & S. F. Ry. Co.*, 97 Tex. 436, 79 S. W. 514; *G., C. & S. F. Ry. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 370; *Mexican Nat. Ry. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126; *H. B. & T. Ry. Co. v. O'Leary*, 136 S. W. 601; *City of Greenville v. Pitts*, 102 Tex. 2, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843; *Railway Co. v. Morgan*, 92 Tex. 102, 46 S. W. 28; *Oil Co. v. Morton*, 70 Tex. 403, 7 S. W. 756, 8 Am. St. Rep. 611; *Dobbins v. Railway*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Railway v. Edwards*, 90 Tex. 68, 36 S. W. 480, 32 L. R. A. 825; *Downey v. O. & O. Ry. Co.*, 28 W. Va. 742; *Carr v. Mo. Pac. Ry. Co.*, 195 Mo. 214, 92 S. W. 877; *Cleveland, etc., Ry. Co. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602; *Albion Lbr. Co. v. De Nobra*, 72 Fed. 739, 19 C. C. A. 168; *Shoemaker v. Kingsbury*, 79 U. S. (12 Wall.) 369, 20 L. Ed. 482; *Indian Refining Co. v. Mobley*, 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497; *Bennett v. L. & N. Ry. Co.*, 102 U. S. 577, 26 L. Ed. 235; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Hutchinson, Carriers*, vol. 2, § 61, p. 57; *Wade v. Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255; *Redigan v. Ry. Co.*, 155 Mass. 44, 28 N. E. 1134, 14 L. R. A. 276, 31 Am. St. Rep. 520; *White, Personal Injuries on Railroads*, vol. 2, §§ 870, 872.

[4] Appellant's second assignment of error is that the court erred in concluding that the defendant, Gulf, Colorado & Santa Fe Railway Company, did not owe plaintiff any duty to repair the fence inclosing its right of way.

As sustaining this assignment appellant cites the same line of authorities reviewed by us in the *August Scholz Case*, 209 S. W. 224. As he was a mere licensee at the time of his injury, these authorities are not in point. The railroad company owed to appellant no affirmative duty in regard to its fence or the condition of its track. As a licensee appellant took the track as he found it, and assumed all the risks incident to the operation of this motorcar. As found by the trial court, the fences inclosing the right of way of appellee were out of repair to such an extent that cattle were able to pass onto the right of way and track of the railway company, and these fences had been out of repair for such length of time and under such circumstances that the railway company ought reasonably to have known of that fact. No affirmative duty rested on the railway company to repair this fence for the protection of a mere licensee. The rule is thus stated by White in

his work "Personal Injuries on Railroads," § 872:

"There is no duty imposed by the law upon an owner or occupant of premises to keep them in suitable condition for those who come there for their own convenience merely, without any invitation, express or implied, and without having any business with the owner of such premises.

"The reason for the distinction is manifest, for the very basis of every action for an injury to the person is the violation of some duty owing by the party alleged to have caused the injury. Without a relation from which a duty would spring or be created by law, there could be no negligence, or a breach of a duty that did not exist, and consequently no liability would exist, unless a relation be first established from which some correlative duty would be implied."

The following authorities fully sustain this rule: *Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 182 Am. St. Rep. 843; *Dobbins v. Railway Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Fleming v. Texas Loan Agency*, 24 Tex. Civ. App. 203, 58 S. W. 971; *Railway Co. v. Sgalinski*, 19 Tex. Civ. App. 107, 46 S. W. 118; *De la Pena v. Railway Co.*, 32 Tex. Civ. App. 241, 74 S. W. 58; *Mack v. Railway Co.*, 134 S. W. 846; *Cameron & Co. v. Polk*, 177 S. W. 1178; *Denison, etc., Power Co. v. Patton*, 105 Tex. 621, 154 S. W. 540, 45 L. R. A. (N. S.) 303; *Railway Co. v. Kinsloe*, 172 S. W. 1124; *Stamford Oil Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111; *Kirby Lbr. Co. v. Gresham*, 151 S. W. 847.

Appellant has many additional assignments in his brief, but, as the two discussed by us dispose of this case, we shall not discuss the others.

Finding no error in this record, this case is in all things affirmed.

**BALL v. McDUFFIE et al.** (No. 2033.)

(Court of Civil Appeals of Texas. Texarkana.  
May 30, 1919. Rehearing Denied  
June 19, 1919.)

1. APPEAL AND ERROR ⇨1052(8)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting abstract of records destroyed by fire is harmless where, if admitted, there was not sufficient evidence to authorize a recovery by plaintiff who offered them.

2. BOUNDARIES ⇨33 — ESTABLISHMENT — BURDEN OF PROOF.

In action to establish boundary line, plaintiff has the burden of showing not only title, but that boundary line was where he claimed it to be on the ground.

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Action by S. C. Ball against J. C. McDuffie and others. From a judgment entered on directed verdict for defendants, plaintiff appeals. Affirmed.

Mahaffey, Keeney & Dalby, of Texarkana, and J. B. Manning, of New Boston, for appellant.

King & Estes and C. A. Wheeler, all of Texarkana, for appellees.

**WILLSON, C. J.** The suit was by appellant to establish the boundary line between land he claimed to own on the John Ball survey in Bowie county and land appellees owned on said survey. After hearing the testimony the trial court instructed the jury to find in favor of appellees, and, the jury having so found, rendered judgment in their favor.

[1, 2] The complaint here is that the trial court erred: First, in excluding as evidence an abstract from records of Bowie county (shown to have been destroyed by fire) of a deed from D. Morris, administrator of John Ball, to Rice, Mason, and Tarrant, under whom appellant claimed; and second, in peremptorily instructing the jury as he did.

As we view the record it is not necessary, in disposing of the appeal, to determine whether the trial court erred when he excluded the abstract; for, had he admitted it, and had it been sufficient, when considered in connection with other evidence, to show title in appellant to land on the Ball survey, the court nevertheless should have instructed the jury as he did. The burden was on appellant to prove, not only that he had title to the land he claimed, but also that the boundary line thereof in question between him and appellees was where he claimed it to be on the ground. Appellant has not referred us to any evidence in the record, and we have not found any therein, which would have enabled the jury, had the case been submitted to them, to say where said land was located.

The judgment is affirmed.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



GULF, C. & S. F. RY. CO. v. STATE.  
(No. 6111.)

(Court of Civil Appeals of Texas. Austin.  
May 14, 1919. Rehearing Denied  
June 11, 1919.)

1. STATUTES ⇐5—SPECIAL SESSION CALLED  
BY GOVERNOR—LAWS WITHIN PROCLAMA-  
TION.

Acts 35th Leg. (Fourth Called Sess.) cc. 24, 31, commonly called the "State-Wide Prohibition Act" and the "Transportation Act," were within the subjects or purposes of the Governor's proclamation, authorizing Legislature to pass laws prohibiting any one from procuring for or delivering intoxicants to any person in the military or naval forces, and not in conflict with Const. art. 3, § 40, and article 4, § 8.

2. STATUTES ⇐48—REPUGNANCY—STATE-  
WIDE PROHIBITION LAW—VALIDITY.

There is no such repugnance or doubt as to the meaning of the provisions of Acts 35th Leg. (Fourth Called Sess.) c. 24, relating to transportation and receipt of intoxicating liquors as to render the same void.

3. INTOXICATING LIQUORS ⇐17—STATE-  
WIDE PROHIBITION LAW—VALIDITY.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not in conflict with any existing law.

4. STATUTES ⇐47—STATE-WIDE PROHIBI-  
TION LAW—VALIDITY.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not indefinitely framed or of such doubtful construction that it cannot be understood from the language in which it is expressed.

5. INTOXICATING LIQUORS ⇐132—REPEAL OF  
STATUTE BY IMPLICATION.

Any law which might be in conflict with Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, as to transportation or receipt of intoxicants, would be repealed thereby by implication, notwithstanding other sections of the chapter provide that all other laws prohibiting or regulating sale of intoxicants shall remain in full force and effect.

6. INTOXICATING LIQUORS ⇐17—STATE-  
WIDE PROHIBITION LAW—VALIDITY.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not in contravention of Const. art. 16, § 20, giving the right to voters within certain prescribed limits to determine from time to time whether intoxicants shall be sold in such prescribed limits.

7. COMMERCE ⇐14—INTERFERENCE WITH IN-  
TERSTATE COMMERCE—INTOXICATING LIQ-  
UORS—WEBB-KENYON ACT.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, in so far as it interferes with interstate commerce, is made valid by Webb-Kenyon Act (U. S. Comp. St. § 8739).

8. INTOXICATING LIQUORS ⇐261—INJUN-  
TION—TRANSPORTATION.

Under Act 35th Leg. (Fourth Called Sess.) c. 24, known as the "State-Wide Prohibition Law," injunction will lie to restrain a railroad from using its transportation facilities in the state for receiving, transporting, or delivering intoxicants except for medicinal, scientific, mechanical, or sacramental purposes.

Appeal from District Court, Travis County; George Calhoun, Judge.

Suit by the State against the Gulf, Colorado & Santa Fé Railway Company. From temporary injunction granted, defendant appeals. Affirmed.

A. H. McKnight, of Dallas, and F. J. Wren and Terry, Cavin & Mills, all of Galveston, for appellant.

C. M. Cureton, Atty. Gen., and W. A. Keeling, Asst. Atty. Gen., for the State.

**SLEEPER**, Special Judge. This is an appeal from a temporary injunction granted by the district court of Travis county, at the suit of the state against Gulf, Colorado & Santa Fé Railway Company, restraining the defendant from using its transportation facilities anywhere in the state of Texas for the purpose of receiving, transporting, or delivering intoxicating liquors except for medicinal, scientific, mechanical, or sacramental purposes.

The action is founded on laws embraced in chapters 24 and 31 of the Fourth Called Special Session of the Thirty-Fifth Legislature, commonly called the "State-Wide Prohibition Act" and the "Transportation Act," relating to intoxicating liquors within this state.

The State-Wide Prohibition Act prohibits the manufacture or sale of intoxicating liquors in this state except for medicinal, scientific, mechanical, and sacramental purposes, and also makes unlawful the transportation within or importation into this state by any railroad, or the receipt of intoxicating liquors, or the receipt of same by any person, firm, or corporation for such transportation, or the delivery of same after such transportation, or the receipt of same after such transportation, except for medic-

inal, scientific, mechanical, or sacramental purposes. The act provides that it shall be cumulative of all laws in force, and all acts of the Fourth Called Special Session of the Thirty-Fifth Legislature prohibiting and regulating the sale of intoxicating liquors, and expressly provides that no law now in force or any act of the Fourth Called Session of the Thirty-Fifth Legislature prohibiting or regulating sale of intoxicating liquor is repealed thereby, but all such laws and acts shall remain in full force and effect. It also provides that in addition to all other remedies now provided by law and provided by said act, the Attorney General is authorized to enjoin any conduct in violation of the act, and suit therefor may be maintained in the name of the state, in Travis county. The act also provides that the provisions of the act, and the provisions of each section thereof, shall be separable, and in the event any section thereof should, for any reason, be held unconstitutional, the remaining sections shall, nevertheless, remain in full force and effect.

Chapter 31, regulating the transportation of intoxicating liquors within this state, makes it unlawful for any person in any place where sale of intoxicating liquors is prohibited to possess such liquors received from a common carrier, or to receive same from a common carrier, or to deliver same to another for shipment, or to receive same for another shipment, or to transport or deliver any intoxicating liquors in any place where the sale of intoxicating liquor is prohibited, or to transport in any manner any intoxicating liquor of any kind from a point within any other state to any person residing in this state within a territory where the sale of intoxicating liquor is prohibited, and the act also provides that same shall be cumulative, and shall not repeal other existing laws prohibiting and regulating the sale of intoxicating liquors; also that all laws and acts regulating and prohibiting sale of intoxicating liquor shall remain in full force and effect; but this chapter contains no law authorizing injunctive relief.

It is manifest that the provisions of chapter 31, making it unlawful for a common carrier to transport intoxicating liquors in this state, will not sustain the injunction granted by the district court in this case, if the State-Wide Prohibition Law comprehended in chapter 24 of such acts, in so far as it forbids the sale of such liquors, is invalid as being in contravention of section 20, article 18, of the Constitution, which provides that—

"The voters of any county, justice's precinct, town, city, or such subdivision of a county as may be designated by the commissioners' court of said county, may, by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

As we have concluded that in order to decide the issues raised in this case it is not necessary to pass upon the validity of the State-Wide Prohibition Law, in so far as it forbids the sale of intoxicating liquors (and on which we express no opinion), further discussion of chapter 31 will be eliminated.

[1] It is claimed by the defendant that these acts of the Legislature were not within the subjects or purposes of the proclamation of the Governor in calling the Fourth Extra Session of the Thirty-Fifth Legislature, at which such acts were passed, and therefore, the laws are in conflict with section 40, article 3, and section 8, article 4, of the Constitution, which limit legislation in such cases to the subjects designated in the proclamation.

The objection is untenable. The proclamation authorizes the Legislature to pass laws prohibiting any person from directly or indirectly procuring for or delivering intoxicating liquors to any person enlisted or engaged in the military or naval forces of the United States, whether in uniform or not at the time. It was for the Legislature to determine the best method of enforcing the laws passed pursuant to the proclamation of the Governor, and apparently in the judgment of the Legislature this could best be done by forbidding absolutely the sale, transportation, or receipt of intoxicating liquors within this state, and such legislation was therefore within the subject designated by the Governor. The law is drastic, but its quality in that respect is discretionary with the lawmaking power.

[2-5] There is not such repugnance or doubt as to the meaning of the provisions in chapter 24, relating to the transportation and receipt of intoxicating liquors, as to render the same void. Section 3 of said chapter, making it unlawful for any railroad to transport within or import into this state intoxicating liquors, and also making it unlawful for any person to receive the same or to deliver the same, is not in conflict with any existing law, and, if valid, should be enforced. The section is not so indefinitely framed or of such doubtful construction that it cannot be understood from the language in which it is expressed, and no law has been pointed out to us with which it is in conflict. Besides, we think any law which might be in conflict with said section 3 would be repealed thereby by implication, notwithstanding the other sections of the chapter, which provide that all other laws prohibiting or regulating the sale of intoxicating liquor shall remain in full force and effect.

[6] The issues in this case depend on legislative power to make it unlawful for railroads to transport intoxicating liquors in this state, and for any person to receive intoxicating liquors which have been transported over any railroad in this state. It is

contended that such laws are invalid and in contravention of section 20 of article 16 of the Constitution, which gives the right to the qualified voters within certain prescribed limits to determine from time to time by majority vote whether intoxicating liquor shall be sold in such prescribed limits. We do not think the Transportation Act embraced in section 8 of chapter 24 is obnoxious to this objection. It reads as follows:

"Sec. 3. The transportation within or importation into this state by any railroad, common carrier, automobile, by private conveyance, or otherwise, or the receipt of any spirituous, vinous, or malt liquors or medicated bitters—capable of producing intoxication, or the receipt of same by any person, firm, or corporation, for such transportation, or the delivery of same after such transportation, or the receipt of same after such transportation—except for medicinal, scientific, mechanical, or sacramental purposes—shall be unlawful."

The constitutional provision does not expressly, or by implication, inhibit the law-making power, which is otherwise supreme, from enacting such law as it may deem proper, hampering and restricting traffic in intoxicating liquor, so long as such laws do not undertake to prohibit sales thereof. *Bell v. State*, 28 Tex. App. 96, 12 S. W. 410; *Ex parte Vaccarezza*, 52 Tex. Cr. R. 105, 105 S. W. 1121. In these cases the reasoning of the Court of Criminal Appeals would indicate that under a proper construction of section 20, article 16, of the Constitution the Legislature had the power to throttle almost to extermination traffic in intoxicating liquors, if indeed the opinions do not go further, as contended by the state in this case, and hold that the Legislature may even prohibit the sale of such liquors throughout the state. In the *Bell Case*, Judge Hurt says:

"The people of the state might desire the prohibition of saloons and not absolute prohibition; but we are seriously told that they cannot have this—that they must take absolute prohibition in order to obtain the suppression of saloons—and this they must receive as doled out to them by the separate action of counties, precincts, cities, and towns. This is absurd. We will follow this subject but one step further. Local option prohibits absolutely in the county of its adoption. Say that this divests the Legislature of the power to prohibit absolutely all over the state (a proposition too preposterous for discussion), may not the Legislature still retain the power to prohibit saloons? Concede that the Legislature, by reason of the local option provision of the Constitution, cannot prohibit the sale of such liquors absolutely, may it not still retain the power to prohibit the saloons? Now, it is well settled by all the authorities that the Legislature, no constitutional provision forbidding, has the right to absolutely prohibit the saloon business, the retail of intoxicating liquors. If, therefore, the Legislature can prohibit this business absolutely, it follows inevitably that the Legis-

lature can annex to the pursuit of such business just such conditions precedent as it may deem just, unless the citizen has granted to him affirmatively, by the Constitution of the United States, the right to sell such liquors by retail, to keep a saloon. If such right is given, the Legislature might regulate the business, but regulation could not extend to prohibition. No such right is conferred; and hence another position of counsel for appellant is unsound."

In the *Vaccarezza Case*, Judge Henderson quotes and approves the language and reasoning of Judge Hurt in the *Bell Case*. In those cases it is plainly intimated that the Legislature might pass laws closing saloons throughout the state, and if it could go to that extent, we see no reason why it might not also prohibit transportation of liquors by common carriers and prohibit persons from receiving such liquors from railroads or common carriers. See, also, *Ex parte Hollingsworth*, 203 S. W. 1102.

[7] The law under discussion, in so far as it interferes with interstate commerce, is made valid by the Webb-Kenyon Act of Congress (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. § 8789]), which, in substance, provides that transportation of intoxicating liquors from one state to another, intended by any person interested therein to be received, either in the original package or otherwise in violation of any law of such state, is prohibited, for the reason that since it is made unlawful for any person to receive such liquors when so transported, such transportation is prohibited by said act of Congress, and as no shipment could be made without the intention of some person to receive it in this state, every such shipment is prohibited and unlawful, both by state law and by the act of Congress. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 328, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; *Seaboard Air Line Co. v. North Carolina*, 245 U. S. 298, 38 Sup. Ct. 96, 62 L. Ed. 299. In the case last cited the court says:

"Since our decision in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 320, 324, 61 L. Ed. 328, 335, 337, L. R. A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that 'its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught,' and that under it a state may inhibit shipments therein of intoxicating liquors from another by a common carrier, although intended for the consignee's personal use, where such use is not actually forbidden."

It seems plain, therefore, since it is made unlawful to receive liquors from a common

carrier by the Legislature of this state and also unlawful for a railroad to transport liquors intended to be received in violation of the law, that such legislation is in accord with the Webb-Kenyon Act, and therefore valid and enforceable.

The view of the law here expressed is not opposed to the ruling in *Ex parte Peede*, 170 S. W. 749. That case related to shipment of liquor into local option territory under a law which prohibited the transportation of liquor into local option territory. There was no provision in the law making it unlawful to receive liquor from a common carrier, but it was only made unlawful to receive for shipment, or deliver for shipment, or to ship intoxicating liquors into forbidden territory, but the act did not make it unlawful to receive liquor after it was shipped. So that it may be said that the law and the facts in that case did not bring it strictly within the Webb-Kenyon Act. However, the opinion of the court in *Ex parte Peede* seems to have been based on the decision of the Supreme Court of Delaware, in the case of *Van Winkle v. State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104, which latter case was reviewed by the United States Supreme Court in *Clark Distilling Co. v. Western Maryland R. Co.*, supra, in which the court criticizes the decision and says:

"The leading state case cited is *Van Winkle v. State*, 4 Boyce (Del.) 578 [91 Atl. 385, Ann. Cas. 1916D, 104]. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if

the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition, because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when the liquor is intended to be used in violation of the law of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

[8] Injunctive relief having been provided for in chapter 24, which also makes transportation of liquors unlawful, as well as receipt from or delivery to the carriers, the remedy applied is sustained by the law.

The judgment of the district court should be affirmed; and it is so ordered.

Affirmed.

BRADY, J., being disqualified, did not sit in this case.

**KANSAS CITY BREWERIES CO. v. MARKOWITZ. (No. 19844.)**(Supreme Court of Missouri, Division No. 2,  
June 3, 1919.)**COURTS —231(22)—MISSOURI—JURISDICTION OF SUPREME COURT.**

Where constitutional question raised in the trial court was not presented, urged, or briefed in the Supreme Court, held that an appeal will not lie to the Supreme Court on the ground of a constitutional question.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

Suit by the Kansas City Breweries Company, a corporation, against Louis I. Markowitz. From a judgment for plaintiff, defendant appeals. Appeal transferred to the Kansas City Court of Appeals.

Frank M. Lowe, of Kansas City, for appellant.

James E. Goodrich and Raymond G. Barnett, both of Kansas City, for respondent.

**WILLIAMS, P. J.** This is an injunction suit, wherein the plaintiff asks to have the defendant enjoined from bringing suits against the plaintiff for rent on certain described premises in Kansas City, Mo.

The petition, among other things, in effect alleges that defendant has brought and threatens to bring numerous suits against plaintiff on the theory that plaintiff is the tenant of defendant at a rental of \$50 per month for a term of two years from February 1, 1915; alleges further that plaintiff is not obligated longer as such tenant to pay the rent mentioned, and that all of said suits involve the same legal questions and similar issue of facts.

Trial was had in the circuit court of Jackson county, which resulted in a judgment and decree in favor of plaintiff. Thereupon defendant was granted an appeal to this court.

Upon an inspection of the record and briefs in this case we have reached the conclusion that we do not have jurisdiction of this appeal.

The amount involved is not definitely shown by the pleadings or evidence, but sufficient appears to justify us in saying that the amount involved does not exceed the sum of \$7,500, but that it is much less than that sum.

Evidently the appeal was allowed to this court on the theory that a constitutional question was involved.

Appellant did raise a constitutional question upon the trial, but the constitutional question is not presented, urged, or briefed in the briefs which appellant has filed here.

Both divisions of this court have held that

under such circumstances a constitutional question, conferring jurisdiction upon this court, is not involved, but that the jurisdiction of such an appeal, absent other grounds which would give this court jurisdiction, is in the Court of Appeals. *Botts v. Railroad*, 248 Mo. 56, 154 S. W. 53; *Moore v. United Railways*, 256 Mo. 165, 165 S. W. 304.

It therefore follows that the cause should be transferred to the Kansas City Court of Appeals.

It is so ordered.

All concur.

**ODELL v. METROPOLITAN ST. RY. CO.  
et al. (No. 19853.)**(Supreme Court of Missouri, Division No. 1,  
June 2, 1919.)**APPEAL AND ERROR —635(8)—BILL OF EXCEPTIONS—SUFFICIENCY—DISMISSAL OF APPEAL—COURT RULE.**

Where plaintiff appealed, complaining only of error in instructions, and the bill of exceptions did not set out the evidence, and respondents objected to its sufficiency, and the appellant did not bring up the testimony of the witnesses, respondent's motion to dismiss must be allowed, in view of Court Rule 6 (186 S. W. vii).

Appeal from Circuit Court, Jackson County; Allen C. Southern, Judge.

Action by Ruby E. Odell against the Metropolitan Street Railway Company and another. Judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal. Appeal dismissed.

C. W. Prince, E. A. Harris, J. N. Beery, and J. E. Westfall, all of Kansas City, for appellant.

Ben T. Hardin, of Kansas City, for respondents.

**BOND, J. I.** This is an action for personal injuries caused to plaintiff while a passenger on defendant's street railway by a collision between a truck belonging to the Standard Oil Company and the street car wherein plaintiff had taken passage. The petition alleges:

"Plaintiff further states that on or about the 24th day of October, 1910, she became a passenger of the Metropolitan Street Railway Company, boarding one of its cars known as the Prospect Avenue, Swope Parkway car, at the corner of Eleventh street and Grand avenue, Kansas City, Mo.; that after she had boarded said car and after she had paid her fare as a passenger thereon, she proceeded up the aisle of said car to take a seat in said car, which car was running in a southerly direction, a collision occurred between said car and a heavy automobile truck owned and operated by de-

fendant Standard Oil Company, due to negligent operation of said car and truck by defendants; that by reason of said collision, the car in which plaintiff was riding as a passenger as aforesaid was, through the carelessness and negligence of the defendant, caused to be jerked or jarred or its momentum changed or altered in such a way and with such violence and unusual force as to cause the plaintiff to be thrown forward over and against the side, top, or edge of the back of the seat in front of the one in which she was preparing to seat herself, and immediately thereafter a forward movement of said car, of unusual violence and force, through the carelessness and negligence of said defendants, caused plaintiff to be seriously and permanently injured, hurt, and crippled, and causing her to sustain serious and permanent internal injuries."

The petition thereafter describes the nature of the injuries, and prays for judgment for \$15,000. The defendants answered separately, the Street Railway Company by a general denial, and the Standard Oil Company by a general denial and an averment of contributory negligence on the part of plaintiff. The trial resulted in a verdict for the defendants. After the overruling of her motion for a new trial, which among other things complains of error in the instructions given for defendants, plaintiff duly appealed to this court.

II. The bill of exceptions presented by plaintiff and allowed by the trial judge, after reciting the qualification and impaneling of the jury, adds:

"Thereafter plaintiff offered evidence which tended to prove all the allegations of her petition. Thereafter the defendant offered evidence which tended to contradict all the evidence offered by the plaintiff and also tended to prove the allegations of the separate answers of said defendants. Thereafter plaintiff offered evidence tending to disprove all of the allegations of new matter contained in said separate answers."

Defendants objected to the allowance of the bill of exceptions, among other reasons because they denied that plaintiff's evidence tended to prove the allegations of her petition or to disprove the allegations of new matter contained in said separate answers, concluding their objections in the following terms:

"Wherefore these defendants cannot and do not consent to said so-called bill of exceptions, because it is absolutely incorrect, and contains so many matters not authorized in said rule 6 of the Supreme Court of Missouri, and for the further reason that the record of testimony in this case is a long one, and no appellate court can get any sort of a correct idea as to what the testimony really was in the trial of the case; and these defendants object to the filing of said so-called bill of exceptions, and protest against its filing, for the reasons hereinbefore set forth."

In furtherance of such objections defendants have filed a motion in this court to dismiss the appeal presented by plaintiff's bill of exceptions, invoking in support of said motion the terms of rule 6 (186 S. W. vii) of this court, to wit:

"Rule 6. *Reviewing Instructions.* To enable this court to review the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter."

The terms of the concluding sentence of the rule of this court, set out above, precludes a review of the instructions complained of by appellant under the bill of exceptions presented on the present appeal. In their objections in the allowance and filing of said bill of exceptions in the trial court, the defendants specifically invoke the application of rule 6, which, as may be seen from an inspection, provides that where the parties disagree as to the tendency of the proof, the bill of exceptions must set out the evidence in narrative form in order to entitle the appellant to a review of the instructions on an appeal taken in accordance with that rule. The language of the rule is plain, unambiguous, and explicit. Its requirements were not complied with, since the bill of exceptions in this case does not purport to contain the testimony given on the trial "in a narrative form, avoiding repetition and omitting immaterial matter," but contents itself with a recital that there was evidence, pro and con, tending to prove the issues presented by the pleadings.

It is evident, therefore, that without abandoning the rule prescribed by us for the preparation of an appeal wherein it is sought only to review the action of the trial court in the giving and refusing of instructions, we cannot review the instructions complained of by appellant in this case. That rule was intended for the convenience of the bar, and if it had been heeded, we would be in a position to review the instructions given for the defendant of which complaint is now made, but appellant ignored the last sentence of the rule, which became operative and binding the moment defendants in an apt and sensible manner denied the recital in the bill that the evidence tended to prove the allegations of plaintiff's petition and the averments of her reply.

It follows that the only alternative left us in the present case is to sustain the motion to dismiss the appeal. It is so ordered.

BLAIR, P. J., and GRAVES, J., concur.

**TRADERS' NAT. BANK OF ROCHESTER v. TEASDALE.** (No. 20172.)(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)Appeal from St. Louis Circuit Court;  
George C. Hitchcock, Judge.

Suit by the Traders' National Bank of Rochester against George W. Teasdale. Upon peremptory instructions there was a verdict and judgment for plaintiff, and defendant appealed to the St. Louis Court of Appeals, which for constitutional reasons certified the cause to the Supreme Court. Judgment affirmed.

Safford &amp; Marsalek, of St. Louis, for appellant.

Robert C. Grier, of St. Louis, for respondent.

**WOODSON, J.** The plaintiff brought this suit in the circuit court of the city of St. Louis upon a written guaranty executed by the defendant to secure the payment of \$5,000 loaned by the plaintiff to Seneca Dried Fruit Company, of which the defendant was the vice president. The defendant's answer set up several defenses, but, since there was no evidence introduced tending to sustain any of them, it would be useless to set out the answer or the evidence introduced.

The money sued for was evidenced by a promissory note executed by the said Seneca Dried Fruit Company. The note mentioned and the contract of guaranty sued on were introduced in evidence, and at the close of all of the evidence the court peremptorily instructed the jury to return a verdict for the plaintiff for the sum sued for, to which action of the court the defendant duly excepted, and appealed the cause to the St. Louis Court of Appeals, which for constitutional reasons certified same to this court.

After a careful consideration of the entire record, we are of the opinion that the trial court correctly instructed the jury to find for the plaintiff. There being no error in the record, the judgment is affirmed.

All concur.

**SHANAHAN v. CITY OF ST. LOUIS.**  
(No. 20181.)(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)**1. APPEAL AND ERROR** §260(3)—RESERVATION OF EXCEPTIONS—NECESSITY.

In an action against a city for injuries sustained by stumbling over manhole cover, error cannot be predicated on the court's action in regard to an offer by plaintiff to exhibit his

person to the jury to show his injuries, where plaintiff saved no exception to the court's failure to rule on the offer, in view of Rev. St. 1909, § 2081, providing that no exception shall be taken to any proceedings, except such as shall have been expressly decided by the court.

**2. TRIAL** §63(2)—RECEPTION OF EVIDENCE—EXHIBITION OF INJURIES—DISCRETION OF COURT.

In a personal injury action, it was within the sound discretion of the trial court to admit the exhibition of plaintiff's injuries to the jury in rebuttal; it being a matter which should have been shown in chief.

Appeal from St. Louis Circuit Court;  
Eugene McQuillin, Judge.

Action by Michael L. Shanahan against the City of St. Louis. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. Sacks, of Tulsa, Okl., for appellant.  
Charles H. Dause and H. A. Hamilton,  
both of St. Louis, for respondent.

**SMALL, C. I.** The plaintiff sued the defendant for damages for injuries sustained by him while walking along the sidewalk on Biddle street, at or near the southeast corner of Broadway and Biddle street, in the city of St. Louis. The allegation of the petition is that plaintiff stepped "upon a certain iron manhole covering which had been negligently placed at said point in said sidewalk by the agents and employes of the defendant, who were at the time engaged in cleaning a sewer at this point, and for that purpose had removed the covering from said manhole, and that as a result of stepping on said covering it was caused to tilt upwards, striking him on the body and legs, causing him to fall and severely injuring him," etc. The answer was a general denial, and plea of contributory negligence, in that plaintiff, while passing along said highway, "was not paying due attention to his course."

The evidence was conflicting as to whether plaintiff fell by reason of stepping on the manhole cover, as claimed by him, or by reason of slipping on the icy curbstone or sidewalk, as claimed by the city. The evidence was also conflicting as to the contributory negligence of the plaintiff in failing to "pay due attention to his course." The jury found for the defendant, and the plaintiff appealed to this court.

Plaintiff testified, in presenting his case in chief, that among other injuries he received from the fall complained of was a rupture on the left side, from which he had suffered severely. On cross-examination he stated that about 20 years before he had been ruptured on the right side, but that

this old rupture had long since ceased to cause him any pain or trouble. Dr. Ayers, plaintiff's witness, in chief, testified that shortly after the accident (he could not recollect the date) he examined the plaintiff, and found that plaintiff was ruptured; but he did not recollect whether this rupture was on the right side or left side, and he could recollect of but one rupture. Plaintiff was recalled for further examination in chief, but no further questions were then asked him as to his injuries, and no offer to exhibit his person was then made. The defendant offered no evidence as to the injuries sustained by the plaintiff. After the close of the defendant's evidence, the plaintiff offered in rebuttal to exhibit his person to the jury, to show that he was ruptured on both sides. The plaintiff's abstract of the record as to what then occurred is as follows:

**('Plaintiff's Rebuttal Testimony.**

"Thereupon the plaintiff to further sustain the issues on his part, offered and introduced evidence as follows, to wit:

"(Counsel and court confer privately on some matter.)

"Mr. Sacks: If the court please, I would like to make a request of the court that, inasmuch as there is some conflicting testimony about the ruptures—

"Mr. Burkham: A pure case of four-flush of that kind, trying to get it in the record and before the jury. I object to counsel making any statement about this before the jury. Let him make it to the court and counsel only; then we can object to it, and the court can rule on it without getting such a statement as he is now attempting to make before the jury.

"Mr. Sacks: If the court please, I offer—

"The Court: No; you can make it to the stenographer and not in the hearing of the jury.

"Mr. Sacks: Counsel for the plaintiff at this time has made a request of the court that the plaintiff be permitted to exhibit his person, under proper restrictions, showing both ruptures, one on the left side and one on the right side, to the jury, both of which ruptures are plainly visible.

"Defendant's Counsel objects: Wait a minute.

"(Mr. Sacks approaches bench, privately discusses something with his honor, and doesn't finish his statement.)

"To which ruling of the court the plaintiff by counsel then and there at the time duly accepted."

II. The only question presented for our consideration is whether there is any error shown on the part of the lower court with regard to the offer of the plaintiff, in rebuttal, to exhibit his person to the jury to show his injuries. We must rule this question against the appellant for two reasons:

[1] First. Section 2081, Revised Statutes of Missouri 1909, provides:

"No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court."

The record fails to show that the court made any ruling whatever upon the plaintiff's offer to exhibit his person, or that plaintiff saved any exception to the court's failure to rule on that offer. Under such circumstances, we are prohibited by the above statute from reviewing the matter presented to us by the appellant. *Ray County Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *State v. Wana*, 245 Mo. 558, 150 S. W. 1085; *Tremain v. Dyott*, 161 Mo. App. 217, 142 S. W. 760; *Craig v. Bank of Joplin*, 189 Mo. App. 889, 176 S. W. 433.

[2] Second, the extent of the plaintiff's injuries was part of the plaintiff's case in chief, and the evidence offered did not constitute matter of rebuttal at all. Whether it should have been admitted in rebuttal was a matter within the sound discretion of the court, and that discretion will not be interfered with, except when clearly abused. No excuse or reason is offered for not making the offer to exhibit plaintiff's person when he was recalled to the witness stand in chief after Dr. Ayers had given his testimony. Furthermore, the plaintiff without objection in rebuttal, after his offer to make proof of his injuries, proceeded to and did fully explain to the jury that he had two ruptures, and would, if he were permitted to, then and there exhibit both of them to the jury. Besides, the defendant had offered no testimony disputing the injuries which the plaintiff claimed he had sustained. Under the circumstances shown by the record, if the court had ruled upon the plaintiff's offer and rejected it, as claimed by appellant, it would not have abused its discretion, and no error would have been committed. *Babcock v. Babcock*, 46 Mo. 243; *Burns v. Whelan*, 52 Mo. 520; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053; *Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452; *Seibel, etc., Mfg. Co. v. Manufacturers' Ry. Co.*, 230 Mo. 59, 130 S. W. 288.

The judgment of the circuit court ought to be affirmed. It is so ordered.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.



## STATE v. STEWART. (No. 21076.)

(Supreme Court of Missouri, in Banc. May 16, 1919.)

1. HOMICIDE  $\S$  309(3) — MANSLAUGHTER IN FOURTH DEGREE — EVIDENCE — INSTRUCTION.

Where defendant obtained deceased's promise to desist from clandestine attentions to defendant's wife, and on the following day observed his wife speaking to deceased, and went deliberately toward them and began to upbraid deceased, who attempted to assault him, and then immediately shot deceased and walked away, the failure to instruct for manslaughter in the fourth degree was not error, in view of Rev. St. 1900, § 4468, defining that degree.

2. HOMICIDE  $\S$  43 — PROVOCATION — MANSLAUGHTER.

A state of facts which is calculated to excite the passions beyond control, and, in the mind of the average just and reasonable man, stir up resentment likely to cause violence and danger to life, which would naturally tend to disturb and obscure the reason and lead to action from passion rather than judgments, is a reasonable provocation adequate to reduce the offense from murder to manslaughter.

3. HOMICIDE  $\S$  146 — DEADLY WEAPON — PRESUMPTION.

That a weapon is deadly may be inferred from the fact that it produces death, although there is no evidence of its quality or dimensions.

4. HOMICIDE  $\S$  146 — MALICE — USE OF DEADLY WEAPON.

The ordinary result of the use of a deadly weapon raises a presumption of malice and shifts the burden of proof to repel the presumption to the accused, unless the evidence proving the killing shows its absence.

5. HOMICIDE  $\S$  309(3) — DEGREE — INSTRUCTION.

Where all the attendant facts show a higher grade of homicide or unqualified self-defense, an instruction on manslaughter in the fourth degree need not be given.

6. HOMICIDE  $\S$  42, 146 — PROVOCATION — MALICE — PRESUMPTION.

The reasonable provocation adequate to reduce the offense from murder to manslaughter does not exclude malice, but only removes the presumption thereof which the law raises without proof, so that, if a defendant deliberately intended to kill deceased, the provocation must be disregarded, unless it has been shown that such purpose was abandoned before the killing.

7. HOMICIDE  $\S$  146 — MALICE — PRESUMPTION.

Where a reasonable provocation adequate to reduce the offense from murder to manslaughter intervenes between the manifestation of malice and the killing, the presumption is that the crime found its moving impulse in malice, and not in the passion produced by the provocation.

8. HOMICIDE  $\S$  325 — APPEAL — MOTION FOR NEW TRIAL — SUFFICIENCY.

Alleged error in an instruction as to one inviting a combat and as to what would constitute a right of self-defense, attempted to be reserved by a general allegation in the motion for a new trial "that the court gave illegal and improper instructions," is not such a preservation of the error as to entitle it to a consideration on appeal. (Per Williams, Faris, and Walker, JJ.)

9. HOMICIDE  $\S$  122 — JUSTIFICATION — INSTRUCTION.

An instruction in a homicide case that, even if deceased had been paying improper attentions to defendant's wife, that fact would afford no excuse or justification for the killing of the deceased, was correct.

10. CRIMINAL LAW  $\S$  811(4) — INSTRUCTION — SINGLING OUT EVIDENCE.

An instruction that, even if deceased had been paying improper attentions to defendant's wife, that fact would afford no excuse or justification to defendant for killing deceased, was not objectionable as singling out and giving improper prominence to the testimony referred to, where the testimony thereon had been brought out principally by defendant.

11. CRIMINAL LAW  $\S$  755½, 759(1) — INSTRUCTION — PRESUMPTION OR INFERENCE.

The trial court cannot properly comment on the evidence or tell the jury what presumption or conclusion should be drawn from any particular fact, but to aid jury in reaching a correct conclusion it may direct their attention to particular facts in evidence.

12. HOMICIDE  $\S$  166(8) — EVIDENCE — MOTIVE — CRIMINAL RELATION WITH DEFENDANT'S WIFE.

In prosecution for homicide committed after defendant had obtained deceased's promise to stop improper attentions to defendant's wife and when he had again found deceased speaking to her, testimony that deceased had visited defendant's wife in defendant's absence from home to show motive, reason, and animus as affording a mitigating circumstance was properly excluded, where the criminal relation, if any, was past, and was known to defendant several days before homicide.

13. HOMICIDE  $\S$  181 — CRIMINAL RELATION — ADMISSIBILITY — PASSION.

Evidence of an adulterous relation of deceased with defendant's wife is only admissible when the discovery thereof by defendant is so near the homicide as to afford no time for the passion thus inflamed to cool.

14. HOMICIDE  $\S$  325 — DYING DECLARATIONS — OBJECTIONS.

Admission of dying declarations are subject to the same regulations applicable to other testimony, and if the appellate court finds that objections thereto have not been properly made or preserved so as to present a proper record thereof, they will not be entitled to consideration. (Per Williams, Faris, and Walker, JJ.)

**15. HOMICIDE ⇨204—DYING DECLARATIONS—SENSE OF IMPENDING DEATH—TIME INTERVENING BEFORE DEATH.**

Where deceased on December 27th, in response to his brother's question as to whether he would have a dying statement taken, said that he had to die, and died on December 29th, it was admissible as a dying declaration. (Per Williams, Faris, and Walker, JJ.)

**16. HOMICIDE ⇨325—APPEAL—MOTION FOR NEW TRIAL—SCOPE.**

A motion for a new trial alleging error in admitting a dying declaration of the deceased and in thereby permitting improper and illegal evidence to go to jury, although general in its terms, must be limited to the specific objections made in the record itself. (Per Williams, Faris, and Walker, JJ.)

**17. CRIMINAL LAW ⇨708—STATE'S REPLY TO DEFENDANT'S OPENING STATEMENT.**

In trial for murder, where the state made an opening statement to jury, as required by Rev. St. 1909, § 5231, and defendant then made a statement of facts, it was reversible error to permit prosecuting attorney to make a reply statement defending character of deceased and showing that he had not of his own motion invaded plaintiff's home, and that after he was shot he could not advance toward defendant, as alleged.

Walker, J., dissenting from paragraph 6 of opinion.

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Robert Stewart was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Pearson & Pearson, of Louisiana, Mo., for appellant.

Frank W. McAllister, Atty. Gen., and Henry B. Hunt and Clarence P. Le Mire, Asst. Attys. Gen., for the State.

**WILLIAMS, J.** An opinion was originally prepared in this case by WALKER, J. All of that opinion was concurred in by the court, with the exception of one paragraph thereof dealing with the question of the right of the prosecuting attorney to make a reply statement of facts to the jury at the beginning of the trial. It being therefore entirely unnecessary to redraft that portion of the opinion and the statement upon which all are agreed, we will adopt that portion of the original opinion in this opinion. The portion thus adopted is as follows:

"Appellant was charged by information in the circuit court of Pike county with murder in the first degree. Upon a trial, he was convicted of murder in the second degree, and his punishment assessed at 10 years in the penitentiary. From this judgment he appeals.

"Walter Allison, the deceased, and the appellant were farmers living in the same neighborhood in Pike county. Allison was a single

man, and the appellant was married, having a wife and children. For several months prior to the killing, deceased had been clandestinely meeting appellant's wife. Appellant, upon being informed of this fact, on the day preceding the killing, requested the deceased to desist in his attentions to his wife. This the deceased promised to do. On December 23, 1916, deceased, in company with Arvie Allison, his nephew, went to some mail boxes on a highway in the neighborhood, one of which belonged to the deceased and another to the appellant. They found the wife and daughter of the appellant at the mail boxes waiting for the arrival of the carrier. The testimony of the state is that upon their arrival they were greeted by the two women; the wife saying that she was not supposed to speak to them. Looking across an adjoining field, she saw her husband coming rapidly towards them, and said, 'Here comes Bob; there is going to be some trouble.' Reaching the scene of the killing, he spoke roughly to the deceased. Just at this juncture, the deceased reached down to pick up his gloves, when the appellant, with an oath, began shooting at him. At the first shot, which took effect, the deceased attempted to straighten up, but at the second he fell, saying, 'Bob, you have killed me.' Appellant, at this juncture, turned and walked away, accompanied by his wife and daughter. The nephew of the deceased, assisted by others, conveyed the latter, who was not then dead, to his home, where he died.

"For the defendant a witness named Lohse testified that from his home, 100 feet or more from the mail boxes, he saw the killing; that the deceased, when the appellant approached, had his left hand turned back, as though about to throw something. At this juncture appellant fired the first shot; that the attitude of the appellant had not changed when the second shot was fired; that the pistol with which the shooting was done belonged to this witness, and immediately after the killing he went down and got it from the appellant, went to his house, and telephoned for help, and returned a few minutes later to where the deceased was lying in the road and assisted in conveying him to his home; that on one occasion prior to the shooting he had discussed with the appellant the intimacy of the latter's wife and the deceased.

"The fifteen year old daughter of the appellant stated that, when her father came up and asked the deceased why he had not complied with his promise, the latter picked up a stone to throw it, saying, with an oath, 'I will smash your brains out.'

"The appellant's testimony material to the matters at issue is substantially as follows: Upon seeing the deceased and his nephew leave the former's home and go down to the mail boxes, he went to his house, put a pistol in his pocket, and went across the field to the mail boxes. Approaching them, he said to the deceased, 'What did you promise me about my family yesterday?' That the deceased replied with an oath, 'I will smash your brains out,' and picked up a stone lying in the road. In the meantime the appellant drew his pistol, and, before deceased could throw the stone, he shot him. At the first shot the deceased threw

the stone on the ground, and it rolled almost to the appellant's feet. That the deceased then reached his hand towards his hip pocket, when the appellant fired the second shot, and deceased fell to the ground. They were some 10 or 12 feet apart when the shots were fired. That appellant then climbed over the fence, and, with his wife and daughter, went down the road to the home of an uncle. The next morning he went back, and got the stone which he states deceased had tried to throw at him; and it was introduced in evidence as being the one in question.

"The instructions as to the grade of the crime were limited to murder in the first and second degrees and self-defense.

[1-7] "I. Error is assigned in the failure of the trial court to give an instruction for manslaughter in the fourth degree. The testimony, if this contention is sustained, must bring the case within the purview of section 4468, Rev. St. 1909, which, so far as pertains to the case at bar, provides that every killing of a human being by the act, procurement, or culpable negligence of another, which would be manslaughter at the common law, and which is not otherwise defined to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree.

"Voluntary manslaughter at the common law is the unavoidable killing of another without malice or upon a sudden quarrel, or in a heat of passion. Hale's P. C. 449; 1 Bl. Com. 191.

"Where the killing is intentional, as contemplated by the statute cited, manslaughter in the fourth degree, under our rulings, is defined to be the killing of a human being in a heat of passion on reasonable provocation, without malice or premeditation, and under such circumstances as will not render the offense justifiable or excusable. State v. Sebastian, 215 Mo. loc. cit. 80, 114 S. W. 522, and cases.

"It is elemental that in the giving of instructions in cases of homicide it is the duty of the trial court to declare the law upon all grades of the crime to which the testimony is applicable. If, therefore, substantial evidence has been adduced in this case, although it may consist of the defendant's testimony alone, showing a state of facts which, if true, would reduce the grade of the crime, it was the duty of the court to instruct the jury upon the grade thus shown. State v. Heath, 221 Mo. loc. cit. 581, 121 S. W. 149.

"The testimony to support the appellant's contention as to his right to the instruction for manslaughter in the fourth degree is that the deceased, with an opprobrious oath, said he would smash appellant's brains out, and, picking up a stone, attempted to throw it at appellant, whereupon the latter drew a pistol and shot the deceased through one of his legs, who fell to the ground, letting the stone drop at appellant's feet. Appellant followed this up with another shot, inflicting the wound from which death resulted. Whatever may be the variant facts under which instructions for manslaughter have been given in the different cases, it must appear, to authorize same, that there was reasonable provocation for the act of the accused.

"As to what constitutes reasonable provocation adequate to reduce the offense from murder to manslaughter is defined in State v. Con-

ley, 255 Mo. 185, 164 S. W. 193, as such a state of facts as is calculated to excite the passions beyond control, and, in the mind of the average just and reasonable man, stir up resentment likely to cause violence and danger to life, and such as would naturally tend to disturb and obscure the reason and lead to action from passion rather than judgment. This probably is as general a definition as can be well given. One of the essentials of such provocation is evidence of personal violence on the part of the deceased towards the defendant. Reasoning from analogous cases, while not wholly satisfactory, will enable a conclusion to be formed as to whether this essential is present in the case at bar to such an extent as to authorize the giving of the instruction for manslaughter.

"We held in State v. Barrett, 240 Mo. loc. cit. 169, 144 S. W. 485, where the evidence showed that the deceased was advancing upon the defendant with a stick or club in his hand in a threatening manner at the time the shots were fired, that this did not constitute such an assault by the deceased as amounted to personal violence.

"In State v. Sharp, 233 Mo. loc. cit. 290, 135 S. W. 488, although there was much conflict in the testimony, it was shown that the shooting commenced, which resulted in the killing, upon an officer in citizen's clothes drawing a pistol upon the defendant. In refusing the instruction for manslaughter in the fourth degree, the court held that there was no such personal violence offered to the defendant as to constitute such reasonable provocation as would authorize an instruction for manslaughter in the fourth degree.

"In State v. McKenzie, 228 Mo. loc. cit. 396, 404, 128 S. W. 948, the deceased rushed at the accused with a large butcher knife; whereupon the accused backed up against a door, and, failing to get it open, drew a revolver and shot the deceased. It was held that these facts did not authorize the giving of an instruction for manslaughter in the fourth degree.

"In State v. Gordon, 191 Mo. 120, 125, 89 S. W. 1025, 109 Am. St. Rep. 790, the deceased, who was a much larger man than the accused, caught the latter, and pressed him to his body and began to choke him. While in this position, the defendant pulled a knife out of his pocket and cut the deceased, in order to liberate himself. The wounds inflicted proved fatal. It was held that these facts did not reduce the killing to the grade of manslaughter.

"In State v. Gartrell, 171 Mo. loc. cit. 520, 71 S. W. 1045, it was shown that the deceased, after the use of opprobrious and insulting epithets, advanced on the accused with an iron wrench, when the latter struck him with the pole of an ax and killed him. These facts were held not to authorize the giving of an instruction for manslaughter in the fourth degree.

"In State v. Sumpter, 153 Mo. 436, 55 S. W. 76, the accused testified that he went into the field where the deceased was plowing and rode up to him, when the deceased said, 'Didn't I tell you I was going to kill you?' that the deceased thereupon stopped his team, wrapped his lines around the plow handles, and started towards the defendant with an ax, who shot him. The court held that an instruction for manslaughter in the fourth degree was unauthorized.

"In *State v. Meadows*, 156 Mo. 114, 116, 56 S. W. 878, a number of witnesses testified that the accused started away, when the deceased fired at him, and was in the act of firing a second time when the accused turned and shot him. The court held that an instruction for manslaughter in the fourth degree was not appropriate, in that the defendant was guilty of murder either in the first or second degree, or that the killing was done in the necessary defense of his person. Instructions as to the grade of the crime were given in each of the cases above cited as in the *Meadows* Case. Upon this theory the trial court declared the law in the case at bar. The other attendant facts which must be considered as a part of, and hence explanatory of, the killing, lend support to the correctness of this conclusion.

"Bad blood existed between the parties, at least on the part of appellant against the deceased, immediately preceding the killing.

"Other than the sight of the deceased at the mail boxes with appellant's wife and daughter, there existed no cause for that heat of passion suddenly aroused on the part of appellant which is a precedent condition to that reasonable provocation necessary to the existence of manslaughter in the fourth degree. On the contrary, the appellant, with that calculation characteristic of a more serious grade of homicide, went deliberately to the scene of the crime and began to upbraid the deceased, and the latter attempted the assault, to the testimony of which we give credence for no other reason than that appellant may have whatever benefit may arise from same in the giving of instructions. There is here no evidence of that sudden combat necessary to arouse the passions of the appellant to the realm of reasonable provocation. In its stead, we find him deliberately arming himself for a deadly encounter, seeking the presence of his victim, and, as the evidence justifies us in saying, baiting the latter with words, that some act of his may at least afford superficial excuse for the use of the weapon conveniently at hand. The procuring of the weapon by the accused gives ground for the presumption that it was in preparation for the commission of the crime (*State v. Sharp*, 233 Mo. 269, 135 S. W. 488). These facts afford no proof of the presence of any element sufficient to authorize the giving of the instruction asked. Furthermore, the appellant's conduct immediately preceding the killing is clearly indicative of such a malign condition of mind as to preclude the giving of the instruction. There is no controversy as to the fact that the pistol used was a deadly weapon. That a weapon is deadly may be inferred from the fact that it produces death, although there is no evidence of its quality or dimensions. *State v. Bowles*, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598. The ordinary result of the use of such a weapon raises a presumption of malice and shifts the burden of proof to repel the inference of same to the accused, unless the evidence proving the killing shows its absence. There was no evidence of this character (*State v. Bauerle*, 145 Mo. 1, 46 S. W. 609; *State v. Evans*, 124 Mo. 411, 28 S. W. 8; *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149; *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *State v. Elliot*, 98 Mo. 150, 11 S. W. 566; *State v. Crawford*, 115 Mo. 620, 22 S. W. 371.

"Actuated by malice in arming himself with the pistol, his immediate subsequent acts justify the presumption of the continuance of this state of mind. *Compton v. State*, 110 Ala. 24, 20 South. 119; *Holland v. State*, 12 Fla. 117; *State v. Johnson*, 23 N. C. 354, 35 Am. Dec. 742. In the presence of malice, there is no room for manslaughter. *People v. Brogetto*, 99 Mich. 336, 58 N. W. 323; *Jackson v. State*, 74 Ala. 28; *People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087; *State v. Tilly*, 25 N. C. 424; *State v. Johnson*, 23 N. C. 354, 35 Am. Dec. 742.

"The cases, therefore, of which that of *Heath*, supra, is a type, however definitely they may announce the doctrine that, upon the testimony of a defendant alone, an instruction for manslaughter is authorized, do not mean that, where all the attendant facts show a higher grade of homicide or unqualified self-defense, an instruction shall be given as is here insisted upon. *State v. Myers*, 221 Mo. 598, 121 S. W. 131; *State v. Barker*, 216 Mo. 532, 115 S. W. 1102. In this connection it may be appropriately stated that even in the presence of that provocation claimed to have existed at the time of the killing this does not disprove malice. It only removes the presumption of same which the law raises without proof. If, therefore, a deliberate purpose on the part of appellant to kill the deceased has been shown by his immediate antecedent acts, the provocation insisted upon as existing at the time of the fatal shot must be disregarded unless it has been shown that this purpose was abandoned before the killing. There was no such showing. The reason for the rule thus stated is that, where provocation intervenes between the manifestation of malice and the killing, the presumption is that the crime found its moving impulse in malice, and not in the passion produced by the provocation. *Reg. v. Kirkham*, 8 Car. & P. 115; *State v. Johnson*, 23 N. C. 354, 35 Am. Dec. 742; *State v. Ta-cha-na-tah*, 64 N. C. 618.

[8] "II. The giving of an instruction in regard to one seeking or inviting a combat, and as to what would constitute the right of self-defense, is complained of. This alleged error is attempted to be preserved by a general allegation in the motion for a new trial 'that the court gave illegal and improper instructions.' This, as we have repeatedly held, is not such a preservation of the error as to entitle it to our consideration. *State v. Crofton*, 271 Mo. loc. cit. 514, 197 S. W. 126; *State v. Pfeifer*, 267 Mo. loc. cit. 28, 183 S. W. 337.

[9-11] "III. Error is assigned in the giving of the following instruction: 'The court instructs the jury that, even though you may find and believe from the evidence in the cause that deceased, Walter Allison, had been paying defendant's wife improper attentions, still such facts, if true, would afford no excuse or justification for defendant shooting and killing the deceased, Walter Allison.'

"The reason urged in support of this contention, in the language of appellant's counsel, is that the instruction complained of 'improperly singled out the evidence or the lack of evidence of the undue intimacy between the deceased and defendant's wife, and unduly and improperly brought this evidence of fact or the lack of it to the attention of the jury by giving said

instruction, and in particular referring to this evidence to the prejudice of the defendant.'

"The language of the instruction does not sustain what is evidently meant by this contention, viz. that the trial court erred in singling out or giving improper prominence to the testimony referred to. While it is true that a trial court cannot properly comment on the evidence or tell the jury what presumption or conclusion should be drawn from any particular fact, it may, to aid the jury in reaching a correct conclusion, direct their attention to particular facts in evidence. This was all that was done in this instance. There was evidence brought out, principally by appellant, of the existence of the alleged relation. The instruction correctly stated the law in regard to the same as constituting, under the facts, no defense to the crime. *State v. Privitt*, 175 Mo. loc. cit. 207, 75 S. W. 457. Unless it had been given the jury would have been left without a guide in this respect. The instruction was therefore permissible as constituting a proper direction to the jury. Furthermore, the instruction does not assume the existence of the fact of which complaint is made, but, being drawn hypothetically, leaves the determination of the same to the jury to say whether or not it existed. As to its form, therefore, the instruction is not subject to criticism, and the appellant has, in this regard, no ground of complaint.

[12, 13] "IV. There was no error in excluding testimony to show that deceased had visited the wife of appellant in the latter's absence from home. The evident purpose of this testimony was to cast the shadow of an adulterous relation having existed between the deceased and the appellant's wife, as affording a mitigating circumstance in the commission of the crime.

"Evidence of an adulterous relation, in a case of the character of that at bar, is only admissible when the discovery of the same by the aggrieved spouse is so near the homicide as to afford no time for the passions thus inflamed to cool. *State v. Privitt*, 175 Mo. 207, 75 S. W. 457; *State v. France*, 76 Mo. loc. cit. 685; *Biggs v. State*, 29 Ga. 725, 76 Am. Dec. 630.

"The adulterous relation, if it existed, was in the past, and appellant had knowledge of it at least several days before the homicide. His motive, therefore, whatever it may have been, in going to the mail boxes, could afford no defense to his crime. Consequently the claim that the evidence was competent for the purpose of showing motive, reason, and animus is without merit. Under the facts in *State v. Grugin*, 147 Mo. loc. cit. 48, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553, cited by appellant, it is not an authority for the contention here made, and we overrule the contention.

[14-16] "V. It is insisted that error was committed in the admission in evidence of the dying declaration, which had been written out at the dictation of the deceased and signed by him.

"Dying declarations are but a form of hearsay evidence. Our review of same is consequently subject to the same regulations applicable to other testimony concerning which the rulings of the trial court are assailed. If, therefore, we find that the objections to the declaration have not been properly made or preserved, so as to

present a live record of same, they will not be entitled to our consideration.

"Preliminary thereto, it is not inappropriate to say that there is no merit in the objection to the declaration that it was not made in articulo mortis, with a full realization on the part of declarant of his impending dissolution. This is the testimony of the latter's brother in that regard: 'Well, I just went to him. I was sitting on the bed, and I went up to him and asked him, I said, "Walter what do you think about having a dying statement taken?" and he said, "Do as you please; I have got to die;" and I told Mr. Hawkins to go ahead and take his statement, and that was all that was said.'

"Declarant's statement as to his realization of his condition was made on December 27th. On the 29th he died. No qualifying facts or modifying statements lessen the cogency of this statement. Its probative force is sufficient to authorize the admission of the declaration on the ground that the deceased realized that death was impending. *State v. Thomas*, 180 S. W. 886; *State v. Lewis*, 264 Mo. 420, 175 S. W. 60; *State v. Vest*, 254 Mo. 458, 162 S. W. 615; *State v. Finley*, 245 Mo. 465, 150 S. W. 1051; *State v. Diple*, 242 Mo. 461, 147 S. W. 111.

"That the extent of the appellant's objections to the admission of the declaration may be clearly shown, we set them out in full: 'Mr. Ras Pearson (counsel for appellant): Well, we object. Sufficient showing has not been made to render it [the declaration] competent. Several of the essentials necessary to render such a statement competent have not been shown.'

"After a statement by the court on its own motion that it would exclude from the jury certain matter in the declaration, and admit same as modified, counsel for appellant further objected as follows: 'Mr. Ras Pearson: We object to the declaration because a sufficient showing has not been made, and particularly they haven't shown that the deceased, Walter Allison, was in a condition that his mind was such to comprehend what he was doing at the time, that he realized what he was doing, and that he had mentality enough to comprehend what he was doing, and that the mere statement of the witness doesn't show that all hope was abandoned because he went on the operating table in two days afterwards, and I take it that a doctor would not have put a man on the table when there was no hope and no prospect of doing any good, or doing the patient any good, and we can at least indulge in the belief that these doctors, though perchance they might save this man's life by taking him through an operation, at least in this case we have their acts and deeds that by medical skill and medical science might prolong a life, and no one, save and except the deceased, who says there was no show for him to live.' After an interruption by the prosecuting attorney, counsel for appellant continued his objection as follows: 'Mr. Ras Pearson: He goes on the operating table the next night or two days afterwards. It still shows they had some hope of prolonging his life. He doesn't show that the deceased at the time he made that dying declaration had abandoned all hope, and that he was going to die, the essentials of which are necessary to make that statement competent.'

"Upon the ruling of the court that the declaration, as limited, would be admitted, counsel

for appellant, continuing his objections, said: 'Mr. Ras Pearson: I think the proof is too scant to put a layman on the witness stand and make the declaration. Now, this deceased had two doctors, and they were there daily, and if there is ground for a dying statement to be offered, it ought to be admitted with more solemnity, and this is not the best proof; not sufficient proof, and on that ground I object and save my exceptions.' Whereupon the declaration was admitted in evidence.

"The burden of appellant's objections to the admissibility of the declaration is based on the ground that it was not sufficiently made to appear that the declarant realized that he was in articulo mortis. Neither from the express terms of these objections or by reasonable implication can their meaning and purpose be extended beyond this. Under the well-established and often-repeated rule, therefore, that objections to matters occurring during the trial should be made at the time of their occurrence, and proper exceptions preserved, we are limited in the consideration of the admissibility of this declaration to the objections made thereto. Certainly, if counsel for appellant had desired that other objections should be entertained, they would have been preserved in a manner to entitle them to our consideration. That this was not their purpose is evident from the motion for a new trial, which simply states 'that the court improperly admitted in evidence the dying declaration of the deceased, Walter Allison, and thereby permitted improper and illegal evidence to go to the jury.' The meaning of this motion, although general in its terms, must be limited to the specific objections made in the record itself. Thus construed, it preserves nothing for our review except that expressly authorized by the record.

"No question is involved here as to the general or specific nature of objections to the introduction of testimony, because there is no objection interposed other than that indicated. A consideration, therefore, of the subject-matter of the declaration is precluded, and we overrule this contention."

[17] VI. It is further contended by appellant that the court erred in permitting the prosecuting attorney to make a reply statement to the jury.

At the beginning of the trial the state made its opening statement to the jury. The defendant likewise made a statement of the case to the jury. After the defendant's counsel had made his statement of facts to the jury the prosecuting attorney, over the objection and exception of the appellant, was by the court permitted to make the following reply statement, to wit:

"In reply to Mr. Pearson's statement with reference to the character that he says he will show that Walter Allison bore, I want to say there is but one incident of that; I think the evidence will show you that Walter Allison was not in conflict with the state law, nor did he bear any such turbulent reputation or any such aggressiveness as Mr. Pearson would have you understand. We will show you, gentlemen, in respect to the evidence that Mr. Pearson says he will introduce here showing you that Walter

Allison invaded the home of this defendant, we will show you that this defendant's wife was urging Walter Allison, and that he was not the aggressor in that, if his home was invaded, but we will show you by letters in her own handwriting that she sought to have Walter Allison come there and sought his company, and we expect to show and prove to you, gentlemen, by the evidence in this case, that in the conversation Mr. Pearson told you that wherein this defendant told Walter Allison he didn't want him to have anything more to do with his wife Walter Allison said, 'All right, Bob, I will let her alone, but I want you to make her let me alone.' And we expect to show, gentlemen, following that, after Walter Allison was shot in the leg, that he was unable to move from that time, to move from his tracks, and couldn't have made the advance towards this defendant that Mr. Pearson told you that the evidence would show you. We expect to show you, gentlemen of the jury, that there was not a weapon upon Walter Allison's person at the time, and we expect to show you by evidence good and strong, gentlemen of the jury, there was no rock in Walter Allison's hand; upon the other hand, there may have been gloves that they seek to turn into a rock."

Section 5231, R. S. 1909, makes it mandatory upon the part of the prosecuting attorney to first make a statement of the case to the jury. No authority is to be found authorizing the prosecuting attorney to make a statement in reply to the statement which the defendant is permitted to make.

In the case of *State v. Kennedy*, 177 Mo. 98 loc. cit. 118, 117, 75 S. W. 979, a situation very analogous to the one now presented was discussed, and the above statute construed. In that case it was held that the remarks made by the prosecuting attorney in a reply statement were prejudicial, and that the same constituted reversible error.

We are of the opinion that the remarks of the prosecuting attorney in his reply statement in the case at bar were as prejudicial in their nature as were the remarks which were condemned in the *Kennedy Case*, supra, and for the reason there given the same should be held to be reversible error.

We are not here saying that every reply statement of a prosecuting attorney without regard to its contents and without regard to whether the statement made contained or did not contain matters prejudicial to defendant's rights would constitute reversible error. The practice, however, should be condemned and not encouraged.

What remarks, if any a prosecuting attorney could make in a reply statement of the case to the jury without committing reversible error we are not here called upon to determine. It is sufficient for the purposes of this case to say that the present statement was sufficiently prejudicial to cause a reversal of the case.

The judgment is reversed, and the cause is remanded.

**PER CURIAM.** The foregoing opinion is adopted as the opinion of court in banc.

FARIS, J., concurs.

BLAIR and GRAVES, JJ., concur in paragraphs 1, 3, 4, 6, and result.

BOND, C. J., not sitting.

WOODSON, J., absent.

WALKER, J. (dissenting). I do not concur in the conclusion reached in the majority opinion as to the alleged error in permitting the prosecuting attorney to make a reply statement to the jury, preliminary to the trial.

It appears from the record that the prosecuting attorney stated to the court that he understood that he would not be permitted to make a reply statement. Upon associate counsel insisting that the state should be permitted to reply to extraneous matter, counsel for appellant stated his grounds of objection thereto. Subsequently, upon a renewal of the request by the prosecuting attorney, the court permitted the reply statement to be made, to which timely objections were interposed.

That portion of the statute (section 5231, R. S. 1909) defining the procedure in regard to the statement of counsel in criminal cases preliminary to the introduction of testimony, is as follows:

"The jury being impaneled and sworn, the trial may proceed in the following order: First, the prosecuting attorney must state the case and offer the evidence in support of the prosecution; second, the defendant or his counsel may then state his defense and offer evidence in support thereof. \* \* \*

The form of the statute, so far as concerns the course to be pursued by the prosecuting attorney, is mandatory. Construed under the rule of "expressio unius," therefore, his right was limited to an opening statement. That the law contemplates the enforcement of this limitation as a part of the regular order of procedure, there is but little question, and a failure to observe the requirement is not to be commended. However, appellant's contention, to afford ground for reversal of the judgment, must take deeper root than is afforded by the form of the statute. It must not only, in reason and in furtherance of a wholesome administration of the criminal law, appear, on account of the court's ruling, that the appellant suffered some substantial injury. The prosecuting attorney's reply consisted of a statement of the testimony he proposed to offer in rebuttal to the evidence which it had been stated would be introduced by the appellant, a portion of which was in regard to the relations, which had been sustained, between the latter's wife and the deceased. While much of the testimony proposed to be introduced by counsel

on each side, in regard to these relations, was wholly irrelevant, and was subsequently excluded when offered, the main portion of the evidence proposed to be offered in the reply statement consisted of material facts which were actually introduced in evidence, and were proper in rebuttal. To the introduction of same counsel for appellant does not complain. He should not be heard, therefore, to complain of the statement of its proposed introduction. The plea, therefore, as to the injury arising from the reply statement is specious rather than real. It will be found, upon an examination of the facts in the case of *State v. Kennedy*, 177 Mo. loc. cit. 117, 75 S. W. 979, that the ruling there made as to the impropriety of the reply statement made by the prosecuting attorney was as to the prejudicial character of same, and not to the fact that it was unauthorized by the statute. No fault is to be found with that ruling, the reason of which is in accord with the conclusion we have reached herein, and hence does not support appellant's contention.

We are therefore of the opinion that no prejudicial error was committed in permitting the prosecuting attorney to make a reply statement, and that the judgment of the trial court should be affirmed.

# RUTLEDGE et al. v. FIRST PRESBYTERIAN CHURCH OF STOCKTON et al. (No. 20907.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

## 1. DESCENT AND DISTRIBUTION $\S$ 332—STATUTES—VALIDITY.

Rev. St. 1909, § 332, governing the course of descent and distribution of real estate, is not unconstitutional or void as against public policy as allowing property to descend to persons not of the blood of the ancestor, in preference to those of his blood.

## 2. CONSTITUTIONAL LAW $\S$ 38—VALIDITY OF STATUTE—PUBLIC POLICY.

Acts of the Legislature are not void because they violate public policy unless that policy is imbedded in some provision of the state or federal Constitution, and the public policy of the state on any given subject is found in the provisions of the Constitution and acts of the Legislature in harmony therewith relating to that subject.

Appeal from Circuit Court, Cedar County;  
B. G. Thurman, Judge.

Suit by James G. Rutledge and others against the First Presbyterian Church of Stockton and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Foulke & Brown and H. C. Hembree, all of Stockton, for appellants.

S. E. Osborn, of Stockton, and Mann, Todd & Mann, of Springfield, for respondent First Presbyterian Church of Stockton.

Parks & Son, of Clinton, for respondents Omar Wasson and Wallace Wasson.

**SMALL, C. I.** This is a suit to quiet title commenced in the circuit court of Cedar county. There is no controversy about the facts. Both plaintiffs and defendants claim through Hugh Ross and John Ross as the common source of title. Hugh Ross owned the property in his lifetime. He was married, but never had any children. At his death in 1890 he left surviving him his wife, Caroline Ross, and his brother, John Ross. By his will he devised a life estate in the property to his wife and directed that after her death the land should be sold and the proceeds be "applied to the erection of a house of worship in the town of Stockton, for the use and benefit of the Old School Presbyterian Church."

Caroline Ross elected to take the provisions made by her husband's will. She remained in possession of the property until 1910, the time of her death. John Ross was the sole heir of his brother Hugh, and upon the latter's death inherited the property, subject to the life estate of Caroline Ross and the right of the defendant church, created by the will of said Hugh Ross. Prior to the institution of this suit John Ross died intestate. He left surviving him his widow, Jane Ross, but no children nor their descendants, and no father, mother, brother, nor sister nor their descendants.

Jane Ross subsequently married John Wasson, and the defendants Omar Wasson and Wallace Wasson are the children of that marriage. Said defendants claim that their mother, as the widow of said John Ross, inherited the property from him, and that they on her death inherited it from her and are the owners of it, subject to the rights of the defendant Presbyterian Church under the will of Hugh Ross, and the decree in certain prior litigation which was affirmed by this court in the case of *Ross v. Presbyterian Church et al.*, 272 Mo. 93, 197 S. W. 561.

There is no controversy between the defendants themselves, but they deny that the plaintiffs have any interest in the property. The plaintiffs were not parties to said prior litigation, and it is not claimed to affect their rights. They claim to own the property as the descendants of Mrs. Rutledge, who was the sister of the mother, and therefore an aunt of said John Ross.

The court below found against plaintiffs and for defendants, and plaintiffs brought the case here by appeal.

II. The circuit court correctly decided the case. The statute governing the course of the descent and distribution of real estate (section 332, R. S. Mo. 1909) provides as follows:

"Third, if there be no children, or their descendants, father, mother, brother or sister, nor their descendants, then to the husband or wife; if there be no husband or wife, then to the grandfather, grandmother, uncles and aunts, and their descendants in equal parts."

The plaintiffs in their brief admit that, if this statute is valid, the plaintiffs have no title as against the defendants Wasson, because said defendants are the descendants of the surviving wife of John Ross, and the plaintiffs are descendants of an aunt of said Ross, and by the plain words of the statute, therefore, said defendants took the title by inheritance from said John Ross, and the plaintiffs have no interest therein.

[1] But the plaintiffs suggest that the statute is unconstitutional or void as against public policy, because it allows property to descend to persons not of the blood of the ancestor, in preference to those of his blood. This contention is untenable. No provision of the Constitution is pointed out nor referred to as conflicting with this statute, and we know of none such.

This subject was carefully considered in the recent case of *State v. Guinotte*, 204 S. W. 306, where it is said by Graves, J., in delivering the opinion of the court in banc (*loc. cit.* 308):

"So under the great weight of authorities we rule: (1) That the taking of property by inheritance or by will is not an absolute or natural right, but one created by the laws of the sovereign power. This court has so said. *State ex rel. v. Henderson*, 160 Mo. *loc. cit.* 216, 60 S. W. 1093. \* \* \* (3) That this right of the state to foreclose absolutely, or partially, the right to inherit by law or will, \* \* \* is inherent in its sovereignty, which allows the state or the nation to say what shall be done with the property owned by the citizen at the time of his death. No provision of the Missouri Constitution stays the free hand of our lawmakers as to the disposition of property owned by a citizen at the time of his death."

To the same effect is the language of Judge Bond in his opinion in *Maguire v. University*, 271 Mo. 359, where he said at page 367, 196 S. W. 737, 739:

"Both the cases heretofore cited in this opinion and correct reasoning deduce the existence of this right [to impose inheritance taxes] in a sovereignty from the fact that the power of succession in such cases depends upon statutes affording that privilege to the claimant, and this, being in the full discretion of the enacting body, is subject to any terms which it sees fit to impose."

[2] As to the contention of the plaintiffs that the statute is void because against public policy, it is sufficient to say that acts of the Legislature are not void because they violate public policy, unless that policy is imbedded in some provision of the state or federal Constitution, and that the public policy of the state on any given subject is found in



the provisions of the Constitution and acts of the Legislature in harmony therewith, relating to that subject. In this case the public policy of the state as to the right of inheritance is found in the statute of descents and distribution above quoted. That statute does not conflict with any constitutional provision and is valid. The circuit court committed no error in following it.

Plaintiffs also attack the validity of the provisions of the will of Hugh Ross in favor of the Presbyterian Church, but, inasmuch as plaintiffs have no interest in the land in controversy, they have no interest in that question and cannot invoke the action of this court thereon. *Wheeler v. Land Co.*, 193 Mo. 291, 91 S. W. 1050.

The judgment of the circuit court should be affirmed; and it is so ordered.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

#### MEREDITH v. CLAYCOMB. (No. 19697.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

##### 1. CONSTITUTIONAL LAW §43(1) — RAISING QUESTION—WAIVER.

Where constitutionality of a statute is denied, the question should be raised on record at first opportunity.

##### 2. CONSTITUTIONAL LAW §43(1) — RAISING QUESTION.

Where petition in an automobile collision case pleaded and based its case upon an ordinance, defendant waived right to question constitutionality of ordinance, where he did not raise constitutional question until he excepted to instructions given jury.

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Wayland Meredith against Stephen Claycomb. Judgment for plaintiff, and defendant appeals. Case transferred to Springfield Court of Appeals.

This suit was instituted in the Jasper circuit court December 18, 1915, for damages resulting to plaintiff from serious injuries received in a collision in a street of Joplin in said county between an automobile driven by defendant, a resident of the city and a motorcycle upon which the plaintiff was riding at the time. The plaintiff, upon his motorcycle, was going east along the south or right side of the street toward an alley which entered it from the south, while the

plaintiff was approaching from the east along the north side of the same street and turned toward the south to enter the alley, colliding with the motorcycle as it was passing the entrance to the alley.

The petition pleaded: (1) An ordinance of the city requiring that every person operating any motor vehicle on the public streets in the city shall drive upon the same in a careful and prudent manner, and prescribing maximum rates of speed; (2) an ordinance providing that every person driving in a vehicle in any street of the city shall operate, drive, or ride such vehicle to the right of the center of the street; and (3) that it was the duty of defendant, while driving west upon Fifth street, "to exercise the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons traveling on said street, but plaintiff states that this the defendant carelessly and negligently failed to do, and that as he approached the alleyway between Connor and Jackson avenue he ran and operated said automobile at a careless and reckless rate of speed; that at said time the plaintiff was riding east upon Fifth street, and it was the duty of said defendant, under and by virtue of the ordinance of the city of Joplin under the laws of the state of Missouri, to pass plaintiff upon the right, but plaintiff states that this the defendant carelessly and negligently failed to do, and, as he approached said alley without warning or signal of any kind, he suddenly turned and drove said machine to the left, and drove the same upon and against the plaintiff, who was attempting in compliance with the law to pass to right of defendant; that it was the duty of defendant to use the highest degree of care to avoid injuring plaintiff, but the said defendant carelessly and negligently failed to do so," and ran upon the plaintiff. It is needless to specify the numerous particulars in which the petition specified the negligence of plaintiff.

The defendant answered by general denial, and afterward, by amended answer, further pleaded "that if plaintiff received the injuries complained of in his petition, the same were caused through no negligence on the part of defendant, but said injuries, if any, were caused by plaintiff's own negligence and want of care, which directly contributed to cause said injuries." At the close of plaintiff's evidence upon the trial the defendant asked a peremptory instruction for a verdict in his behalf, which was refused, and defendant excepted. The defendant introduced his evidence, upon the close of which he renewed his request, which was refused, to which he excepted. The plaintiff thereupon asked three instructions as follows:

"(1) If you find and believe from the greater weight of the evidence that the defendant, on the 9th day of September, 1915, was driving west in an automobile on Fifth street, and that said street, between Jackson and Connor avenues, is a much-traveled public street, then it was his duty, under the law of the state of Missouri, in operating his said automobile upon said street, to exercise the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons traveling upon said street; and if you further find that at said time plaintiff was riding a motorcycle on said street and was approaching said alley from the west, and that defendant saw plaintiff approaching, or could have seen him by the exercise of ordinary care, and that as plaintiff approached defendant he drove his said motorcycle to the right and attempted to pass defendant on the right, and that at the same time the defendant carelessly and negligently turned to the left, and that before turning he carelessly and negligently failed to give any warning of his intention to turn toward the left, and carelessly and negligently ran his automobile upon and against plaintiff; and if you find that defendant at said time failed and neglected to operate said machine in a careful and prudent manner, and failed to exercise the highest degree of care that a very careful person would use under the same or similar circumstances, and as the result of such want of care, if any, on defendant's part, plaintiff received the injuries complained of; and if you further find at said time plaintiff was operating his said motorcycle with the highest degree of care that a very careful person would use under the same or similar circumstances and was without fault or negligence on his part which contributed to or caused his said injury—then your verdict should be for the plaintiff.

"(2) The court instructs the jury that even though you find and believe from the evidence that at the time of the collision between defendant's machine and plaintiff's motorcycle plaintiff did not have a light upon his said motorcycle, and that it was then after sunset, yet, if you further find that there was sufficient light for the defendant, by the exercise of ordinary care on his part, to have seen plaintiff's motorcycle, even though the same was without lights, approaching said alley, and that the defendant did see him approaching, or could have seen him by the exercise of due care on his part as defined in these instructions in time so that by the exercise of such care he could have avoided running into and injuring plaintiff, if you find that he did run into and injure him, and if you further find that the fact that plaintiff's motorcycle was without lights at said time did not cause or directly contribute to cause the said collision and injury to plaintiff, if any, then plaintiff's violation of the law, if any, does not preclude him from recovering against defendant.

"(3) The court instructs the jury that under the law it was the duty of both plaintiff and defendant in operating or controlling their motor vehicles on said street to use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons on or traveling over said street, and a failure to use such degree of

care is negligence as the word is used in these instructions."

Whereupon the following proceedings appear in the record:

"Before the giving of instructions 1, 2, and 3, on the part of plaintiff, and to the giving of each of said instructions, defendant objected and excepted, and particularly to that part of said instructions that provides and enjoins upon the defendant in operating his automobile upon the street mentioned in evidence, and at the time of the alleged injury the duty to exercise the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons traveling upon said street, in that said instructions and said provision in each of them is based upon division 9 of section 12 of the Laws of Missouri for 1911, of an act entitled 'Motor Vehicles,' which said provision of said act is unconstitutional and in express violation of the Constitution of the state of Missouri in that it deprives defendant of his property without due process of law in violation of section 30, article 11, of the Constitution of Missouri, and in that it violates section 53 of article 4 of the Constitution of Missouri, which prohibits the General Assembly from passing any local or special law relating to the practice or jurisdiction of or changing the rules of evidence in judicial proceedings, and in that said act of the General Assembly is a special law relating to negligence and discriminates without any sufficient reason therefor, and prescribed a different rule of care for owners of automobiles than for other vehicles regulated by the act, and places a different measure of duty and care upon the owners of automobiles in their operation than on the owner of other motor vehicles, and in that it requires the operator of an automobile to exercise not the highest degree of care of the average or ordinary person in his class, but the highest degree of care that the superlatively careful person in his class would use.

"Which said objections and exceptions to the giving of said instructions were by the court overruled, and the court gave each and all of them, to which action of the court defendant excepted at the time and still excepts."

It is not necessary to notice the other instructions. The cause being duly submitted to the jury, it returned a verdict for plaintiff for \$4,000, upon which judgment was entered, and this appeal taken therefrom.

Norman A. Cox and Hugh Dabbs, both of Joplin, for appellant.

Walden & Andrews, of Joplin, for respondent.

BROWN, C. (after stating the facts as above). This appeal stands in this court solely upon the constitutional question first raised in the trial court upon objection to instructions to the jury. The only question is whether it was lodged in the record of the trial court in time to require its consideration and decision.

One of the important duties of this court

is to protect its own jurisdiction, so that its activities may be devoted to the work with which it is charged by the Constitution. Perhaps its most important function consists in the determination of questions involving the construction and effect of the Constitution with respect to the validity and effect of the acts of the legislative department of the state government. Such questions are grave ones; so grave, in fact, that, where they arise in the most trivial matters which enter into the judgments of the courts of general jurisdiction, those matters are charged upon this court for review.

[1] It is evident that these great questions, involving, as they do, the validity of the acts of a co-ordinate branch of the state government, should not come to us with all their burden of details, as mere momentary incidents of an otherwise unimportant trial, but should have been subjected to the deliberate scrutiny and consideration of the trial court. This requires that upon the first presentation of an act of the Legislature as a ground of recovery or defense the constitutional power to enact it should, if questioned, be denied upon the record at the first opportunity afforded by the rules of pleading and practice. This court in *Milling Co. v. Blake*, 242 Mo. 23, 31, 145 S. W. 438, 440, clearly stated this rule as follows:

"The rule of this court is that so grave a question must be lodged at the first opportunity, or it will be deemed to have been waived. If it can be appropriately and naturally raised in the pleadings, and thereby be a question lodged in the record proper, such is the time and place to raise it."

This rule has been definitely stated by this court in many cases. *Lohmeyer v. Cordage Co.*, 214 Mo. loc. cit. 689, 118 S. W. 1108; *Barber Asphalt Pav. Co. v. Ridge*, 169 Mo. 377, loc. cit. 287, 68 S. W. 1043; *State v. Gamma*, 215 Mo. loc. cit. 104, 114 S. W. 619; *Hartzler v. Street Ry. Co.*, 218 Mo. loc. cit. 564, 117 S. W. 1124; *George v. Railroad*, 249 Mo. 197, loc. cit. 199, 155 S. W. 453; *State ex rel. Simmons v. Surety Co.*, 210 S. W. 428.

[2] In this case the plaintiff pleaded this statute in his petition in its very words, and also pleaded its violation as a ground for recovery. That, in the cases to which its terms apply, it superseded the common-law rule of actionable negligence is evident, because it included that rule, surrounding it on every side by its own larger application. That the defendant understood that it was intended by the pleader to be founded upon this statute is clearly shown by his objection to the plaintiff's instruction containing the same

words, for he, "objected and excepted \* \* \* particularly to that part of said instructions that provides and enjoins upon the defendant in operating his automobile \* \* \* the duty to exercise the highest degree of care that a very careful person would use under like or similar circumstances to prevent injuries to persons traveling upon said street, in that said instructions and said provision in each of them is based upon division 9 of section 12 of the Laws of Missouri for 1911, of an act entitled 'Motor Vehicles,' which said provision of said act is unconstitutional and in express violation of the Constitution of the state of Missouri."

The petition directly charged that this statutory negligence was a duty that rested upon defendant at the time and place of the accident, and which he failed to perform by failing to use any degree of care. If the statute was unconstitutional the duty so pleaded did not rest upon him. This allegation of duty being founded entirely upon the statute, we see no reason why the defendant could not have placed upon the record his plea of its unconstitutionality by his answer as easily and distinctly as in his attempt to put it in by oral objection after the pleadings had been settled, the evidence heard, and while the cause was in progress of submission by the court to the jury.

We can see no difference in principle between this case and the *George Case*, supra. It is true that in the *George Case* the duty of statutory care seemed to have been embodied in a separate count, while in this case it is one of the charges in a count which might stand without it. If it contained more than one cause of action improperly mingled in that count, the Code affords a remedy to secure their separate statement, and the defendant cannot now complain of his attempt to cover all its allegations by a single denial.

We think this constitutional question was one which should have been presented and an opportunity offered the court to settle it in the pleadings, and that in failing to present it until the cause was finally submitted to the jury in the instructions it has been waived. For the reasons above stated, this cause is transferred to the Springfield Court of Appeals.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

**CITY OF ST. LOUIS v. SCHUTTENBERG**  
et al. (No. 20130.)

(Supreme Court of Missouri, Division No. 1  
June 2, 1919.)

**1. EMINENT DOMAIN ⇨230—PROCEEDINGS—  
COMPENSATION OF COMMISSIONERS.**

Under St. Louis City Charter, art. 21, § 9, relating to costs in condemnation proceedings, the matter of extending time for commissioners to file their report and the number of days the statutory per diem is to be allowed them is within the discretion of the court.

**2. EMINENT DOMAIN ⇨230—CONDEMNATION  
PROCEEDING—COMMISSIONERS' COMPENSA-  
TION—BURDEN OF PROOF.**

Where commissioners appointed in condemnation proceeding orally requested an extension of time, stating that additional time was necessary, that statement was sufficient to justify the court in allowing an extension, and the burden thereafter was on the city, which was required to pay compensation, to show clearly that in granting such extension the court abused its discretion.

**3. EMINENT DOMAIN ⇨230—CONDEMNATION  
PROCEEDINGS—COMMISSIONERS' COMPENSA-  
TION—ABUSE OF DISCRETION.**

Where a city asserted that the action of the court in extending the time for commissioners appointed in eminent domain proceedings to report and the allowance of the statutory per diem for the full time was an abuse of discretion, the showing made held insufficient to establish such abuse.

Appeal from St. Louis Circuit Court;  
Charles B. Davis, Judge.

Condemnation proceedings by the City of St. Louis against John H. Schuttenberg and others. From an order of the circuit court, taxing as costs against the city compensation allowed James Hagerman, Jr., and others, commissioners in condemnation, the City appeals; its motions to retax having been denied. Affirmed.

Chas. H. Daues and G. Wm. Senn, both of St. Louis, for appellant.

**SMALL, C.** This is an appeal from an order of the circuit court of the city of St. Louis, taxing costs against said city in favor of three commissioners in a condemnation proceeding to open an alley.

The commissioners' first meeting was on February 4, 1916. On February 25th, having previously met on 5 different days in the performance of their work, they made an oral application to the court for additional time to make and complete their report. The court granted them 5 days' additional time. On February 26th the city filed a motion to set aside the extension of time thus granted on the ground that additional time was unnecessary, and that the commissioners had

not been diligent during the first 5 days of their service. On March 3d this motion was taken up, and testimony was introduced thereon by the city, and, being considered by the court, the motion was overruled. On September 22d the commissioners filed their report, together with a fee bill for 10 days' attendance, or \$50 each, for two of them, and 8 days' attendance, or \$40, for the other. Afterwards, on the same day, the city filed its motion to disallow the amounts claimed by the commissioners in their fee bill, which the court overruled, and on January 15, 1917, the court rendered final judgment of condemnation, and the aforesaid sums were taxed in favor of the commissioners against the city and ordered paid by it. The total damages allowed to the 16 property owners was \$84, and the total compensation allowed the commissioners was \$140. Afterwards, on the same day, the city filed its motion to set aside this final allowance to the commissioners, which motion was subsequently overruled.

On February 25th, when the court granted the additional 5 days' time on the oral application of the commissioners, no evidence was heard, and the representatives of the city were not present. The commissioners, however, were present and asked for more time, stating to the court that they had not been able to complete their work, and that more time was necessary. On March 3d, when the city's motion to set aside this allowance of extra time as unnecessary came on for hearing, none of the commissioners were present or represented, nor had they been notified of the filing or hearing of the motion. The city, however, introduced several witnesses who were connected with the city's legal department, who testified from their experience in such cases that the work of the commissioners should have been completed within even less time than the 5 days which they had served before they made their application for additional time. Said city's witnesses also testified that not more than one or two hours (less than two hours) of each of said first 5 days were spent by the commissioners on their work at the City Hall. But it appeared that the commissioners might have spent additional time elsewhere in the performance of their duties.

In support of its motion of September 22d, to retax, the city read the evidence, preserved by a term bill of exceptions, offered in support of its first motion. No evidence was introduced to support any of the subsequent motions filed by the city. The said motions all being overruled, and the sums hereinbefore mentioned being by the final judgment of the court taxed in favor of the commissioners and against the city, it has appealed for relief to this court.

[1-3] II. The sole contention by the city in

its brief here is that the circuit court abused its discretion in making the extension of time and allowance to the commissioners made by it. The charter of the city of St. Louis (section 9, art. 21) on this subject provides:

"The losing party shall pay the costs caused by litigation subsequent to the filing of the commissioners' report and the city shall pay all other costs, including the compensation to the commissioners, which shall be \$5.00 per day for each commissioner, for not exceeding five days in any one action, unless the court makes an order allowing further time at like compensation."

The matter of extension of time and the number of days to be allowed the commissioners, at \$5 per day, the per diem prescribed by the charter, are admittedly matters within the sound discretion of the lower court. The action of that court will not, therefore, be set aside by this court, except on evidence clearly establishing that it abused its discretion. These commissioners were not present and had no opportunity to show the reasonable amount of work done and time required of them in the performance of their duties, upon the hearing of the city's motion to set aside their allowance, and the evidence presented by the city, in the absence of definite information which the commissioners might have given, had they been notified or been present and heard, is not so clear and persuasive as to show an abuse of discretion on the part of the circuit court in overruling said motion. The oral request of the commissioners and their statement to the court that additional time was necessary were sufficient to justify the court, in its discretion, in the first instance, in allowing the extension requested, and the burden was upon the city thereafter, if it desired to set aside such allowance, to show clearly that, in granting such allowance, the court abused its discretion. This, in our opinion, has not been done.

The judgment of the lower court should be affirmed. It is so ordered.

**BROWN and RAGLAND, CC., concur.**

**PER CURIAM.** The foregoing opinion of **SMALL, C.**, is adopted as the opinion of the court. All the Judges concur.

**BLAIR, P. J., and BOND and GRAVES, JJ., concur.**

**EOTON v. TOMLINSON et al. (No. 20185.)**  
(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

**1. DIVORCE — 254 — DECREE — COLLATERAL ATTACK — ALIMONY.**

The jurisdiction of courts to award alimony being statutory, its judgment, so far as

awarding to the wife specific personal property as alimony and cutting off her dower, is void and subject to collateral attack.

**2. DIVORCE — 254 — COLLATERAL ATTACK.**

Judgment in divorce, so far as it attempted to vest title in the wife to specific personal property and to cut off her dower, being beyond scope of pleadings and relief prayed, was void and open to collateral attack.

**3. DIVORCE — 254 — ALIMONY — ACQUIESCENCE IN VOID JUDGMENT.**

The wife acquiescing in the void part of a divorce decree awarding to her, in lieu of dower rights, personal property of her husband which she had taken, is estopped to claim dower.

**Appeal from Circuit Court, Audrain County; E. S. Gantt, Judge.**

Suit by Alice Ecton against Lillie Tomlinson and another. Judgment for plaintiff, and defendants appeal. Reversed.

**R. D. Rodgers, of Mexico, Mo., for appellants.**

**Fry & Fry, of Mexico, Mo., for respondent.**

**RAGLAND, C.** This is a suit for the recovery of dower, and is here by appeal from the circuit court for Audrain county. The petition is conventional. The answer pleads the decree of divorce hereinafter set out as a complete defense, in that it operated to extinguish dower, as it is claimed, and also by way of estoppel.

Respondent, a widow with two children, in 1901 married one William S. Ragsdale. In 1907 she secured a divorce from him for his fault and misconduct. The decree of divorce as far as material in this case is as follows:

"And the court doth further find that the said plaintiff is entitled to all of the household goods and furniture now in her possession and removed from the residence of the said defendant, and is also entitled to one diamond ring and one diamond stud heretofore taken into her possession from the defendant. It is therefore considered, ordered, and adjudged by the court that the plaintiff be divorced from the bonds of matrimony heretofore contracted between the plaintiff and the defendant, and that she have a judgment for alimony in addition to the property above described in the sum of \$1,500, and that the same be paid to her as follows: \$500 on or before the first day of April, 1907, and \$1,000 on or before September 1, 1907, and that said \$1,000 payment bear interest from date at the rate of 6 per cent. per annum, and it is further adjudged by the court that said plaintiff take said property and said debts as alimony in gross and in lieu of all dower and other right in defendant's property, and that defendant's property be free from any further claim by said plaintiff."

The trial court in the instant case, at the request of defendant, made the following special finding of fact:

"The court finds from the evidence that the alimony in gross awarded plaintiff in her suit for divorce amounted to about the sum of \$2,500, and that the decree of divorce was prepared and drawn by George Robertson, who was the attorney for plaintiff in the divorce suit, and that the court in the divorce suit in awarding alimony in gross intended to award a sum sufficient to include and compensate plaintiff for the value of her inchoate right of dower, and gave plaintiff substantially more alimony in gross than would have been given her if the question of dower had not been considered in said decree of divorce, and the court further finds that the parties to said divorce suit and their respective counsel so understood said decree of divorce."

Ragsdale had never been married before, and upon his marriage to respondent he provided a home and furnished it. Some months prior to the institution of the divorce suit by respondent she separated from her husband and removed from his dwelling, and took with her his household goods and furniture and the diamonds mentioned in the decree. This property that she took, together with the \$1,500 awarded to her as alimony, was equivalent to practically one-half of all the property owned by Ragsdale. Neither party took an appeal from the decree of divorce, and it became final as to each of them so far as each was concluded thereby. Respondent kept the personal property of her husband mentioned in the decree, and Ragsdale paid the money awarded as alimony. Ragsdale died in March, 1916, and respondent immediately instituted this suit to recover dower in his real estate.

No children were born of the marriage, and consequently Ragsdale left no descendants. One Goldie Ragsdale and defendant Lillie Tomlinson, his nieces, were his only heirs. Goldie conveyed after her uncle's death to her sister Lillie, who upon the institution of the suit was in possession of the lands in which dower is claimed. Defendant Green Tomlinson is the husband of his codefendant, and has no interest in said lands.

The case was tried to the court without a jury. At the request of plaintiff, the court declared as a matter of law that that part of the divorce decree, to wit, "And in lieu of all dower and other rights in defendant's property and that defendant's property be free from any further claim by plaintiff," is absolutely void and of no effect, and is not binding upon the plaintiff. The court found the issues for the plaintiff, and rendered judgment accordingly. Appellants after an unavailing motion for new trial were duly granted an appeal to this court.

As the evidence indisputably shows that respondent was married to Ragsdale; that at a time during the marriage he was seized of an estate of inheritance in the lands in controversy; that she at no time joined with him in a deed or other conveyance of the

same; that she obtained a divorce from him for his fault and misconduct; and that he has since died—she is entitled to dower unless the judgment in the divorce case, under the circumstances under which it was rendered and her subsequent acquiescence therein, operated to preclude her. That judgment decreed to her household goods and furniture and diamonds, the property of her husband, of the value of \$1,000, and in addition thereto awarded her alimony in the sum of \$1,500, the payment of a part of which was deferred and bore interest. The judgment then recites:

"And it is further adjudged by the court that said plaintiff take said property and said debts as alimony in gross and in lieu of all dower and other rights in defendant's property and that defendant's property be free from any further claim by said plaintiff."

It is the theory of the respondent that the judgment in the respect that it attempts to deprive her of dower in the lands of her former husband is void, a mere nullity, and not binding upon her in any degree whatever. Appellants on the contrary contend: (1) That as the court had jurisdiction over the parties and subject-matter, the judgment, even though erroneous, not being appealed from or set aside, became final and binding and not subject to attack collaterally; and (2) that plaintiff, having accepted and taken all the property awarded her under that decree, is estopped from repudiating any part of it, but is bound by all its terms.

[1, 2] 1. That the jurisdiction of courts in this state to hear and determine suits for divorce and alimony depends upon and is limited by the statutes is not now an open question. *Chapman v. Chapman*, 269 Mo. 663, 192 S. W. 448. Because of such limitations a court in an action for divorce cannot decree to a wife as a part or all of her alimony specific personal property of the husband. *Aylor v. Aylor*, 186 S. W. 1071. For the same reason it cannot in such an action by its decree compel the relinquishment by the wife of her dower in her husband's lands. *Davison v. Davison*, 207 Mo. 702, 106 S. W. 1; *Scales v. Scales*, 65 Mo. App. 292. In an action for divorce where the court attempts to take into account, adjudicate and settle all questions of property rights, both present and inchoate, between the parties, it is not in so doing merely erroneously exercising jurisdiction; it is proceeding wholly without jurisdiction. It follows, therefore, that its judgment in such respect is void. The judgment in question, in so far as it attempts to vest title in the wife to the husband's specific personal property and cut off her dower, is entirely beyond the scope of the pleadings and the relief prayed, and is for this additional reason void and open to collateral attack. It is necessary that a court have jurisdiction,

not only of the parties and the subject-matter, but it must also have jurisdiction to render the particular judgment in the particular case. *State ex rel. Muench*, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536; *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 21 L. R. A. (N. S.) 481, 127 Am. St. Rep. 874.

[8] 2. If it be conceded then that the judgment in the divorce case is void, is the respondent thereby estopped to claim dower? Ordinarily a void judgment cannot operate even as an estoppel. It has been said that it is for all purposes a nullity, just as ineffectual as though it had never been rendered. It would no doubt be true that if the court in a given case after decreeing divorce and awarding alimony in gross were to add that such alimony should be in lieu of dower, the wife might safely ignore the unauthorized addenda and accept the alimony without being put to her election. The judgment to the extent that it granted the divorce and awarded alimony would be valid, and the condition imposed would be entirely nugatory. In such case the wife would be entitled to the alimony as a matter of absolute right, without restriction of any kind, and there would be nothing inequitable in accepting and retaining it and rejecting the unwarranted limitation. In this case, however, the judgment goes further. It decrees specific personal property of the husband to the wife, awards her a sum of money, and adjudges that both shall be in lieu of dower and other right in the husband's property which shall thereafter be free from any claim on her part. The decreeing the husband's property to the wife, and the adjudging that it and the alimony shall be in lieu of dower are but two mutually dependent features of a scheme that is an entirety. That scheme is an attempted adjustment and adjudication of the general property rights between the husband and wife growing out of the marital relation, and for the reasons stated is invalid. So that the question is, Can the wife accept and retain that part of the void judgment which is advantageous to her and repudiate the remainder?

When the respondent separated from her husband she took all his household goods and furniture and diamonds. The court in rendering judgment in the divorce case said to her in effect, I will award you alimony, and you may also keep the personal property you have taken from your husband, which, with the alimony, is practically half of all he possesses, but upon the condition that you renounce all further claims to his property including your dower. She understood this, and acquiesced, as the trial court found. She kept, and for aught that appears still has, the property so adjudged her,

but after the lapse of nine years upon the death of her former husband she would repudiate that part of the judgment that has become onerous. Thus she ought not be permitted to do. Having voluntarily accepted the privileges, benefits, and fruits of the void decree, she is estopped to dispute that part which debars her of dower. *Hamill v. Talbott*, 81 Mo. App. 210; *Richeson v. Simmons*, 47 Mo. 20; *Mohler v. Shank's Estate*, 93 Iowa, 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274; *Marvin v. Foster*, 61 Minn. 154, 63 N. W. 484, 52 Am. St. Rep. 586.

Other points have been raised by appellants, but it is unnecessary to consider them. Under the views herein expressed the judgment below cannot stand; and it is accordingly reversed.

SMALL, C., concurs.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the Court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

HILTON et al. (SUBURBAN SUPPLY CO. et al., Interveners) v. UNIVERSAL CONST. CO. et al. (No. 2033.)

(Supreme Court of Missouri, Division No. 1  
June 2, 1919.)

COURTS  $\S$  231(5)—MISSOURI SUPREME COURT  
—MUNICIPALITY AS PARTY.

Where materialmen filed petitions against construction company and city asking that balances due them be ordered paid them by city out of amount retained by city under construction contract, and, from judgment ordering such sums paid and adjudging that such payments should be in satisfaction pro tanto of another judgment by the construction company against the city, the construction company alone appealed, the Supreme Court had no jurisdiction of the appeal, the amount involved being insufficient to confer jurisdiction; the city not being a party thereto, and being a party to the cause below solely as stakeholder.

Appeal from St. Louis Circuit Court; William M. Kinsey, Judge.

Petition by R. L. Hilton and another against the Universal Construction Company and another, in which the Suburban Supply Company and others intervened. From judgment for the named intervener and certain other interveners, the named defendant appeals. Case transferred.

Hunkins-Willis Lime & Cement Company and R. L. Hilton, on behalf of themselves

and all others similarly situated, filed their petition in the circuit court for the city of St. Louis, against the Universal Construction Company and the city of St. Louis, wherein they alleged that the city entered into a contract with the Universal Construction Company for the construction of a sewer, to be paid for on monthly estimates, of which the city should retain 15 per cent. until the completion of the work; that J. W. Farley & Co. were subcontractors for a portion of the work and, becoming bankrupt, Joseph P. Gallagher, their trustee, undertook to finish their work; that plaintiff lime and cement company furnished materials therefor to Farley & Co. and to Gallagher, trustee, and plaintiff Hilton furnished labor to them, and that there was a balance due plaintiffs, which they pray the court to order paid to them by the city out of the retained percentage in its possession due to the Universal Company, the sewer having been completed.

The contract referred to was made under the provisions of an ordinance of the city numbered 25071, in which the sewer is designated the "River des Peres Foul Water Sewer." It provided that the work should be paid for by the city on monthly estimates, out of which 15 per cent. should be retained until all claims for material and labor should be paid. A bond was embodied in the contract, conditioned that the contractor should "pay the proper parties all amounts due for material and labor used and employed in the performance thereof," and that suit might be brought thereon "by any materialman, laboring man or mechanic" in the name of the city for breach of the conditions thereof.

A number of intervening petitions were filed in the cause, asking similar relief, but all such claims were allowed and paid or dismissed except those of the three respondents in this appeal, so that the issue here is between them and the appellant construction company, the original contractor, as to whether these three are entitled to the payment of their respective claims out of the money retained by the city. The claim of the Suburban Supply Company is \$452.74 and interest for coal furnished J. W. Farley & Co., subcontractors and their trustee in bankruptcy and used in the operation of steam excavating and hoisting machines and in a monkey engine used in handling the material excavated. The claim of the Lumaghi Coal Company is for coal used for similar purposes. The claim of Lorimer & Gallagher Company, as allowed, was for lumber used in the ditch for bracing. The finding and recommendation of the referee in case of each of these three interveners and respondents was as follows: First that in the matter of the Suburban Supply Company judgment be rendered for the defend-

ant; second, in the matter of the Lumaghi Coal Company the same recommendation was made; third, in the matter of the intervention of the Lorimer & Gallagher Company judgment was recommended for the intervener for \$356. The cause coming on to be heard upon the report of the referee, the court, after dismissing the claims of all other interveners, leaving only the intervening petitions of the Suburban Supply Company, Lumaghi Coal Company, and Lorimer & Gallagher Company pending for adjudication, adjudged as follows:

"The court finds that the intervening petitioner Suburban Supply Company is entitled to recover the sum of \$425.74, with interest thereon, from December 13, 1913.

"The court finds that the intervening petitioner Lumaghi Coal Company is entitled to recover the sum of \$753.10, with interest thereon from December 13, 1913.

"The court finds that the intervening petitioner Lorimer & Gallagher Company is entitled to recover only the sum of \$356, with interest thereon from December 13, 1913, in accordance with the referee's report and finding.

"The court further finds that the defendant the city of St. Louis is now indebted to the defendant Universal Construction Company in the sum of \$22,152.60, for which sum judgment has been entered as of this date in favor of the said Universal Construction Company against said city of St. Louis in cause No. 89419.

"It is therefore considered and adjudged by the court that the intervening petitioner Suburban Supply Company have and recover judgment against the defendant Universal Construction Company in the sum of \$501.87; that the intervening petitioner Lumaghi Coal Company have and recover judgment against the defendant Universal Construction Company in the sum of \$881.72, and that the intervening petitioner Lorimer & Gallagher Company have and recover judgment against the defendant Universal Construction Company in the sum of \$411.96.

"It is further ordered and adjudged by the court that the defendant city of St. Louis pay out of moneys found to be due from it to the defendant Universal Construction Company the judgment aforesaid, to the respective intervening petitioners in whose favor they are rendered, together with lawful interest from and after this date; and it is still further ordered and adjudged that the costs of this proceeding be taxed against the defendant Universal Construction Company, and that the defendant city of St. Louis also pay said costs either to the clerk of this court or to the parties entitled thereto out of moneys found to be due from it to the defendant Universal Construction Company; and it is still further ordered and adjudged by the court that all moneys paid by the defendant city of St. Louis, in satisfaction of this decree and costs of this proceeding, shall be in satisfaction pro tanto of the judgment entered on this date and by this court in favor of defendant Universal Construction Company, and against the city of St. Louis, in a certain cause pending in this court wherein the said Universal Construction Company et al. are plaintiffs and the city of St. Louis is defendant, being cause No. 89419."



From that judgment this appeal was taken by the defendant Universal Construction Company alone. The amount of the appeal bond was fixed at \$500, which was given.

Kinealy & Kinealy, of St. Louis, for appellant.

John B. Denvir, Jr., of St. Louis, for respondents.

BROWN, C. (after stating the facts as above). Do we have jurisdiction of this appeal? The aggregate amount of the judgment is only \$1,795.55, so that the jurisdiction cannot, by any process of reasoning, rest upon the amount involved. The city of St. Louis is not a party to this appeal. It is satisfied with the judgment because it has no beneficial interest in any fund out of which it may be paid. It is a party solely as a stakeholder. This judgment discloses on its face that another judgment has been rendered by the circuit court in favor of this appellant and against the city which liquidates the fund out of which these judgments, if sustained, will be payable. Upon the authority of *Barnett v. St. Louis*, 195 S. W. 1017, and the numerous cases therein cited we must refuse to entertain jurisdiction, and accordingly transfer the cause to the St. Louis Court of Appeals.

RAGLAND and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

STATE ex rel. and to Use of FENN v. CONRAN et al. (No. 20170.)

(Supreme Court of Missouri, Division No. 1.  
June 3, 1919.)

**1. JUDGMENT  $\Leftrightarrow$ 206—GENERAL JUDGMENT—ENTRY IN ATTACHMENT SUIT.**

Under Rev. St. 1909, § 2333, where defendant in an action for slander appeared by applying for a change of venue, the trial court was allowed to enter a general judgment on trial on the merits, and it would have been error to enter a special judgment only against the attached property.

**2. ATTACHMENT  $\Leftrightarrow$ 331—LIABILITY ON BOND—GENERAL EXECUTION.**

Where an action of slander was begun, and defendant's property attached, he appeared, and plaintiff secured general judgment, on which execution issued, in the absence of appeal bond, and the attached property was sold, plaintiff and his surety on the attachment bond were not liable thereon.

**3. ATTACHMENT  $\Leftrightarrow$ 331—ACTION ON BOND—LIABILITY.**

Where the sheriff had in his hands a general execution properly issued in the absence of appeal bond, and there came to his hands certain property of the judgment debtor, it was his duty to make his execution out of the property which he levied upon and applied, not by force of an attachment, but by virtue of the general execution on a general judgment, so that the judgment creditor and the surety on his attachment bond are not liable for such application in the judgment debtor's action on the bond.

**4. ATTACHMENT  $\Leftrightarrow$ 331—LIABILITY ON BOND—VOLUNTARY SET-OFF.**

The voluntary action of a judgment debtor in setting off against the judgment creditor's judgment three judgments held by himself against the judgment creditor cannot be charged to the attachment bond in his suit thereon against the judgment creditor and the surety.

**5. JUDGMENT  $\Leftrightarrow$ 883(11)—SET-OFF—RIGHT OF JUDGMENT CREDITOR.**

A general judgment creditor had the right to appear in the court where the judgment debtor's judgment against him was entered, and to file a motion to have the same satisfied by offsetting it with the unpaid balance of his own general judgment, and the order and judgment of the court allowing such satisfaction became final when no appeal was taken.

**6. ATTACHMENT  $\Leftrightarrow$ 331—LIABILITY ON BOND.**

The statute prescribing bonds to be given in attachment suits covers only the damages occasioned by the attachment and orders, judgments, processes, and proceedings under such branch of the case.

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

Action by the State of Missouri, at the relation and to the use of Bert F. Fenn, against M. J. Conran and J. K. Robbins, administrators of the estate of James V. Conran, deceased, and the United States Fidelity & Guaranty Company, a corporation. From judgment for relator for less relief than demanded, he appeals. Affirmed.

H. A. & C. R. Hamilton and Bert F. Fenn, all of St. Louis, for appellant.

John M. Wood, of St. Louis, and Oliver & Oliver, of Cape Girardeau, for respondent United States Fidelity & Guaranty Co. Gallivan & Finch, of New Madrid, for Conran estate.

GRAVES, J. This is an action upon an attachment bond. Cause was tried before a referee, to whose report the relator filed exceptions, a part of which were sustained. The bond was for \$20,000, and relator asked damages in a sum over \$17,000. The referee recommended judgment in the sum of \$5,016.25, but, after sustaining certain of relator's exceptions, and modifying the report accordingly, the court gave relator judg-

ment for \$7,226.68. Not satisfied with this sum, the relator has appealed.

Facts and pleadings may well be outlined together. In May, 1906, James V. Conran commenced an action by attachment against Bert F. Fenn in the circuit court of New Madrid county. The bond in this suit is the attachment bond in that case. Defendant appeared and filed an application for a change of venue, and the venue was changed to St. Genevieve county. Plea in abatement was filed, and in January term, 1907, of that court a trial was had on the plea in abatement, and verdict and judgment was entered for the plaintiff in said matter sustaining the attachment. Later, but at the same term of the court, a trial was had on the merits of the case, and the plaintiff secured a verdict and judgment for \$5,000. The action was for slander. The judgment was a general judgment.

From the two judgments the defendant in that action appealed, but gave no appeal bond, and by reason of this failure come several questions in the case now before us. The appeal finally reached the St. Louis Court of Appeals, and both judgments were reversed by that court. *Conran v. Fenn*, 159 Mo. App. 664, 140 S. W. 82. The reversal in that court was in September 1911. Before a retrial the plaintiff (Conran) in the slander suit died, and of course his cause of action abated. The result was that the attachment was dissolved without further trial.

The two parties (Conran and Fenn) seem to have been active in lawsuits. While Conran was suing and attaching Fenn in the country, Fenn brought a number of suits against Conran in the city of St. Louis. In some three or four he procured judgments, and herein more trouble in the instant case.

Whilst the slander suit of *Conran v. Fenn* was pending upon appeal, there being no appeal bond given, Conran caused execution to be issued and some property of Fenn to be sold and some money in a partition suit to be held and applied on the judgment. This occasions a contention here.

Furthermore, during the pendency of the appeal, Fenn obtained some three or four judgments in the city of St. Louis, and Conran used his judgment in the slander suit to satisfy or partially satisfy these judgments. These likewise occasion contentions in the instant case.

The latitude of the pleadings covered all these matters, and we have combined both brief outlines of pleadings and facts. More details can be best left to the discussion of the points urged in the course of the opinion.

I. There are but three assignments of error made by appellants, and of these in order.

In the slander suit the court (the defendant having personally appeared) entered a general judgment. No appeal bond having

been given by Fenn, the plaintiff caused a general execution to issue upon this judgment pending the appeal and sold under that execution some real estate of Fenn for \$2,241, the net proceeds of which was credited upon the judgment. This sum relator says that he should be permitted to recover.

The referee found that relator could not recover upon this claim because there was no evidence before him from which he could determine his damages. The court, however, took the position that there was no liability upon the attachment bond for these alleged damages. If this be true, there is no reason to discuss the reason assigned by the referee.

[1] In this attachment suit the defendant, Fenn, was personally served, and appeared. He appeared first by applying for a change of venue. *Winningham v. Trueblood*, 149 Mo. loc. cit. 582, 51 S. W. 399. By statute (section 2383, R. S. 1909) the court was allowed to enter a general judgment upon the trial of the merits. In fact, we have held it error to enter a special judgment against the attached property, and error not to enter a general judgment when defendant appears. *Maupin v. Mining Co.*, 78 Mo. loc. cit. 27; *Borum v. Reed*, 73 Mo. loc. cit. 464; *Jones v. Hart*, 60 Mo. 351; *Kritzer v. Smith*, 21 Mo. 296; *Anderson v. Hull*, 45 Mo. App. loc. cit. 205.

[2] The sale was not had by reason of any judgment or order in the attachment branch of the case. It was had under a general execution, issued upon a general judgment. Now, while as between creditors and their claims to priority of liens we hold that an attachment lien is merged into this general judgment lien, yet that does not reach this case. The question here is: If the relator was damaged by the sale of this land, did that damage grow out of the attachment of the property under the bond herein sued upon, or did it follow from this general judgment? We think the latter. Up to the time of the entry of this general judgment relator had not suffered this particular damage. When the general judgment was entered it became not only a lien upon the attached property, but upon all other realty, if any. Conran had the legal right, in the absence of an appeal bond, to have his general execution, and the right to sell not only the realty sold, but any other that Fenn had at the time. This per force of the general judgment and the general execution. Suppose Fenn had owned other realty which had not been attached, and the sheriff under his general execution had levied upon and sold it; could it be said that the attachment bond would be liable? Certainly not. If that be correct, then how can there be liability upon the attachment bond here, when under the law the sheriff had just the same right to sell this attached property

(under the circumstances of this case) as he would have had to sell other unattached realty. The general judgment gave both Conran and the sheriff exactly the same rights in either instance. When this realty was sold, it was legally and rightfully sold (there being no appeal bond), and the attachment bond is not liable. After the reversal of the judgment, Conran may have been liable in a proper suit, but not by action on the bond. We agree with the views of the trial court upon this question.

[3] II. Whilst Conran's execution, *supra*, was in the hands of the sheriff, he also had in his hands \$721 belonging to Fenn, which came to the sheriff from a partition sale of lands, and this \$721 the sheriff applied to the Conran judgment on the execution he had. Relator says he should have had a recovery for this sum. What we have said in our paragraph 1, *supra*, practically determines this contention against the appellant. The sheriff had in his hands the general execution mentioned. Then came to his hands this \$721, the property of Fenn. It was the duty of the sheriff to make his execution out of the property of Fenn. He levied upon and applied this \$721 not per force of the attachment, but by virtue of the general execution on a general judgment. Point 1 controls this point, and our ruling there will preclude the claim of appellant here.

[4-6] III. Fenn had some three judgments against Conran, which were satisfied by being set off by the slander suit judgment. The aggregate amount so used was \$2,100 and relator says he was entitled to recover this sum.

The record shows that the larger of the three judgments above mentioned was settled in this way by consent of the parties. This voluntary action of Fenn, and his consequent loss, if any, certainly cannot be charged to this bond in the attachment suit. As to the other two judgments, the record shows that Conran appeared in the St. Louis court, where Fenn's judgment was entered, and filed a motion to have the same satisfied by offsetting it, with the unpaid balance of the general judgment in the slander suit. This Conran had the legal right to do, and the order and judgment of the court allowing the satisfaction in this manner became final, in that no appeal was taken.

But, if we are right in our paragraphs 1 and 2, relator is not entitled to recover these items for the reasons in paragraph 1 expressed. All this was done under a general judgment, and not under any order or judgment in the attachment branch of the case. The statute prescribes the form of the bond to be given in attachment suits, but it covers only the damages occasioned by the attachment and orders, judgments, processes, and

proceedings under that branch of the case. In this case all these matters occurred per force of a general judgment.

Suppose that the plea in abatement had been sustained in the circuit court in the case of Conran v. Fenn, and suppose on the trial of the merits Conran had gotten a judgment for \$5,000, as he did here, and suppose further he had offset this general judgment of \$5,000 against the judgments of Fenn in the St. Louis courts, as was done in the instant case; could it be contended for a moment that the attachment bond would be liable? We think not. Nor can it be liable in the instant case. In offsetting the judgments by this general judgment of \$5,000 Conran was doing what he then had the legal right to do. He was not acting under the attachment, but under a general judgment. Relator may have had some rights against Conran upon the reversal of his \$5,000 general judgment, but not against the attachment bond, because none of the things were done under any judgment or process in the attachment proceeding.

Finding no error in the record, this judgment should be, and is, affirmed.

All concur, except BOND, J., not sitting.

KEMPER et al. v. LONG et al. (No. 21174.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

SCHOOLS AND SCHOOL DISTRICTS  $\S$  70—HIGH SCHOOL—RENTAL OF BUILDING—"ESTABLISH."

Laws 1913, p. 721, relating to consolidated school districts, Rev. St. 1909,  $\S$  10869, giving consolidated school districts power to "establish" high schools, and Rev. St. 1909,  $\S$  10833, relating to rental of school buildings, authorize consolidated school district directors to rent high school building, where district has refused to vote funds for erecting such building.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Establish.]

Appeal from Circuit Court, Charlton County; Fred Lamb, Judge.

Injunction suit by B. F. Kemper and others against George Long and others. A final injunction was appealed to the Kansas City Court of Appeals, which reversed the judgment (203 S. W. 632), and certified case to the Supreme Court. Judgment reversed.

John D. Taylor, of Keytesville, for appellants.

Roy McKittrick, of Salisbury, for respondents.

BLAIR, P. J. In a suit to enjoin the directors of consolidated school district No. 4, Chariton county, injunction was made final, and the cause appealed to the Kansas City Court of Appeals. That court reversed the judgment (208 S. W. 682), and certified the cause here because it deemed its opinion in conflict with *Black v. Cornell*, 80 Mo. App. 641, and *Fugate v. McManama*, 50 Mo. App. 39.

The district was duly organized, but has refused to vote funds to erect a high school building. The directors rented a room, in which they have caused a high school to be conducted, and intend to continue this course. The real question is whether they have power to rent a building in these circumstances. The Court of Appeals held they had that power. The district has, since its organization, maintained four primary schools and a high school, and the latter is now duly accredited as a high school of the third class. Section 10923, R. S. 1909. It is not claimed the demands of the district do not require a high school, nor that the district funds are insufficient for its further maintenance. One of the declared purposes of the organization of consolidated districts is the maintenance of high schools (section 1, p. 721, Laws 1913), and one of the reasons for the emergency passage of the Consolidated School District Law is the "immediate need" of rural high schools. Section 9, p. 724, Laws 1913. In the same act it is provided that, when a consolidated district is formed, "all the laws applicable to the organization and government of town and city school districts as provided in article IV, chapter 106, R. S. 1909, shall be applicable. \* \* \* The act of 1913 does not require that a high school building shall be erected by the district in every instance, though it holds out a substantial inducement (section 7, p. 724, Laws 1913) to follow this course. It speaks of the district providing an adequate building, and for special aid when such building is provided and a designated course of study is maintained. Section 8, p. 724, Laws 1913. This aid was given the Chariton county district by the state during the school year preceding this suit.

Section 10869, also, gives the consolidated district power to establish a high school. The word "establish" has a variety of meanings. "The particular sense in which the word [establish] is used must be determined by the context and the manifest intent and scope of the statute." *Armstrong v. George*, 84 Kan. loc. cit. 251, 114 Pac. 210. The relevant portion of section 10869 reads thus:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corre-

sponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward, and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade," to wit, high schools.

In some circumstances the word "establish" may include the selection of sites and the erection of buildings thereon. We do not think it is so used in the section quoted. The Legislature declared that in the case of ward schools the board should establish an adequate number. For the purpose of doing so the board must divide the district into school wards and fix the boundaries. The provision for the selection of sites and the erection of buildings is an independent clause. The thing to be done for the purpose of establishing such schools is the division into wards. The sites and buildings are also required, but are not enumerated as necessary for the purpose of establishing the schools. Had the section read, "And for this purpose the board shall divide the school district into school wards and fix the boundaries thereof and select and procure a site," etc., the meaning would have been different. With respect to establishing high schools the section adds nothing to the simple authorization, "and the board may establish," etc. It is apparent the word is used with reference to the school rather than the site and building, and the latter are treated by the Legislature as not within the meaning of that word as used in this section. It is used in the same sense in other sections in this chapter. It is true a building is necessary, but what we are now attempting is to discover the meaning of a particular word as used in a particular connection by the Legislature. When given the meaning above pointed out, and when the absence of any requirement as to sites and buildings for high schools is noted, and when the act of 1913, above referred to, is read in connection with this section, the most reasonable interpretation of the section is that the Legislature did not intend to preclude an arrangement for high school buildings in such districts, in circumstances like those appearing in this record, by means other than the purchase of sites and the erection of buildings thereon by the district. Any other conclusion, as is apparent, would involve difficulties in construing the statutes referred to. The state department of education evidently has so construed the act of 1913 and section 10869, and approved the granting of state aid to this school. Other sections, it is true, provide means for securing funds for high school buildings, but this does not militate against the view that section 10869 means that the erection of a

building is not essential to the establishment of a high school, as that word is used in that section. In such circumstances, since a building is necessary, and since the board is not confined by this section to erecting a building, the board is left free, so far as this section is concerned, to acquire one by other lawful means. The word "establish" has itself been held to include power to rent. *City v. Ledwith*, 26 Fla. 192, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558.

Section 10833, R. S. 1909, which is applicable to this case, provides that title to school property shall be vested in the district, "and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district school house is unoccupied. \* \* \*". This section clearly recognizes the power of districts of this kind to rent school buildings. It has granted the privilege (section 10869) and imposed the duty (Laws 1913, p. 721) to "establish" and "provide" high schools in consolidated districts, and authorized state aid without requiring the erection of a building by the district. We think that, when construed together, the several acts require the conclusion that in a case like this the board of directors was authorized to provide a high school building by renting it.

We do not think the opinion of the Court of Appeals conflicts with *Black v. Cornell*, 30 Mo. App. 641, and *Fugate v. McManama*, 50 Mo. App. 39. These cases dealt with common school districts and involved other statutes. Besides, section 10833 has been substantially amended since the decision in *Black v. Cornell*, and *Fugate v. McManama* was decided on grounds not relevant here and independent of *Black v. Cornell*.

The judgment is reversed.

BOND and GRAVES, JJ., concur.

#### GILES v. MICHIGAN CENT. R. CO. (No. 19744.)

(Supreme Court of Missouri, Division No. 2,  
June 3, 1919.)

#### 1. CARRIERS §315(3)—CARRIAGE OF PASSENGERS—NEGLIGENCE.

Where the petition of a passenger on defendant's train averred that a vestibule door was negligently left open, and that as a result of a sudden jar or jolt he was thrown from the car platform onto the tracks, proof of the concurring acts of negligence is essential to recovery.

#### 2. APPEAL AND ERROR §1061(1)—REVIEW—HARMLESS ERROR.

Where a demurrer should have been sustained to plaintiff's evidence, but the court submitted the same to the jury, which found for defendant, error in the instructions does not warrant new trial, because it was harmless.

Appeal from Circuit Court, Buchanan County; Thomas B. Allen, Judge.

Action by Boyd Giles against the Michigan Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Sterling P. Reynolds, of St. Joseph, for appellant.

Culver & Phillip, of St. Joseph, for respondent.

WALKER, J. In a suit for personal injuries, brought by plaintiff against defendant in the circuit court of Buchanan county, a trial resulted in a verdict for defendant, from which plaintiff appeals.

On December 25, 1913, plaintiff was a passenger on one of defendant's solid vestibuled trains, en route from New York City to Chicago. When the train reached the latter city, at about the Twenty-Second Street crossing, the plaintiff, it is conceded, there being no eyewitness to the accident, fell through an open vestibule door and was injured. Soon thereafter he was found lying in an unconscious condition near the track by employes of the defendant. He was taken to a hospital in Chicago, and upon an examination by the attendant physician and the surgeon employed by defendant it was discovered that he had a bruise on the right temporal region of his head. His blood pressure was taken, showing it to be above normal. A subsequent examination a few hours later showed a further increase in blood pressure. He remained unconscious during the night, and, his blood pressure the next morning being greater, it was decided that there was such an injury to the brain as to render an operation necessary. In the meantime he had aroused from his stupor and became wildly delirious. An anæsthetic was administered and an operation performed, in which that portion of the skull underneath the bruise over the right temporal region was trephined and a portion of the bone removed. Other steps were taken in their order necessary to leave the wound in a condition to heal. Coming out from under the influence of the anæsthetic, he again became violent, and it was necessary to administer opiates and place him under physical restraint to prevent his removing the bandages from the wound and inflicting injury on himself. After about a week he regained his normal mental condition, talked rationally, and recognized his friends. The wound healed with-

out infection, and after about two weeks from the date of the injury he left the hospital in seemingly good health.

The conclusions of experts as to the probable effect of the injury were widely variant, as is not infrequent in this character of testimony; at best they were problematical, or of little probative force. The fact appears, however, more potent than speculation based on assumptions of fact, that since the plaintiff's recovery he has been pursuing with satisfaction to his employers his former vocation, that of caretaker in the shipment of live poultry. His principal contention is that he suffers from a loss of memory, and that his left knee is partially paralyzed, as a result of the injury. His own testimony, as preserved in the record, does not give color to this contention.

The petition, after the usual formal and necessary allegations in a pleading of this character, the sufficiency of none of which are questioned, avers, in effect, that while plaintiff was a passenger on defendant's solid vestibuled train, with a knowledge on his part as well as that of the agents and servants of the defendant of the presence, use, and purpose of the vestibules connecting the cars, and that they should remain closed, except to admit of the ingress and egress of passengers at stations, that defendant's agents and servants negligently permitted the entrance to the vestibule of the coach on which plaintiff was riding as a passenger, and that of the adjoining coach, to carelessly and negligently remain open while the train was in motion, without the knowledge of plaintiff, and while he was in the exercise of ordinary care, in going from one coach to another, that said train gave a quick jerk and plaintiff was thrown through the open vestibule to the ground and permanently injured. The accident and plaintiff's injury are more particularly pleaded as follows:

"That in said fall, and by reason thereof, caused by the negligence of the defendants in permitting the vestibule to be open, and the negligence and carelessness of the defendants' servants in charge of said train in causing the said train to be jerked, plaintiff was thrown to the ground from said train in a violent and dangerous manner, his skull mashed and fractured, his head seriously and permanently injured, and a hole torn into his skull; that he received a cerebral injury; that on account of said cerebral injury his left knee is partially paralyzed, and will continue to be for the balance of his life; that the cerebral injury received by him is permanent, and will never heal or cure; that by reason of said injury, caused by the negligence of defendant's agents and servants aforesaid, he has suffered great bodily pain and mental anguish, and will continue to suffer great bodily pain and mental anguish the remainder of his life.

"Wherefore, the premises considered, the plaintiff prays judgment against the defendants for the sum of twenty-five thousand dollars (\$25,000.00), and for his costs herein expended."

The answer was a general denial.

[1] The petition, as the quoted portion of same discloses, charged two acts of negligence—the open entrance or door to the vestibule, and a sudden jerk in the car. These were so pleaded as to form connected facts, the proof of both of which was necessary to a recovery. While separate specific acts of negligence may be charged, and a recovery had upon proof of one, if that one is sufficient to constitute a cause of action (*Jordan v. Transit Co.*, 202 Mo. 418, 101 S. W. 11), that was not done in the instant case. The only proof of negligence adduced was as to the open door or entrance. In addition to the absence of any evidence of a jerk in the car, it is shown as inconsistent with the occurrence of such a fact that at the time the accident must have occurred the train was moving on a straight and level track at a speed of not more than 15 miles per hour. Under this state of facts, with the additional one that the vestibule was at the time well lighted, the conclusion cannot reasonably be drawn that the plaintiff, upon stepping out of the car upon the vestibule, was thrown therefrom and received the injuries for which he claims damages. Proof of the connected acts of negligence, therefore, as pleaded, was necessary to establish the liability of the defendant.

The facts here are parallel with those in the recent case of *Kirn v. Harvey*, 208 S. W. 479, in which *Ellison, P. J.*, speaking for the Kansas City Court of Appeals, said:

"It was necessary that each of the acts should occur in order to throw her from the car. The lurch of the car on the rough track would have been harmless, if the doors had been closed; and the open doors would have been harmless, if the car had not lurched on the rough track. The combined, or concurring, acts of negligence were necessary to make a case."

The Supreme Court of Alabama, in *Western Ry. Co. v. McPherson*, 146 Ala. 427, 40 South. 934, held that where the negligence is alleged as consisting of several acts, conjunctively averred, all must be proved before plaintiff is entitled to recover. A like ruling has been made by the Supreme Court of Michigan, in *Wormsdorf v. Det. Ry. Co.*, 75 Mich. 477, 42 N. W. 1000, 13 Am. St. Rep. 453, where it is held that where the accident and resulting injury are alleged to have been caused by several negligent concurring acts and omissions each must be proved to warrant a recovery.

[2] Under the pleadings, and in the absence of the proof noted in the case at bar, plaintiff was not entitled to recover. This being true, it is immaterial whether the instructions given or asked and refused were right or wrong. *Quinn v. Met. St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46; *Carr v. R. R.*, 195 Mo. 214, 92 S. W. 874. If a record discloses that a plaintiff is not entitled to re-

cover, the court should sustain a demurrer to the evidence. If, instead of doing so, the court submits the case to the jury and gives erroneous instructions, and the jury finds for the defendant, the verdict will not be disturbed, because it is for the right party, as plaintiff, under no circumstances, would have been entitled to a verdict. *Moore v. Lindell Ry. Co.*, 176 Mo. 545, 75 S. W. 672; *Woods v. Ry.*, 187 S. W. 11.

From all of which it follows that the judgment should be affirmed; and it is so ordered.

COUGHENOUR v. HUTCHINGS et al.  
(No. 19918.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

VENDOR AND PURCHASER — 38(2) — MISREPRESENTATION — FARM LAND — IRRIGATION.

Missouri farmer, who has been induced to buy Texas land upon the representation that the land was in "one of the richest, most certain agricultural districts of the world," and that the "most splendid irrigation system that can be found" had been installed, and that the land had more advantages and fewer disadvantages than any other land on the American continent, may rescind sale after discovery, after removal to Texas, that it was impossible to produce the crops that he had been told could be produced, and that the irrigation system was wholly insufficient to water land.

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Suit by John Coughenour against C. F. Hutchings and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. O. French, of Kansas City, for appellants.

J. E. Haymes, of Marshfield, for respondent.

BOND, J. I. Suit to rescind a land contract for fraud and to recover money damages in addition thereto.

Plaintiff Coughenour, a farmer of Webster county, Mo., through D. J. Haugeberg, one of defendant corporation's land agents, was interested in a proposition of said company to sell him a tract of land in their Edinburgh district in Hidalgo county, Tex.

The Standard Land Company in 1913 were endeavoring to interest farmers in Missouri, Illinois, and other states in a

large tract of uncleared Texas land which they widely advertised to be "one of the richest, most certain agricultural districts of the world," and that they had installed therein "the most splendid irrigation system that can be found," claiming that they could "show more advantages and fewer disadvantages than can be found elsewhere on the American continent."

In June, 1913, plaintiff, attracted by the glowing accounts of the resources of that country, the fertility of the soil, the fine climate, certainty of crops, joined an excursion party which the defendants were taking to Edinburgh, Tex., to view this land. On the trip home the plaintiff entered into a written contract to purchase about 42 acres of land in the Edinburgh tract at the rate of \$185 per acre, and in part payment he agreed to execute a deed to his 80-acre farm in Webster county, Mo., at the rate of \$20 an acre, giving notes for the balance, secured by a vendor's lien on the Texas land.

In October of the same year, plaintiff removed his family to Texas, where he rented a farm in the vicinity of the uncleared land which he had purchased. He continued to farm in that locality until the spring of 1915, when, having discovered that it was impossible to produce the crops he had been told could be produced, and claiming that the irrigation system was wholly insufficient to water the land, and that he had been deceived and defrauded, he returned to Webster county Mo., and in February, 1915, instituted this suit, asking annulment of his contract and the cancellation of the deed conveying his Missouri farm to defendants.

The court found the issues for plaintiff, and decreed that the deed executed by plaintiff, conveying his Webster county farm to defendant, be canceled and set aside, and that plaintiff should also recover \$175 paid by him to defendants in cash, together with the costs of suit. Defendants duly appealed.

II. The grounds of appeal in this case are the same as far as they go, as the errors assigned by the appellants in the case of *Rabenau v. Harrell et al.* (No. 19919) 213 S. W. 92, not yet officially reported. The evidence of deceit and fraud in the present case is similar to that adduced in the former. For the reasons given in the opinion in that case, the decree in this should be affirmed. It is so ordered.

BLAIR, P. J., and GRAVES, J., concur.

**KUENZEL v. CITY OF ST. LOUIS.**  
(No. 20137.)

(Supreme Court of Missouri. Division No. 1  
June 2, 1919.)

**1. MUNICIPAL CORPORATIONS — 733(1) — LIABILITY FOR TORT — MAINTENANCE OF PARK PAVILION.**

In providing in its public park a pavilion furnished with a rest room and ladies toilet room, a city did not act in its governmental capacity so as to exempt it from liability for injuries or death by its negligence in maintaining the premises.

**2. DAMAGES — 208(2) — PROXIMATE CAUSE — QUESTION FOR JURY.**

In action against a city for death from pneumonia of plaintiff's wife, injured when she fell in the pavilion in a park, whether the injury suffered in the fall was the proximate cause of the pneumonia *held* for the jury.

**3. EVIDENCE — 553(4) — EXPERT OPINION — HYPOTHETICAL QUESTION — WANT OF BASIS.**

In an action for death from pneumonia of plaintiff's wife, injured by a fall in park pavilion maintained by defendant city, the trial court's refusal to permit the city to put a hypothetical question as to whether, on the facts assumed, the death could have been caused by lobar pneumonia *held* not error; the evidence tending to show that death resulted from bronchial pneumonia.

**4. APPEAL AND ERROR — 1048(5) — HARMLESS ERROR — EVIDENCE.**

In action for death from injuries in falling downstairs, where the witness called by plaintiff to prove that a railing was subsequently placed by defendant on the side of the steps where the injury occurred answered "I do not know" to the question, it was rendered harmless.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Action by Andrew Kuenzel against the City of St. Louis. From judgment for plaintiff, defendant appeals. Affirmed.

Charles H. Danes and Everett Paul Griffin, both of St. Louis, for appellant.

Muench, Walther & Muench, of St. Louis, for respondent.

**BOND, J. I.** Action to recover damages for personal injuries resulting in the death of plaintiff's wife, due to the alleged negligence of the defendant.

The city of St. Louis, defendant herein, owns and maintains a park in the northeastern part of the city known as O'Fallon Park. On the bank of a small lake in this park is a two-story pavilion used as a boathouse, and for shelter, rest and refreshment. Opening from a large room on the main floor used as a lounge, there is a passageway leading to the women's dressing room. Above this door-

way, in large letters is the word "women," and three feet inside this doorway is a flight of three steps descending to the level of the women's dressing and toilet room.

The evidence tends to prove that on the afternoon of July 12, 1914, about 7 o'clock and shortly before sunset, Francisca Kuenzel, plaintiff's wife, a woman in her late 50's, accompanied by a friend, entered this passageway on her way to the women's dressing room. Being unfamiliar with the building and having no knowledge of the steps inside the doorway, and the electric bulb that is placed in the ceiling to light the passageway being unlighted, she lost her balance and fell, fracturing her hip and sustaining other serious injuries. She was thereafter confined to her bed until the 19th day of September, when she died after a six-day attack of pneumonia, which the medical experts stated sometimes follows a fracture.

Defendant's answer was a general denial couched with a plea of contributory negligence.

The jury found for plaintiff, and assessed his damages at the sum of \$1,500, and from a judgment entered in accordance, defendant appealed.

[1] II. The first point made by appellant is that the city was acting in its governmental capacity in providing a pavilion furnished with a rest room and ladies toilet room in its public park. We think not. These conveniences were, primarily, if not exclusively, for the benefit of persons who frequented the park. In fact their existence in the park was essential to its use as a place of recreation and comfort. Without such necessities the park would be ill-adapted to the use of both sexes. That the establishment and maintenance of the park is the exercise of a proprietary function of a municipality has often been decided in this state. *State ex rel. v. Schweickardt*, 109 Mo. loc. cit. 512, 19 S. W. 47; *Carey v. Kansas City*, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65; *Capp v. City St. Louis*, 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (N. S.) 731, Ann. Cas. 1915C, 245. There was no error on the part of the trial court in overruling appellant's demurrer to the evidence based on the above contention.

[2] III. The next error assigned is that there was no evidence that the death of plaintiff's wife from pneumonia in September was caused by the fracture of her hip in July. Whatever might be our own view of the causative relation of these two happenings, it is sufficient to say that the facts and circumstances disclosed on the trial rendered it proper to submit to a jury the question of the relativity of the two events and whether the first was the proximate cause of the last, and their finding concludes this question of fact in this court.

[3] IV. Complaint is made of the refusal of



the trial court to permit appellant to put a hypothetical question as to the cause of the death of plaintiff's wife. The proposed inquiry was whether upon the facts assumed her death could have been caused by lobar pneumonia. The court excluded the question because there was no evidence that this particular kind of pneumonia caused her death. On that point the relevant evidence tended to show that her death resulted from bronchial pneumonia. That ruling is sustained by the record, and hence no error is predicable thereon.

[4] V. It is finally insisted that the court erred in permitting plaintiff to show that a railing was subsequently placed on the side of the steps where the injury occurred. This would have been error except for the fact that the witness called by plaintiff to make such proof answered, "I do not know." The question was thereby rendered harmless.

Finding no reversible error in the record, the judgment of the trial court is affirmed. It is so ordered.

BLAIR, P. J., and GRAVES, J., concur.

#### STATE v. GRIFFIN. (No. 21821.)

(Supreme Court of Missouri, Division No. 2.  
June 3, 1919.)

#### 1. CRIMINAL LAW § 882—TRIAL—SPECIAL VERDICT.

In a prosecution for removing and concealing personal property covered by a mortgage, a verdict finding defendant guilty of feloniously, willfully, and unlawfully concealing personal property covered by a chattel mortgage, and assessing punishment at six months' imprisonment, is insufficient, being a special verdict which did not set out all of the elements of the offense, one of which was, under Rev. St. 1909, § 4570, that the act should be done with intent to hinder, delay, or defraud the mortgagee.

#### 2. CRIMINAL LAW § 1187 — APPEAL—DISCHARGE OF DEFENDANT.

Where the record upon appeal is such as to make it reasonably apparent that evidence sufficient to sustain a conviction cannot be produced upon retrial, it is proper to order the defendant discharged; otherwise the cause should be remanded.

#### 3. CRIMINAL LAW § 1189 — APPEAL — REMAND.

In a prosecution for removing and concealing personal property covered by chattel mortgage, held that the record did not make it reasonably apparent that evidence to sustain a conviction could not be produced upon retrial, and hence the case should, on reversal of a conviction, be remanded.

Appeal from St. Louis Circuit Court; John W. Calhoun, Judge.

Carlisle Griffin was convicted of the crime of removing and concealing personal property covered by chattel mortgage, and he appeals. Reversed, and cause remanded.

In the circuit court of the city of St. Louis, defendant was tried and convicted of the crime of removing and concealing personal property covered by chattel mortgage. The punishment was fixed at six months' imprisonment in the city jail, and defendant has duly perfected an appeal.

The evidence upon the part of the state may be summarized as follows:

In May, 1916, the Weber Motorcar Company, a corporation located at 2217 Locust street, St. Louis, Mo., sold to the defendant for the sum of \$300 one secondhand Ford automobile. Defendant paid \$125 in cash and gave his notes for the balance, securing the same by a chattel mortgage on the automobile. By subsequent payments defendant reduced the mortgage indebtedness to the sum of \$126.27.

In May, 1917, after having written numerous letters to defendant concerning the payment of the balance then overdue, representatives of the mortgagee called upon and talked to defendant at his place of business on Delmar avenue. They requested that defendant either pay the balance of the mortgage indebtedness or surrender the car. He replied that he could neither pay the notes nor deliver the car. He finally said that he would give up the car, and that it would be found at the back of his residence on Pendleton avenue. The representatives of the mortgagee then went to defendant's residence and made a search of the premises, but were unable to find the car.

A short time thereafter a representative of the mortgagee again called upon defendant, demanding either the money or the car, and in that conversation told the defendant that the mortgagee had been unable to find the car at defendant's residence, the place where defendant told them it could be found. Defendant then said, "I cannot tell you where the car is; I do not know."

Defendant did not offer any evidence. The jury returned the following verdict:

"We the jury in the above-entitled cause, find the defendant guilty of feloniously, willfully and unlawfully removing and concealing personal property, covered by a chattel mortgage, and assess the punishment at six months (6) in the city jail. S. A. Bramble, Foreman."

Frank C. O'Malley, of St. Louis, for appellant.

Frank W. McAllister, Atty. Gen., and S. E. Skelley, Asst. Atty. Gen., for the State.

WILLIAMS, P. J. (after stating the facts as above.) [1] I. Appellant contends that the verdict is insufficient to support the

judgment, in that it is a special verdict and falls to find all of the elements of the alleged crime. The learned Attorney General confesses error in this regard. We are of the opinion that the point is well taken. The verdict is a special verdict. *State v. Modlin*, 197 Mo. 376, 95 S. W. 345. Being a special verdict, it should find all the essential elements of the offense. *State v. Bishop*, 231 Mo. 411, 133 S. W. 33.

One of the essential elements of the offense is that the act must have been done "with intent to hinder, delay, or defraud such mortgagee." Section 4570, R. S. 1909.

The verdict is also defective in other respects, but the foregoing is sufficient to show the insufficiency of the verdict, and to cause a reversal of the judgment.

[2, 3] II. Appellant further contends that the evidence is insufficient to sustain a conviction of the alleged offense, and that therefore the judgment should be reversed and the defendant discharged. When the record upon appeal is such as to make it reasonably apparent that evidence sufficient to sustain a conviction cannot be produced upon a retrial, it is and should be the practice to order the defendant discharged; otherwise the cause should be remanded to be tried anew if the officers charged with that duty deem further prosecution of the cause advisable. *State v. Elsey*, 201 Mo. 561, loc. cit. 572, 100 S. W. 11.

Whether the evidence in the present record is sufficient is rather a close and debatable question. What evidence a retrial may bring forth we have no way of knowing.

We think the facts shown by the present record are at least not such as to make it reasonably apparent that a case cannot be made. It therefore follows that the judgment should be reversed, and the cause remanded.

It is so ordered.

All concur.

### RIGG v. CHICAGO, B. & Q. R. CO. (No. 20113.)

(Supreme Court of Missouri. Division No. 1.  
June 2, 1919.)

#### 1. APPEAL AND ERROR ⇐1064(1)—HARMLESS ERROR—INSTRUCTIONS.

One act of negligence, sufficient to authorize recovery, being alleged in the petition, and properly submitted by the instruction, and required to be found to permit of a recovery, any error of the instruction in submitting another act of negligence was not prejudicial to defendant.

#### 2. DAMAGES ⇐132(1)—EXCESSIVE—BURNS.

Verdict of \$25,000 for severe burns, reduced by remittitur in trial court to \$15,000, held still excessive by \$7,500.

#### 3. APPEAL AND ERROR ⇐1140(2)—DETERMINATION—REMITTITUR.

There being no suggestion of incorrect attitude of jury during trial, except the size of the verdict, still too large after remittitur in trial court, this can be cured by a further remittitur on appeal.

Appeal from Circuit Court, Buchanan County; Thomas B. Allen, Judge.

Action by George L. Rigg against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed conditionally.

H. J. Nelson, E. M. Spencer, and M. G. Roberts, all of St. Joseph, for appellant.

Mytton & Parkinson, of St. Joseph, for respondent.

**RAGLAND, C.** This is an action to recover damages for personal injuries received by respondent while working as an engine wiper for the appellant in its roundhouse at Hannibal, Mo. It comes here on appeal from the Buchanan circuit court.

At and prior to the time of respondent's injury it was the practice of appellant to have the boilers of its locomotive engines washed in its roundhouse upon the incoming of the engines from trips on the road. The method pursued was this. The fire was knocked from the fire box while the engine was still outside of the roundhouse, and it was then run in under its own steam and stopped over a pit about 60 feet in length, about 3 feet in width and about 3 feet in depth. It required a pressure in the boiler of at least 40 pounds to move the engines, and sometimes the pressure was as much as 120 pounds when the engine reached its place in the roundhouse. After the engine reached its place, the next thing to be done was, in the vernacular of the roundhouse operatives, to "bust" it; that is, get the steam out of the boiler and thereby remove all pressure. This was done by attaching one end of a hose to what is called the "blow-off pipe" of the boiler and the other to a system of piping in the pit that connected with a large vat outside of the roundhouse that received the steam and hot water called a "sump." A valve in the blow-off pipe, known as the "blow-off cock," was then opened and all the steam and hot water was blown from the boiler into the sump. The engine was then "busted" and ready for the boiler washers. A card indicative of that fact was hung on its side. On all of the appellant's locomotive engines that were washed in its roundhouse at Hannibal there were a number of washout plugs, usually six, located in the barrel of the boiler along the bottom line of the fire box. Through the orifices made by removing them the mud and sediment was washed out of the boiler. The

washout plugs were never removed until the engine was "busted"; otherwise, the hot water and steam would have been ejected with tremendous force by the pressure in the boiler.

Just immediately before his injury respondent was in a pit under an engine cleaning oil cups on the eccentric rods. While he was so engaged one of appellant's boiler washers, preparatory to washing the boiler, removed a washout plug in the boiler of an engine that had not been "busted," and which was standing over a pit parallel with that in which respondent was working and about 10 feet distant therefrom. The washout plug so removed was on the side of the boiler next to where respondent was, and he was severely scalded and burned by the water and steam.

The petition predicates the right of recovery on three alleged negligent acts: (1) Removing the washout plug without first having removed the steam; (2) removing the plug without having taken any precaution to ascertain whether the steam had been removed; and (3) removing the plug without having given warning to plaintiff or other employees working in and about the engine.

The answer admits that Simon Anderson "a servant of the defendant employed to fill engine boilers with water removed the washout plug from the boiler of an engine standing upon an adjacent and parallel track close to the one upon and under which plaintiff was at work; admits that there was a high pressure of steam in the said engine at the said time, and that the said steam and water escaped through the opening made by said washout plug, and was thrown upon the plaintiff and he was thereby burned and scalded; but the defendant avers the fact to be that said Anderson, in removing the said washout plug, was acting entirely beyond and outside of the scope of his duties," etc.

The court in its principal instruction, given at the request of plaintiff, hypothecated the plaintiff's right to recover on their finding defendant guilty of all three of the acts of negligence averred in the petition.

The plaintiff laid his damages at the sum of \$100,000. The jury returned a verdict in his favor, assessing his damages at \$25,000. The trial court required a remittitur of \$10,000 and judgment was rendered for \$15,000. Other facts necessary for an understanding of the questions involved will be stated in connection with their consideration.

Appellant makes two assignments of error. First, the giving of the plaintiff's principal instruction, and, second, the failure of the court to grant a new trial because the verdict is so excessive as to be indicative of passion and prejudice on the part of the jury.

[1] 1. Appellant complains of the instruction, first, because it required Anderson to give a warning without regard to the question as to whether Anderson knew, or could

have known by the exercise of ordinary care, that the plaintiff was in such close proximity to the engine as to be entitled to a warning; and, second, because the instruction permits a recovery, even though Anderson gave no warning to the plaintiff, if, as a matter of fact, he gave it to other "employees" working in, about, or near the engine. If it had been Anderson's purpose to do so an unheard-of thing as remove the washout plug while the boiler was still under pressure, and thereby permit the boiling water to be driven with explosive force from the boiler by the steam pressure, it would unquestionably have been his duty to have warned respondent of his intention so to do; and if the case had been submitted to the jury by the instruction solely on that theory there would have been grounds for appellant's criticism. But it is clearly evident, without minute analysis of the situation, that the primary or fundamental negligence consisted in removing the washout plug at all while the boiler was full of scalding water and under a high pressure of steam as the answer admits. Under the situation as disclosed by the evidence, Anderson owed all the operatives in the roundhouse, including respondent, who in the discharge of their several duties were, or might momentarily come, within proximity to the engine in question, the legal duty to exercise ordinary care to ascertain that the water and steam had been removed from the boiler before he took out the washout plug. If he failed so to do, he was negligent. This act of negligence was also alleged in the petition, and also submitted in the instruction complained of, and the jury were required to find the defendant negligent in this respect, in addition to that of a negligent failure to warn. Appellant was not prejudiced, therefore, because the instruction was faulty in the respect it points out. *Moyer v. Chicago & A. R. Co.*, 198 S. W. 839.

[2, 3] 2. The main insistence of the appellant in this court is that the verdict is so palpably excessive as to convict the jury of prejudice. As to this the facts relative to the pain suffered and which may be suffered by respondent, the nature and extent of his injuries, and their effect, if any, in lessening his earning capacity, must speak. At the time of his injury he was 22 years of age, in perfect health, and earning \$1.70 a day. The scalding water and steam burned over at least one-third of his body. The greater part of the burn was a second degree burn; that is, a burn which extends down beneath the skin proper and into the subcutaneous layers, and which leaves marked, permanent scars. The burns over the left hip, left thigh, and left knee were third degree burns, and extended through the skin and subcutaneous layers, and involved the fascia covering the muscles. Immediately after receiving the burns, he was hurried to a hospital and his

injuries dressed. During the first week or 10 days thereafter he suffered excruciating agony, being delirious at times from pain, and for nearly a month afterwards had occasional nervous chills from the shock. At the end of 8 weeks he was discharged from the hospital and received no further medical treatment. At the date of the trial, 5 months after the injury, he looked pale and undernourished, and walked with a slight limp on account of his left knee. The joint was stiff to such an extent that the leg could not be straightened; but, when extended to the utmost, remained at an angle of 25 degrees from perpendicular. He could walk about two blocks, when the leg gave out. He did not sleep well, on account of his left hip hurting him at night, and his appetite was not good. He had no organic trouble, however, and had shown marked, though gradual, improvement since his discharge from the hospital, especially in the use of his leg. The appellant paid all expenses incurred for his care and treatment at the hospital. Thus far the evidence as to the respondent's suffering and injuries is without conflict. In what respect and to what extent his injuries are permanent is the matter in dispute. Seven physicians testified in the case, and there was sharp disagreement as to this. It was the opinion of some of them that the stiffness of the left knee was caused by the contraction of the scar tissue over the knee, which was not deep enough to involve the tendons and muscles; that this tissue was movable over the bony structure and ligaments of the joint; and that by exercise in moderation this contraction would in a few months be entirely overcome, and the function of the limb entirely restored.

Others testified that the third degree burns were tending definitely toward what was termed keloid formations; that is, scar tissue tumors which may greatly increase in size, and which may subsequently become so painful as to require removal, and which, when removed, return; that in any event, the scar tissue over the joints, whether it developed into keloids or not, would substantially permanently impair the use of the leg on account of its thickness and density.

It may fairly be deduced from the evidence as a whole that there is more or less permanent impairment of the function of respondent's left leg in walking, and that there is a reasonable probability that throughout his life he will, to some extent, suffer pain and inconvenience from the scar tissue formations on his left leg. Notwithstanding the severity of the pain he has suffered and the permanence of his injuries, when measured by the standards that have been applied by this court in innumerable cases, the verdict is excessive, even after the remittitur entered in the trial court. However, the case was

well tried and nothing can be gained by another trial. Indeed, it is inconceivable that the jury under the evidence could have done otherwise than return a verdict in favor of respondent. There is not a suggestion of an incorrect attitude on their part during the trial, unless it be in size of the verdict. This can be cured by a further remittitur.

Accordingly the judgment should be affirmed, on condition that the respondent enter a remittitur in this court, as of date of the original judgment, of \$7,500. If the respondent enters such remittitur within 10 days, the judgment should stand affirmed in the sum of \$7,500 as of date of the original judgment. Otherwise, the judgment should be reversed, and the cause remanded for a new trial.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

WEST v. DYER et al.

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

COURTS  $\S$ 231(23)—MISSOURI—JURISDICTION OF SUPREME COURT—CONSTITUTIONAL QUESTION.

A constitutional question must be raised at the first opportunity, and the constitutional provision alleged to be violated pointed out; hence mere contention that grading tax bills issued against property were invalid and worked a confiscation of the property, because in excess of its value, raises no constitutional question, which would give the Supreme Court jurisdiction.

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Suit by A. L. West against William F. Dyer and others. From a judgment for plaintiff, defendants appealed to the Kansas City Court of Appeals, which tribunal certified the cause to the Supreme Court. Case recertified to Kansas City Court of Appeals.

Wm. F. Allen, of Kansas City, for appellants.

Clarence S. Palmer, of Kansas City, for respondent.

GRAVES, J. This case was certified here by the Court of Appeals upon the theory that a constitutional question is involved. 191 S. W. 1024. The short opinion filed reads:

"This is a suit on grading tax bills issued against the property of the defendants, located in Kansas City, Mo. The sole defense is that the amount of the tax bills exceeds the value of the property against which they were issued, and for that reason the enforcement of the tax bills will confiscate said property. This defense is set up in the answer of the defendants, in the requested instructions, and in the motion for a new trial. At the conclusion of the trial of the cause, the defendants asked the following declaration from the court:

"If the court, sitting as a jury, find and believe from the evidence offered in this cause that the special tax bills issued against the property of defendants exceed the value thereof, then the court declares the law to be that said special tax bills are null and void, for the reason that said special tax bills would be and are confiscation of defendants' property."

"This declaration was refused. In their motion for a new trial the defendants raised the point that the court erred in refusing to give this declaration. The point, therefore, is saved in the pleadings and throughout the trial. The same point is raised by the appellants in this court.

"The defense of 'confiscation' is equivalent to a statement that the defendants' property is being taken contrary to the provisions of the Constitution. Therefore this cause cannot be determined without this court passing upon a constitutional question.

"For the reasons given, the case is transferred to the Supreme Court."

The suit is one to enforce the collection of two small special tax bills. The only thing in the answer is the following:

"Defendants, further answering, state that the special tax bills sued in this cause exceed the value of the property mentioned in plaintiff's petition, and that said tax bills will confiscate the real estate upon which they are issued against, and defendants state for that reason said tax bills sued on are null and void, and are of no validity or effect."

The next is the refusal of the instruction set out in the opinion above. Then the sixth ground of the motion for new trial reads:

"The court erred in refusing to give instructions offered on behalf of defendants in said cause."

The question is: Has there been a constitutional question raised? No mention of any constitutional provision is pointed out, or even mentioned, from one end of the record to the other. Constitutional questions cannot be raised in this loose and indefinite way. The constitutional question must be raised at the first opportunity, and a finger must be pointed to the constitutional provision violated. *Lohmeyer v. Cordage Co.*, 214 Mo. loc. cit. 688, 113 S. W. 1109. In this case we said:

"Nor would a general reference to the Constitution, state or federal, do. He must come

into the open and put his finger on the specific provision of the Constitution touched by the adverse ruling. *Excelsior Springs, to Use, v. Ettenson*, 188 Mo. 129, 86 S. W. 255, and cases cited; *Davis v. Thompson*, 209 Mo. loc. cit. 186, 107 S. W. 1067 et seq.; *Independence, to Use, v. Knoepker*, 205 Mo. loc. cit. 842, 103 S. W. 940 et seq., and cases cited."

This was not done in the case at bar, and there is no constitutional question involved. Jurisdiction remains in the Kansas City Court of Appeals, to which court the case should be recertified.

It is so ordered.

All concur, except WOODSON, J., absent.

WALKER v. OZARK COOPERAGE & LUMBER CO. OF NEW JERSEY.  
(No. 19474.)

(Supreme Court of Missouri, Division No. 2,  
June 8, 1919.)

COURTS 231(52) — MISSOURI — SUPREME COURT.

Where demurrer was sustained to a petition alleging that plaintiff recovered a judgment for about \$1,600 against the predecessor of the defendant corporation, that the judgment debtor conveyed its property to a corporation, which conveyed to defendant, that the conveyances were without consideration and for the purpose of preventing enforcement of the judgment, and praying the appointment of a receiver and dissolution of defendant, the Supreme Court was without jurisdiction upon appeal to review the matter, for the amount in controversy was less than \$7,500, and the prayer should be disregarded; the jurisdiction of the Supreme Court depending on the amount in controversy as shown by the entire petition, and not the relief prayed.

Appeal from St. Louis Circuit Court;  
Chas. Claffin Allen, Judge.

Suit by George W. Walker, doing business as the Walker Stove Company, against the Ozark Cooperage & Lumber Company of New Jersey. A demurrer was sustained to the petition, and plaintiff appealed to the St. Louis Court of Appeals, which tribunal certified the case to the Supreme Court. Case retransferred to the St. Louis Court of Appeals.

This is a suit in equity, by which plaintiff seeks to have satisfied out of the property held by the defendant corporation a judgment for \$1,646.01, rendered in his favor in the federal court against the predecessor of the defendant corporation.

The trial court sustained a demurrer to the plaintiff's petition, and an appeal was taken by him to the St. Louis Court of Appeals. That court, having doubt as to its jurisdiction

of the appeal, certified the case here. 179 S. W. 948.

After the case reached this court the respondent filed a motion here to remand the cause to the St. Louis Court of Appeals. This motion was ordered to be taken with the case, and should be now determined before proceeding further.

The facts bearing upon the question of jurisdiction are stated in the opinion of the Court of Appeals, from which we quote as follows:

"The petition inter alia alleges that plaintiff obtained a judgment in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri in the sum of \$1,646.01 against the Ozark Cooperaage Company, a Missouri corporation. The petition does not disclose the date of the rendition of such judgment, though it is averred that the suit in which the same was rendered was instituted on February 23, 1905, the defendant therein, referred to in the petition as 'Ozark Cooperaage Company No. 1,' transferred its assets to the Ozark Cooperaage Company of St. Louis, Mo., referred to in the petition as 'Ozark Cooperaage Company No. 2,' likewise a Missouri corporation. And it is alleged that there was a 'pretended dissolution' of the original corporation. It is averred that the latter was 'at the time of said pretended dissolution \* \* \* a large and prosperous corporation, having assets of more than \$50,000 over and above its liabilities.' Further allegations are made with which we are not now concerned, and it is then alleged that later Ozark Cooperaage Company No. 2 transferred all of the assets obtained by it from Ozark Cooperaage Company No. 1 to Ozark Cooperaage & Lumber Company of New Jersey, a New Jersey corporation, which had been licensed to transact business in the state of Missouri.

"It appears that all of the said corporations were originally named as defendants, as well as certain individuals alleged to have been officers and directors of the three companies, but that the suit was dismissed as to all defendants except the Ozark Cooperaage & Lumber Company of New Jersey, respondent herein.

"The petition charges that the transfers of the assets aforesaid were without consideration, and were fraudulently made by the officers and directors of said corporations for the purpose of hindering, delaying, and defrauding the plaintiff. And it is alleged that the assets of the two Missouri corporations have been fraudulently 'intermingled and commingled,' so that the same 'cannot be disentangled, separated, reached, or set apart by the ordinary process of law,' but that the sum of \$7,000 was on deposit in the National Bank of Commerce of St. Louis to the credit of the Ozark Cooperaage & Lumber Company of New Jersey at the time of the filing of the petition. The prayer of the petition is as follows:

"Wherefore, plaintiff prays that this court will order, decree, and appoint one receiver for said Ozark Cooperaage Companies Nos. 1 and 2, respectively, and said Ozark Cooperaage & Lumber Company of the State of New Jersey, to impound all the assets of said companies and to disentangle all the assets of all of said companies and take charge of the affairs of said

three corporations, and apply, out of the assets of said Ozark Cooperaage Company No. 1, now intermingled as aforesaid, so much thereof as will pay plaintiff's said judgment, with interest and costs; and that the defendant herein, the said Ozark Cooperaage & Lumber Company of New Jersey, be restrained and enjoined from drawing any check or checks upon the fund aforesaid, now on deposit in said National Bank of Commerce, in St. Louis, and that said bank be restrained and enjoined from paying out any moneys on said checks; and that the affairs of the said Ozark Cooperaage & Lumber Company of New Jersey, said above-described fraudulent corporation, be wound up, and that it, and its officers and servants, be forever restrained and enjoined from further doing business in the state of Missouri; and that the affairs of said Ozark Cooperaage Company No. 1, and of said Ozark Cooperaage Company of St. Louis, Mo., being Company No. 2, be finally wound up by this court, and that plaintiff recover his claims out of said assets, and for such other and further and general relief, whether of the same or of a different nature, as to the court may seem meet and proper."

Henry B. Davis, Charles Erd, and Robert A. Thomann, all of St. Louis, for appellant.

Wells H. Blodgett, George B. Webster, Henry W. Blodgett, and Walter N. Fisher, all of St. Louis, for respondent.

WILLIAMS, P. J. (after stating the facts as above). We are of the opinion that this court has no jurisdiction over this appeal.

The real amount in controversy is the \$1,646.01, judgment debt plus an unknown amount of interest and the monetary value of the possession, under a receivership, of the corporation's property, until such time as the above judgment debt can be satisfied therefrom.

"It is settled that, where the right of appeal depends on the value of the matter in dispute, such value must be estimated in money. When the object of the suit, however, is not to obtain a money judgment, but other relief, the amount involved must be determined by the value in money of the relief to the plaintiff, or the loss to the defendant should the relief be granted, or vice versa, should the relief be denied." *State ex rel. E. L. & P. Co. v. Reynolds*, 256 Mo. 710, loc. cit. 719, 165 S. W. 801, 803.

In the recent case of *Bates et al. v. Werries et al.*, 196 S. W. 1126 (not yet officially reported), the question of the "amount involved," where a temporary receivership was ordered pending the litigation, was discussed, and it was there held by court en banc as follows:

"Where a judgment affects merely the temporary control of property, as contradistinguished from the permanent divestiture of title thereto, the amount in dispute should be the financial value of such control, or loss of control, as the case may be, and not the value of the property controlled."

Under the allegations of the petition in the case at bar the plaintiff could in no event

recover more than enough to satisfy his debt and the costs of suit. And the only loss which defendant could possibly sustain under the pleadings would be an amount sufficient to pay the debt and costs of suit, plus the financial value of the temporary loss of the control of its corporate assets pending any receivership which might be ordered in aid of the main suit. It does not appear nor can it be inferred from this record, that the amount thus involved would exceed \$7,500, and therefore confer jurisdiction here.

The fact that the prayer of the petition may contain some extravagant requests or demands (in no manner based upon the allegations of the petition), as, for instance, that the affairs of the corporation be "wound up" and the corporation enjoined from further doing business in the state, does not mean that such portions of the prayer should be considered in determining a jurisdictional question.

In the case of *Wilson v. Drainage & Levee District*, 237 Mo. 39, loc. cit. 40, 139 S. W. 136, 137, the court en banc, in discussing the rule for determining the amount in dispute when a demurrer is sustained to a petition, said:

"To determine the amount, we must therefore go to the petition itself. *We are not bound by the prayer of the petition*, but must take the whole instrument and determine what sum is involved." (Italics ours).

And more especially should the above rule be applied where, as here, we are dealing with a portion of the prayer, which is not germane to the subject-matter of the petition, but one wholly foreign to the purposes for which the suit was (as shown by the allegations of the petition) attempted to be instituted.

It follows that the cause should be transferred to the St. Louis Court of Appeals.

It is so ordered.

All concur.

TRAPP et al. v. SHULL et al. (No. 19740.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

# 1. APPEAL AND ERROR ¶17—REVIEW — JURISDICTION.

The Supreme Court cannot pass on the merits of any case falling within its appellate jurisdiction except through the medium of an appeal or writ of error taken or sued out as prescribed by statute.

# 2. APPEAL AND ERROR ¶66(3)—REVIEW—DECISIONS APPEALABLE.

Under Rev. St. 1909, § 2038, an order sustaining an exception to and setting aside the report of commissioners appointed in a partition case is not appealable, for it does not determine

the rights of the parties, and in view of sections 2586, 2587, the court has unhampered power to appoint new commissioners; the rights of the parties being left wholly unaffected.

Appeal from Circuit Court, Holt County; A. D. Burnes, Judge.

Partition suit by Grace M. Trapp and others against Lula M. Shull and others. From an order vacating the report of commissioners, Catherine A. Weller and others appeal. Dismissed.

Frank Petree, of Oregon, Mo., for appellants.

Cook & Cummins, of Maryville, for respondents.

BOND, J. I. A farm of 200 acres in Holt county, Mo., is owned by six sisters as tenants in common, three owning four-fifths thereof, the remaining three owning the residue, or one-fifth.

A partition suit was brought and answer made, admitting the ownership of the parties as alleged in the petition, and praying that commissioners be appointed to divide the land accordingly.

Upon these pleadings, on November 2, 1915, the circuit court of Holt county rendered an interlocutory decree, adjudging the rights, titles, and interests of all the parties to the action and ordering that partition be made accordingly, and adjudging, further, that the estates of the sisters who own four-fifths of the lands "be set off together" (they having so requested), and appointing three commissioners to make partition of said land according to law and as directed in said decree.

These commissioners duly reported, awarding 160 acres of the farm, whereon are situated the buildings and improvements, to the owners of four-fifths of the whole, and valuing this allotment at \$19,650, and awarding the remaining 40 acres to the owners of the one-fifth interest, and reporting that it was not susceptible of division in kind, and recommending its sale, and recommending also that to the proceeds of such sale \$50 be added and charged against the three sisters to whom the 160 acres were allotted, and this sum divided among the sisters owning one-fifth of the farm. To this report exceptions were filed, upon the hearing of which it was set aside, and from the order of vacation this appeal was perfected, and which respondents have moved to dismiss as premature.

[1] II. Respondents' motion to dismiss the appeal presents a threshold question; for this court cannot pass on the merits of any case falling within its appellate jurisdiction except through the medium of an appeal or writ of error taken or sued out as

prescribed by statute. *Star Bottling Co. v. Exposition Co.*, 240 Mo. loc. cit. 641, 144 S. W. 776; *Stid v. Railroad*, 211 Mo. loc. cit. 418, 109 S. W. 663; *Beechwood v. Railroad*, 173 Mo. App. loc. cit. 381, 158 S. W. 868.

[2] The section of the statute pertinent to the right to an appeal in partition suits is 2611 of the Revision of 1909, to the effect that an appeal or writ of error in such actions may be brought "on all final judgments." It is not claimed by appellants under the facts in this record that the present appeal could be sustained under that statute. It is, however, insisted by appellants that their appeal falls within the purview of the general statute applicable to all civil actions. That section (2038) provides that—

"Any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution, may take his appeal to a court having appellate jurisdiction \* \* \* from any interlocutory judgments in actions of partition which determine the rights of the parties." R. S. 1909, § 2038.

The action of the court from which this appeal is prosecuted was nothing more than a refusal on its part to confirm the report of the commissioners in partition and a setting aside of the recommendation made by them. Its jurisdiction to proceed further was in no wise affected by its rejection of the report of the commissioners. Its action in so doing is expressly authorized by the statute applicable to such proceedings, and it had unhampered power to appoint new commissioners "as often as may be necessary." R. S. 1909, § 2586. In rejecting the report it did not "determine the rights of the parties." On the contrary, it left all such rights wholly unaffected. If it had confirmed the report of the commissioners, then it would have conclusively bound the parties to the proceeding; for such is the statute. R. S. 1909, § 2587. From such judgment of confirmation an appeal would lie under the terms of the statute quoted above (R. S. 1909, § 2038); for the interlocutory order of confirmation, being binding upon and determinative of the rights of the parties, would have brought it strictly within the language of the statute, and therefore within the class of judgments from which an appeal may be taken in partition suits.

The fault in the reasoning of the learned counsel for appellants is the failure to distinguish between the essence of what is done when an interlocutory judgment of confirmation of a report of commissioners in partition is rendered and what happens when the trial court refuses to adopt such a report. In the latter case the annulment of the report of the commissioners leaves the

rights of the parties just as they existed or had been adjudged prior to the report. Hence it cannot logically be said that their rights were "determined" by the refusal of the court to approve the report recommended by the commissioners. It being obvious from this analysis that the rights of the parties were unaffected by any interlocutory judgment of the court, after its judgment of a former term decreeing partition (from which no appeal was taken), it must be clear that the attempted appeal in this case was abortive, and must be dismissed as not lodging any jurisdiction in this court to consider the merits of the case. Appellants are not, however, prejudiced, for, after final judgment, they may bring up the whole case for a full review of all matters to which exceptions shall have been properly saved.

The result is that the present appeal is dismissed. It is so ordered.

BLAIR, P. J., and GRAVES, J., concur.

KILPATRICK et al. v. ROBERT et al.  
(No. 20134.)

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

1. JUDGMENT ⇐848(1) — RES JUDICATA — PLEADING.

Res adjudicata being an affirmative defense to be pleaded, where the claim to which such defense is urged is made by intervening petition not showing former adjudication on its face, and the answers to such petition are simple general denials, the question of res judicata is not presented.

2. APPEAL AND ERROR ⇐802(1)—MOTION OF NEW TRIAL—GENERALITY.

Motion for new trial held not so general in its assignments as to prevent review of errors occurring at trial.

3. TRUSTS ⇐318—COMPENSATION OF TRUSTEES.

But one compensation can be allowed for the trusteeship, whether there be one or more than one trustee, and, if there be more than one trustee, since the work and responsibility are divided, the compensation is divided.

4. TRUSTS ⇐316(1)—COMPENSATION OF TRUSTEES.

While commissions of trustees are usually based upon a percentage of the income as matter of convenience, the question is one, not of percentage, but of compensation for services performed and liability incurred; fair compensation being all that a trustee is entitled to.

5. TRUSTS ⇐316(2)—COMPENSATION OF TRUSTEES—AMOUNT OF COMMISSIONS.

Upon a \$6,000,000 estate, originally well invested, involving no vexatious questions in its administration, reinvestments and sales being



made through brokers paid for such work, and collection of rents and keeping of accounts being looked after by a paid bookkeeper, a compensation to trustees of 5 per cent. of the gross income during the 18 years during which the trust ran, which was divided among the three trustees, could not be said to be inadequate, as claimed by executors of a deceased trustee, particularly where such trustees, during his lifetime, received such compensation without suggestion of dissatisfaction.

Appeal from St. Louis Circuit Court;  
Rhodes E. Cave, Judge.

Petition by Claude Kilpatrick and others, trustees, for approval of accounts and order of distribution, to which Douglas W. Robert and another, executors, file intervening petition. From the judgment, interveners appeal. Affirmed.

Douglas W. Robert, of St. Louis (P. Taylor Bryan, of St. Louis, of counsel), for appellants.

Jesse A. McDonald, of St. Louis, for John E. Liggett.

Nagel & Kirby, of St. Louis, for John Fowler and others.

James A. Siddon, for Cora B. Fowler and others.

GRAVES, J. Leaving out of consideration the acrimony which has crept into some of the briefs on one side of this case, a comparatively short statement will suffice to present the issues involved herein. The facts are few and simple. The appellants are the executors of the estate of Edward S. Robert, deceased. The respondents are the trustees and beneficiaries under the will of John E. Liggett, deceased.

John E. Liggett died testate November 23, 1897, leaving a very large estate in the city of St. Louis. His will was probated November 29, 1897, and by the terms of the will Claude Kilpatrick, John Fowler, and Mitchell Scott were made trustees of the estate. These trustees were the husbands of John E. Liggett's three daughters. These trustees served until December 8, 1902, at which time Mitchell Scott died. Early in February the two remaining trustees (as contemplated by the will) brought a proceeding in the circuit court of the city of St. Louis, asking the appointment of a successor trustee to Mitchell Scott, deceased. As a result Edward S. Robert was appointed as successor trustee on February 19, 1903, and continued to serve until December 12, 1911, on which date the said Edward S. Robert died.

Following the death of Mr. Robert, the surviving trustees, Kilpatrick and Fowler, brought another proceeding in the circuit court of the city, for the appointment of a successor to Mr. Robert, and this resulted in the appointment of Charles Wiggins, who was then the husband of Ella L. Scott, the

former wife of the first trustee, Mitchell Scott.

In this last proceeding all the beneficiaries of the trust created by the will were made parties defendant, as also were the executors of the estate of Edward S. Robert, deceased, being the same executors who are interveners in the instant case.

To the petition were three exhibits, viz. Exhibit A, the will; Exhibit B, statement of the assets of the estate; Exhibit C, statement of receipts and expenditures for the year past. The petition concluded with this prayer:

"Wherefore plaintiffs pray the court to appoint a successor to the said Edward S. Robert, that it fix the amount of bond to be given by said successor, and that the court approve the accounts of the property in the possession of said trustees on the 12th day of December, 1911, and grant such other and further relief as to the court may seem just."

In Exhibit C, supra, appear, among many items of credits, the following:

"Dec. 30, 1911. By C. Kilpatrick, trustee's commission 1911, \$5,434.66." "Dec. 30, 1911. By E. S. Robert, trustee's commission 1911 \$5,434.67." "January 4, 1912. By John Fowler, trustee's commission 1911, \$5,434.67."

Under the testimony in the case the trustees at the end of each year, took out of the gross income of the estate for the year 5 per cent. thereof, and divided this equally among the trustees. This averaged Mr. Robert during his incumbency about \$5,600 annually. The estate was near a \$6,000,000 estate. Under the terms of the will the trust created thereby terminated in April, 1916. From the beginning of the trust to the end thereof the 5 per cent. of the gross income was taken out of the annual income each year, by the trustees for their services.

For 9 years Mr. Robert was a party to this act. The trust ran for 18 years, but this 5 per cent. of the income was taken both before and after the incumbency of Mr. Robert, as well as during his incumbency.

In this present action the executors of Mr. Robert ask some \$57,000 additional compensation for him, to be allowed out of the estate funds. The income of the estate (exclusive of the trustees' commissions aforesaid, and the expenses of the trust) was divided semiannually between such of the beneficiaries as were entitled to immediate distribution. The present claim for the estate of Mr. Robert was by intervening petition, the trustees by their petition having sought to wind up their trust by having an approval of their stewardship and an order of distribution. Answers to the intervening petition were filed, and the issues thus raised are the matters for determination here.

[1] I. Some preliminary questions appear, and must be disposed of before we reach the merits of the controversy. First it is urged

that the matter has been previously adjudicated. That is to say, *res adjudicata* is urged by respondents here. This is bottomed upon the item in the settlement in 1912 (set out in our statement) wherein it appears that Mr. Robert (after his death) was charged with \$5,434.67 as his commission for 1911, his death occurring December 12, 1911. We need not go into details on this matter. Suffice it to say that *res adjudicata* is an affirmative defense, and should be pleaded. There is no such plea in this record. Here the claim is made by an intervening petition. The answers to this intervening petition are simple general denials. The intervening petition upon its face does not show former adjudication, and the answers make no such defense. The question is therefore not in the record.

It is true that it has been ruled that where a petition upon its face shows former adjudication, the question being in the petition makes it demurrable on the ground that the petition fails to state an unadjudicated cause of action. *Givens v. Thompson*, 110 Mo. loc. cit. 443, 19 S. W. 833. But such is not the status of this case. The applicable rule is thus well stated in *Beattie Mfg. Co. v. Gerardi*, 106 Mo. loc. cit. 156, 65 S. W. 1038, whereat it is said:

"*Res adjudicata* is an affirmative defense, and like all other defenses of that character must be pleaded, unless the petition upon its face shows that the cause of action sued upon is in some way barred, which can not be said of the petition in this case. This question was passed upon by this court in the case of *Kelly v. Hurt*, 61 Mo. 463, in which it was said:

"The point that the validity of *Hurt's* purchase has been heretofore settled by this court in favor of the defendant in the case of *Hurt v. Kelly*, 43 Mo. 238, cannot be considered by us now. There is no plea in this case that the subject-matter of this suit has become *res adjudicata*, and whether that suit is for any reason a bar to the present one cannot be determined on this demurrer." *Mo. Pac. Ry. Co. v. Levy*, 17 Mo. App. 501.

"It may be that the former judgment is a bar to a recovery in this action, but that question should be raised by a plea of *res adjudicata*, and supported by proof that the matters adjudicated in the former suit were the same that are now presented for determination in the suit at bar. It follows that the demurrer could not properly have been sustained upon this ground."

See, also, *Trimble v. Railroad*, 109 Mo. loc. cit. 55, 56, 97 S. W. 164; *Nelson v. Jones*, 245 Mo. loc. cit. 590, 151 S. W. 80.

Under our rule, which is sound and well supported the question of *res adjudicata* is not in the case.

[2] A Second preliminary question lies in a suggestion of counsel for respondents, wherein they say:

"The motion for a new trial is so general in its assignments that there is nothing before this court for its decision."

To present the matter clearly we should give the motion. We thought the matter fully settled, but some recent cases from the Courts of Appeal would indicate that our recent ruling has not been fully understood, even by some of our own brothers. The motion in this case reads:

"(1) Because the court erred in admitting illegal and improper evidence offered by plaintiffs and defendants against interveners' objection.

"(2) Because the court erred in excluding competent and legal evidence offered by interveners.

"(3) Because the finding and decree of the court is against the law and the evidence.

"(4) Because the finding and the decree of the court is against the weight of the evidence.

"(5) Because the finding and decree of the court is not supported by the evidence, and was for plaintiffs and defendants, and not for the interveners.

"(6) Because the court erred in applying the law to the facts in the case.

"(7) Because the court misconstrued the facts, and erroneously misstated them.

"(8) Because the court erred in dismissing interveners' petition.

"(9) Because the court erred in not finding interveners entitled to an equitable proportion of a fee to be allowed out of the corpus of the fund in the hands of the trustees."

Under our ruling in *Wampler v. Railroad*, 269 Mo. loc. cit. 476 et seq., 190 S. W. 908, this motion is sufficient, under our practice, in all of its several assignments. The case law is fully reviewed in the *Wampler Case* by our court in banc, and upon the question here involved six judges concur *BOND* and *REVELLE, JJ.*, concur in separate opinion, but upon the sufficiency of the motion (one in general terms) in the *Wampler Case*, they agree. As the *Wampler* opinion cites and reviews all, or at least many, of our cases upon the subject, further citation is not required here. This contention of the respondents must be overruled.

III. This brings us to the merits of this case. The estate was a large one, but one when first placed in the hands of the trustees largely composed of first-class interest-bearing securities, and required but little attention, except to clip and collect coupons, and distribute the income to the beneficiaries. The life of the trust was 18 years, and Mr. Robert served as trustee about half that time. There were no vexatious questions or conditions in the entire course of the administration of the estate. Reinvestments were to be made, and sales of securities, but in instances brokers were paid fees for such work. Shortly after Mr. Robert became a trustee large investments were made in several pieces of first-class real estate in St. Louis, all of which were on or soon placed upon a good fixed and permanent rental basis, and a bookkeeper looked after many of the details of collecting, and keeping the accounts of these rents. This man was paid out of the estate funds. So, all told, the ad-

ministration of the estate had no intricate or mean conditions.

Attempt is made to show by the figures that the corpus of the estate was increased in value by some \$600,000 during the term of Mr. Robert, but the showing in this regard is by no means satisfactory, or, to say the least, far from conclusive. The claim of the Roberts' estate of \$57,000, as his one-third of an additional compensation would, when applied to other trustees, and during the whole term of 18 years, absorb more than one-half of the whole alleged increase.

[3, 4] It seems to be conceded that but one compensation can be allowed, whether there be one or more than one trustee. In other words that the compensation is a single compensation for the management of the trust. If there be more than one trustee, the work and responsibility have been divided, and the compensation is divided. Not only so, but in the absence of a statute fixing compensation of trustees (as is the case in Missouri) the compensation should be a reasonable one, having due regard for the services rendered to the estate by the trustee, or trustees. 2 Perry on Trusts (6th Ed.) § 918; Barney v. Saunders, 16 How. 541, 14 L. Ed. 1047. So that the kind and character of services is one of the potent factors in fixing the compensation.

In the case of Re Harrison's Estate, 217 Pa. loc. cit. 209, 66 Atl. 354, it is said:

"The compensation of a trustee, of any character, may be arrived at, as matter of convenience, by the way of a percentage on the amount of receipts and disbursements. But after all, on all authority, it is a question, not of percentage but of compensation. When the court has fairly responded to the interrogatory, how much has the trustee earned? It has discharged its whole duty in the premises. It, therefore, comes to nothing to say the percentage is large or the percentage is small as compared with the estate, if the executor has received neither less nor more than what his services are worth."

In the same case, at page 210 of 217 Pa., at page 354 of 66 Atl., it is said:

"The safer rule, therefore, to be adopted and followed in remunerating a trustee for his services is the simple one that he be compensated for the services performed and the liability incurred. It should be understood by trust companies as well as individuals that the position of a trustee is not to be sought nor granted *for the purpose of profit*. Fair compensation, to be ascertained under the rule suggested, is all that a trustee has a right to demand, and all that any court should award." (The italics are ours.)

In 2 Perry on Trusts (6th Ed.) § 919, it is said:

"The usual practice in relation to trusts is to allow trustees a commission upon the amount of the yearly income received and paid out by them. This commission varies according to the rule in the various states."

[5] It is clear in this case that the trustees of this estate acted upon this usual rule stated by Mr. Perry. From the beginning to the end of the life of this trust (18 years) the trustees took out 5 per cent. of the gross income of this estate and appropriated it to their own use. Out of the remainder they paid the other expenses of the trust, and the net proceeds they paid over to the beneficiaries. For 9 years Mr. Robert was a party to this proceeding. I have no doubt that Mr. Robert, as well as the other trustees, looked upon these annual payments to themselves as a fair and just compensation for the services they were rendering the estate. If they thought their services were worth more, the income was in their hands, and they would have taken out more. There is nothing in the record to suggest the contrary. There were ample funds in the income with which to pay them each year for all their time, trouble, and liability in the execution of this trust. They seem to have decided upon annual payments for their services, and fixed their own estimate of the value of those services. These facts no doubt went far toward influencing the chancellor nisi in the determination of the intervening petition and the claim presented therein. The whole course of conduct indicates that these trustees, including Mr. Robert, took what they thought to be a reasonable compensation for their services. And considering what they had to do, we think it was a reasonable compensation. So viewing the case, the judgment nisi should be and is affirmed.

All concur.

CITY OF ST. LOUIS ex rel. and to Use of HYDRAULIC PRESS BRICK CO. v. RUECKING CONST. CO. et al. (No. 20127.)

(Supreme Court of Missouri, Division No. 1. June 2, 1919.)

1. APPEAL AND ERROR ⇐23—COURTS ⇐23, 37(1)—DETERMINATION SUA SPONTE OF JURISDICTION.

As jurisdiction can neither be waived nor conferred by consent, it is the duty of the appellate court to determine sua sponte the question of its own jurisdiction at whatever step or stage of the proceeding it obtrudes itself.

2. COURTS ⇐231(5) — MISSOURI SUPREME COURT—POLITICAL SUBDIVISION OF STATE AS PARTY.

Since for the Supreme Court to have appellate jurisdiction on the sole ground that a political subdivision of the state is a party the political subdivision, in its capacity as such, must be a real party in interest, the Supreme Court has no jurisdiction, on such ground, of a suit, against a construction company and its surety, by a city at the relation of a materialman, based on bonds executed by defendants

to the city to secure paving contract; the city being but a nominal party, having no control of the proceeding, and incurring no liability, even for costs, under Rev. St. 1909, § 2778.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Consolidated suits by the City of St. Louis, at the relation and to the use of the Hydraulic Press Brick Company, against the Ruecking Construction Company and another. From judgment for relator, defendants appeal. Case transferred.

See, also, 212 S. W. 889.

On the 29th of November, 1915, three several suits were filed in the circuit court for the city of St. Louis by the city of St. Louis at the relation and to the use of the Hydraulic Press Brick Company against the Ruecking Construction Company and the Southern Surety Company. The basis of each of the suits is a bond that was executed by the defendant construction company with the defendant surety company as its surety to the city to secure the performance of a contract entered into between the city and the defendant construction company for the paving of certain streets and alleys. The suits were by agreement consolidated and tried as a consolidated cause. The bonds sued on are identical in form and terms, except as to amounts, and the pertinent part of each is as follows:

"Said construction company, as principal, and said surety company, as surety, hereby bind themselves and their successors or assigns unto the city of St. Louis in the sum of \$——, conditioned that in the event the said construction company shall faithfully and properly perform said contract, and pay to the proper parties all amounts due for material and labor used and employed in the performance thereof, then this obligation to be void; otherwise in full force and effect. Said bond may be sued on at the instance of any materialman, laboring man, or mechanic in the name of the city of St. Louis to the use of such materialman, laboring man, or mechanic for any breach of the conditions hereof, provided that no such suit shall be instituted after the expiration of ninety days from the completion of any work under the above contract."

The relator, Hydraulic Press Brick Company, furnished brick for the paving required by the contracts, and for which the defendant construction company failed to pay. The latter company duly completed the several contracts, and, after the expiration of more than 90 days from the completion of all the contracts, the relator instituted the several suits on the bonds to recover the price of the brick so furnished.

The petition in each case declares on the bond sued on according to its legal effect, except that it is silent as to the cause limiting to 90 days the time in which suit may be brought thereon by a materialman, assigns

as breach the failure of the defendant construction company to pay relator for brick so furnished by it, and lays relator's damages at the value of such brick.

The answer of defendant surety company alleges that the bond was not sued on until after the expiration of more than 90 days from the completion of the work under the contract, and that, by reason of the provision of the bond that no suit could be instituted thereon in the name of the city of St. Louis at the instance of any materialman, etc., to the use of such materialman, etc., after the expiration of 90 days from the completion of the work under the contract, the plaintiff "is forever barred from a recovery herein."

The reply alleges that under the provisions of section 2780 and sections 1247 and 1248, Revised Statutes of Missouri 1909, the clause in said contract providing that no suit should be instituted thereon after the expiration of 90 days from the completion of the work is null and void.

There is no disagreement as to the facts, and it is apparent that the only question for decision on this appeal is whether the clause limiting the time in which suit may be brought on the bond by third parties for whose benefit it was made is a valid and subsisting part of the obligation. The bond was drawn under the ordinance of the city of St. Louis and in exact conformity to its terms and prescribed conditions.

The trial court in rendering judgment in the consolidated cause, treated the petition in each of the original suits as a separate count, and judgment was rendered for plaintiff for the several penalties of the bonds declared on in the respective counts, and an execution was awarded for the damages assessed in favor of plaintiff under each count. The several penalties of the bond for which judgment was rendered aggregate \$6,857.50, and the total amount of the damages assessed in favor of relator and for which execution was awarded is \$3,402.89.

Both defendants were granted an appeal, but the surety company alone has perfected and now prosecutes its appeal in this court.

John P. McCammon, of Springfield, for appellant Southern Surety Co.

Elliot, Chaplin, Blayney & Bedal, of St. Louis, for respondent.

RAGLAND, C. (after stating the facts as above). [1] The jurisdiction of the appeal is the first question to present itself on this record. No suggestion has come from counsel on either side on this score. Nevertheless, as jurisdiction can neither be waived nor conferred by consent, it is the duty of the court to determine sua sponte the question of its own jurisdiction at whatever step or stage of the proceeding it obtrudes itself. *Railroad v. Schweitzer*, 246 Mo. 122-127, 151 S. W. 128.

[2] That a political subdivision of the state is a party is the only feature of the case even suggestive of our jurisdiction. It is true that the city of St. Louis is a political subdivision of the state within the meaning of the constitutional provision conferring appellate jurisdiction on this court, and it is also true that the city is a party to this suit, but it is a nominal party only. It had nothing to do with the institution of the suit, other than by its contract having made it possible; it has not had, and does not now have, any control of the proceeding; it has not a particle of interest at stake and incurs no liability of any kind, not even for costs. Section 2778, R. S. 1909.

For this court to have appellate jurisdiction solely on the ground that a political subdivision of the state is a party, the political subdivision, in its capacity as such, must be a real party in interest. *Barnett v. St. Louis*, 195 S. W. 1017; *State ex rel. v. Dent*, 121 Mo. 162, 25 S. W. 924.

It follows that we are without jurisdiction, and the case is accordingly transferred to the St. Louis Court of Appeals.

BROWN and SMALL, CO., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

CITY OF ST. LOUIS ex rel. and to Use of HYDRAULIC PRESS BRICK CO. v. RUECKING CONST. CO. et al. (No. 20129.)

(Supreme Court of Missouri, Division No. 1. June 2, 1919.)

COURTS  $\Leftarrow$  231(51) — MISSOURI SUPREME COURT—AMOUNT IN CONTROVERSY.

In consolidated suits against construction company and its surety by a city on relation of a materialman, based on bonds executed by defendants to the city to secure paving contract, in which suits judgment was rendered for relator for the aggregate penalties of the bonds, which was \$7,940.88, and execution awarded for the total damages assessed in relator's favor, amounting to \$3,857.56, the Supreme Court had no appellate jurisdiction; the latter amount being the amount in dispute as determinative of jurisdiction of appeal on ground of amount involved.

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Consolidated suits by the City of St. Louis, at the relation and to the use of the Hydraulic Press Brick Company, against the Ruecking Construction Company and another. From judgment for relator, defendants appeal. Case transferred.

See, also, 212 S. W. 887.

Holland, Rutledge & Lashly, of St. Louis, for appellants.

Eliot, Chaplin, Blayney & Bedal, of St. Louis, for respondent.

RAGLAND, C. On the 29th day of November, 1915, three suits were filed in the circuit court for the city of St. Louis by the city at the relation and to the use of the Hydraulic Press Brick Company against the Ruecking Construction Company and the Chicago Bonding & Surety Company. Each suit is on a bond given by defendants to plaintiff, and in each the relator seeks to recover on account of brick which it furnished the construction company for public improvements, and for which it has not been paid. The three suits were by agreement consolidated and tried as a consolidated cause. Judgment was rendered in the consolidated cause for plaintiff for the aggregate penalties of the bonds, which is \$7,940.88, and execution was awarded for the total damages assessed in relator's favor, amounting to \$3,857.56.

The case in all its aspects is identical with the case of *St. Louis ex rel. v. Ruecking Construction Co. and the Southern Construction Co.*, 212 S. W. 887, heard at this term, except that the formal judgment for the full amount of the penalties of the several bonds in this case is in excess of the sum of \$7,500. However, the total damages assessed in relator's favor is \$3,857.56, and that is the amount in dispute as determinative of jurisdiction of the appeal on that ground. *State ex rel. v. St. L. Ot. App.*, 87 Mo. 569.

In accordance with the views expressed in the *Southern Construction Company Case* above referred to, and for the same reasons, this court has no jurisdiction of this appeal, and it is transferred to the St. Louis Court of Appeals.

BROWN and SMALL, CO., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

BLAIR, P. J., and BOND and GRAVES, JJ., concur.

**SCHALL, Public Adm'r, v. UNITED RYS. CO.  
OF ST. LOUIS. (No. 20205.)**

(Supreme Court of Missouri, Division No. 1  
June 2, 1919.)

**CARRIERS — 340—INJURY TO PASSENGER ON  
TRACKS—PRESUMPTIONS.**

Where deceased got off a car running on the north track and stood in the passageway between tracks while a car was approaching on the south track, and then stepped in front of it and was struck and killed, the motorman in charge of the car which struck had the right to presume that he would not leave a place of safety and thrust himself suddenly in front of the car, and an instruction to that effect, etc., was proper.

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Edward G. Schall, Public Administrator for the county of St. Louis, in charge of the estate of Archie Ferguson, alias T. F. Jordon, deceased, against the United Railways Company of St. Louis. From an order setting aside verdict for defendant and granting new trial, defendant appeals. Order reversed, and cause remanded, with directions to reinstate verdict and enter judgment thereon.

Action for the alleged negligent killing of one Archie Ferguson, alias T. F. Jordon, brought by the public administrator of St. Louis county, in charge of the estate of decedent.

The defendant operates a double-track line of railroad in St. Louis county known as the Creve Oeur line. It is an electric street railway line partially in the city of St. Louis and partially in St. Louis county. Decedent was a passenger on a west-bound car on said line, having as his destination a point where said street car tracks cross or intersect with Walton road in said county. He safely alighted from the car at or near the place of his destination, and in attempting to cross the track of defendant upon which the east-bound cars of defendant ran he was struck by an east-bound car and killed. The petition charges several grounds of negligence, but when the cause was submitted to the jury all were abandoned except the one bottomed on the humanitarian rule.

The answer of defendant contained: (1) A general denial; and (2) a plea of contributory negligence. Reply was in conventional form for such an answer.

Upon a trial before a jury the defendant had a verdict. Upon plaintiff's motion for new trial the court set aside such verdict, and defendant has appealed from the order setting aside the verdict. The petition prayed for damages in the sum of \$10,000.

The fourth ground of the motion for new trial charged that the court had erred in giv-

ing instruction No. 7 for the defendant, and it was upon this ground alone that the trial court sustained the motion. Instruction No. 7, mentioned above, reads:

"The court instructs the jury that the motorman in charge of the car at the time had the right to presume that Ferguson, the deceased, would not move from a position of safety and into one of danger, and there was no duty upon said motorman to stop said car until he saw, or by the exercise of ordinary care would have seen, said Ferguson in a position of imminent peril; therefore, if you find from all the evidence in the case that said Ferguson did move from a position of safety to a position immediately in front of the on-coming car and so close to same that the motorman in the exercise of ordinary care could not stop said car and avoid striking said Ferguson after discovering his peril, then the plaintiff is not entitled to recover in this case, and your verdict should be in favor of the defendant."

Defendant demurred to the evidence at the close of the case, which instruction in the nature of a demurrer to the evidence was overruled, and exception duly saved. These two matters cover the contested points of the case. Respondent claims in the brief that the record does not show upon what ground of the motion for new trial the action of the court in granting the motion was taken. The printed abstract of the record avers that the order granting the new trial was based upon the fourth ground of the motion, and there is no counter abstract. This sufficiently outlines the case.

T. E. Francis, of St. Louis, A. E. L. Gardner, of Clayton, and Chauncey H. Clarke, both of St. Louis, for appellant.

Albert E. Hausman, of St. Louis, for respondent.

\* GRAVES, J. (after stating the facts as above). With the view we have of the facts in this case it is necessary to discuss but one point raised. It is a case purely under the humanitarian rule. All other alleged negligence was abandoned by the plaintiff, and a reading of the record shows good reason for this action.

For the point we have in view, it may be conceded that the evidence is conflicting (a very strained concession in behalf of plaintiff) upon the question as to whether or not the motorman of defendant's car saw, or by the exercise of ordinary care could have seen, the decedent in a position of peril in time to have averted the injury. Defendant urges there was no substantial evidence upon which to take that question to the jury, and for that reason its demurrer to the evidence should have been sustained. But, conceding for the purposes of this opinion that there was such evidence, we have left the propriety of instruction No. 7, given for defendant and quoted at length in the statement, supra.

The giving of this instruction was proper. To determine its propriety we must get defendant's viewpoint of the case as indicated by the evidence. As said decedent got off of the west-bound car, which was running upon the north track, two other passengers had gotten off and had crossed the tracks and were en route to their homes. Defendant's motorman saw those two men, and saw the decedent standing still in the passageway between the north and south tracks. The car from which he alighted was going west on the north track, then came this space, and then the south tracks upon which ran the east-bound car which killed the man. The only eyewitness introduced by the plaintiff said that, when she saw decedent last, he was standing in between the north and south tracks, where he could not be hurt by the car which did hurt him. Almost immediately thereafter she heard the motorman make some exclamation, and the impact of the car. The motorman says that he first observed the man standing between the two tracks in a place of safety; that he gave no indications of his intention to go upon the south track until his car got within eight feet of him, when the man suddenly took a step or two and got in front of his car, was struck, run over, and killed; that his car was going five to six miles an hour; that it could not have been stopped in time to have averted the injury; that he rang the gong and called to the decedent as soon as he observed his intention to cross in front of the car. This is the state of facts from the motorman, and defendant had the right to have an instruction covering this phase of the case. The evidence further shows that the accident occurred right about 6 o'clock on a bleak December night, with a sprinkling of snow falling and a slippery railroad track; that there was a brilliant headlight on the car, which could have been seen easily.

Under this state of facts the giving of this instruction was not error. The witnesses on both sides agree that this man when first seen by them was standing perfectly still in a place of absolute safety. Defendant's evidence (and with safety we could add plaintiff's evidence) showed that there was nothing in his manner indicating a purpose to leave that place of safety. The motorman had the right to presume that the man in a place of safety would not leave such place and suddenly thrust himself in front of a brilliantly lighted moving car. We have so frequently ruled that citation of cases is hardly necessary. *Reno v. Railway Co.*, 180 Mo. loc. cit. 489, 79 S.W. 464; *Guyer v. Railway Co.*, 174 Mo. loc. cit. 350, 73 S.W. 584; *Matz v. Railway Co.*, 217 Mo. loc. cit. 297, 117 S.W. 584; *Keele v. Railway Co.*, 258 Mo. loc. cit. 79, 167 S.W. 433; *Kling v. Railroad Co.*, 211 Mo. loc. cit. 18, 109 S.W. 671. The foregoing cases fully uphold the

propriety of instructions No. 7 given for the defendant, under the facts shown by the defendant, if indeed all the facts authorized the submission of the case at all. The trial court erred in setting aside the verdict of the jury in this case for the reason assigned by that court. Nor do we find any other reason justifying the disturbance of the verdict. The only serious question in the case is whether or not it should have ever been submitted to a jury.

The order granting the new trial is reversed, and the cause remanded, with directions to reinstate such verdict and enter judgment in accordance therewith.

All concur, except WOODSON, J., absent.

### LOUNDIN v. APPLE et al. (No. 20188.)

(Supreme Court of Missouri, Division No. 1.  
June 3, 1919.)

#### 1. MUNICIPAL CORPORATIONS §819(1)—SIDEWALKS—DEFECTS—LIABILITY OF ABUTTING OWNER—EVIDENCE.

In a suit by a pedestrian, who stepped on the cover of a coal hole, which tipped, causing her to fall and sustain injuries, evidence held to show that defendants, the abutting owners, were in control and possession of the opening.

#### 2. MUNICIPAL CORPORATIONS §819(6)—INJURIES TO PERSONS ON SIDEWALKS—DEFECTS—EVIDENCE.

In an action by plaintiff, who stepped on the cover of a coal hole, which tipped, causing her to fall and receive injuries, evidence held sufficient to establish defendant's negligence, showing that they must have had knowledge of the defect in the cover.

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Suit by Mary Loundin against Nathan Apple and others. Plaintiff dismissed or took a nonsuit as to defendants August Meyer and others, as owners. From a judgment for plaintiff against defendants Apple, as tenants, they appeal. Affirmed.

Frumberg & Russell, of St. Louis, for appellants.

E. V. Maher and John B. Dempsey, both of St. Louis, for respondent.

WOODSON, P. J. The plaintiff brought this suit in the circuit court of the city of St. Louis against a large number of persons to recover \$10,000 damages for personal injuries sustained through their alleged negligence. The court, at the close of plaintiff's evidence, sustained a demurrer thereto, but, upon motion, the court granted her a new trial. From the order of the court grant-

ing plaintiff a new trial, the defendants duly appealed the cause to this court.

The plaintiff brought the suit to recover damages she claimed she had sustained by reason of falling into a coal hole in the sidewalk on Franklin avenue in the city of St. Louis. The suit was against August Meyer, Edwin Meyer, Lena Meyer, Laura M. Feraholtz, Emma Teutenberg, and William H. P. Schoetker, guardian, on the ground that they were the owners and in possession of the adjoining premises, 1405 Franklin avenue, and had placed the coal hole in the sidewalk. The defendants Nathan Apple, Alexander Apple, and Benjamin Apple were also joined as defendants, on the ground that they were the tenants of the above-named owners, and rented or leased part of said building located at 1405 Franklin avenue, and were engaged in the leather business at said 1405 Franklin avenue, and that they, while doing business as the Star Leather Company, received coal through this hole in the sidewalk.

The alleged negligence counted upon by plaintiff was that—

"Plaintiff's injuries are due to and were caused through the carelessness and negligence of the defendants in this: That they negligently and carelessly suffered and permitted said hole to be improperly and dangerously covered, in violation of City Ordinance No. 1293 of the City Code, requiring the covers over such holes to be so fastened and secured as to prevent them from slipping or turning when stepped upon by pedestrians, when they knew, or by the exercise of ordinary care could have known, that the cover lid or grating was insecurely fastened and would slip or turn if stepped upon."

Before any evidence was introduced, the plaintiff dismissed as to some of the defendant owners and took a nonsuit as to the remaining owners, leaving the action to proceed against the appellants only. The answer of the appellants was a general denial.

The evidence of the plaintiff clearly tended to prove all of the allegations of the petition, and the appellants ask to have the judgment reversed for two reasons, namely:

"Before a defendant can be found guilty of negligence in failing to secure the safety of an opening in the sidewalk, it must be shown that he was in possession and had the use of such opening.

"The adjoining occupant, who subjects the sidewalk to his personal use, is not an insurer of its safety, and proof of injury is not sufficient to show negligence."

[1] Regarding the first: The plaintiff's evidence clearly showed that the coal hole was directly in front of the door to appellants' place of business, and that the appellants had been seen repeatedly to use the hole in putting coal in the basement through that hole. This evidence showing that appellants were in possession of the hole, and

that they used it for their personal benefit, as previously stated, this point is ruled against the appellants.

[2] And as to the second reason assigned for reversing the judgment, the evidence showed that, when the plaintiff stepped upon the edge of the lid or covering of the coal hole, it tipped up and the plaintiff was thereby precipitated into the hole and sustained severe injuries. After the plaintiff was removed from the hole, the appellants, who were present and saw the whole affair, instead of replacing the lid or cover on the coal hole, placed a chair over it, and during that same evening removed it, and took a barrel and placed the end of it into the hole to stop it up, which the evidence shows remained there for several days. The evidence also showed that some three or four days after the injury the cover was repaired.

Mr. Roe testified:

"Q. Did you see them making any repairs on it? A. Yes, sir.

"Q. What were they doing to it at the time? A. I seen them putting new rods and new cross-bars into it.

"Q. What were the rods? A. About one inch in diameter, and they ran from the center of the grate all the way down to the coal hole, and they fastened with a nut and bolt on the end."

In our opinion an inference might well have been reasonably drawn from the facts that the appellants did not replace the lid or covering of the hole after the plaintiff had been removed therefrom, but first placed a chair over the hole, and later on the same evening placed a barrel in the hole, and a few days thereafter had the repairs made on the cover, which consisted of placing new iron rods and crossbars in the same, an inch in diameter and extending from the center of the grate or covering all the way down to the coal hole, and fastened by a nut and bolt; that the lid or grate was defective, and had been for a long time, because iron rods and crossbars an inch in diameter would not become so defective in a few days or a short time, but it would take months, if not years, to become so defective as to require new ones of those dimensions to replace the defective ones. Again, if the grate or covering was not defective, why did not the appellants replace it over the hole when the plaintiff was removed therefrom? The answer must be that they knew it was defective, and, if replaced, that in all probability some one else might step on it and cause it to tilt and the person to fall therein; and it was evidently for the reason, as stated in substance to the appellants, at the time the chair was placed over the hole, that "this is a hell of a time to mark the place of danger after the plaintiff had been injured by falling into the hole."

The acts of the appellants, considered in



the light of the facts and circumstances detailed in the evidence, show the appellants' knowledge of the defective condition of the grate just as plainly as if they had in person testified to those facts in direct and positive language.

The judgment is affirmed.

All concur; BLAIR, P. J., in result.

**ELSBERRY DRAINAGE DIST. v. WINKELMEYER et al. (No. 19583.)**

(Supreme Court of Missouri, Division No. 1.  
June 2, 1919.)

**1. DRAINS  $\S$  85—DRAINAGE TAXES—WHEN DUE.**

Under Laws 1913, p. 238, § 11, providing that a tax imposed by a drainage district to pay organization and preliminary expenses shall be due and payable as soon as assessed, such tax, when assessed in September, became delinquent by December 31st of that year.

**2. STATUTES  $\S$  188—CONSTRUCTION—RULES.**

Under Rev. St. 1909, § 8057, it is the duty of the court, unless the construction be plainly repugnant to the intent of the Legislature, to construe words and phrases in their plain, ordinary, and usual sense, and in the order of grammatical arrangement in which they are used.

**3. DRAINS  $\S$  85—DRAINAGE DISTRICT—TAXES—WHEN DUE.**

In view of previous legislation regarding assessments for drainage districts, as well as Rev. St. 1909, § 8057, prescribing rules for construction of statutes, *held*, that an annual assessment imposed by a drainage district under Laws 1913, p. 243, § 19, providing that the board of supervisors shall each year thereafter determine order and levy the amount of the annual assessment, such assessment, which follows that for cost of construction, when levied in September, cannot be deemed, in view of sections 18 and 23, to become delinquent on December 31st of that year.

Appeal from Circuit Court, Lincoln County; E. B. Woolfolk, Judge.

Action by the Elsberry Drainage District against Christopher Winkelmeyer and others. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded.

O. H. Avery and Wm. A. Dudley, both of Troy, for appellant.

Creech & Penn and Sutton & Huston, all of Troy, for respondents.

BLAIR, P. J. This is an appeal from a judgment on demurrer to the petition in a suit begun to collect drainage taxes. The petition contained two counts—one for a tax

imposed to pay organization and preliminary expenses (section 11, p. 238, Laws 1913), and one to recover an annual installment tax (section 19, p. 243, Laws 1913) levied by the board of supervisors in the fall of 1914.

[1] I. The board of supervisors, as soon as elected and qualified, on September 13, 1914, levied the tax under section 11 and certified it to the collector. This tax was "due and payable as soon as assessed," and, not being paid, became delinquent "by December 31 of the year in which" it was levied, to wit, 1914. We discover no defect in the count based on this assessment, and respondent does not contend there is any. He asserts this count was overlooked. The record shows simply that the demurrer was sustained to the petition. The judgment on this count is wrong and cannot stand. The tax became due and collectible in 1914 by plain provision of the statute.

[2, 3] II. The count for the annual installment presents a different question. The decree confirming the amended report of the commissioners was rendered September 2, 1914. The general levy of the total tax (section 18, p. 242, Laws 1913) thought to be necessary for the completion of the work was not made until September 30, 1914. The drainage tax book was thereafter made up as the same section requires. Subsequently (section 19, p. 243, Laws 1913) the board levied an annual installment tax and certified this to the collector on November 5, 1914. The question on this branch of the case is whether, in the circumstances, this levy of an annual installment tax for 1914 can be enforced as a tax for that year, collectible in that year, and delinquent December 31, 1914.

This system of organizing drainage districts had its origin in 1879. Section 6207 et seq., R. S. 1879. Under section 6218, R. S. 1879, it was provided that, as soon as the district had been organized, the board of supervisors, in order to pay all expenses, including cost of survey, construction, maintenance, and administration, might "order the assessment of a tax, not exceeding fifty cents on each acre of land in the said district, \* \* \* for each and every year, and until no further expenditure of money in that behalf shall be necessary." This tax was required to be certified to the clerk of the county court and by him extended on the general tax book like other taxes and collected by the collector of the county. This section, except for the assessment, adopted the general taxing machinery in use under the general law. *State ex rel. v. Angert*, 127 Mo. loc. cit. 463, 30 S. W. 113; *Drainage Dist. v. Daudt*, 74 Mo. App. loc. cit. 585. Under this statute the taxes were extended and the tax book delivered to the collector within 90 days after the correction of the book, which was made immediately after the coun-

ty board of appeals and the state board of equalization acted, usually in April. Sections 6671-6676, 6748, R. S. 1879.

It is clear the first assessment under section 6218 could not go on the tax book, unless it was certified to the county clerk prior to the time he was required to deliver that book to the collector. The conclusion must be that section 6218 contemplated that the first 50 cent per acre assessment was to be extended on the tax book, which was made up and certified by the county clerk to the collector next after the assessment was made by the board of supervisors. Had section 6218 been in force in 1914, there can be no doubt a levy after September 30th of that year, as in this case, would not have been collectible before the fall of 1915. There would have been nothing upon which to base an earlier collection. In other words, section 6218 would not have empowered the board to make an assessment in October or November, 1914, which could have been the basis of a tax collectible in that year. Section 6218 remained unchanged until 1905. Section 6528, R. S. 1889; section 8262, R. S. 1899. Section 8263b (Laws 1905, p. 199), which amended section 8262, R. S. 1899, provided that, as soon as the decree confirming the report of the commissioners had been filed in the office of the county clerk, the board of supervisors should levy upon benefited lands a tax equal to the expense of organization and preliminary work and estimated cost of construction, administration, etc., and certify this levy to the county clerk, whose duty it became to record it. Section 8263b (Laws 1905, p. 200) closed with that provision. Section 8263c began thus:

"The said board of supervisors shall annually thereafter determine, order and levy the amount of the installment of the tax named in the next preceding section, which shall become due and be collected during said year at the same time that state and county taxes are due and collected, which said annual installment \* \* \* shall be evidenced and certified by the said board not later than March 1st of each year to the county clerk," etc.

The form of the board's certificate is set out and contains the following:

"The said installment of tax shall be collectible and payable the present year at the same time that state and county taxes are due and collected."

The clerk was required to record the certificate in a drainage district book, and to set out therein the names of owners, description of lands, and amount of the installment, and to certify this as "true copies of the certificates of total and the annual—drainage district installment tax for the year A. D. 190—, and," etc. This certified record the clerk was required to deliver "each year to the collector" at the time the collector commenced the collection of state and county

taxes. Thenceforward the act retained in force the provisions of the general revenue concerning collection of taxes. Section 8263g provided that the tax was to become delinquent December 31st of the year for which said taxes were levied.

The principal change made by this act, affecting the question in this case, is the omission of the requirement that the county clerk should extend the drainage tax on the general tax book. For this it substituted the requirement that the clerk should make out a separate tax book and extend the taxes thereon. It is apparent that the act of 1905 dealt with calendar years. It is certain it required the board to certify the tax to the county clerk by March 1st, and required him to make up the drainage tax book thereafter and by the time the collector commenced the collection of state and county taxes. The time for the extension of taxes by the clerk was fixed definitely, as it had been under the former law. The difference was merely in the book upon which the extension was to be made. Under this act a levy of an installment made in October by a district which had not earlier reached a stage in organization in which it could make such levy, could not have been certified to the clerk until after the time the collector was required to begin his collections of state and county taxes. Under that act, when a levy made in October or November was certified to the clerk "by March 1st," it would have been the clerk's duty to make up a tax book for the calendar year following the levy. This is clear from the provisions of the act which have been quoted.

The acts of 1909 (section 5519 et seq., R. S. 1909) and of 1911 (Laws 1911, p. 213 et seq.) made no changes which materially affect the question in this case. Section 18 of the act of 1913 (Laws 1913, p. 242) requires that the board of supervisors, after the recording of the decree of confirmation of the amended commissioner's report, shall, without unnecessary delay, levy a tax equal to such portion of the benefits assessed as shall be necessary to pay the cost of construction and ten per cent.

The secretary of the board is then required to make out a "drainage tax record." Section 19 reads thus:

"Sec. 19. The said board of supervisors shall each year thereafter determine, order and levy the amount of the annual installment of the total taxes levied under the preceding section, which shall become due and be collected during said year at the same time that state and county taxes are due and collected, which said annual installment and levy shall be evidenced and certified by the said board not later than September 1st of each year to the collector of revenue of each county in which lands and other property of said district are situate."

A form of certificate is then set out. This certificate states that the tax certified is "for the year 19—," and that—

"Said taxes shall be collectible and payable the present year at the same time that state and county taxes are due and collected, and you are directed and ordered to demand and collect the said taxes at the same time you demand and collect the state and county taxes due on the same lands and other property," etc.

It is to be remembered the decree confirming the commissioner's report was rendered September 2, 1914, the levy of the total cost tax (section 18) was made September 30, 1914, and the annual installment was levied after this was certified and recorded, and was certified to the collector November 5, 1914. Appellant's contention is that this first annual installment was due and collectible in and for the year 1914. To maintain this position it contends that the words "each year thereafter" should be construed as if they read "thereafter each year."

In construing statutes it is the duty of this court, "unless such construction be plainly repugnant to the intent of the Legislature or of the context of the state statute," to construe words and phrases "in their plain, ordinary and usual sense." Section 8057, R. S. 1909. If the words, in their natural sense, as used, and "in order of grammatical arrangement" in which they are used, "embody a definite meaning, which involves no absurdity and no contradiction between the different parts of the same writing," that is the meaning it is our duty to ascribe to them. *State ex rel. v. Board of Curators*, 268 Mo. loc. cit. 606, 609, 188 S. W. 128. It is not contended the words "each year thereafter" do not have a plain and usual meaning which involves no absurdity, nor is it contended that, if such meaning is given them, appellant's position can be maintained. The argument is that the proposed work would be delayed in some cases if the words were so employed; that the act is remedial, and the beginning of the work of improvement should not be thus postponed. The word "thereafter," in a connection like this, ordinarily means "after that; afterward"; "the time or period following an event or date." *Standard Dict.*; *Webster's International Dict.*; *Century Dict.*; *State v. Ryan*, 120 Mo. loc. cit. 93, 22 S. W. 486, 25 S. W. 351; *State v. Murray*, 237 Mo. loc. cit. 168, 140 S. W. 899. Used in its ordinary sense the word "thereafter," in section 19, refers to "the time or period following an event or date" previously fixed in the same act. No such time or date is fixed in that part of section 19 which precedes that word. It must refer to some time or date fixed in a previous section. Section 18 provides for the levy of the general tax covering the estimated total cost of the proposed work. This levy is a step necessarily precedent to the annual levies contemplated by section 19. Likewise the apportionment of the general levy to the respective tracts in the district

and the filing in the recorder's office, for lien purposes, of a certificate showing such apportionment (section 23) are things required to be done prior to the levy of the annual installment, as is clear from sections 18, 19, and 23 and the forms set out therein.

The Legislature was at no loss for language to provide for the immediate collection of a tax when it desired it to be so collected. In section 11 of the same act it had, as pointed out, provided that "the board of supervisors \* \* \* shall, as soon as elected and qualified, levy a uniform tax of not more than fifty cents per acre," and "such tax shall be due and payable as soon as assessed, and if not paid by December 31 of the year in which it has been levied, the same shall become delinquent." This language is plainly effectual to accomplish, with respect to the acreage tax under section 11, exactly what appellant argues was intended, with respect to the first annual installment tax, under the quite different language of section 19. The natural import of the words in section 19 is different from that of the words quoted from section 11. It would be a little remarkable if the Legislature could be held to have intended to express the same thing by two formulas so divergent in their usual and natural meaning. There is nothing in the act which can be construed to conflict with the natural interpretation of the words "each year thereafter." The danger of delay apprehended by appellant is obviated by a provision empowering the board to issue bonds (section 42, p. 256, Laws 1913) and thus anticipate its revenue and provide at once a fund for the work of construction. The acreage tax (section 11) provides for the preliminary expenses. Section 19 grew by amendment gradually out of section 6218, R. S. 1879. All along its course it carried the meaning which the usual and ordinary sense of the words "each year thereafter" gives to section 19.

This is not a case in which an official has neglected to comply with some regulation designed to secure order, system, and dispatch in proceedings for the assessment and enforcement of taxes (*State ex rel. v. Phillips*, 137 Mo. 259, 38 S. W. 981), but is one in which the question is whether the board had the power to impose an installment tax for a particular year. When the words in section 19 are construed as the statute (section 8057) requires, no obstacle to such construction appearing in this case, it is clear the board had no power to make a levy collectible in 1914. The delay was not due to the dereliction of any official concerned in the matter, but arose from the absence of statutory authority to make the levy. As already pointed out, the Legislature has provided means whereby the district board may avoid any consequent delay in the work of the improvement. This court stated no cause of action.

III. Because of the error pointed out in paragraph I, the judgment is reversed, and the cause remanded.

All concur: BOND, J., in the result.

MESSER v. HELFER et al. (No. 19753.)

(Supreme Court of Missouri, Division No. 2  
June 8, 1919.)

1. MORTGAGES  $\S$ 86(3)—MENTAL CAPACITY—EVIDENCE.

In a suit by a person of unsound mind by her guardian to set aside a deed of trust executed by such insane person, evidence held insufficient to establish mental incapacity of such person at or prior to date of the execution of the trust deed.

2. DEEDS  $\S$ 68(1½)—CAPACITY.

Mere peculiarities or eccentricities of the grantor do not make a deed invalid if he had sufficient capacity to understand the nature and effect of the transaction; the legal test of capacity being the power of the grantor to understand the matter in hand and the effect of the transaction.

Appeal from Circuit Court, Ray County; Frank P. Divilbiss, Judge.

Suit by Melissa E. Messer, by William F. Yates, her guardian, against Alice Helfer and others. From judgment for defendants, plaintiff appeals. Affirmed.

Lavelock & Kirkpatrick, of Richmond, and Martin E. Lawson, of Liberty, for appellant.

M. J. Henderson, Garner, Clark & Garver, John C. Jacobs, and George W. Crowley, all of Richmond, for respondents.

MOZLEY, C. The plaintiff, Melissa Messer (formerly Melissa Stack), brings this action by William F. Yates, her guardian, and it has for its purpose the setting aside of a certain deed of trust executed by the plaintiff on the 25th day of February, 1895, in which one Steven Messer was made trustee, to secure to one E. M. Endsley a note for \$500, which sum he, on said date, loaned to the plaintiff. Said deed of trust covered the east half of the northeast quarter of section 11, township 51, range 29, in Ray county, Mo., except a tract theretofore conveyed to one Brasher off the east and south sides thereof for a private road.

The petition is in two counts, the first in equity and the second in ejectment. The first count bases plaintiff's right to have said deed of trust set aside on the ground that she was without mental capacity to make it at the time it was executed, that

is, on said 25th day of February, 1895, and further seeks to set aside the deed to the purchaser under the foreclosure sale under said deed of trust and all mesne conveyances from said foreclosure sale of said land down to defendant Everett Endsley, and that they be declared a cloud upon plaintiff's title, canceled and for naught held, and that the title thereto be decreed in the plaintiff. The second count merely seeks to recover the possession of said land.

On the 17th day of August, 1891, the plaintiff, Melissa Messer (at that time Melissa Stack), by warranty deed from William Vance and wife became the owner in fee of the land above described, and, as above stated, executed said deed of trust thereon on said 25th day of February, 1895. On the 27th day of February, 1895, just two days after said deed of trust was executed, plaintiff and Steven Messer, the trustee therein, intermarried. On the 24th day of June, 1895, plaintiff was adjudged by the probate court of Ray county to be of unsound mind and incapable of managing her own business, and a guardian was appointed for her. This proceeding was had 3 months and 29 days subsequent to the execution of said deed of trust. On the 3d day of April, 1897, default having been made in the payment of the debt and interest in said deed described, and the trustee therein, the husband of plaintiff, having refused to act, the then acting sheriff of Ray county, at the request of the legal holder of said note, foreclosed said deed of trust in due and legal form, and the holder and owner of said note, E. M. Endsley, became the purchaser of said land for the price and sum of \$600, and, as above stated, the title thus acquired, by subsequent conveyances, vested in Everett Endsley for a valuable consideration.

There is no controversy in the pleadings, or otherwise, between plaintiff and defendant except as to the mental capacity of the plaintiff to make said deed of trust on the date it was made, the plaintiff by her guardian asserting that she was mentally incapacitated to make it and the defendant that she was not, and further contending that the proof brought in support of the affirmative of the proposition, if true, was wholly insufficient to establish mental incapacity on her part to make said deed of trust on the date that it was made. This proposition was the crux of the case in the court below, and, as will readily be seen, it is solely a question of fact. All testimony tending to prove the sanity of plaintiff after she had been adjudged insane by the probate court on the 24th day of June, 1895, was by the court excluded from consideration. Many witnesses were examined, and the learned chancellor, after seeing the witnesses and hearing all of the competent testimony that was offered, resolved

this question of fact in favor of defendant, evidently taking the view that there was no testimony establishing mental incapacity of plaintiff to make said deed of trust on the 25th day of February, 1895, and decreed that plaintiff was of sound mind at that time, and also that defendant Everett Endsley was the owner of said land, and that his codefendants had no interest therein.

Motions for new trial and in arrest of judgment were filed and overruled by the court, and the plaintiff comes here as appellant. In this court learned counsel for appellant have limited the issue presented for our determination to a single question of fact; that is, was the plaintiff mentally incapacitated to make said deed of trust on the 25th day of February, 1895? We quote from appellant's reply brief as follows:

"The appellant does not question the law cited by respondent, but says that no one can carefully read the evidence in this case and come to any other conclusion than that Melissa Messer, at the making of the deed of trust in question, and for a long time before, was wholly incapable of understanding the deed of trust, and ever since then has remained in that condition."

[1] The issue thus presented necessitates an examination of the facts relied upon by appellant to establish mental incapacity and the facts offered by defendant tending to prove mental capacity. Many witnesses testified, but we shall not do more than to set out the substance of their testimony. On the part of the plaintiff it shows: (a) That she was the mother of seven or eight children, and that she did not dress them or herself in accordance with the idea entertained by some of the witnesses, although the record abounds with undisputed evidence of her squalid poverty. We pass this feature of the testimony with the remark that, in our judgment, it would be a dangerous attempt for a court to undertake to establish as a precedent that childbearing and poverty, either singly or combined, constituted evidence of insanity. (b) Further it was testified that she hesitated about, and finally declined, to rent her farm, on which the deed of trust in question had been placed, to one of the witnesses. If this incident has any probative value whatever, it manifestly would be in favor of plaintiff's sanity. It discloses that she knew he was trying to rent her farm, and that she declined to contract with him. She may have had many reasons for declining to rent to this witness which were entirely satisfactory to her. We think her conduct in this transaction shows unmistakably that she understood and appreciated what she was about, and could not therefore, by any possibility, be distorted into evidence of insanity. (c) The evidence on the part of plaintiff further shows that, in conversation, she occasionally changed the subject rather abruptly and would possibly walk

away. This has been done many times by persons to whom no suspicion of mental incapacity attached. The writer has always regarded (and now regards) such conduct most frequently in the light of necessary self-defense rather than as furnishing evidence of mental incapacity of one who was probably tired of a conversation. (d) It is further said that plaintiff spoke roughly to or about her children. This could have happened and yet furnished no evidence of mental incapacity. (e) It is also proven that she would occasionally sing a verse of that once popular song "After the Ball is Over," and this is charged as an item of her alleged insanity. Historically speaking, it will be recalled that at about the time of plaintiff's alleged mental incapacity, this song was one of the most popular songs extant. It was sung on all the stages and by all the musically inclined off the stage and even by those who had no music in their souls, all were singing or trying to sing this song, manifestly with no thought upon their part that subsequently they might be accused of furnishing evidence of their own mental incapacity. This song has had its period of popularity—has run its course—and has, like many others once popular, passed into "innocuous desuetude," and we hesitate to hold that because Mrs. Messer occasionally sang a verse of it while it was popular that she thereby furnished evidence of mental incapacity to make the deed of trust in question. (f) A fair sample of what the witnesses relied on in reaching their conclusion that plaintiff was insane when she made the deed of trust, I find in the testimony of Isom Turner, and, as it throws light on the probative value of the whole of plaintiff's evidence upon which reliance is placed to set aside said deed of trust, we quote the following therefrom:

"Q. You say you did not regard this woman as being insane at all? A. I didn't think she was bright by any means.

"Q. You didn't think she was an insane person? A. Well, I couldn't say I thought she was insane. I thought she was an idiot. \* \* \*

"Q. But you say she wasn't insane? A. I couldn't say she was or wasn't, but I don't think she had a good mind. \* \* \*

"Q. You say the only evidence you had to make up your mind that she was of unsound mind, she made corn dodgers on the stove. A. And other things. I have had her turn her stock right out in my field.

"Q. What made you think it wasn't right to cook dodgers on the stove? A. I always had mine in a pan.

"Q. Old-fashioned folks used to put them on a griddle? A. I never made mine—

"Q. You don't mean to tell the court that she was crazy because she put dodgers on the stove? A. I am only telling what you tell—

"Q. The finest hotels in the country broil meat and make toast on the stove. A. Not for me they don't.

"Q. And you think that a person that would do that and would make bread on top of the

stove would be regarded as of unsound mind? A. Take it just as you like it, and the court can decide, but they don't cook mine on top of the stove."

The foregoing constitute the chief items of alleged unusual conduct upon the part of Mrs. Messer which are relied upon as showing that she was mentally incapacitated to make said deed of trust. We are forced to the conclusion that it falls far short of establishing her mental incapacity to make said deed of trust on said 25th day of February, 1895. It may be, and doubtless is true, that she was peculiar and eccentric, but it stands out prominently in this record and is worthy of note that no question was made as to her sanity from August, 1891, when she bought the land from Vance, until the 24th day of June, 1895, as above stated, 3 months and 29 days after she had borrowed the money from Endsley and executed the deed of trust in question to secure the payment thereof.

On the other hand, without undertaking to set out in full the evidence offered by defendant, it is sufficient to say that it discloses that she bought the land in controversy from Vance and in doing so went on the land, two trips (once alone and once with her mother), to inspect it; that she was satisfied with it, but thought she ought to pay not more than \$1,400, but did, on the advice of her half-brother, pay \$1,500; that this sum was paid by her check with her own money, she signing the check and handing it to Vance and he, in turn, handing the deed to her. It shows that she placed said deed of trust on the land, which was duly executed and acknowledged by her, and that no one questioned her mental capacity, nor was there any suggestion that she did not know precisely what she was doing; it shows that shortly thereafter she sought to rent the land to one of the witnesses for cultivation with the view of having the rental applied to the discharge of the debt and interest mentioned in said deed of trust; it shows also that she took care of her stock and milked two cows, etc. These things are undisputed by the record and, to our mind, establish the contrary of mental incapacity.

As we view the record, there is no evidence of any probative value tending to establish mental incapacity of plaintiff on said 25th day of February, 1895, or at any other date prior to the 24th day of June, 1895, when she was adjudged to be of unsound mind by the probate court of Ray county, and that incident, as above stated, was 3 months and 29 days after the execution of said deed of trust and is, in our opinion too remote, under the facts of this record, to throw any light on her mental condition when said deed of trust was made.

[2] The test in determining whether one

had sufficient mental capacity to make a valid deed has uniformly been held by the authorities of this state to be as follows:

"Mere peculiarities or eccentricities of the grantor do not make a deed invalid, if he had sufficient capacity to understand the nature and effect of the transaction." *Ellis v. McNally*, 177 S. W. 654; *Huffman v. Huffman*, 217 Mo. 182, 117 S. W. 1; *Chadwell et al. v. Reed*, 198 Mo. 359, 95 S. W. 227.

In the case last cited the learned judge held the test of making a valid deed as follows:

"The legal test of the capacity of a grantor making a voluntary conveyance of all of his property to his wife, to the exclusion of his children, is his capacity to understand the matter in hand and the effect of the transaction."

Without further pursuing the subject, we hold, upon the whole record, that Melissa Messer, at the time she executed the deed of trust in question, was capable of understanding the nature and effect of the business she was engaged in, and was fully competent to make said deed of trust. We hold, therefore, that the case was properly tried in the court below, and accordingly affirm the judgment.

RAILEY and WHITE, CC., concur.

PER CURIAM. The foregoing opinion by MOZLEY, C., is adopted as the opinion of the court.

All the Judges concur.

#### PRODUCE EXCH. BANK v. NORTH KANSAS CITY DEVELOPMENT CO.

(No. 13248.)

(Kansas City Court of Appeals. Missouri. May 26, 1919.)

#### 1. BANKS AND BANKING ⇐228 — COLLECTIONS — RAISING CHECK — QUESTION FOR JURY.

In view of Rev. St. 1909, § 9988, question whether check was originally drawn for \$80.90, or for \$8.90, *held*, under the evidence, for the court sitting as a jury.

#### 2. BANKS AND BANKING ⇐227(1)—EVIDENCE ⇐69—NAMES ⇐18—PAYMENT OF RAISED CHECK—RECOVERY—BURDEN OF PROOF.

It being a presumption that identity of name is evidence of identity of person, and the presumption being in favor of correct dealing, and against forgery, the burden was upon defendant drawer to plead and prove that A. Parish, who cashed the check in question, was not the same person as A. Parish named as payee.

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

"Not to be officially published."

Suit by the Produce Exchange Bank against the North Kansas City Development Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kenneth McC. De Weese, of Kansas City, for appellant.

McGilvray, Woodbury & Doyle, of Kansas City, for respondent.

BLAND, J. This is a suit on a check issued by defendant, payable to A. Parish, and drawn on the Fidelity Trust Company, of Kansas City, Mo. The check was cashed May 3, 1912, by plaintiff, and was sent by it through the Kansas City Clearing House to the Fidelity Trust Company, which accepted it for value and charged defendant with the amount it then called for, to wit, \$80.90. Four or five weeks later defendant found what it claimed to be an error in the amount of the check. Defendant claimed that the check should have been for \$8.90, instead of \$80.90, and on this discovery defendant sent the check back to the Fidelity Trust Company, who notified plaintiff that the check had been raised.

The testimony shows that one of defendant's employes filled out the check, but she was not sure whether she wrote "eighty" or "eight." She was of the opinion that the "y" at the end of the "eighty" was not her "y," although she was in doubt about it. She was positive that the figure "0" after the figure "8" in the numerals was not hers. There was expert testimony that the "y" was in the same handwriting as the balance of the word "eighty," and that the whole word "eighty" was written by one and the same person. The facts show that the payee named in the check was a stranger to the bank. The bank required no identification, and preserved no means of identification, of the person to whom the money was paid. The money was paid out to the person representing himself to be A. Parish.

The court rendered judgment in favor of plaintiff for an amount including the full amount specified in the check, to wit, \$80.90, and defendant has appealed.

[1] It is quite evident that the question whether the check was originally drawn for \$80.90, or \$8.90, was one for the trial court, sitting as a jury, to decide under the evidence. *Bank v. Phillips*, 179 Mo. App. 488, 162 S. W. 721; section 9988, R. S. 1909. But it is defendant's contention, and it offered a declaration of law to that effect, which was refused, that because neither plaintiff nor its paying teller knew A. Parish, the payee of the check, and did not require the payee named to be identified, and did not preserve any means by which he might be identified, the verdict should be for the defendant. The agreed statement of facts contained the following:

"No evidence is introduced to show that A. Parish, who received the check from defendant originally, was not the same A. Parish who cashed said check on the plaintiff."

[2] It being a presumption of law that identity of name is evidence of identity of person (*Long v. McDow*, 87 Mo. 197; *State v. McGuire*, 87 Mo. 642), and the presumption being in favor of correct dealing and against forgery, the burden was upon defendant to plead and prove that A. Parish, who cashed the check, was not the same person as the A. Parish who was named as payee in the check. This was neither pleaded nor proved, and therefore was not an issue in the case. The only issue in the case was as to the correct amount of the check. The court found that issue against defendant. Whether the plaintiff was negligent in not having the person who cashed the check identified was not determinative of that issue.

The judgment is affirmed.

All concur.

#### WOODS v. KANSAS CITY LIGHT & POWER CO. (No. 13243.)

(Kansas City Court of Appeals. Missouri.  
May 5, 1919.)

#### 1. MUNICIPAL CORPORATIONS — 708(5) — STREETS — COLLISION — NEGLIGENCE — SPEED—EVIDENCE.

In an action for damages for personal injuries, evidence held sufficient to sustain the allegation of the negligence of the defendant's servant in passing over the intersection of city streets at a negligent and dangerous rate of speed without having his motorcycle under reasonable control.

#### 2. MUNICIPAL CORPORATIONS — 708(5) — STREETS — COLLISION AT INTERSECTION — WARNING OF APPROACH OF MOTORCYCLE— EVIDENCE.

In an action for personal injuries received at a street crossing, evidence held sufficient to sustain the allegation that defendant's servant was negligent in not sounding a reasonably sufficient warning of the approach of the motorcycle he was riding to the street intersection and failing to keep a reasonably sufficient lookout ahead.

#### 3. MUNICIPAL CORPORATIONS — 705(1) — STREETS — COLLISION — PERSONAL INJURIES—SUFFICIENCY OF WARNING.

In an action for personal injuries received in collision at street crossing, the warning that defendant's servant was required to give of the approach of his motorcycle was a reasonably sufficient warning and in time to permit pedestrians to avoid injury, and a warning given by the noise of the exhaust, which grew less as the speed slowed, was insufficient and tended to confuse.

**4. MUNICIPAL CORPORATIONS ¶706(8) — STREETS — COLLISION AT INTERSECTION — INSTRUCTION.**

In an action for personal injuries received in collision at street intersection, an instruction that, if the jury found that the operator "was driving the motorcycle referred to in evidence north on Troost avenue," etc., *held* not erroneous as broadening the instruction, for the reason that the petition alleged the motorcycle was being operated on the wrong side of the street, since plaintiff was not required to submit all his various allegations of negligence to the jury.

**5. MUNICIPAL CORPORATIONS ¶706(8) — STREETS — COLLISION — COMMON-LAW NEGLIGENCE—NECESSITY OF SUBMITTING VIOLATION OF ORDINANCES.**

In an action for personal injuries resulting from a pedestrian being struck by a motorcycle at a street intersection, plaintiff was not required to submit an alleged violation of a city ordinance, where the case was submitted to the jury on common-law negligence, and followed the allegation of the petition referring thereto.

**6. MUNICIPAL CORPORATIONS ¶706(6) — STREETS — REASONABLENESS OF SPEED AT COMMON LAW—QUESTION FOR JURY.**

In an action for personal injuries resulting from being struck by a motorcycle at a street crossing, where the rate of speed pleaded and submitted was neither ordinance nor statutory, but common-law, speed, it was for the jury to determine whether or not it was reasonable under the circumstances.

**7. MUNICIPAL CORPORATIONS ¶706(5) — STREETS — COLLISION — PERSONAL INJURY — FAILURE TO KEEP LOOKOUT—EVIDENCE.**

In an action for personal injuries resulting from being struck by a motorcycle at a street intersection, evidence *held* to show that defendant's servant operating the motorcycle could have seen plaintiff at a greater distance had he not been negligent in keeping a lookout ahead.

**8. TRIAL ¶199 — COLLISION — INSTRUCTION—MIXED QUESTION OF LAW AND FACT.**

In an action for personal injuries resulting from plaintiff's being struck by a motorcycle at a street crossing, an instruction that, if the jury found that the driver "was employed by defendant and acting for it in the scope of his employment," then the negligence of said operator was the negligence of the defendant, *held* not erroneous as submitting a mixed question of law and fact to the jury, where both plaintiff's and defendant's evidence showed that the operator was acting within the scope of his employment at the time of the collision.

**9. DAMAGES ¶216(8) — MEASURE OF DAMAGES — INSTRUCTION — INSUFFICIENT EVIDENCE.**

In a personal injury action giving an instruction as to the measure of damages for plaintiff's loss of earnings was error, where, although there was evidence that plaintiff was working at the time of injury, there was no evidence as to his earnings or earning capacity.

**10. MUNICIPAL CORPORATIONS ¶706(8) — STREETS — COLLISION — PERSONAL INJURY — INSTRUCTION.**

In an action for personal injuries received by plaintiff when struck by a motorcycle at a street intersection, a tendered instruction which sought to tell the jury that plaintiff stepped in the way of an approaching motorcycle when the evidence was that the motorcycle ran him down was misleading, and tended to prejudice plaintiff's case, and was properly refused.

**11. DAMAGES ¶132(7) — EXCESSIVE DAMAGES—PERSONAL INJURY—INJURY TO LEG AND BACK—BROKEN BONES.**

Where plaintiff, previously a reasonably strong, healthy man, suffered an injury to his back and a compound comminuted fracture of both bones of leg between knee and ankle, was required to use crutches more than a year thereafter, was forced to have operation to remove splintered bones, and had a plaster cast taken off five times to rebreak and reset the leg, which was left two inches shorter than the other, and the wound was discharging blood, pus, and bone at the time of the trial, and he was forced to bear much expense, a judgment for \$7,500 was not excessive.

**12. APPEAL AND ERROR ¶511(1)—RECORD—BILL OF EXCEPTIONS—SUFFICIENCY FOR REVIEW OF EVIDENCE.**

Where the record, under a heading "Bill of Exceptions," shows that a "bill of exceptions was duly signed, approved, and filed herein, the same being at the May term of said court and in due time, which, omitting the caption, is in words and figures as follows: 'Plaintiff, to sustain the issues upon his part, offered and introduced evidence as follows, to wit:'—there is a sufficient showing that a bill of exceptions was filed in the case.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Lew G. Woods against the Kansas City Light & Power Company. Verdict and judgment for plaintiff, and defendant appeals. Judgment reversed and remanded unless plaintiff within ten days remit the sum of \$500, in which case the judgment will be affirmed.

William C. Lucas and John H. Lucas, both of Kansas City, for appellant.

Harry Friedberg and Atwood, Wickersham, Hill & Popham, all of Kansas City, for respondent.

BLAND, J. Plaintiff recovered a verdict and judgment in the sum of \$7,500 on account of damages for personal injuries alleged to have been sustained by reason of the negligence of defendant's servant. The accident happened about 8 p. m. of February 12, 1917, at the intersection of Twelfth street and Troost avenue, in Kansas City, Mo. Plaintiff, a man 60 years of age, was walking



west on the north sidewalk of Twelfth street, and, while proceeding across Troost avenue in a line with said sidewalk, he was struck at a point about the middle of said street by one of defendant's servants riding a motorcycle northward.

The grounds of negligence alleged in the petition are: (1) Failure on the part of the driver of the motorcycle to slow down or bring his motorcycle to a stop before passing a standing street car; (2) violation of the rule of the road requiring the operation of a motorcycle on the right or east side of Troost avenue, and alleging that the same was being operated on the west side; (3) violation of the ordinance of Kansas City fixing the rate of speed that a motorcycle might be driven at the place in question at 10 miles per hour; (4) operating a motorcycle over the intersection of Twelfth street and Troost avenue at "a negligent and dangerous rate of speed and without having and keeping the same under reasonable control"; (5) failure of defendant's servant "to sound a reasonably sufficient warning of the approach of said motorcycle to said intersection" and failure "to keep a reasonably sufficient lookout ahead of the same as it approached and passed over said intersection"; (6) facts constituting a last chance case.

[1, 2] Plaintiff submitted his case to the jury on the following acts of negligence, contained in his instruction No. P-1. In that instruction the court told the jury that it was the duty of defendant's servant—

"\* \* \* to operate said motorcycle at a reasonable rate of speed, having regard to the traffic and use of said streets, and to keep a reasonably careful lookout ahead of said motorcycle upon said street, and to give reasonable and timely warning of the approach of said motorcycle to said intersection; and if the jury find and believe from the evidence that the operator of said motorcycle at the time and place referred to negligently, if you so find, failed to perform any one or more of the duties above enumerated, and at the time and place above referred to ran said motorcycle against plaintiff, if you so find, and that plaintiff was thereby injured, if you so find, and that such collision and injury, if any, resulted directly from the negligence, if any, as above set out and as defined in these instructions, on the part of the operator of said motorcycle, and that plaintiff at said time was exercising ordinary care for his own safety, then the plaintiff is entitled to recover against defendant, and your verdict will be for the plaintiff."

Defendant's first point is that its demurrer to the evidence should have been sustained; it being the contention that there is no evidence to support the allegations of the petition. Taken in its most favorable light to plaintiff, the evidence shows that at the time of the collision it was dark at the intersection of said streets; the street and store lights being out. There was no light present ex-

cept that made by the headlights of two street cars, one standing a few feet north of Twelfth street and south-bound on Troost avenue, and one a few feet south of Twelfth street, north-bound on said avenue. At the time plaintiff started across the street he looked in both directions on Troost avenue and saw nothing approaching; the motorcycle being without any lights. Plaintiff's eyesight and hearing were good. He heard the pop-pop of the motorcycle at a distance, but thought that it was going in another direction. When he approached a point a little to the west of the center of Troost avenue and nearly in front of the standing south-bound street car the motorcycle struck him, and he was knocked unconscious. No warning was given plaintiff of the approach of the motorcycle. There was no horn or signal device on it.

The evidence shows that the motorcycle approached Twelfth street at a speed from 35 to 40 miles per hour, and at a point 15 to 20 feet south of that street the driver shut off the power of his machine and coasted from there to the place of collision. From the time the motorcycle reached the south side of Twelfth street to the point of collision it ran silently. The rate of speed of the motorcycle from the intersection to the point of collision was about 30 miles per hour. The motorcycle proceeded north on Troost avenue toward Twelfth street, then swerved to the left in order to go around the left or west side of the north-bound car. It then cut to the east side of Troost avenue, and just before striking plaintiff swerved again to the west of the center line of Troost avenue, where the collision took place. The impact caused the motorcycle and plaintiff to slide about 15 feet. After the collision the motorcycle was found under the south-bound street car.

The driver of the motorcycle testified that on account of the darkness he did not see plaintiff until he was 6 or 8 feet from him. At that time plaintiff seemed to hesitate in the driver's path, and when plaintiff so hesitated the driver swerved to the left, thinking to pass around plaintiff, but the latter continued forward to a place in front of the motorcycle. At another point in his testimony the driver stated that he did not attempt to stop the motorcycle until he reached a point about 10 feet from plaintiff; that being the first time he saw the plaintiff. Plaintiff's witness Sprague testified that he was 40 feet north of Twelfth street on the west side of Troost avenue, and that he saw what happened. It was therefore evidently light enough for the driver of the motorcycle to have seen plaintiff for a greater distance than that he testified he was away from plaintiff at the time he made an effort to stop the motorcycle. At the speed at which he was

going, the driver of the motorcycle could not stop it in less than 30 feet. The driver testified that, if he had gone to the right instead of to the left, he would have missed plaintiff. A witness for the plaintiff testified that "this motorcycle seemed to dash without any warning; didn't give any signal at all or blow his horn; just crashed into him; didn't attempt to stop." There was no obstruction between the driver of the motorcycle and plaintiff after the driver started to cross Twelfth street. Plaintiff testified that in his judgment Troost avenue was 60 feet in width.

The driver of the motorcycle was employed by the defendant to correct defects occurring to defendant's electric system. He was on his way to correct one of these defects at the time of the collision. He testified that trouble calls were necessarily answered as hastily as possible, and that he was in haste at the time.

We think there is no question but that this evidence was sufficient to sustain the fourth and fifth allegations of negligence in the petition; that is, that defendant's servant went over the intersection of Twelfth street and Troost avenue at a negligent and dangerous rate of speed without having his motorcycle under reasonable control, and that said servant did not sound a reasonably sufficient warning of the approach of the motorcycle to the intersection and failed to keep a reasonably sufficient lookout ahead in passing over the same.

[3] It is defendant's contention that plaintiff admits that he heard the approach of the motorcycle, and for that reason the allegation in reference to the lack of warning is not proved. We think there was evidence of a lack of warning. There were a number of witnesses, including plaintiff, who testified that before the motorcycle reached Twelfth street it was making a loud noise by reason of the explosion of the engine through a cut-out, the latter being open. Plaintiff testified that he thought the motorcycle was going in another direction. The dying out of the sound from the exhaust of the motorcycle after it reached the south side of Twelfth street naturally caused plaintiff to arrive at the conclusion that the motorcycle had departed in another direction. The warning that defendant's servant was required to give was a reasonably sufficient warning and in time to permit pedestrians to avoid injury by taking means to avert being struck. Warning such as was given by the noise of the motorcycle, which was not continued to a point reasonably near the place of the collision, and such a noise as tended to confuse plaintiff rather than to give him warning was not such a warning as the driver of the motorcycle was required to give under the circumstances. The undisputed evidence shows that no warning was given by

means of any regular signal device, because there was none on the motorcycle.

[4-7] Defendant complains of plaintiff's instruction No. 1. This instruction we have quoted supra. The instruction further provides that, if the jury found that the operator "was driving the motorcycle referred to in evidence north on Troost avenue," etc. It is defendant's contention that this part of the instruction broadened the issue, for the reason that it is alleged in the petition that the motorcycle was being operated on the wrong side of the street. It is contended that the instruction should have submitted to the jury the question as to whether the driver of the motorcycle was operating the same on the wrong side of the street. There is nothing in this contention, because plaintiff was not required to submit all his various allegations of negligence to the jury. There was evidence that plaintiff was struck somewhat to the west of the center line of Troost avenue, but plaintiff could submit those allegations of negligence he thought fit and abandon the others. Defendant further complains that the instruction does not submit the alleged violation of an ordinance of Kansas City. Of course, plaintiff was not required to submit this allegation. The case was submitted to the jury on common-law negligence (*Mitchell v. Brown*, 190 S. W. 354, loc. cit. 356), and the submission followed the allegation of the petition in reference to the same. It is contended that the instruction is erroneous because it permits the jury to determine what was a reasonable rate of speed, having regard to the traffic and use of the streets. It is contended that it thus submits a question of law to the jury, as they are not told what was a reasonable rate of speed under the circumstances. The rate of speed pleaded and submitted was neither ordinance nor statutory, but common-law, speed, and it was for the jury to determine whether or not it was reasonable under the circumstances. It is contended that there is no evidence that the driver of the motorcycle was not keeping a reasonably careful lookout ahead of said motorcycle upon the street. There was evidence that such driver swerved around the left side of the car. This necessarily obstructed his vision. He testified that he did not see plaintiff until he was 10 feet from him, while there was evidence that it was not so dark that a man might not see at least 40 feet under the circumstances.

[8] It is contended that plaintiff's instruction No. 2 was erroneous. This instruction told the jury that defendant could only act through its agents and employees, and if they found that the driver of the motorcycle "was employed by defendant and acting for it in the scope of his employment," then the negligence of said operator was the negligence of the defendant. It is contended that

this instruction submits a mixed question of law and fact to the jury; that is, whether the driver of the motorcycle was acting within the scope of his employment. Whether this be true or not is immaterial, because there is no conflict in reference to the matter. Defendant's evidence as well as plaintiff's shows that the driver of the motorcycle was acting within the scope of his employment at the time of the collision.

[8] It is contended that plaintiff's instruction No. 4 was erroneous. This instruction is on the measure of damages, and told the jury that they might find for the plaintiff if they found that he suffered "any loss of earnings \* \* \* as a direct result of such injuries, if any, not exceeding on this account \$500." There was evidence that plaintiff was working at the time he was injured, but there is no evidence whatever as to what were his earnings or his earning capacity. Under the circumstances the giving of the instruction was error.

[10] It is contended that the court erred in refusing defendant's instruction No. 4. This instruction was properly refused because, among other things, it improperly sought to tell the jury that plaintiff stepped in the way of an approaching motorcycle. This was misleading and tended to prejudice plaintiff's case. It was not admitted that plaintiff stepped in front of the motorcycle. It was plaintiff's contention that the motorcycle ran him down, and the evidence so shows, and not that he stepped in the way of the motorcycle. The instruction was a harmful comment on the evidence.

[11] It is contended that the amount of the verdict is excessive. The evidence shows that plaintiff was a reasonably strong, healthy man before he was injured. Immediately after the collision he was carried into a nearby drug store and given emergency treatment, and then taken to the City Hospital, where he was confined from the day of the injury, February 12, 1917, to May 2d of that year, when he left. On June 26, 1917, he went to St. Margaret's Hospital, and remained there until October 8, 1917. He suffered a compound comminuted fracture of both bones of the left leg between the knee and the ankle. The ends of the bones punctured the flesh and the bones were splintered. The flesh of his leg was split and bled from the puncture. He suffered constantly from his leg. It was necessary for him to use crutches at the time of the trial, which was somewhat more than a year after the ac-

cident. He could walk a short distance with one crutch and a cane. It was necessary when he was in the hospital to have a plaster cast taken off his leg five times for the purpose of having his leg rebroken and reset by pulling and twisting it back into place. While at St. Margaret's Hospital he underwent an operation for the purpose of removing fragments of bone from the flesh of his leg. As a result of the accident his left leg is permanently deformed, being two inches shorter than the right one. At the time of the trial the wound was discharging blood, pus, and bone. His back was injured by reason of the collision and pained him at the time of the trial. It was difficult for him to get up after lying down. He expended \$365 at St. Margaret's Hospital as a result of his injuries. Plaintiff was very nervous after the accident and did not rest or sleep well at night. Since the trial he was incapacitated from performing any kind of labor. There was medical testimony that plaintiff's injury was permanent. We think under the circumstances that the verdict was not excessive.

[12] Plaintiff makes the point that there is nothing before us but the record proper, for the reason that the record proper fails to show that a bill of exceptions was filed in this case. However, we find under the heading "Bill of Exceptions" the following:

"And afterwards, on the 7th day of September, 1918, bill of exceptions was duly signed, approved, and filed herein, the same being at the May term of said court and in due time, which, omitting the caption, is in words and figures as follows: 'Plaintiff, to sustain the issues upon his part, offered and introduced evidence as follows, to wit,'"

The record in this case is substantially in the same condition as that in the case of *State ex rel. Field v. Ellison* (Sup.) 209 S. W. 107, and in that case it was held that this court under the circumstances should consider the bill of exceptions.

It is urged that appellant has not filed any statement such as is required by our rules and the statutes. We think there was a substantial compliance with the rules and statutes in reference to this matter.

For the error in the giving of the instruction on the measure of damages the case must be reversed and remanded, unless plaintiff will within ten days remit the sum of \$500. If this is done, the judgment will be affirmed.

All concur.

**WADLOW et al. v. CONSOLIDATED SCHOOL DIST. NO. 3, TP. 30, R. 23, GREENE COUNTY, et al. (No. 2459.)**

(Springfield Court of Appeals. Missouri. May 24, 1919. Rehearing Denied June 17, 1919.)

**1. ESTOPPEL ¶68(2) — JUDICIAL PROCEEDINGS—INCONSISTENT CONDUCT.**

Plaintiffs, who with other citizens sought to prohibit issue of bonds legally voted and the building of a high school on a site legally selected, and who took legal steps with that object in view, or were financial contributors in injunction suits prohibiting the issuance of the bonds, all of which prevented delivery of the bonds, are not in a position to maintain suit to enjoin collection of certain school levies and delivery of the bonds on the ground that levies were illegal because bonds had never been delivered.

**2. SCHOOLS AND SCHOOL DISTRICTS ¶111—LEVYING TAXES FOR INDEBTEDNESS NOT INCURRED—INJUNCTION—TAXPAYERS' SUIT.**

While Const. art. 10, § 12, providing that school district incurring indebtedness shall, "before or at the time of so doing," provide for collection of an annual tax, is mandatory, the instant case is not one where a school district is levying taxes on the residents year after year for an indebtedness which has not been incurred, and no bonds have been issued without just cause, in view of injunction suits, prohibiting issuance of bonds, pending nearly all of the time in question.

Appeal from Circuit Court, Polk County; C. H. Skinker, Judge.

Suit by Charles E. Wadlow and others against the Consolidated School District No. 3, Township 30, Range 23, Greene County, Mo., and others. Bill dismissed, and plaintiffs appeal. Affirmed.

Hamlin & Hamlin, of Springfield, for appellants.

John Schmook and Geo. W. Goad, both of Springfield, for respondents.

**FARRINGTON, J.** This suit is the result of a school fight, growing out of the consolidation of certain districts in this county under the Buford Law. There has been much litigation concerning this consolidation, as will be seen by referring to the case of *State ex rel. School District No. 45 v. Cloud*, County Clerk, reported in 192 Mo. App. 322, 180 S. W. 26, in which suit was raised the validity of the posting of notices by the county superintendent. Again, in the case of *Young et al. v. Consolidated School District No. 3 et al.*, 196 Mo. App. 419, 193 S. W. 627, certain citizens of this consolidated school district attempted to enjoin the school board from building a high school on the Kymes site which had been selected by the board. There is mention in the abstract before us of

other litigation, the purpose of which was to test the validity of the proceedings organizing the consolidated school district and the action of the school board members in relation thereto.

The present suit was brought by plaintiffs named herein and other citizens of the district, seeking to enjoin the delivery of the bonds which had been voted for the purpose of building a high school, and for the further purpose of enjoining the levying and collection of certain school levies made in 1916 and 1917, and to further enjoin the collector from paying out any money that might have been collected under the levy of 1916. The filing of the suit in this case is not shown by the abstract before us, the record entry being that the cause was tried on an amended petition filed November 3, 1917. The trial court dismissed the bill, and the plaintiffs, appellants, are complaining of its action in this court solely on one ground.

It is shown, without question, that the bonds were legally voted, the site legally selected, the money advanced to register them by the secretary of state. An offer to purchase the bonds was made by Francis Bros. & Co., of St. Louis, and accepted by the school board, and \$500 paid by Francis Bros. & Co. to the district to bind the bargain. It is also shown that the bonds are still in the hands of the school board, never having been issued and delivered to the purchaser, Francis Bros. & Co.

[1] The sole ground of contention made here is that the levies made and certified by the school board for the years 1916 and 1917 were illegal, because taxes were being collected, and no indebtedness had been actually incurred by them; the bonds never having been delivered.

On referring to the files in the former case and the record in this case, we are unable to uphold the contention of appellants, as it appears that on March 28, 1916, in the suit brought by Young, heretofore referred to, the petition in that case sought to restrain the school board from purchasing the Kymes site, and from using any money of said district for the erection and construction of a school-house in said district on any site or place other than the Appleby site. This suit was brought for the purpose of preventing the school directors from using the money to be derived from these bonds on the Kymes site, on which site they had a perfect right to erect a school building, as was decided by this court in the Young Case. That suit, in which some of the same parties who are plaintiffs in this case were interested, tended to prevent, and did prevent, the school board from taking any steps toward building this school on the Kymes site, and that case pending in the courts not finally determined until March 27, 1917. After the opinion in

that case was handed down, there were yet 10 days for motion for rehearing to be filed, and still 30 days in which the clerk had time to send down the mandate. Certainly during all of that time the plaintiffs here, who were interested in and carrying on that litigation, cannot complain because of the failure of the school directors to deliver the bonds and actually get the money in their hands to build on the Kymes site, which was the legally selected site, when these plaintiffs were seeking in court to enjoin that very thing from being done. The amended petition in this case, which was filed in November, 1917, enjoined the school directors from taking any action toward delivering the bonds. While the record shows the amended petition was filed in November, we are left in the dark so far as the actual record before us is concerned when the original petition enjoining this action was filed. In oral argument, respondent stated in open court that that petition was filed in June, 1917, and this was not denied by appellant's counsel in oral argument.

Appellants, as stated before, are now complaining of the levies as being illegal, because the school directors had not issued and delivered the bonds, when the record, as hereinbefore stated, shows that there were injunction suits pending during all of the time, with the possible exception of from some time in April until some time in June, 1917, which injunctions prohibited the doing of the very thing about which these plaintiffs are now complaining, and these plaintiffs who are now complaining were parties plaintiff or financial contributors in the injunction suits.

It would violate the fundamental rules of equity to permit plaintiffs, who the evidence shows were constantly and consistently filing suits to prevent the defendants from doing the things which the plaintiffs now say they should have done, to take advantage of such alleged inaction. One of the plaintiffs, testifying, said:

"I remember signing up the agreement with quite a good many others to hold up the bond issue, to delay them; it was my intention and purpose to delay the issuance of the bonds, and that is the way I feel about it now. I knew about the suit that Young and Rogers brought in the circuit court of Greene county that went to the Court of Appeals. I was a witness in the trial of that case in Judge Arch Johnson's court, and contributed toward that litigation. I could not tell the exact figures, but something like \$10."

Under the Constitution of Missouri, section 12, article 10, school districts incurring any indebtedness requiring the assent of the voters as aforesaid shall, *before* (italics ours) or at the time of doing so, provide for the collection of an annual tax sufficient to pay the

interest on such indebtedness as falls due, and also to constitute a sinking fund, etc.

It has been held in the case of *State ex rel. v. Allen*, 183 Mo. loc. cit. 292, 82 S. W. 103, and *Evans v. McFarland*, 186 Mo. loc. cit. 726, 85 S. W. 873, and *Black v. Early*, 208 Mo. loc. cit. 312, 106 S. W. 1014, that the above provision of the Constitution is mandatory and self-enforceable, and that the school board must, either at the time of incurring the indebtedness or before that time, provide for the collection of an annual tax as a sinking fund and to pay interest.

[2] The case before us is not one where a school district is levying taxes on the residents year after year for an indebtedness which has not been incurred and no bonds have been issued without just cause. But the case we are dealing with is one where the whole record before us shows that the plaintiffs here, together with other citizens of the school district, had from the beginning of this consolidated district sought to hinder and delay, and prohibit the issuing of bonds and building of a high school on the site which the school board chose; and, having taken the legal steps which they did to hinder action, and to delay and stop the school board in proceeding to the building and erection and maintenance of a high school, as had been voted, they are in no position to now complain of a failure to do the thing they were using the courts to prohibit.

We, therefore, hold that the trial court's action in refusing the injunction and dismissing the bill was entirely proper, and the judgment is affirmed.

STURGIS, P. J., and BRADLEY, J., concur.

## BUZAN v. KANSAS CITY RYS. CO. (No. 13258.)

(Kansas City Court of Appeals. Missouri.  
May 26, 1919.)

### 1. STREET RAILROADS $\S$ 114(19) — INJURIES TO PERSONS ON TRACKS — ACTION — JURY QUESTION.

In an action for the death of a woman struck by defendant's car while walking on the track, evidence held to make out a prima facie case for plaintiff under the last clear chance doctrine.

### 2. APPEAL AND ERROR $\S$ 1060(2) — REVIEW — HARMLESS ERROR.

In an action against a street railroad company for the death of one struck by a car, where objection was sustained to a question to the conductor of the car that struck deceased as to whether he testified before the coroner's jury, that the question was asked a second time held not prejudicial, where objection was duly sustained to it.

### 3. EVIDENCE $\Leftrightarrow$ 539½(2)—EXPERT EVIDENCE—QUALIFICATION.

An expert motorman, though he had never operated a car of the type which caused the accident, may testify as to the distance within which it could be stopped, where he had ridden with motormen who were at the time operating such cars, and saw how they were operated, etc.

### 4. EVIDENCE $\Leftrightarrow$ 553(2)—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.

In an action for the death of a woman struck by a street car, an hypothetical question as to the distance in which a car could be stopped held not erroneous because not including the weight of the car, the kind of motors, etc., where the witness testified he was familiar with that type of car.

### 5. APPEAL AND ERROR $\Leftrightarrow$ 204(7)—REVIEW—OBJECTION BELOW.

Objections to hypothetical question propounded to an expert, which were not made in the court below, cannot be considered in the Appellate Court.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

"Not to be officially published."

Action by Dennis Buzan against the Kansas City Railways Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Richard J. Higgins, Charles L. Carr, Roscoe P. Conkling, and Clyde Taylor, all of Kansas City, for appellant.

E. A. Scholer, Cook & Gossett, and Thos. Madden, all of Kansas City, for respondent.

BLAND, J. Plaintiff recovered a verdict and judgment in the sum of \$2,500 for the wrongful death of his wife, and defendant has appealed.

Defendant's first point is that its demurrer to the evidence should have been sustained. The facts taken in their most favorable light to plaintiff show that on the night of July 23, 1916, the deceased was crossing defendant's street car tracks on Swope parkway at Woodland avenue, in Kansas City, Mo. The place of the accident was in a sparsely built up portion of the city. Swope parkway was paved, and had a sidewalk on the south side thereof. The car rails of the defendant, which consisted of east and west bound tracks, were laid on the north side of said boulevard, 4 or 5 feet of the paved portion of the same. Defendant maintained a gravel platform on each side of the tracks for the purpose of affording a place for its passengers to board and alight.

Deceased was on her way home, which was situated on Michigan avenue about one-half of a block north of the boulevard. Michigan avenue was the first street east of Wood-

land avenue. At that time Michigan avenue was not a traveled street at its intersection with Swope parkway. Deceased had come from a point several blocks west of Woodland avenue. It was the custom of persons who lived north of Swope parkway and on Michigan avenue to use the Woodland avenue crossing in going from Swope parkway to their homes. Woodland avenue was a street 50 feet in width. Deceased had left the sidewalk on the north side of Swope parkway about 100 feet west of Woodland avenue, had cut across the boulevard in a northeasterly or diagonal direction, had entered upon the east-bound car tracks on the west side of Woodland avenue, and had walked directly east 30 feet at the rate of 2½ miles per hour, when an east-bound street car operated at the rate of 20 miles per hour, coming from the rear, struck her. The car did not slacken its speed or sound any warning before striking her. One witness testified that the "car ran almost a block before it stopped" after it struck the deceased. The car tracks were practically level at and near the place of the accident, and the night was clear and dry. Under the conditions present the car could have been stopped going at a rate of 20 miles per hour in a distance of 65 feet.

[1] It is defendant's contention that the motorman could not have seen a greater distance than 30 feet by means of the headlight on the car and the street light situated about 15 feet east of the east line of Woodland avenue and about 4 feet from the car tracks. However, there is evidence that a witness on a west-bound car, which passed about the time of the accident, saw deceased when he was 200 feet east of her. There was testimony that deceased had on a white skirt. As the evidence shows that deceased walked 30 feet at the rate of 2½ miles per hour after she got upon the track, it is apparent that she was on the track something over six seconds. A car going at the rate of 20 miles per hour would cover a distance of approximately 180 feet in six seconds; therefore the motorman had at least 180 feet in which to stop the car after deceased could have been seen in a position of peril. There is no question but that plaintiff made out a case under the last chance doctrine.

A large part of defendant's brief is devoted to an attack upon witness O'Leary. This witness was in the rear vestibule of the west-bound car already mentioned. He testified as to the rate of speed of the two cars and as to various distances that the cars were from deceased at different times. His testimony was somewhat conflicting and unsatisfactory as to the distance the car that struck deceased was from her at the time he first saw deceased upon the track.

There is no contention that this witness was not on the west-bound car and in the rear vestibule as he claimed, as the conductor upon that car, who was one of defendant's witnesses, stated that a man was there at the time, and called his attention to the accident. There is nothing inherently unbelievable in the testimony of this witness that he saw from his position on the car the occurrence, and his evidence was clear and explicit on the point that he was able to see the deceased 200 feet away. In view of the conditions and surroundings, it is easily believed that deceased could have been seen that far. In stating the evidence, we have not used the testimony of this witness in any manner whatever, except his evidence that he saw deceased 200 feet away, and there is no question but that the jury had a right to consider his testimony on this point, if not upon other points testified to by him. It is not necessary for us to pass upon whether his testimony should be considered in reference to other matters, as plaintiff clearly made out a case without his testimony on these matters.

[2] Defendant's witness, Scott, who was the conductor on the car that struck deceased, was asked on cross-examination if he testified before the coroner's jury. Objection was made to the question, and the court sustained the same. Later the question was again asked, and the court a second time sustained the objection. It is now urged that the witness had a right to stand upon his constitutional rights when requested to testify at the coroner's inquest, and it was improper to ask him in reference to the matter at this trial. The objection to the testimony was sustained; and, while plaintiff's counsel should not have again gone into the matter after the court had once sustained the objection, we fail to see how any harm was done. Whether or not the witness had testified at the inquest did not get before the jury in this case. Therefore the jury could not draw any unfavorable inference to the witness or defendant by reason of the occurrence.

[3] It is urged that the court erred in permitting improper and incompetent evidence in reference to the distance in which the

car could have been stopped. Plaintiff's counsel asked an expert motorman, introduced by him, what distance he could stop a car of the 1200 type; that being the kind of car that struck deceased. It was shown that this witness had never operated a car of this type, but that he had operated one of the 900 type, that the equipment upon the two types of cars was identical, and that the witness had ridden with motormen who were at the time operating cars of the 1200 type; that he saw how such cars were operated and the effect thereof, and had talked with other motormen in reference to the matter. We think the witness was clearly shown to have been competent to testify as to in what distance this type of car could have been stopped, as he was thoroughly acquainted with the kind of car and the stopping apparatus, and had often seen other motormen make stops with that type of car.

[4, 5] It is urged that the hypothetical question asked the witness did not include the weight of the car, kind of motors upon the car, general conditions of the car, condition of the brakes and condition of the rails. There is no merit in this contention. The witness testified that he was familiar with the 1200 type of car. He, therefore, knew the weight of the car and the motors upon the same. The question inferentially assumed that the condition of the car and brakes was good, and the question submitted the element of its being a clear, bright night. The witness was asked in what distance the car could be stopped "without any risk of serious danger or injury, material injury, to the passengers." It is claimed that the proper criterion was not hypothesized in the question. It is contended that the kind of stop that is required to be made is one "with absolute safety to the passenger and the motorman and conductor and to the car and equipment." In the various objections made to the hypothetical question the objection now made in this court was not included. *Burton v. Railroad*, 176 Mo. App. 14, loc. cit. 19, 162 S. W. 1064; *Strother v. Dunham*, 193 S. W. 882, loc. cit. 885.

The judgment is affirmed.

All concur.

## RAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 17, 1919.)

1. CRIMINAL LAW §1144(10)—REMARKS OF PROSECUTING ATTORNEY—PREJUDICIAL EFFECT—PRESUMPTION.

Where the court rebuked the commonwealth's attorney for making remarks, and admonished jury to disregard them, it will not be presumed that the remarks were calculated to influence passion and excite prejudice against defendant on account of his being a negro and deceased a white man.

2. CRIMINAL LAW §1037(1)—APPEAL—TIMELY OBJECTION—ARGUMENT.

Objection to improper remarks of counsel in argument to the jury, or to any ruling of the court respecting the same, comes too late to warrant review, when made for the first time in the motion and grounds for a new trial.

3. CRIMINAL LAW §938(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted for newly discovered evidence which is cumulative, merely tending to impeach or discredit opposing witness.

4. CRIMINAL LAW §945(1) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

To authorize a new trial, the newly discovered evidence should be of such convincing character as to have a decisive influence on and against the evidence to be overthrown by it.

5. HOMICIDE §163(2) — DISPOSITION OF DECEASED—SINGLE ACT—ADMISSIBILITY.

While it would have been proper to have permitted proof that deceased was by reputation or even by habit a person of violent temper and quarrelsome disposition, evidence that on one occasion prior to the homicide deceased drew a pistol on the witness was incompetent.

6. CRIMINAL LAW §1182 — ABSENCE OF PREJUDICIAL ERROR—AFFIRMANCE.

Where the instructions which are not criticized properly gave the law necessary for the guidance of the jury, the evidence was sufficient to support the verdict, and no prejudicial error appears in any ruling of the trial court, the judgment will be affirmed.

Appeal from Circuit Court, McCracken County.

Ed Ray was convicted of voluntary manslaughter, and appeals. Affirmed.

Graves & Wall, of Paducah, for appellant.  
O. H. Morris, Atty. Gen., and Beverly M. Vincent, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, Ed Ray, shot and killed Dwight Alcock in the city of Paducah. The homicide was followed by an indictment charging appellant with the crime

of voluntary manslaughter. The trial resulted in his conviction of the crime charged; his punishment being fixed by the verdict of the jury at confinement in the penitentiary for a term of 18 years. He was refused a new trial by the circuit court and has appealed.

The homicide occurred about 10:30 o'clock at night in front of a saloon. Each of the participants was armed with a pistol, and each fired several shots at the other. Appellant received a flesh wound in the leg, and the deceased a bullet in the eye, which entered the brain, producing instant death. While there was a great contrariety of evidence as to whether appellant or deceased fired the first shot, as a whole the evidence left no doubt that the killing occurred in a sudden affray, or sudden heat and passion, and, in either event, it was unjustifiable. Hence there can be no reason for declaring appellant's conviction of voluntary manslaughter unwarranted.

It is, however, contended by appellant that he should have been granted a new trial: First, because of the misconduct of the commonwealth's attorney in argument to the jury; second, on the ground of newly discovered evidence; third, because of the exclusion of certain alleged competent evidence—and that the failure of the circuit court to grant the new trial on one or more of these grounds entitles him to a reversal of the judgment of conviction.

[1] As to the ground that the alleged misconduct of the commonwealth's attorney, consisting of certain remarks calculated, as claimed, to influence the passions and excite the prejudices of the jury against appellant on account of his being a negro and the deceased a white man, it is sufficient to say that the trial court, without objection by appellant to the remarks, rebuked the commonwealth's attorney for making them and admonish the jury to disregard them. The remarks are not here quoted because, as will presently be seen, we cannot on this appeal review them, or the action of the court regarding them; but it is not improper to say that they are such as are frequently used in speeches in the prosecution of criminal cases, and not different in meaning or effect to others, we have held not so prejudicial as to demand the reversal of a judgment of conviction. *Williams v. Commonwealth*, 153 Ky. 710, 156 S. W. 372; *Meredith v. Commonwealth*, 148 Ky. 106, 146 S. W. 407; *Burton v. Commonwealth*, 151 Ky. 537, 152 S. W. 545; *Wright v. Commonwealth*, 155 Ky. 750, 160 S. W. 476. However, in view of the admonition from the trial court mentioned, it will not be presumed that the remarks of the commonwealth's attorney complained of had the prejudicial effect attributed to them by the counsel.



[2] But, as already intimated, we are prevented from considering the remarks, or any ruling that may have been made by the trial court respecting them, because of the failure of the appellant to object to them when made, or to ask for the setting aside of the swearing of the jury and a continuance of the case. Objection to improper remarks of counsel in argument to the jury, or to any ruling of the court respecting same, comes too late, when made, as in the instant case, for the first time in the motion and grounds for a new trial. *May v. Commonwealth*, 153 Ky. 141, 154 S. W. 1074; *Wright v. Commonwealth*, 155 Ky. 750, 160 S. W. 476.

[3] Appellant's complaint of the refusal of the circuit court to grant him a new trial on the ground of newly discovered evidence is equally without merit. Conceded the diligence claimed for him by his counsel, it is patent from the affidavits of appellant and the new witnesses that the newly discovered evidence would be and is purely cumulative. It all relates circumstantially to the question whether the first shot at the time of the homicide was fired by appellant or the deceased, as to which matter a great quantity of proof was heard on the trial; much of it being of the same character as that shown by the affidavits. The affidavit of one of the witnesses indicates that his testimony would be directed to showing that a witness for the commonwealth had made to him a statement shortly after the homicide, contradictory of what he had said of the same matter when testifying on appellant's trial. But this testimony would also be cumulative, as the commonwealth's witness had been contradicted during the trial on the same point.

[4] We have repeatedly held that a new trial will not be granted on account of newly discovered evidence, which merely tends to impeach or discredit an opposing witness, or is only cumulative. To authorize a new trial the newly discovered evidence should be of such convincing character as to have a decisive influence on and against the evidence to be overthrown by it. *May v. Commonwealth*, 153 Ky. 141, 154 S. W. 1074; *Ellis v. Commonwealth*, 146 Ky. 715, 148 S. W. 425; *Robinson v. Commonwealth*, 149 Ky. 291, 148 S. W. 45. The newly discovered evidence here relied on does not meet this test; hence the refusal of the new trial upon such evidence was not error.

[5] Appellant's complaint that the exclusion by the trial court of the testimony of the witness Upchurch was error cannot be sustained. Upchurch testified that on an occasion prior to the homicide Alcock, the deceased, drew a pistol on him. This evidence was incompetent. It would have been proper to have permitted proof that Alcock was by reputation, or even habit, a person of violent temper and quarrelsome disposition; but a

single, particular, apparently belligerent act like that testified to by the witness cannot be shown.

[6] As the instructions, which are not criticized, properly gave the law necessary for the guidance of the jury, the evidence was sufficient to support the verdict, and no prejudicial error appears in any ruling of the trial court, the judgment must be and is affirmed.

#### KEETON et al. v. TIPTON et al.

(Court of Appeals of Kentucky. June 12, 1919.)

#### 1. WILLS §634(10) — CONSTRUCTION — REMAINDER — CONTINGENCY.

Where a trustee, to whom testator's estate was devised with directions to pay the income to his two brothers for life, was directed upon the death of survivor to convert estate into cash, and pay over the same to the then living descendants of one of them per stirpes, the remainder was contingent.

#### 2. WILLS §858 — CONTINGENT REMAINDER — RIGHT OF ACCELERATION — TESTATOR'S INTENTION.

The fact that a remainder is contingent is not always conclusive against the right of acceleration, and the rule will not be applied where it will defeat the testator's intention.

#### 3. REMAINDERS §5 — ACCELERATION OF REMAINDER.

The doctrine of acceleration of remainder proceeds on the theory that, though by its terms the ulterior devise does not take effect in possession until the decease of a prior devisee, if tenant for life, yet it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate.

#### 4. REMAINDERS §5 — CONTINGENT REMAINDER — ACCELERATION.

Where a life tenant who has taken under a will and enjoyed the income for a number of years, renounces his interest, and asks the court that property be sold free from his claim, his act is not a destruction of the life estate accelerating a contingent remainder, but is merely a conveyance by estoppel which does not remove the life estate.

Appeal from Circuit Court, Montgomery County.

Suit by Waller Tipton and others against Eva Keeton and others. From judgment for plaintiffs, defendants Eva Keeton and husband appeal. Reversed and remanded, with directions.

Ohas. D. Grubbs, of Mt. Sterling, for appellants.

Robert H. Winn, of Mt. Sterling, for appellees.

CLAY, C. James D. Tipton, a resident of Montgomery county, died testate in the year 1905, leaving a widow, Sallie Black Tipton, but no children. He devised all of

his property to a trustee, with directions to pay the net income to his wife during her lifetime. Upon the death of his wife, he directed the payment of certain small bequests, and disposed of the remainder of his estate in the following manner:

"Sixth. Subject to the provisions and bequests above made, my said trustee shall hold my estate and keep same invested and pay the net income thereof, equally to my two brothers, the said R. Letcher Tipton, of Montgomery county, Ky., and Dr. Waller Tipton, of Magoffin county, Ky., as long as they both live, and after the death of either of them, the whole of such net income to the survivor of them, my said two brothers, as long as he lives, and on the death of such survivor, my said trustee shall convert my entire estate into cash and shall divide and pay over same to the then living descendants of my said brother Waller Tipton, per stirpes or by stocks."

The testator's widow, Sallie Black Tipton, died many years ago. After her death the net income from the estate was paid to the testator's brothers, R. Letcher Tipton and Waller Tipton. Upon the death of R. Letcher Tipton, which also occurred several years ago, the entire net income was paid to Waller Tipton. Waller Tipton is now advanced in years, and has seven children, some of whom are married and have children.

This suit was brought by Waller Tipton and six of his children against his daughter, Eva Keeton, and her husband, George Keeton, and others, for the sale and division of all the property owned by the testator at the time of his death. The petition contains the following allegation:

"That the said Waller Tipton is otherwise provided for and is advanced in years, and that he desires to, and does surrender up and renounce all benefits made for him under the said trust in said will, and desires that the said property be sold free of the said trust and free of any usufructuary right therein in himself, and that the proceeds be divided among his children above named."

The chancellor granted the relief prayed for, and the defendants, Eva Keeton and her husband, appeal.

[1, 2] The relief was asked and granted on the ground that the action of the life tenant, Waller Tipton, in uniting in the petition and surrendering all benefits under the will, had the effect of accelerating the remainder and vesting the title in the now living children of Waller Tipton. On the other hand, it is the contention of appellants that the remainder was contingent, and, that being true, there can be no acceleration by a premature determination of the life estate. As the trustee was directed, upon the death of the testator's last surviving brother, to convert his estate into cash and to pay over same to "the then living descendants of my said brother, Waller Tipton, per stirpes or by stocks," it is apparent that the persons

who are to take are uncertain, and that therefore the remainder is contingent. But the fact that a remainder is contingent is not always conclusive of the right of acceleration, and the rule will not be applied where it will defeat the testator's intentions. *O'Rear v. Bogle*, 157 Ky. 668, 163 S. W. 1107.

[3] The doctrine of acceleration proceeds upon the theory that though the ulterior devise is in terms not to take effect in possession until the decease of a prior devisee, if tenant for life, yet that, in point of fact, it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264. Hence, where it is apparent that the remainder is postponed only in order that a life estate may be given to a life tenant, a failure or a destruction of the life estate will accelerate the remainder, although the life tenant be alive. Hence if the life tenant renounces the will, or refuses to take, or becomes incapable of taking, or the life estate has been terminated by the happening or nonhappening of a certain event provided for in the instrument creating the estate, the remainder will be accelerated. In other words, the cases provide that the prior estate shall be "removed out of the way," and in the case of *Cummings v. Hamilton*, supra, it was held that a conveyance of the life estate to the remaindermen did not amount to its removal "out of the way." Discussing the question, the court said:

"It is not removed unless it is in some manner destroyed, as by renunciation or refusal to take, or by its being defeated by some event which takes away the right of the life tenant to hold the property prior to his decease, where the instrument creating the life tenancy has provided that such event should terminate that tenancy, or where the life tenant has failed in the performance of duties upon the performance of which the life tenancy depends. The conveyance of the life estate to another does not amount to a destruction or removal thereof."

[4] We are unable to perceive any substantial distinction between that case and this. Here, the life tenant did not renounce the will or refuse to take. As a matter of fact, he did take under the will and enjoyed the income for a number of years. He now comes into court and renounces his interest, and asks that the property be sold free of his claim. It seems to us that this is not such a failure or destruction of the life estate as is contemplated by the law. It is nothing more than a conveyance by estoppel, and the effect is not to destroy the life estate, but really to vest it in the purchaser. Were we to adopt the rule that the life tenant, by such an act, could accelerate a contingent remainder, it would open the door for collusive proceedings that might result in the property's being used and expended by

those who might never be entitled to it under the will.

Judgment reversed, and cause remanded, with directions to enter judgment dismissing the petition.

### HARRISON v. PERRY.

(Court of Appeals of Kentucky. June 13, 1919.)

#### 1. CONTRACTS $\S$ 108(2) — PUBLIC POLICY — POPULARITY CONTEST.

Contract to pay for articles incident to conduct of popularity contest, for which dealer was instructed candidates should be nominated by his casting fictitious votes, was invalid as based on fraud and deceit of the public, and therefore against public policy; it being immaterial that the complimentary votes were equalized and the contestants put on the same footing.

#### 2. BILLS AND NOTES $\S$ 106 — POPULARITY CONTEST.

Notes given by a dealer for a popularity contest involving deceitful methods are based on a vicious consideration, defeating their collection in hands of the original holder.

#### 3. BILLS AND NOTES $\S$ 497(4) — HOLDER IN DUE COURSE — BURDEN OF PROOF.

Where maker shows vice in the inception of a note, as that it was given for a fraudulent popularity contest, the burden shifts to a holder to show that he is a holder in due course under Negotiable Instruments Law,  $\S$  52.

#### 4. BILLS AND NOTES $\S$ 525 — HOLDERS IN DUE COURSE — PROOF.

Where note was shown to be based on a vicious consideration, holder's evidence held insufficient to show want of notice of the infirmity.

Appeal from Circuit Court, Madison County.

Action by C. W. Harrison against H. L. Perry. Judgment for defendant, and plaintiff appeals. Affirmed.

Burnam & Burnam, of Richmond, for appellant.

Grant E. Lilly, of Lexington, and D. M. Chenault, of Richmond, for appellee.

QUIN, J. Appellee entered into a contract with the Lyon-Taylor Company (hereinafter referred to as the company) January 28, 1914, by the terms of which he promised to pay to said company the sum of \$1,200 for three pianos, and other articles incident to the conduct of a popularity contest. Finding he had overreached himself in the making of the contract, appellee notified the company of this fact, and as a result of certain correspondence between them a contract of a similar nature, but for a smaller amount, was entered into, the cash consideration be-

ing \$500, represented by a note dated May 11, 1914, and payable in four installments of \$140 each, due in two, three, four, and five months thereafter. The first installment on the note was not paid, so appellant, to whom the note had been assigned, instituted this action. Among other things, appellee alleged in his answer that appellant was not a holder in good faith; the company had not complied with its contract; that agents of the company had represented to him the piano was worth \$400, when as a matter of fact it was not worth over \$75, or \$80, and that the scheme, which was the basis of the note sued on, was a fraudulent one.

In the contract sued on is this provision:

"To make the above guaranty binding upon you we agree to take this shipment promptly, carry out your contest plan fully, issue votes as directed in rules, promptly meet all obligations entered into in this agreement, keep goods displayed, report gross sales every thirty days during life of this agreement, and promptly furnish all information requested in pushing this contest."

The rules of the contest are not in record, but in one of the letters received by appellee from the company was an inclosure entitled Way to Get Candidates, in which we find these suggestions:

"The merchant putting on a piano contest should not by any means expect candidates to enter the contest of their own accord to a sufficient extent to insure success. Again, he should not expect and should not wait for the friends of the young ladies to nominate them. The best way to secure a list of candidates lies in nominating them yourself. Sit down and make up a list of forty or fifty or perhaps more active and energetic young ladies in all directions around you in the territory from which you desire to draw trade.

"Write each name on a ballot and drop in the ballot box where it will be found and counted by the judges at the first counting of the ballots. The young ladies will then be listed as candidates. Immediately after the first counting of votes write each young lady a short note, copy in our General Instructions, advising her that she had been nominated in the race and that she had 1000 votes to her credit. Request her to call at the store, see the prices and learn full particulars concerning the race.

"Don't make the mistake of going around and asking the candidates if they desire to enter. Many of them would refuse, simply because they would not have the determination necessary. On the other hand, if you take matters into your own hands and nominate these girls many of them will get out and hustle who would otherwise never have taken interest in the contest.

"In selecting these candidates be sure that a considerable number of them come from families who have heretofore been trading with your competitors."

The Lyon-Taylor Company is an unincorporated concern, with headquarters at Iowa

City, Iowa. It is owned by M. F. Price, who is also the owner of the Puritan Manufacturing Company, which is engaged in the same character of business, and he is likewise the owner of several other concerns, all of which have offices in the same building.

The present appellant and others have appeared as parties appellee or appellant in a number of cases before this court involving transactions similar to the one here.

In *Robertson v. Commercial Security Co.*, 152 Ky. 336, 153 S. W. 460, *Pratt v. Rounds*, 160 Ky. 358, 169 S. W. 848, *Harrison v. Percy-Coleman Co.*, 174 Ky. 485, 192 S. W. 513, *Harrison v. Nicholson-Foley Co.*, 179 Ky. 513, 200 S. W. 929, *Gardner v. Commercial Security Co.*, 184 Ky. 164, 211 S. W. 405, the exact nature of the contract involved does not appear, and a right to recover on the notes sued on was sustained, because there was nothing to show the plaintiffs were not bona fide holders. But in the cases where the rules of the contest and the real nature of the contract has been disclosed this court has condemned such schemes in no uncertain terms.

*Harrison v. Ford*, 158 Ky. 467, 165 S. W. 663. The present appellant and the Puritan Manufacturing Company were involved, and the court held that inasmuch as there was sufficient evidence to take the case to the jury upon the issue as to whether Harrison was a holder in due course, a verdict in favor of the defendant would not be disturbed.

*American Mfg. Co. v. Record Press*, 166 Ky. 548, 179 S. W. 456. The court after quoting at length from a book of instructions says:

"From the foregoing it will be observed that the persons who are notified of their nomination are led to believe that they have been nominated and voted for by some of their friends, when, as a matter of fact, they are placed in nomination and given complimentary votes by the person conducting the contest. It further appears from the plan that persons who take no interest and are inactive are placed in the lead by giving them complimentary votes. Not only that, but the plan provides for the elimination of inactive contestants and the transfer of their votes to others, who are led to believe that the votes have been actually cast by their friends. People who are actually in the lead are led to believe that they have fallen behind, when, as a matter of fact, the contestants who have passed them have acquired their new positions, not by bona fide votes, but by complimentary votes entirely. Another part of the scheme is not to record the votes of the leading contestants, but to give them mere receipts, and thus keep in the race the other contestants, who, if they knew the facts, would probably cease their efforts or withdraw from the contest. We regard further discussion of the plan as unnecessary. It speaks for itself. It is founded on deceit and misrepresentations. It is no defense to all this to say that in the end the complimentary votes are equalized and the contestants are put on the same footing. That may be true, but all during

the contest they have served their purpose by deceiving the contestants and the public in general. \* \* \*

[1-3] While, as before stated, the rules or instructions as to the contest are not in evidence, yet from the document entitled *The Way to Get Candidates*, hereinabove referred to, it would seem that the method condemned in the preceding case is not dissimilar to the one here, the principal difference being that in the former the fictitious or fraudulent votes were credited to the several candidates during the progress of the contest, but in the present case the candidates are nominated through phony votes, and thus made to believe they have in good faith been nominated by some of their friends. As stated in the foregoing opinion, it is no defense to say that the complimentary votes are equalized and the contestants put on the same footing.

In our judgment the contest in the present suit is a fraud on the public and violates good morals just as much as the plan referred to in the above case, and one should no more receive the sanction of the court than the other.

In *Commercial Security Co. v. Archer*, 179 Ky. 842, 201 S. W. 479, we had under consideration another of these contracts. The court says that the opinion in the *Record Press Case*, supra, meets with its unqualified approval.

In the last-named case preference is made to certain sections of the Negotiable Instrument Law (Laws 1904, c. 102), and it is said that, defendant having successfully sustained the burden which the law cast upon it and established by his proof that the consideration of the note sued on was vicious and sufficiently so to defeat the collection of the notes in the hands of the original holder, therefore it became necessary, under the rule stated, governing the rights of the parties, for plaintiff by its proof to bring itself within the defense of a bona fide holder in due course as prescribed by section 52 of the Negotiable Instrument Law, and to do this the court says it was incumbent upon plaintiff to prove that the notes were complete and regular upon their face; that it became the holder of them before they became overdue; that it took them in good faith and for value, and that at the time they were negotiated to it plaintiff had no notice of any infirmity in either of the notes, or of any defect in the title of the American Manufacturing Company, plaintiff's assignor.

After referring to the testimony of plaintiff's president the court says:

"In the case before us there is no doubt about the establishment of the fraud, and there is but little less doubt about the failure of the plaintiff to sustain the burden to prove that it was a purchaser in good faith. The fact that plaintiff paid a consideration for the notes is

insufficient of itself to show, under the facts of this record, that it did not have actual knowledge of the fraud entering into the consideration of the notes. 8 Corpus Juris, 506."

[4] That the plaintiff in the instant case has likewise failed to sustain the burden that he was a purchaser in good faith is evident from his testimony. He was at most a very reticent witness, but from his deposition the following facts were developed. He is a public accountant; had audited the accounts of the Lyon-Taylor Company each year for 10 years, and each of these audits required from three weeks to two months of his time; he does similar work for the Puritan Manufacturing Company and the other Price owned companies. He refused to say how much time he gave each year to these several companies; does not know the size nor the personnel of the office force of any of the companies; believes he came into possession of the notes sued on in July, 1914; the exact date is not given. It might be well at this point to call to mind that the first installment was due July 11, 1914. He knew the company had had some litigation over their paper; he made no investigation as to the financial standing of appellee; he lent the company \$2,000 for \$2,245 of their paper, including appellee's notes, but does not know whether he let the company have this money in cash or by check; had previously lent money to the company and to the Puritan Manufacturing Company.

The Iowa attorney representing him was also attorney for the companies. He did not employ said attorney in this case, although said attorney appears for him in the taking of his deposition. It was understood that all legal costs were to be borne by the company. He has sued on other paper of the company. Collections made on the company's paper are deposited to his credit; does not know who gave instructions to said attorney as to the application of credits through collections made on the company's paper. He would get the money lent whether he succeeds or fails in this suit; some of the collateral given him at the time the note sued on was assigned to him has been collected, but none applied on the note in suit. This is the gist of his testimony.

The contest was never put into effect; appellee declined to receive the plane, and returned the silverware and other articles sent him. It seems clear to us that the facts of this case are not essentially different from the cases last above referred to. The plan of contest was conceived in fraud; initialed with an unreal, an inflated vote; the nominations were false, deceit being practiced upon the unsuspecting candidates; it was an imposition upon the public; and the courts should not give their sanction to such deceitful practices.

There is no complaint of the instructions, and, the jury having found for the defendant, their verdict will not be disturbed.

Wherefore the judgment of the lower court is affirmed.

### DANIEL v. SHAVER.

(Court of Appeals of Kentucky. June 10, 1919.)

#### 1. EASEMENTS ⇐7(6)—PRESCRIPTION—RIGHT TO PASSWAY OVER ADJOINING LAND—INTERFERENCE WITH USE.

If plaintiff's predecessor in title held and used passway over defendant's land for as much as the statutory period, his right to passway was fully established, and was not lost by any attempted interruption not amounting to an adverse holding for the statutory period, 15 years.

#### 2. EASEMENTS ⇐36(1)—PASSWAY—PRESUMPTION AND BURDEN OF PROOF.

Where a passway has been used for a long term of years and the statutory period has elapsed, the presumption is that the use was by grant and as a matter of right, and if the owner of the servient estate asserts use was by permission, the burden is upon him to establish the fact.

#### 3. EASEMENTS ⇐36(1)—PASSWAY—PERMISSIVE USE—BURDEN OF PROOF.

Plaintiff having established the use of the passway in question over defendant's land by himself and his predecessor in title for 54 years before the commencement of the present action, the burden is upon defendant, the owner of the servient estate, to show that the use of the passway was by permission, and not by claim of right.

#### 4. EASEMENTS ⇐36(1)—PASSWAY—PERMISSIVE USE — EVIDENCE TO OVERCOME PRESUMPTION.

In action by plaintiff, claiming prescriptive right to a passway over lands of defendant, to require defendant to remove an obstruction which he had placed across passway, evidence for defendant held insufficient to overcome presumption that use was as a matter of right.

#### 5. EASEMENTS ⇐18(3)—PASSWAY OVER ADJOINING LAND—NECESSITY.

The mere fact that there was another passway from the pike to the small tract of land purchased by plaintiff's predecessor, after the establishment and use of the passway in controversy, would not militate against the right of plaintiff's predecessor and his successors in title to claim and use the passway in question.

#### 6. EASEMENTS ⇐36(3)—PASSWAY OVER ADJOINING LAND—RIGHT—EVIDENCE.

In action by plaintiff, claiming prescriptive right to passway over lands of defendant, to require defendant to remove an obstruction which he had placed across passway, chancellor's finding that the use of the passway by plaintiff and his predecessors in title was as a matter of right and not by permission held not against the weight of the evidence.

Appeal from Circuit Court, Campbell County.

Action by S. F. Shaver against Eugene Daniel. Judgment for plaintiff, and defendant appeals. Affirmed.

C. D. Ihrig, of Falmouth, for appellant.  
W. M. Rardin, of Butler, for appellee.

SAMPSON, J. Claiming a prescriptive right to a passway over the lands of appellant, Eugene Daniel, S. P. Shaver instituted this action for a mandatory injunction against Daniel to require him to remove an obstruction which he placed across the passway in question, and to recover \$250 damages. Daniel owns a farm lying on both sides of the turnpike. Adjoining this farm Shaver owns two adjoining tracts, which together contain about 30 acres, but Shaver's tract lies away from any road or passway except the one in controversy. A part of Daniel's land lies between Shaver's land and the pike. All this land was formerly owned by Thomas Daniel, but he divided it and sold it off in small tracts, and, after passing through different hands, Shaver became the owner of the two small tracts known as the Ackerman land, and Eugene Daniel, a grandson of Thomas Daniel, owns the old Daniel homestead, and occupies the same house in which his grandfather lived.

The passway in question is about 264 feet long, and extends from Shaver's line over the land of Daniel to the pike. It was first established about 1861 or 1862, when Ackerman purchased the lands from old man Thomas Daniel. Gates were maintained at each end of the passway; one at the pike and one at the Ackerman line. There was no fencing on either side of the passway. Ackerman lived on his land from 1861 up to 1900, and at all times traveled and used the passway in question. The members of his family, his servants and employes made use of the passway at all times at will. According to the testimony of Mrs. Ackerman, now 76 years of age, her husband, who is now dead, made some arrangement with old man Thomas Daniel concerning this passway at the time he entered on and took possession of his home place, or soon thereafter, by which he had the free and uninterrupted use thereof until he moved away in 1900, a period of more than 38 years. True there is some intimation that many years before Ackerman left his place he and Daniel had some controversy about the right of way, and Ackerman paid Daniel \$35 in money, but whether this was paid for a grant of a right of way or in some other respect is not made clear. At any rate Ackerman and his successors in title have claimed and used the passway ever since, without let or hindrance from Daniel. After Ackerman moved away his tenants used the passway as a matter of right, and after the

property was conveyed each succeeding vendee of Ackerman claimed and used the right of way as appurtenant to the farm. Each one testifies that he claimed the use of the passway as a matter of right, and not by permission of Daniel.

[1] On the other hand, Daniel and his witnesses say that the passway was closed up from 1901 to 1902; that no one lived in the Ackerman house, and no one traveled over the passway. They also state that the use of the passway was interrupted at different times while Ackerman lived there, but this evidence is all very indefinite, vague, and uncertain. If, as claimed by Shaver, Ackerman held and used the passway for as much as the statutory period from 1861, when he first entered, his right to the passway by prescription was fully established, and was not lost by any attempted interruption by old man Thomas Daniel, or any of his successors in title, by closing the passway for a few days or for a year or so. Once a passway is acquired by prescription the right continues, though not used, indefinitely, and the prescriptive owner does not lose his right to the passway unless it be adversely held by another for the period prescribed by the statute. Title by prescription is as strong as title by grant or deed; and it is not lost by failure to use or by adverse possession for any term less than the statutory period, 15 years. In 9 R. C. L. 812, it is said that an easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais, without deed or other writing. The same writer says it is a well-established rule that if, during the period required to create a prescriptive right, the easement is in the open, visible, notorious, and hostile possession of the owner of the servient tenement, it will be extinguished even when resting in grant. Indeed, in some courts the rule is that an easement acquired by grant is one that can be lost only by such adverse possession. Conformably to the rule generally, the adverse possession, in order to be effective must be open, unequivocal, continued, and equivalent to an ouster of the dominant owner, and incompatible with the possession and use of the easement by him. The inclosure of the way by the owner of the servient tenement does not constitute an adverse possession unless it is inconsistent with the right which is sought to be extinguished. In general the elements essential to adverse possession sufficient to extinguish an easement are very similar to those involved in an acquisition of an easement by prescription. In the case of *Hook v. Joice*, 94 Ky. 450, 22 S. W. 651, 15 Ky. Law Rep. 337, 21 L. R. A. 96, we held that an easement may be acquired and perfected by prescription so as to pass by descent to heirs at law, and, whether acquired

by deed or by possession, may be lost by entry and continuous adverse possession for the statutory period of 15 years. See, also, 14 Cyc. 1194. The same rule is recognized and reasserted in the case of *Clay v. Kennedy*, 72 S. W. 815, 24 Ky. Law Rep. 2034, where we held that a prescriptive right once acquired "can only be defeated by such adverse possession as would defeat a right of entry on real estate."

[2] The rule is that where a passway has been used for a long term of years and the statutory period has elapsed, the presumption is that the use was by grant and as a matter of right, and hostile to the owner of the servient estate; and, if the owner of the servient estate asserts that the use was by permission, the burden is upon him to establish this fact. In the case of *Lyles v. Graves*, 147 Ky. 809, 145 S. W. 763, in considering a question very similar to the one here, we said:

"This court is committed to the doctrine that, where the use of a passway has extended over a long period of years, very slight evidence will be sufficient to show that it was enjoyed under a claim of right; and, when a proprietor undertakes to close a passway the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment for more than 15 years was not exercised under a claim of right."

To the same effect is *Smith v. Pennington*, 122 Ky. 353, 91 S. W. 730, 28 Ky. Law Rep. 1282, 18 L. R. A. (N. S.) 149; *Anderson v. Southworth*, 76 S. W. 391, 25 Ky. Law Rep. 776; *Rogers v. Flick*, 144 Ky. 844, 139 S. W. 1098; *Wilkins v. Barnes*, 79 Ky. 223; *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. 638, 10 Ky. Law Rep. 760; *Bowen v. Cooper*, 66 S. W. 601, 23 Ky. Law Rep. 2065; *Hampton v. Fuson*, 165 Ky. 182, 176 S. W. 972.

[3, 4] Applying this rule to the facts before us, Shaver having established the use of the passway by himself and his predecessors in title for 54 years before the commencement of this action, the burden was upon Daniel, the owner of the servient estate, to show that the use of the passway was by permission, and not by claim of right on the part of Ackerman and his grantees. While there is some evidence for Daniel tending to show that the use was permissive, it was not sufficient to overcome the presumption in favor of Shaver and his predecessors in title that the use was as matter of right. Indeed, we think the preponderance of the evidence upon the whole case is to the effect that Ackerman claimed and used the passway as a right appurtenant to his lands.

[5] The mere fact that there was another passway from the pike to the small tract of land purchased by Ackerman from old man

Thomas Daniel, after the establishment and use of the passway in controversy, did not militate against the right of Ackerman and his successors in title to claim and use the passway from his house to the pike. From the evidence in this case we learn that the house and passway in controversy are on an elevation, while the second passway spoken of is in a valley or at the foot of a slope. This second passway was granted by Daniel in connection with a second purchase of land by Ackerman, and long after Ackerman began claiming and using the passway in front of his house.

[6] The chancellor having found the fact that the use of the passway by Shaver and his predecessors in title was as a matter of right and not by permission, and upon this finding, adjudged appellee Shaver entitled to the use of the passway, and granted a perpetual injunction restraining Daniel from obstructing the passway and awarded Shaver nominal damages, we would not be justified in reversing the judgment, unless the finding of fact by the chancellor was against the weight of the evidence, which does not appear to be true here. *Thomas v. Vallaingham*, 181 Ky. 649, 205 S. W. 686; *Matney et al. v. Edmonds*, 179 Ky. 243, 200 S. W. 365; *Bond v. Bond's Adm'r*, 150 Ky. 389, 150 S. W. 363; *Wathen et al. v. Wathen*, 149 Ky. 504, 149 S. W. 902; *Byassee v. Evans*, 143 Ky. 415, 136 S. W. 857; *Kirkpatrick's Ex'r v. Rehkopf*, 144 Ky. 134, 137 S. W. 862.

Judgment affirmed.

## TERHUNE v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 10, 1919.)

### 1. RAILROADS $\S$ 485(7)—SETTING FIRES—INSTRUCTIONS.

In action against railroads for setting fire to plaintiff's house, instructions correctly submitting phase concerning liability for failure to equip locomotives with proper spark arresters held insufficient, as failing to predicate liability of roads on failure to keep right of way free from grass, weeds, etc., as required by statute.

### 2. RAILROADS $\S$ 456—SETTING FIRES.

A railroad is liable for burning a house by fire communicated to weeds, high grass, etc., on its right of way by an otherwise harmless spark emitted by a locomotive through a proper spark arrester; the statute requiring that railroads' rights of way be kept free from combustible material.

### 3. APPEAL AND ERROR $\S$ 1001(1)—REVIEW—VERDICT—CONCLUSIVENESS OF VERDICT.

The verdict of a jury based on evidence is conclusive on the facts.

**Appeal from Circuit Court, Shelby County.**

Action by Carl Terhune against the Louisville & Nashville Railroad Company and another. From a judgment for defendants, plaintiff appeals. Reversed.

Ralph Gilbert and Barrickman & Kaltenbacher, all of Shelbyville, for appellant.

Willis, Todd & Bond, of Shelbyville, for appellees.

SAMPSON, J. Terhune's house was destroyed by fire about 2 o'clock on the night of November 7, 1915, and this action was instituted by him against the Louisville & Nashville Railroad Company and the Chesapeake & Ohio Railroad Company, to recover \$500 for the destruction of the building, \$640 for destruction of the household goods and furniture in the house, and \$900 for the destruction of a threshing machine and other farming implements stored in the building, upon the grounds that the fire was started by the railroad companies in one of three ways: (1) Operating their engines without equipping them with spark arresters, as provided by statute; (2) in otherwise negligently operating and managing their engines; (3) negligently allowing combustible material to accumulate and be upon the right of way. The defendants filed separate answers, traversing the allegations of the petition. A trial before a jury resulted in a verdict in favor of the defendants railroad companies, and Terhune prosecutes this appeal.

He filed motion and grounds for a new trial, in which he set forth the following reasons why his motion and grounds should prevail: (1) Because the court erred in giving instructions Nos. 1, 2, and 3, and to the giving of each the plaintiff excepts at the time, and still excepts. (2) Because the court erred in refusing to give instructions Nos. 4 and 5 offered by plaintiff, to which ruling of the court plaintiff objected and excepted. (3) Because the verdict is not sustained by sufficient evidence. We will consider these objections in the order named.

[1, 2] 1. Instruction No. 1 directed the jury to find for the plaintiff, Terhune, if his house was ignited by sparks from the engines, if the said engines were not at the time equipped "with the best screens or spark arresters known to science, in practical use, for preventing the escape of sparks," and same were not kept in perfect order. This instruction properly presented one phase of the case, as we understand the facts; for, if the appellant's house was set on fire by sparks emitted from the smokestack of an engine of the railroad companies which was not properly equipped with screens or spark arresters, such as prescribed by statute, then the company was liable to Terhune for the loss of his property by fire. But this instruction did not cover the whole law of the case,

according to plaintiff's version of the facts. Instruction No. 2 covers another phase of the case. It directed the jury in substance to return a verdict for plaintiff, Terhune, although sufficient spark arresters were attached and properly adjusted to the engines, if the jury believed from the evidence that the agents and employes of the railroad companies "so negligently operated or managed said engines as to cause sparks to be emitted from same," which ignited the house of plaintiff. Instructions Nos. 1 and 2, considered together, failed to present the whole law of the case applicable to the facts, and for a better understanding of the reasons why the court should have given an additional instruction presenting another theory of plaintiff's case we will briefly state the facts:

Terhune's house stood within about 40 to 50 feet of the railroad track. It was a new house, built of oak lumber, but not painted. The railroad tracks ran back of the house, and there was more or less combustible matter, according to the evidence for plaintiff, allowed to accumulate on the right of way just back of the premises of Terhune. In addition to this, there was a pile of slabs or old lumber lying near the right of way, and between it and the house of Terhune. There was also a fence between the right of way and Terhune's lot. The weather was extremely dry, and the grass and vegetation was seared and inflammable. On the night of the fire an engine and train drew up alongside of Terhune's property and was omitting large live sparks and cinders about 25 minutes before 1 o'clock. The fire and tinder on the right of way next to the Terhune house burned before or during the fire, and it is argued by appellant that this combustible material first took fire from the sparks from the engines and burned over onto Terhune's lot, into the slab pile and to the house, causing its ignition and destruction.

There is a sharp conflict in the evidence as to whether the whole or only a part of the surface of the right of way next to Terhune was burned over, and, if burned over, whether before the fire was discovered in the house or afterwards, and as a result of the heat and fire from the house. The grass and inflammable material on the right of way was burned away in part, but just how much we are unable to tell, because there is no map in the record indicating the burned area; but the conflict in the evidence is largely confined to the time that this material was burned from the right of way, whether before the fire started in the house or afterwards. The appellant, Terhune, contends that the burning of the grass from the right of way occurred before and during the burning of the house, and that the ignition of the grass on the right of way was the direct cause of the destruction of his property, while the railroad companies contend that the fire



which destroyed the house originated inside of the house, and that the grass was not burned from the right of way until after the house was on fire, and that the fire from the house spread to the grass and slab pile.

2. As there is admitted to have been combustible material on the right of way of the railroad company adjacent to the property destroyed, and as there was some evidence tending to show that the fire started in this inflammable material, and later reached the house, the trial court should have submitted that phase of the case to the jury by proper instructions, as it was sufficiently alleged in the petition. As said in the case of *Ohio & Kentucky Railroad Co. v. Whitt*, 180 Ky. 421, 202 S. W. 900:

"In allowing filth to accumulate upon the right of way, the railroad company was negligent; it violated the statute, and while it would not ordinarily be liable for damage resulting from sparks emitted from its engine, properly equipped with spark arresters, and operated with reasonable care, it is liable for resulting damage to adjacent property arising from an otherwise harmless spark emitted from its smokestack through a properly adjusted and sufficient spark arrester from a train under proper control, if the spark fell upon inflammable filth and combustible matter negligently allowed to accumulate and be upon its right of way."

Although the jury may have believed from the evidence that the spark arresters were in all respects sufficient and were properly adjusted on the smokestack of the engine, and that the train was otherwise operated with reasonable care, yet if the right of way "was not clear and free from weeds, high grass, and decayed timber, which, from their nature and condition, are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property," and an otherwise harmless spark from the engine fell upon such combustible matter, ignited it, and caused the conflagration, the railroad companies were responsible to Terhune for the loss of his house and personal property. This theory of the case, however, was not presented by the court to the jury in any of the instructions given, but it was contained in instruction No. 4, offered by appellant and rejected by the court; and this instruction, or one more concisely drafted, presenting this theory of the case, should have been given.

There is some objection to instruction No. 3, the measure of damages; but we are of opinion that this instruction fairly presents the measure of compensation to which Terhune was entitled, if any.

[3] 3. The objection that the verdict is not sustained by the evidence could not avail; but, inasmuch as the case was not submitted to the jury by proper instructions, a new trial must be had. We are strongly inclined

to the opinion that the weight of the evidence supports the verdict. However this may be, upon another trial, when the facts are properly submitted to the jury, it will weigh the evidence, and its verdict will be conclusive on the facts. Upon a retrial of the case the court will instruct the jury as indicated herein.

Judgment reversed.

### KLOTZ v. COOK et al.

(Court of Appeals of Kentucky. June 18, 1919.)

#### 1. CRIMINAL LAW §112(9) — VENUE — RECEIVING STOLEN GOODS.

Receiving stolen goods is a distinct offense from larceny of the same goods, and the circuit court of the county where the goods are received has jurisdiction to try the offense; the receiving of the goods constituting the crime.

#### 2. RECEIVING STOLEN GOODS §8 — GIST OF OFFENSE — KNOWLEDGE.

Receiving stolen property knowing it to be stolen is itself a complete offense; the gist of the offense consisting of the guilty knowledge of the property having been stolen.

#### 3. ARREST §70 — NECESSITY FOR TAKING PRISONER BEFORE MAGISTRATE.

One arrested without a warrant by an officer who received a telegram from another state, having consented to accompany the officer of the other state, cannot complain that the officer who arrested her did not take her before a magistrate as provided in Cr. Code Prac. § 48.

#### 4. FALSE IMPRISONMENT §39 — ARREST WITHOUT WARRANT — REASONABLE CAUSE — QUESTION FOR JURY.

Whether defendant, in action for false imprisonment, who arrested plaintiff without a warrant on receiving a telegram from another state charging plaintiff with the crime of receiving stolen goods, had reasonable grounds to believe the plaintiff had committed a felony, held a question for the jury.

#### 5. ARREST §63(4) — NECESSITY FOR WARRANT.

In view of Cr. Code Prac. § 36, peace officers may arrest any person who they upon reasonable ground believe has committed a felony, although it afterwards appears that no felony was actually perpetrated.

Appeal from Circuit Court, Campbell County.

Action by Hesper Klotz against Louis Cook and the Fidelity & Deposit Company of Maryland. Judgment for defendants, and plaintiff appeals. Affirmed.

Horace W. Root, of Newport, and B. F. Graziani, of Covington, for appellant.

L. J. Crawford, of Newport, for appellees.

QUIN, J. Ohas. McMahon, an employé of a department store in Toledo, Ohio, stole several thousand dollars worth of merchandise from his employer, part of which, consisting of various articles of personal apparel, he sent to the appellant in Kentucky. The itemized list of these covers two typewritten pages. Having discovered some of the articles stolen by McMahon had been sent to appellant, the chief of police of Toledo sent the following telegram to the chief of police at Bellevue, Ky.:

"We hold warrant for Mrs. Hesper Klotz on charge of receiving stolen goods; arrest and wire; hold all goods in house; if arrested, officer will arrive with search warrant."

Appellant having moved to Ft. Thomas, this telegram was sent to the appellee, who was marshal of the latter town. After first advising with the city attorney, appellee went to appellant's residence, explained the purpose of his call, and told her the substance of the telegram. He then took her in his machine to his residence over the jail, introduced her to his family, and at appellant's request got in telephonic communication with her father, a railroad detective at Toledo. Having been advised of McMahon's arrest, appellant agreed to go to Toledo the next day. She roomed with appellee's daughter that night, had breakfast with the family next morning, and upon the arrival of an officer from Toledo appellant, appellee, and said officer went to appellant's residence, where she showed them the various articles she had received from McMahon, giving them the address of a dressmaker who was making some dresses for her out of the silk goods she had received, and at her suggestion these goods were shipped in her trunk to Toledo. She went with the Ohio officer that night to Cincinnati, and, transportation having been furnished her, she proceeded to Toledo, conferred with the prosecuting attorney, and testified before the grand jury, and on her testimony McMahon was indicted on several counts.

After spending several days with her father in Toledo she returned to Kentucky and instituted this suit against appellee for damages because of her alleged false arrest and imprisonment. From a judgment adverse to her contention she has appealed.

The refusal to give tendered instructions and the admission of irrelevant and incompetent evidence are the grounds relied upon for a reversal.

[1] It is appellant's theory there should have been a directed verdict in her behalf. It is claimed the offense was committed in Ohio, and not in Kentucky, and, furthermore, that the arrest having been made without a warrant, it was appellee's duty, under section 46 of the Criminal Code, to forthwith carry appellant before the most convenient

magistrate in the county for examination. We have written a number of times that, where property is stolen in one state and carried by the thief into another state, it is a fresh asportation in the state to which it has been carried, and the offender may be indicted and punished there. 1 Bishop's Crim. Law, §§ 140, 141; Ferrill et al. v. Commonwealth, 1 Duv. 154; Tramwill v. Commonwealth, 148 Ky. 624, 147 S. W. 36, 42 L. R. A. (N. S.) 207. In the latter case it was held that, where a horse stolen in Tennessee was brought to Hopkinsville, in this state, there was a fresh asportation for which the defendant could be indicted and punished in Kentucky. To the same effect is Hobbs v. Commonwealth, 156 Ky. 847, 162 S. W. 104. See 16 C. J. Criminal Law, §§ 211, 214, and 186.

[2] Receiving stolen goods is a distinct offense from larceny of the same goods, and the circuit court of the county where the goods are received has jurisdiction to try the offense. The receiving of the goods constitutes the crime. Rose's Ky. Crim. Law & Procedure, § 441.

[3] Receiving stolen property, knowing it to be stolen, is itself a complete offense. The gist of the offense consists of the guilty knowledge of the property having been stolen. Allison v. Commonwealth, 83 Ky. 254.

[4] Appellant having consented to accompany the Ohio officer to Toledo, appellee was relieved of the necessity of taking her before a magistrate as provided in section 46 of the Crim. Code.

The offense of receiving stolen goods having been committed in Kentucky, and appellant having waived the requirements of section 46, supra, the lower court did not err in refusing to give the tendered instructions.

[5] Section 36 of the Criminal Code provides that a peace officer may make an arrest without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony.

The appellee did not have a warrant for appellant's arrest. His authority was the telegram hereinabove referred to, and the question whether this furnished him reasonable grounds to believe the appellant had committed a felony was a question for the jury. It was properly submitted to the jury, and by their verdict they found for appellee. See Miles et al. v. Brown et al., 143 Ky. 537, 136 S. W. 1001.

Peace officers may arrest any person whom they, upon reasonable grounds, believe has committed a felony, although it afterwards appears that no felony was actually perpetrated. It is authorized by the section of the Code above referred to. It is so stated in the text-books and upheld in many decisions of this and other courts. 2 R. C. L. 447; 5 C. J. 399. See note to Leger v. War-

ren, 51 L. R. A. p. 203; *Grau v. Forge*, 183 Ky. 521, 209 S. W. 369.

The court instructed the jury as follows:

"(1) If you shall believe from the evidence in this case that at the time complained of by plaintiff the defendant Cook wrongfully or without having any reasonable grounds to believe plaintiff had committed a felony, to wit, receiving stolen goods, committed in Kentucky arrested plaintiff and kept her in his custody and deprived her of her liberty for any time, then the law is for the plaintiff, and you will find for her such sum in damages as you may believe from the evidence will fairly compensate her for being deprived of her liberty, or for any physical and mental suffering or for all of them, which you may believe from the evidence was the direct or proximate result of said deprivation of liberty, not exceeding \$10,000, the amount claimed. But, unless you shall so believe from the evidence, you will find for defendants."

This is a correct statement of the law. A more favorable instruction appellant could not have asked, and, the jury having returned a verdict in favor of appellee, we find no reason to set aside a judgment entered pursuant thereto.

It is urged the court erred in the admission of incompetent and irrelevant evidence; this point is not well taken; the court having properly ruled in this respect.

For the reasons given, the judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. STAEBLER et al.

(Court of Appeals of Kentucky. June 18, 1919.)

Appeal from Circuit Court, Henry County.

Action by Alex Staebler and another against the Louisville & Nashville Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

W. B. Moody, of New Castle, and Benjamin D. Warfield, of Louisville, for appellant.

J. M. Chilton and Edwards, Ogden & Peak, all of Louisville, for appellees.

QUIN, J. This is a companion case to that of Louisville & Nashville Railroad Co. v. Oscar Scott's Administrator, 184 Ky. 319, 211 S. W. 747.

At the time of his death, December 5, 1916,

Oscar Scott was riding in an automobile truck owned by the appellees in this case. The truck, while being driven by Chas. Staebler, a son of appellees, was struck by an east-bound passenger train of the appellant in the town of Campbellsburg.

Appellees and the administrator of Oscar Scott filed suits against the appellant in the Henry circuit court, and from judgments in favor of both plaintiffs the railroad company appealed.

In the opinion in the Scott Case, *supra*, both the law and facts are elaborately treated. During the trials objections were interposed by appellant's counsel to questions propounded to certain witnesses as to the speed of the train. For example, in the Scott Case the question was asked one of the engineers:

"Mr. Swift, at what speed would you have to operate your train, this train, at this crossing so as to give persons an opportunity going over the crossing and get off of the crossing or out of the way, before your train struck him?"

Commenting on this line of interrogation, this court said:

"There can be no doubt but that these questions and answers were highly prejudicial. We have heretofore in this opinion attempted to define the purpose of the limitations upon the speed of a train at this character of crossing. The requirement as to the speed of a train at such crossings does not go to the extent of having the train under such control 'as that persons could get out of the truck, get off of the track, after it came into view.' To so hold would place an unreasonable restraint upon the speed of trains, and would make railroad companies guarantors and insurers of the safety of everybody who used a grade crossing. This would not only exact too stringent regulations of the operation of trains, but it would destroy rapid transit, which the necessities of commerce and travel demand of railroad companies."

Practically the same questions were asked the witnesses in the instant case. The causes of action grew out of the same accident. The evidence in this case is substantially that given in the Scott Case; the witnesses testifying here having testified in that case.

For reasons given in the foregoing opinion, the judgment in this case is reversed, and upon a retrial the lower court will be guided by that opinion.

SAMPSON, J., dissenting.

**TUTT v. SMITH.**

(Court of Appeals of Kentucky. June 13, 1919.)

**1. APPEAL AND ERROR ¶1009(3)—FINDINGS UPON CONFLICTING TESTIMONY—REVIEW—DOUBT AS TO CORRECTNESS OF JUDGMENT.**

The finding of the chancellor upon conflicting evidence will not be disturbed, where upon consideration of the whole case the mind is left in doubt as to the correctness of the judgment, and the court is not convinced that the chancellor has erred to the prejudice of appellant's substantial rights.

**2. ARBITRATION AND AWARD ¶35—ABSENCE OF ARBITRATOR—EFFECT UPON AWARD.**

Award was not invalidated by the fact that one of the arbitrators was not present all the time, but spent three hours elsewhere, where, upon returning, his colleagues explained to him what had been done in his absence, and he went over their work and approved it.

Appeal from Circuit Court, Wolfe County.

Suit by W. C. Smith, administrator of the estate of S. M. Tutt, deceased, against Laura Tutt, to enforce an award made under an arbitration agreement, and for an attachment. The court sustained exception to so much of the award as adjudged title in a 14-acre tract to the Tutt estate, and in all other respects the award was upheld, and defendant appeals. Affirmed.

G. C. Center, of Still Water, W. L. Kash, of Jackson, and Hazelrigg & Hazelrigg, of Frankfort, for appellant.

A. D. Lykins and G. B. Stamper, both of Campton, S. Monroe Nickell, of Lexington, and G. Allen, of Winchester, for appellee.

QUIN, J. Appellant is the widow of S. M. Tutt, who died intestate in October, 1913. As the result of two previous marriages he had eight children; an only child of the third marriage died in infancy.

Being unable to agree on the appointment of an administrator, after much delay, appellee was finally selected, and, having qualified, entered upon the discharge of his duties. J. H. Stamper, a son-in-law of decedent, appears to have taken an active part in the affairs of the estate. With the exception of the shares of the children of a deceased daughter he purchased the interests of the several children; he also purchased appellant's dower in all the lands owned by her husband.

Appellant was a good business woman, and for a number of years had active charge of the farm on which they resided. She seems at times to have done everything necessary on the place, from looking after her step-children to building fences and hoeing corn. She kept a separate account of her steward-

ship. By gift and purchase she claimed much of the live stock and their progeny, and to the question of the ownership of these, counsel have devoted many pages of testimony. The record is replete with charges and countercharges, criminations and recriminations. It is claimed that fictitious receipts and credits were filed; erroneous charges made; witnesses intimidated; articles hidden from the appraisers; certain personalty unaccounted for; the minutes of arbitrators lent one of the parties never returned. These are some of the accusations to be found in the record.

Through the influence of Stamper, appellant's appointment as administratrix was enjoined. She sued Stamper in the quarterly court on a board bill. She brought two suits against appellee: One to prevent him from selling some bacon, lard, lumber, live stock, etc., which she claimed as her own; the other was a settlement suit in which she sought judgment for \$1,635, due her from the estate on account, also \$349.50, balance due her as exemption under the statute. Later appellee brought suit against appellant for \$1,900, due on account and for a settlement of the estate. Thus it will be seen that the interested parties are rather litigious.

While all four of these cases were pending the parties, appellant, appellee, and Stamper, agreed to arbitrate their differences. Two of the arbitrators were selected by appellant, the third by appellee and Stamper. The arbitrators were in session six days, and, after hearing the evidence and the arguments of counsel, they brought in their award, in which, as between the parties the several suits were ordered dismissed; an adjustment of costs was made; appellant was given the food stuffs and live stock mentioned in her first suit; the ownership of a tract of about 14 acres was adjudged to the estate of decedent; appellant was held to be in possession of certain personal property that had not been appraised, and on a settlement of her account with the estate it was found she had received \$220.11 over and above the amount she had expended, and this sum she was ordered to pay to the estate, appellant and Stamper to pay the costs of the arbitration.

May 10, 1915, appellee filed another suit against appellant, in which the agreement to arbitrate is set out, together with the award, and it is alleged that appellant refused to comply with its terms, and an attachment was asked against appellant's property.

Thereafter appellant filed 11 exceptions to the award. Various pleadings were filed in the several actions. Prior to the arbitration agreement the consolidated cases on appellant's motion were referred to a master to hear proof and make due report to the court.

In the meantime the papers in the case disappeared, and a special commissioner had to be appointed to supply them.

It does not appear what became of the report of the master if any was filed. On final submission the court sustained exceptions to so much of the award as adjudged title in the 14-acre tract to the Tutt estate; in all other respects the award was upheld. And it is to reverse this judgment that this appeal has been taken.

[1] As will readily be seen, the real issue here is one of fact, the evidence is conflicting, and unless this court is convinced that the chancellor has erred to the prejudice of the substantial rights of appellant, an affirmance must be had. The finding of the chancellor will not be disturbed where, upon a consideration of the whole case, the mind is left in doubt as to the correctness of the judgment. *Herzog et al. v. Gipson et al.*, 170 Ky. 325, 185 S. W. 1119; *Bacon v. Dabney*, 183 Ky. 193, 208 S. W. 807. Thus considered, the record in this case is not such as to authorize us to direct a reversal. The arbitrators, two of whom were appellant's selection, returned a unanimous award, and this was affirmed by the chancellor, except as to the title to a small tract of land. Many of the witnesses were related to both parties, the merits and demerits of the parties and their proof are about equal.

The chancellor and the arbitrators doubtless were personally acquainted with most of those who testified, and when we consider this fact and the nature of the case and the evidence we cannot say they were not justified in reaching the conclusions they did.

[2] It is claimed: (1) Two of the arbitrators were prejudiced against appellant because they awarded the tract of land to the Tutt estate. (2) One had a grievance because appellant refused to join her husband in the execution of a note to him. This was a considerable time prior to the arbitration. (3) Another of the arbitrators was a candidate for circuit clerk, and though Stamper pretended to be for his opponent, he became an ardent supporter of said arbitrator after the award. The proof is that Stamper resided in another county and had no vote in the election for that office. (4) That one of the arbitrators was not present all the time. This is true. He was the county school superintendent, and one day was compelled to spend about three hours with his board, but when he returned his colleagues explained to him what had been done in his absence, he went over their work and approved it.

The award and judgment are said to be erroneous because appellant was not allowed the balance of her statutory exemption, and for the further reason that the account as stated by her was not accepted as correct.

But in each of these respects there is a conflict in the evidence, and full consideration and credit have been given to all her claims, and we are not persuaded appellant has not received every cent to which she is entitled. More weight would be attached to the charge of fraud, passion, prejudice and partiality on the part of two of the arbitrators were it not for the testimony of the third, who was one of those selected by appellant, introduced as her witness, and he testifies that the award was his verdict, and he saw no evidence of unfairness on the part of the other two. He acted as secretary, heard all the testimony, kept the minutes. The latter he lent to appellant at her urgent request, and though he requested her to return the minutes, so borrowed, she has never done so.

We deem further comment unnecessary, being satisfied the judgment of the lower court, measured by the rule stated, should be affirmed; and it is accordingly so ordered.

#### STANDIFER et al. v. COMBS et al.

(Court of Appeals of Kentucky. June 13, 1919.)

#### 1. FRAUDS, STATUTE OF §70—AGREEMENT AS TO BOUNDARY.

An agreement upon a division line which was in effect the mere exchange of lands owned by the different parties was in contravention of the statute of frauds; there being no uncertainty as to where the true boundary line ran nor any bona fide dispute as to its location.

#### 2. ADVERSE POSSESSION §23—SUFFICIENCY OF POSSESSION.

Occasional cutting of timber on land did not show sufficient possession to give title by adverse possession.

Appeal from Circuit Court, Perry County.

Action by Leslie Standifer against Woodson Combs and others. On plaintiff's death before trial, the action was revived in the name of his representatives, Elizabeth Standifer and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

Charlie Wooton, of Hazard, and H. C. Eversole, of Annville, for appellants.

P. T. Wheeler and Miller, Wheeler & Craft, all of Hazard, for appellees.

CLARKE, J. [1] Leslie Standifer filed this action in equity to quiet his title to 150 acres of land lying on First creek in Perry county, Ky., alleging both title to and possession of same as was necessary he should do to maintain the action. Section 11, Kentucky Statutes. After the case had been prepared for trial, but before submission, he

died intestate, and the action was revived in the names of his real representatives; who prosecute this appeal from a judgment dismissing the petition.

The answer of the defendants, in addition to denying both title and possession in plaintiff, alleged title and possession in themselves under and by virtue of a deed dated August 14, 1917, from Elhanon Combs, their father, to whom the land was granted by the commonwealth by patent dated January 11, 1890.

By reply plaintiff admitted Elhanon Combs under his patent had title to the land until May 1, 1894, but alleged that on that date he and Elhanon Combs agreed and in consideration of exchange of lands and other valuable considerations paid by plaintiff to said Elhanon Combs, they made a conditional line between their lands, in which it was agreed that Elhanon Combs took all the land Leslie Standifer owned above and north of "a certain described line," and this plaintiff took the tract of land described herein and some other lands owned by Elhanon Combs; that the division line was marked, and that plaintiff then took possession of all the lands lying below and south of that line, including the land involved here, and has since then been in the continuous, peaceable, notorious, adverse possession of same to the well-defined and marked division line for more than 22 years prior to the institution of this suit; that he has title by adverse possession and defendants' deed from their father is champertous and void.

A traverse of the affirmative allegations of the reply completed the issues.

[1] There is no evidence whatever of an actual adverse possession by plaintiff of any part of the land in controversy for any continuous period, but an attempt was made to prove the establishment of an agreed division line between his and Elhanon Combs' lands, and this proof, it is argued by his counsel, is sufficient to establish both his title to and possession of the land up to the division line, including the land in controversy, under authority of *Turner v. Bowens*, 180 Ky. 755, 203 S. W. 749; *Le Moyne v. Hays*, 145 Ky. 415, 140 S. W. 552; *Rice v. Blair*, 161 Ky. 280, 170 S. W. 657; *Warden v. Addington*, 131 Ky. 296, 115 S. W. 241; and *Garvin v. Threlkeld*, 173 Ky. 262, 190 S. W. 1092.

These cases are but a few of many from this court wherein an agreed division line which had been established, marked, and acquiesced in for a considerable length of time by the parties has been upheld, but, as was pointed out in the recent case of *Bordes v. Leece*, 183 Ky. 146, 208 S. W. 780:

"The result of such an agreement must not be the mere transfer of the lands owned by one party to the other, as this is in contravention of the statute against frauds. The principle upon which such an agreement is upheld and enforced is that the mere establishment of the true dividing line is not a sale or transfer of land by one party to another, and hence not an agreement within the statute of frauds, requiring it to be in writing and signed by the parties to be bound, but is an ascertainment and demarcation of the lands already owned by the parties, and is enforced in the interest of putting an end to controversies."

And as said in *Garvin v. Threlkeld*, supra:

"While the validity of parol agreements to settle disputed boundaries was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute, it is now settled that, where the dividing line is uncertain and there is a bona fide dispute as to its location, and the parties agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such an agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate. The reason for the rule is that the parties do not undertake to acquire and to pass the title to real estate, as must be done by written contract or conveyance. They simply by agreement fix and determine the situation and location of the thing that they already own; the purpose being simply by something agreed on to identify their several holdings and to make certain that which they regarded as uncertain."

[2] Plaintiff utterly failed to bring his claim within the rule of these cases, because not only was the evidence in our judgment insufficient upon the question of any agreement upon a division line and its recognition as such by the parties, but there is no evidence whatever of a bona fide or any kind of a dispute as to the ownership of this land when it is claimed the asserted division line was agreed upon. Plaintiff neither exhibited nor claimed any title or pretense of title to any of the land now seemingly for the first time in dispute, except a denied parol purchase from Elhanon Combs which he did not plead, and which, if made, was clearly within the statute of frauds and unenforceable. The only acts of ownership or possession he attempted to prove was an occasional cutting of timber on the land."

It is therefore apparent plaintiff failed to prove either title to or possession of the land, and the chancellor did not err in dismissing the petition.

Wherefore the judgment is affirmed.

## NICHOLS &amp; SHEPARD CO. v. DUDDERAR.

(Court of Appeals of Kentucky. June 18, 1919.)

1. PRINCIPAL AND AGENT  $\S$ 124(3)—EXECUTING SPECIAL WARRANTY—QUESTION FOR JURY.

In action by seller to recover for purchase price of an engine, in which action the buyer counterclaimed for breach of special warranty executed by the seller's local agent, whether such agent had authority to execute the special warranty *held* for the jury.

2. PRINCIPAL AND AGENT  $\S$ 148(1)—WARRANTIES—RESTRICTIONS.

Provision in the original contract between the seller of an engine and the buyer that, after delivery, all subsequent contracts relating to a warranty therein or the return of machinery must be in writing and be signed by the seller's president, applies only where there has been a delivery under the original contract, and not where the original contract was repudiated by the buyer before acceptance.

3. SALES  $\S$ 429—WARRANTY—RETURN OF ARTICLE SOLD.

There being no provision in special warranty of boiler making it imperative upon buyer to return it in case of breach of the warranty, he could either return it or retain it and recoup his damages for breach of the warranty in action by seller for the purchase price.

Appeal from Circuit Court, Garrard County.

Action by the Nichols & Shepard Company against David Dudderar, in which defendant counterclaimed. From a judgment for defendant on his counterclaim, plaintiff appeals. Affirmed.

Bagby & Huguey and O. C. Bagby, all of Danville, and G. Clay Walker, of Lancaster, for appellant.

J. E. Robinson and L. L. Walker, both of Lancaster, for appellee.

CLARKE, J. Appellant instituted this action to recover of appellee \$1,100, the aggregate of four notes executed by him as deferred payments on a rebuilt traction engine purchased of appellant. As a counterclaim the defendant asserted damages in the sum of \$1,000 for breach of the following special warranty:

"If the boiler on the 20 horse power double cylinder traction engine bought by David Dudderar from Nichols & Shepard Company is defective, the Nichols & Shepard Company agrees to furnish him a boiler without any defect.

"Nichols & Shepard Company,

"By E. B. Ray.

"This June 18, 1914."

In its reply the plaintiff denied the authority of Ray to execute this warranty, set up the original contract executed by the par-

ties on April 16, 1914, which provided that a failure to return defective parts within a specified time was a waiver of all warranties therein, and alleged a failure to return the boiler and also the execution of a "satisfaction slip" as estoppels of the claimed breach of warranty.

In response to this reply the defendant admitted failure to return the engine, and alleged that the "satisfaction slip" was procured by fraud, which fraud was denied by the plaintiff in an appropriate pleading. The trial resulted in a judgment and verdict in favor of the defendant on his counterclaim for \$600, from which the plaintiff is appealing.

Although numerous grounds were set up in the motion for a new trial, the only error relied upon for a reversal is the refusal of the court to direct a verdict in favor of plaintiff on the defendant's counterclaim. This failure it is insisted was error for two reasons: First, because Ray was without authority to execute the special warranty dated June 18, 1914; and, second, the defendant's failure to return or tender back the engine, or the alleged defective boiler, was a waiver of all warranties, both those contained in the original contract and in the special warranty of June 18, 1914, if the latter should be held binding on the company.

1. The original contract between the parties executed on April 16, 1914, obligated the plaintiff to deliver and the defendant to accept a described rebuilt traction engine at Lancaster, Ky., on or about June 1, 1914. When the engine arrived at Lancaster on June 17, 1914, the defendant, after an examination by himself and others whom he procured to make an examination thereof, declined to accept it upon the ground the boiler was not as represented, and gave notice thereof to the plaintiff by telegram to its home office at Battle Creek, Mich., and by telephone and letter to its district office, at Nashville, Tenn. These notices were sent by him on the morning of June 17th. Early the next morning, June 18th, Mr. Ray, who lived at Lebanon, Ky., and who was the sales agent of the defendant under its district manager located at Nashville, Tenn., with whom the defendant had made the contract for the purchase of this engine, arrived in Lancaster, and to him the defendant also gave notice that the boiler on the engine was defective and that he would not receive the engine. Ray tried to induce the defendant to accept the engine, assuring him the boiler was not defective, and that if it was the warranties in the original contract afforded him full protection. The defendant, however, still refused to accept the engine under the warranties of the original contract and until he was given by Ray the

special warranty with reference to the boiler. This is admitted by Ray, but he denies that he had authority to execute or deliver the special warranty or to alter in any way the original contract between the parties. The defendant, however, testified that when Ray came to him the next day, after he had notified the company both at its home office and district office that he would not accept the engine, Ray told him that he had come in response to directions from Mr. Peyton, who it is admitted is the company's district manager in charge of the Nashville office, for the purpose of adjusting the trouble with defendant. Upon this testimony the court submitted to the jury, by an instruction which is not criticized, the question whether or not Ray had authority to execute the special warranty, which was the inducement upon which defendant accepted the engine and executed his notes therefor.

[1] That the evidence was sufficient to raise an issue as to whether or not Ray had authority to execute the special warranty does not seem to us open to doubt. Ray was an agent of the company, with authority to make sales for it. The defendant had refused to accept the engine, and after notice of that fact Ray appeared upon the scene and, acting for the company, completed the sale. In doing so he was certainly acting within the apparent scope of his authority. Moreover, the company accepted the result of the work he performed for it, and in this action is attempting to enforce against defendants the notes Ray procured for it by executing the special warranty, without which there would have been no notes executed by the defendant.

[2] The original contract notified the defendant that "after the machinery mentioned herein is delivered to the purchaser all subsequent contracts relating thereto or in any wise affecting this warranty, or the return of the machinery thereunder, must be in writing and must, in order to bind the vendor, be signed by its president," and that "no representations or guaranties have been made by the salesman of Nichols & Shepard Company which are not herein expressed"; but these provisions plainly apply only where there has been a delivery under the original contract, and have no reference whatever to such a state of case as we have here, where the original contract was repudiated by the purchaser before acceptance.

We had a very similar question before us, involving the same kind of a contract and this plaintiff, in *Nichols & Shepard Co. v. Caldwell*, 80 S. W. 1099, 26 Ky. Law Rep. 136; the only difference being that in that case the authority of the agent was admitted and the supplemental contract was denied, while here the contract is admitted, but the authority of the agent denied. In that case we upheld the modification of the original

contract, although the new agreement was not in writing and signed by the company's president, because the contract was completed and the notes of the purchaser procured as the result of the modification made by an agent acting within the apparent scope of his authority. Whether or not Ray had the authority to make the special warranty before delivery was a fact about which the evidence was conflicting, and therefore a question for the jury.

2. If Ray had the authority to make this special warranty, there can be no doubt that this warranty superseded the conditional warranty in the original contract, so far at least as the boiler is concerned. The special warranty is by its terms unconditional, and obligated the plaintiff to replace the boiler if it was defective, and was made to the defendant with knowledge that he at the time he accepted the engine, claimed it was defective, and not only was the warranty given with the knowledge upon the part of the plaintiff that the defendant claimed the boiler was defective, and with knowledge of the particular respects in which the defendant then and now claims that it was and is defective, but when the first of defendant's notes became due, and upon receiving notice of that fact, he wrote the company the following letter:

"Lancaster, Ky., Oct. 9, 1914.

"Nichols & Shepard Co., Nashville, Tenn.—  
Dear Sirs: In regard to the boiler I bought from you, was leaking when it came and under our contract it was to be O. K. I am ready to pay you when you make this boiler right. Please send some one to adjust this matter. I am ready to pay when made satisfactory."  
"Dave Dudderar."

So the company not only knew at the time the defendant accepted the engine he was claiming that the boiler was defective, and that he accepted it only upon agreement that, if defective, it would be replaced by one that was not defective, but it was also informed by the defendant, immediately after the first note became due, that the defendant still claimed that the boiler was defective, and refused to pay therefor until it was made satisfactory, and it was not misled in any way by either act or deed of the defendant as to the condition of the boiler, unless by the execution of the "satisfaction slip," and there was clearly proof enough as to whether or not that was procured by fraud to carry that question to the jury, since even Mr. Ray, while denying the defendant's testimony that this paper was not read by or to him, admits that the defendant refused to sign it until Mr. Ray had assured him it did not waive his warranty.

[3] Therefore the only question remaining is whether or not, as a matter of law, the defendant waived or is estopped to claim the benefit of the special warranty by failure to return or tender back the boiler.



The rule was thus stated in *Hauss v. Surran*, 168 Ky. 686, 182 S. W. 927, L. R. A. 1916D, 997:

"But where the sale is executed, and the provision of the contract is not imperative, but merely permits the buyer to return the property, he may, at his election, resort to that remedy, or he may retain the article and recoup his damages for the breach of the warranty in any action by the vendor for the price."

See, also, *Cook v. Gray*, 2 Bush, 121; *Harrigan & White v. Advance Threshing Machine Co.*, 81 S. W. 261; *Ruby Carriage Co. v. Kremer*, 81 S. W. 251; *Glover Machine Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516.

There was no provision in this special warranty, which alone controls with reference to the boiler, making it imperative upon the defendant to return the property, or even suggesting the necessity therefor, and he therefore, under the above authorities, had the right to retain the engine and recoup his damages for the breach of the warranty in this action by the plaintiff for the purchase price. It is therefore apparent that the court did not err in refusing to direct a verdict for the plaintiff upon defendant's counterclaim, as the evidence was ample to warrant a submission to the jury as to whether or not Ray had the authority to execute the special warranty upon which the defendant relied, and the failure of the defendant to return the defective boiler did not preclude his right to recoup his damages for the breach of the warranty.

Wherefore the judgment is affirmed.

# GREENE v. E. H. TAYLOR, JR., & SONS.

(Court of Appeals of Kentucky. June 17, 1919.)

## 1. TAXATION §117—CORPORATIONS—FRANCHISE TAX—STATUTES APPLICABLE.

Ky. St. § 4189a, requiring payment of franchise or license tax by corporations, but exempting corporations "which under existing laws are liable to pay a franchise or license tax," and section 4214a, imposing additional license tax on manufacturers of double stamp spirits, having become laws on the same day, plaintiff, a manufacturer of double stamp spirits, was bound for the payment of license tax provided by the latter section at the time when the former section became a law, and not liable for license tax provided by the former.

## 2. STATUTES §256 — TIME §11 — DISREGARDING FRACTIONS OF DAYS.

Generally the law takes no account of fractions of days, and in the absence of anything to the contrary it can only be concluded that two statutes enacted upon the same day, and becoming effective as laws thereafter on the same day, became effective at the same time.

## 3. STATUTES §225½—ENACTED AT SAME SESSION—CONSTRUING TOGETHER.

Statutes enacted by the Legislature at the same session, upon the same subject, must be construed together for the purpose of ascertaining the intention of the Legislature.

## 4. TAXATION §47(1)—DOUBLE TAXATION.

A court would not be justified in construing a statute so as to impose double taxation, unless the terms of the statutes require it.

## 5. MANDAMUS §118—REFUND OF TAX PAID—PAYMENT UNDER MISTAKE.

Plaintiff, a manufacturer of double stamp spirits, but exempt from license tax provided by Ky. St. §§ 4189a, 4189c, having paid the tax, made without any assessment by the tax commission, under the mistaken belief that it was liable therefor, and having made application for its return within the time provided by law, may maintain mandamus, under Ky. St. § 162, to compel auditor to draw warrant upon the treasurer for amount of tax paid, in view of section 162.

## 6. PAYMENT §82(1) — MONEY PAID UNDER MISTAKE.

Money paid under a mistake of law or fact may be recovered if the money was not due and payable, and in good conscience ought to be returned.

## 7. TAXATION §589—VOLUNTARY PAYMENT—RECOVERY.

The general doctrine which prevails is, that if the taxes were voluntarily paid, they cannot be recovered, although not due and paid under a mistake of law.

## 8. TAXATION §538—PAYMENT MADE "VOLUNTARILY" OR "INVOLUNTARILY."

If the assessments can be collected by distraint, they were involuntarily paid and can be recovered, but if the taxes can only be collected by suit the taxpayer has the opportunity for a day in court, and if instead of resisting the payment he pays it, the payment is voluntary and cannot be recovered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Involuntary; Voluntarily.]

Appeal from Circuit Court, Franklin County.

Suit by E. H. Taylor, Jr., & Sons against Robert L. Greene, Auditor. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Morris, Atty. Gen., and Davis M. Howerton, Asst. Atty. Gen., for appellant.

Hazelrigg & Hazelrigg, of Frankfort, for appellee.

HURT, J. E. H. Taylor, Jr., & Sons is a domestic corporation, and is engaged in the manufacturing of double stamp spirits. Its capital stock consists of \$1,000,000 par value, and divided into shares. For the year 1918 it was required to and did pay into the treasury a license tax, which, together with

the interest and penalties, amounted to the sum of \$670. This license tax is the one provided for by section 4189a, Ky. Stats. Thereafter it made application to the auditor of public accounts for the return to it of the sum paid, which being refused, it instituted a suit against the auditor, to require him, by a writ of mandamus, to draw a warrant upon the treasurer in behalf of the corporation for the sum paid, and this suit resulted in a judgment of the circuit court, granting to it the relief sought, and from this judgment the auditor has appealed. Two questions are presented upon the record for consideration. The one is whether or not any such tax was due from the corporation, and the other is whether such facts are presented as entitle it to have a writ of mandamus against the auditor to require a return to it of the money paid. These will be considered in their order.

[1] (a) The contention upon the part of the auditor is that the corporation is due to pay the taxes collected, under the provisions of section 4189a, Ky. Stats., which is section 1, chapter 7, Session Acts 1917. The section is as follows:

"All corporations having a capital stock divided into shares organized by or under the laws of this or any other state or government, owning property or doing business in this state, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan associations, banks and trust companies and all corporations, which, under existing laws, are liable to pay a franchise or license tax, shall pay to this state, to be credited to the sinking fund, an annual license tax based upon its authorized capital stock, as hereinafter provided."

Section 4189c, Ky. Stats., provides that the license tax required by the preceding section of a corporation shall be 50 cents upon each \$1,000 of its authorized capital stock, or at least upon that part of the stock, which is represented by property owned, and business transacted, in this state. The foregoing statutes, together with their sections and provisions, became a law upon the second day of May, 1917. Upon the same day section 1, chapter 5, of Session Acts 1917, which is section 4214a, Ky. Stats., became a law. These acts were enacted by the General Assembly upon the same day, and therefore became laws and in force upon the same day after the termination of the General Assembly. The last-mentioned statute is as follows:

"Every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits, known as whisky or brandy, or other species of such double stamp spirits in this state, and every owner or proprietor of a bonded warehouse in this state in which such spirits are stored, shall in addition to the taxes now imposed by law pay to the commonwealth of

Kentucky a license tax of two cents on every proof gallon of said distilled spirits which is liable for tax to the federal government as shown by its official records and the amount of tax due the state shall be thereby fixed and measured by the state tax commission."

For the purpose of ascertaining the taxes imposed by the above statute, and collecting them, when due, the manufacturer is required to report to the auditor on the first day of January, May, and September of each year the quantity, in proof gallons, of the spirits on which the federal government tax has been paid, or has become due, or has been transferred under bond, or removed from the warehouse during the preceding four months, and shall, at the same time, pay the tax of 2 cents per gallon to the Treasurer through the auditor. If there is a failure to pay this tax within 15 days after it becomes due, a penalty of 8 per centum of the amount of the tax is imposed, and the auditor is directed to take the necessary proceedings for the collection of the taxes.

The appellee, E. H. Taylor, Jr., and Sons, made the first payment of the 2 cents per gallon taxes on the 25th day of July, 1917, and paid same at the proper periods thereafter. In the month of April, 1918, a deputy state revenue agent demanded of appellee to pay the license tax provided by section 4189a, supra, and which it thereafter paid.

It will be observed that section 4189a, supra, which imposes the license tax of 50 cents upon each \$1,000 of the authorized capital stock of corporations, expressly exempts from the payment of the tax, "all corporations, which, under existing laws, are liable to pay a franchise or license tax." It may be conceded that the statute intended to exempt such corporations only as were liable to pay franchise or license taxes at the time section 4189a, supra, became a law. It and section 4214a, supra, having become laws upon the same day and at the same time, the appellee being a manufacturer of double stamp spirits, necessarily and inevitably was bound for the payment of the tax provided for by section 4214a at the time when section 4189a, supra, became a law.

[2] As a general rule, the law takes no account of fractions of days, and in the absence of anything to show to the contrary it can only be concluded that, the two statutes being enacted upon the same day, and becoming effective as laws thereafter on the same day, they became in force at the same time.

[3] Statutes enacted by the Legislature at the same session, upon the same subject, must be construed together, for the purpose of ascertaining the intention of the Legislature, which, after all, is the law, and the statutes are the expressions of it. The evident purpose of the Legislature, as indicated by the language of the statutes, was to im-

pose, upon all corporations a license tax based upon their authorized capital stock, except such as it exempted from the operation of the statute, and its purpose to exempt those corporations upon which the law at the time imposed a franchise or license tax is just as evident.

[4] Neither could it be concluded that the Legislature intended to impose two license taxes upon such corporations as the appellee, and a court would not be justified in construing a statute so as to impose double taxation, unless the terms of the statute require it. *Merchants' Ice & C. S. Co. v. Commonwealth*, 154 Ky. 453, 157 S. W. 717; *Commonwealth v. Ledman*, 127 Ky. 608, 106 S. W. 247, 82 Ky. Law Rep. 452. While the argument is made that its business is one which the public policy of the times seeks to restrict, there is nothing in section 4189a, supra, which would indicate that there was any corporation which was liable to pay a license or franchise tax, which was intended to be taken out of the exception in the statute. The tax imposed by section 4189a, supra, is simply and purely a license tax. It is neither a tax upon the property of a corporation nor upon the value of it, but is a license required for its right to do business in the state and its amount is in accordance with the volume of its authorized capital stock. *Hillman Land & Iron Co. v. Commonwealth*, 174 Ky. 759, 192 S. W. 880. The tax imposed by section 4214a, supra, is likewise a license tax. It is not a tax upon property, nor its value, but is a tax regulated, as to its amount, by the volume of business done by the corporation for the privilege of engaging in the business of manufacturing double stamp spirits, and is imposed by legislation which is authorized by section 181 of the Constitution. *Raydure v. Board of Supervisors*, 183 Ky. 84, 209 S. W. 19. Under other statutes, such corporations, as appellee, are required to pay an ad valorem tax upon the value of their property, and such tax, it is presumed, is the one referred to in section 4214a, supra, when the 2 cents per gallon tax is imposed in addition to the other taxes then imposed by law. The construction, which is here placed upon the two statutes, 4189a and 4214a, supra, tends to preserve that equality in taxation which the Constitution guarantees, and also enables force and effect to be given to the clauses of the different statutes, and prevents any repugnancy between them. Hence we conclude that appellee was liable for the license tax of 2 cents per gallon upon the spirits produced by it, as provided by section 4214a, supra, and not liable to the license tax provided by section 4189a, supra, and the payment of the last-mentioned tax was a payment of money or taxes into the treasury, when such taxes were not due.

[5] (b) The corporation relies upon section

162, Ky. Stats., as giving it a right to maintain this action to compel the auditor by writ of mandamus to draw his warrant upon the treasurer, in its favor, for the amount of the tax paid when it was not due. The section of the statutes is as follows:

"When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the commonwealth on such land, has been paid, independent of the mistaken payment, and ought to be reimbursed."

The foregoing has been a part of the statutory law of this state, since the year 1854, and has been carried from each revision of the statute laws to the one following. It will be observed that the statute does not, in terms, make anything essential to a right to a return from the treasury of the money paid for the tax, except the bare fact that the tax was paid into the treasury, when it was not, in fact, due, and a further condition is imposed by section 163, Ky. Stats.; that the application to the auditor, for a return of the money must be made within two years from the date of its payment into the treasury. The statute does not expressly provide that a payment of money for a tax, when such tax is not, in fact, due, because of a mistake of law, or fact, or because the payment was involuntary, should constitute grounds upon which the money can be reclaimed, but it seems clear that, although the statute does not, in terms make necessary the existence of a mistake or compulsion to enable the taxpayer to reclaim the money, there must exist, in favor of the claimant, some equitable ground upon which to entitle him to call into his service the powers and processes of the courts. If one, with a knowledge of the fact that he did not owe the tax, should voluntarily pay it into the treasury, upon what could he base a right to ask a court of equity to exercise its powers and processes to compel a return of it to him? As said in *Tyler et al. v. Smith*, 18 B. Mon. 793:

"The doctrine is well settled that where a man demands money of another as his right, and the other, with a full knowledge of all the facts and of his rights, voluntarily pays the money thus demanded, he cannot recover it back." *Bean v. City, etc.*, 57 S. W. 478, 22 Ky. Law Rep. 415; *City of Maysville v. Melton*, 102 Ky. 72, 42 S. W. 754, 19 Ky. Law Rep. 1083.

[6] The language touching a mistaken payment, as used in the last clause of the statute, indicates that in the enactment of the

statute it was intended to be a means of relief when payments were made into the treasury under the mistaken belief that the one paying was liable for the tax. A well-established doctrine in this state, as applying to the transactions of individuals, is that money paid under a mistake of law or fact may be recovered if the money was not due nor payable and in good conscience ought not to be retained. *Ray & Thornton v. Bank, etc.*, 3 B. Mon. 510, 39 Am. Dec. 479; *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407.

[7] However, as regards the payment of taxes, and although it was held by this court in *Bruner v. Town of Stanton*, 102 Ky. 459, 43 S. W. 411, 19 Ky. Law Rep. 1514, *Trustees v. Hite*, 2 Ky. Law Rep. 888, *Fecheimer v. Louisville*, 84 Ky. 306, 2 S. W. 65, 8 Ky. Law Rep. 310, *City of Covington v. Powell*, 2 Metc. 226, *City of Louisville v. Henning & Speed*, 1 Bush, 381, *Harrodsburg v. Renfro*, 58 S. W. 795, 22 Ky. Law Rep. 806, and probably in other cases, that license and other taxes paid to a municipality without compulsion, but under a mistaken belief that the ones paying were liable for the taxes, could and should be recovered, the general doctrine which now prevails, is that taxes, paid to counties, cities, towns, and county officers collecting the state revenues and other collecting officers, if the taxes are voluntarily paid, cannot be recovered, although not due, and paid under a mistake of law. *City of Louisville v. Anderson*, 79 Ky. 334; *L. & N. R. R. Co. v. Hopkins County*, 87 Ky. 605, 9 S. W. 497, 10 Ky. Law Rep. 806; *L. & N. R. R. Co. v. Commonwealth, for the use, etc.*, 89 Ky. 531, 12 S. W. 1064, 11 Ky. Law Rep. 734.

[8] The rule by which is determined whether such payments were made voluntarily or involuntarily is that, if the assessments can be collected by distraint, they are involuntarily paid, and can be recovered from the county, municipality, or taxing district to which paid, if paid under the mistaken belief that they were owing when in fact they were not; but if the taxes can only be collected by a suit, and the taxpayer thus has the opportunity for a day in court, but, instead of resisting the payment, pays it, the payment is voluntary, and the one paying cannot recover it. However, in *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062, 18 Ky. Law Rep. 1008, *Bruner* was required to pay a license tax of \$750 before the council would grant him a license to sell spirits by retail, when the maximum license fee allowed by law was only \$300, and *Bruner* knew this to be a fact, but paid the \$750, as he had already obtained a state license and rented property to do business in at considerable cost, which he must lose or else pay the excessive demand, and it was held that he was entitled to recover back the excess over

\$300 on the ground that the payment was by compulsion and not voluntary.

It is insisted that the rule applying as between individuals and counties, cities, or taxing districts, as held in *Anderson v. Louisville, L. & N. R. Co. v. Hopkins County*, and *L. & N. R. Co. v. Commonwealth*, supra, should be applied to claims for recovery of taxes not due, and paid into the treasury, when claims are made against the auditor under section 162, supra, and thus a recovery of all should be denied, except such as were involuntarily paid in accordance with the rule established by the above-cited cases, although the payment was made under a mistake of law or fact, and under a mistaken belief that the tax was due when in fact it was not. This application of the rule would also deny a recovery of money paid into the treasury for taxes, when no such tax was due, if the payer knew that it was not due, but was made to make the payment involuntary and by compulsion. The application of such a construction of the statute would be contrary to its very terms, which require the auditor to draw his warrant upon the treasurer in favor of one who has paid money into the treasury for taxes, when no such taxes were, in fact, due, and does not limit the right to recover such payments, as were only involuntarily made. Hence it is apparent that it was intended by the statute to apply a different rule to the right to recover money paid into the treasury for taxes when no such taxes were, in fact, due, and when application for the return of such money could be properly made to the auditor under section 162, supra, from the rule which is applied to the recovery of taxes paid to municipalities, counties, and taxing districts generally. It will be observed that the statute has no application to a demand for a return of money improperly paid for taxes when made upon any other authority than the auditor. In *Bank of Commerce v. Stone*, 108 Ky. 427, 56 S. W. 683, 22 Ky. Law Rep. 70, and in *German Security Bank v. Coulter*, 112 Ky. 577, 66 S. W. 425, 23 Ky. Law Rep. 1888, the payments of money into the treasury, sought to be recovered, and which the claimants were held entitled to receive back under section 162, supra, were payments made under a mistake of law, and voluntarily made; the claimants believing that they were liable under the law for the payments of the sums when in fact they were not. The principle was upheld in *Louisville City National Bank v. Coulter*, 112 Ky. 577, 66 S. W. 427, 23 Ky. Law Rep. 1883. It was, however, held in the latter case that, while the difference in the rate of taxation between what was paid and what was due the claimants were entitled to have back, under section 162, supra, the errors made by the board of valuation and

assessment in assessing the property of the claimants could not be reviewed by the auditor, and if taxes were collected which were not due, on account of such erroneous assessments, the auditor could not be required to rectify such errors and to pay back the amount in excess of what was due, as the taxes were voluntarily paid, and to such payments the court applied the rule as established in *Anderson v. Louisville*, 79 Ky. 334, 42 Am. Rep. 220, *supra*, and in other cases cited.

The statute confers a special authority upon the auditor to refund to claimants money paid for taxes into the treasury when no such taxes were due, but the auditor cannot be required, by mandamus, to do a thing unless he has the power and it is his duty to do it; and, where a properly constituted authority, vested with the duty of making assessments for taxes, does so, the auditor cannot be required to review the proceedings of the authority which made the assessment, and determine whether a proper assessment has been made as to the property assessed, and to find whether an assessment is erroneous, and, if so, to pay back to the claimant any money paid by him into the treasury which arose from such erroneous assessment, and therefore was not due, as there are other officers whose duty it is to make the assessments of the property, and it is not the duty of the auditor. Neither has the auditor any authority to review and correct assessments made by properly constituted authorities, and designated by law for that purpose. *Louisville City National Bank v. Coulter*, 112 Ky. 577, 66 S. W. 427, 23 Ky. Law Rep. 1833; *County v. Bosworth*, 160 Ky. 812, 169 S. W. 742; *Louisville Gas Co. v. Bosworth*, 169 Ky. 824, 185 S. W. 125. For the purpose of ascertaining

the taxes due from a corporation under section 4189a, *supra*, it is the duty of the tax commission to furnish a blank to the corporation not later than the 15th of December, and it is then the duty of the corporation to report, among other things, the amount of its capital stock, on or before February 1st following, upon the blank, to the tax commission. The tax commission must then assess the corporation with the tax due, if any, under sections 4189a and 4189c, and certify to the auditor the amount of such tax due from the corporation, and also give the corporation notice of the assessment, and it may then apply seasonably for any correction in the assessment which it desires to have made. Sections 4189c, 4189d (1-3), 4189e. The record in the instant case does not disclose whether any assessment of taxes against the appellee, under the above statutes, was made by the tax commission and certified to the auditor, and inasmuch as the auditor is authorized to demand and collect taxes, whether assessed by the assessing authorities or not, we cannot assume that such assessment was made by the assessing authorities, and the collection was made thereupon. It therefore appears that the collection of the money sued for was made without any assessment having been made by the tax commission, and the tax paid to the treasurer through the auditor. The tax was not due, and wholly without consideration. The petition alleges facts which substantially show that the money was paid for the tax under a mistake of law, and under belief by the corporation that it was liable for the tax, and, having made application for its return within the time allowed by law, it is entitled to have the money returned to it.

The judgment is therefore affirmed.

**JONES v. GILLIAM et al. (No. 8174.)**

(Supreme Court of Texas. June 4, 1919.)

**1. EXECUTORS AND ADMINISTRATORS  $\S$ 514—  
FINAL ACCOUNTING—APPROVAL OF ANNUAL  
EXHIBIT.**

Approval of statutory administrator's annual exhibit does not prevent, on the final settlement, re-examination of the charges made by him.

**2. EXECUTORS AND ADMINISTRATORS  $\S$ 97—  
AUTHORITY OF PROBATE COURT TO SANCTION  
EMPLOYMENT OF BROKER.**

In necessary cases the probate court may, under the statute, sanction an administrator's employment of a broker to make a sale advantageous to the estate, and allow a reasonable broker's commission as a legitimate expense of administration, although the power should be sparingly exercised.

**3. EXECUTORS AND ADMINISTRATORS  $\S$ 97—  
AUTHORITY OF PROBATE COURT TO SANCTION  
EMPLOYMENT OF BROKER.**

The probate court, not the administrator, must be the judge as to the necessity of employing a broker to make a sale for the estate, as well as of the amount of the broker's compensation; the administrator being but an agency of the court.

**4. EXECUTORS AND ADMINISTRATORS  $\S$ 97—  
INDEPENDENT EXECUTOR — EMPLOYING  
AGENTS.**

An independent executor has the same authority as the probate court possesses in ordinary administrations to employ agents to sell the lands of the estate and to make the estate liable for reasonable commissions earned under such employment.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Application by Will P. Jones, administrator, for final settlement and discharge, contested by Alma Gilliam and others. The county court's refusal to allow certain items was affirmed by the district court, and, on appeal, by the Court of Civil Appeals (199 S. W. 694), and the administrator brings error. Affirmed.

Fires & Diggs, of Childress, for plaintiff in error.

M. J. Hathaway, of Childress, for defendants in error.

**PHILLIPS, C. J.** The question presented by the case is as to the authority of an ordinary administrator to bind the estate, without any order of the Probate Court, to pay commissions to brokers for the sale of the estate's property.

Here, in the administration of the estate of P. S. and Alma Roberts of which Will P. Jones was the statutory administrator, the court ordered the sale of certain lands. Jones, as administrator, made a contract with Ramsey & Gillespie, real estate brokers, whereby he agreed to pay them a commission of five per cent. of the selling price upon their procuring a purchaser on the terms authorized. In connection with the Vernon Realty Company, Ramsey & Gillespie closed a contract for the sale with Ike M. Smith for the price of \$18,000.00, upon which the five per cent. commission would have been \$950.00. The sale was reported to the court and confirmed. On account of Smith's death, however, the sale was not made. Later, another real estate broker, Owensby, advised Jones that he could effect a sale to W. T. Coble and would do so if he were paid a commission. Jones, in reply, told him of his previous contract with the other brokers, and, in effect, agreed that he should have a commission on the sale if he could adjust the commission with them. Such an adjustment was reached, whereby Owensby was to receive \$100.00, Ramsey & Gillespie, \$375.00 and Vernon Realty Company, \$375.00, a total of \$850.00. The sale to Coble for \$19,000.00 was made. It was confirmed by the court. The commissions in the amounts stated were paid by Jones to the respective brokers. The expenditure was reported by him in his annual exhibit which was approved by the court.

The present contest arises upon the administrator's final account. On its presentation, the heirs of the estate challenged the charges constituted by the commissions, and the right of the administrator to receive for himself five per cent. on these amounts. Their contest was sustained as to the \$750.00 paid Ramsey & Gillespie and Vernon Realty Company and as to the administrator's commission on that disbursement. On the administrator's appeal to the District Court, a like judgment was rendered, which was affirmed by the Court of Civil Appeals.

In the order of the court for the sale of the lands, no authority was given the administrator to employ brokers for the purpose. Nor was the payment of such commissions authorized in the court's action on the report of either sale. The employment of the brokers and the payment of their commissions were solely the acts of the administrator upon his own responsibility.

[1] Since the approval of the administrator's annual exhibit did not prevent on the final settlement re-examination of the charges (Richardson v. Kennedy, 74 Tex. 507, 12 S. W. 219; McShan v. Lewis, 83 Tex. Civ. App. 253, 76 S. W. 616), the establishment of the commissions against the estate depends upon whether, under the circumstances, they are

to be regarded as necessary and reasonable expenses of administration.

[2, 3] In necessary cases, we do not doubt the power of the Probate Court under the statute to sanction an administrator's employment of a broker for the purpose of effecting a sale advantageous to the estate, and therein to allow a reasonable broker's commission as a legitimate expense of administration. While such authority should be sparingly and providently exercised, it cannot be said that under no conditions would the court possess it. In some instances its exercise might be necessary and prove of distinct benefit to the estate. But in all cases the Probate Court must be the judge as to the necessity for the estate's employment of a broker for the purpose, as well as of the amount of his compensation. These are not matters which the administrator may determine for himself. The court administers the estate, not the administrator. The administrator is but an agency of the court through which its powers are exercised.

Here, as already said, there was no authorization by the court for the employment of the brokers. There was accordingly no determination beforehand by the court that the employment was necessary. The administrator, acting independently, contracted for the employment. His action was not conclusive upon the estate. The question as to the necessity for the employment still remained within the province of the court to determine on the final settlement. In reaching the same judgment as the Probate Court, the District Court, on the appeal, found as a fact that the expenditure was unnecessary and that it did not appear but that the administrator could have effected the sale himself. The administrator was allowed, for himself, the statutory commission on the amount realized from the sale. In the state of the record there is no warrant for a revision here of the court's judgment in the matter. It cannot be said as a matter of law that the employment was necessary.

[4] Cases, such as *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268, holding that an independent executor may employ agents to sell the lands of the estate and the estate thereby becomes liable for a reasonable commission earned under such employment, do not control the question here. An independent executor has the same authority in that regard that the Probate Court possesses in ordinary administrations. Here, the Probate Court has, in effect, declined to exercise the authority because of the want of any necessity for its exertion.

The judgments of the District Court and Court of Civil Appeals are affirmed.

# INTERNATIONAL TRAVELERS' ASS'N v. POWELL et al. (No. 3150.)

(Supreme Court of Texas. June 4, 1919.)

## 1. INSURANCE — 618 — MUTUAL BENEFIT INSURANCE — PLACE OF SUIT — PROVISION OF POLICY.

An insurance company cannot enforce a provision of its policy and by-laws prohibiting the maintenance of suits on its policies elsewhere than in the county of its domicile; such contract stipulation being contrary to public policy.

## 2. PLEADING — 104(2) — PLEA OF PRIVILEGE — SUFFICIENCY — NEGATING EXCEPTIONS.

In suit on accident policy, where company's plea of privilege did not negative exceptions contained in subdivisions 24 and 29 of Rev. St. art. 1830, as to venue, it was properly overruled in view of article 1903, as to sufficiency of plea of privilege.

## 3. INSURANCE — 550 — MUTUAL BENEFIT INSURANCE — LIABILITY — WAIVER.

Though by-laws provide that, if a member files claim before his disability ceased, he waives all right to future benefit, insurer cannot reduce its true liability by means of a mere unaccepted offer on the part of insured to receive in satisfaction of his demand less than amount to which he is entitled under Rev. St. art. 4807.

Error to Court of Civil Appeals, Eighth Supreme Judicial District.

Action by E. A. Powell and another against the International Travelers' Association. Judgment for plaintiffs was affirmed on appeal to the Court of Civil Appeals (196 S. W. 957), and defendant brings error. Affirmed.

W. W. Moores, of Stephenville, and Seay & Seay, of Dallas, for plaintiff in error.

R. L. Thompson and E. E. Solomon, of Stephenville, for defendants in error.

GREENWOOD, J. [1] This case involves first whether an insurance company can enforce a provision of its policies and by-laws forbidding the maintenance of suits on its policies elsewhere than in the county of its domicile.

We have this day determined that such a contract stipulation is contrary to public policy, and that notwithstanding the same, plaintiff in error was subject to be sued on one of its policies in any county specified in subdivisions 29 and 24, of article 1830, R. S. *International Travelers' Ass'n v. Branum*, 109 Tex. —, 212 S. W. 630.

[2] The plea of privilege in this case did not negative the exceptions contained in subdivisions 29 and 24 of article 1830, and therefore it was properly overruled. Article 1903, R. S.

[3] The remaining assignments of error complain of the rendition of judgment against

plaintiff in error for the full amount which it promised to pay by the policy sued on, because defendants in error had filed a claim for a lesser amount.

It appears that before the expiration of the full period of disability for which the insured was entitled to indemnity he filed proofs of his claim, notwithstanding one of plaintiff in error's by-laws provided that, if a member filed a claim before his disability ceased, he waived all right to future benefits.

In our opinion the utmost effect which could be given to this by-law would be to protect plaintiff in error from further payment after it had discharged a claim presented to it for an inadequate amount. If plaintiff in error had paid the claim originally presented, it would be necessary for us to determine the validity of the by-law, in view of the provision of article 4807, R. S., that companies, such as plaintiff in error, become liable for the full amount provided by their policies or certificates on the happening of the contingencies insured against.

It is decisive of this case to hold that we would not regard it as either fair or reasonable to construe the by-law here invoked as intended to enable defendant in error to reduce its true liability by means of a mere unaccepted offer on the part of the insured to receive in satisfaction of his demand less than the amount to which he was entitled.

The judgment of the Court of Civil Appeals is correct, and is affirmed.

HAWKINS, J., disqualified and not sitting.

FLATTERY et ux. v. MILLER et al.  
(No. 2784.)

(Supreme Court of Texas. June 11, 1919.)

APPEAL AND ERROR ⇐345(2)—PROCEEDINGS  
—ERROR TO COURT OF CIVIL APPEALS—LIMITATION.

It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by T. F. Flattery and wife against J. W. Miller and others. From an order of the Court of Civil Appeals, reversing judgment for plaintiffs (171 S. W. 253), they bring error. Dismissed for want of jurisdiction, and withdrawn from the Commission of Appeals.

R. L. Whitehead and W. W. Kirkpatrick, both of Houston, and E. B. Pickett, of Liberty, for plaintiffs in error.

G. W. Thorp and Barkley & Green, all of Houston, for defendants in error.

PHILLIPS, C. J. Since our reference of this case to the Commission of Appeals it has come to our attention that the petition for writ of error was filed in the Court of Civil Appeals more than thirty days after the overruling by that court of the motion for rehearing. The motion for rehearing was overruled on December 3, 1914. The petition for writ of error was filed in the Court of Civil Appeals on January 4, 1915.

In order for the Supreme Court to have jurisdiction to grant a writ of error, the petition for the writ must be filed in the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing. This is a plain and positive jurisdictional requirement. *Schleicher v. Runge*, 90 Tex. 456, 39 S. W. 279; *Vinson v. Carter*, 106 Tex. 273, 166 S. W. 363. The case must be dismissed for want of jurisdiction. It is withdrawn from the Commission and so dismissed.

SIBLEY v. ROBISON, Com'r of General Land Office, et al. (No. 3186.)

(Supreme Court of Texas. June 11, 1919.)

MINES AND MINERALS ⇐6—PERMIT TO PROSPECT FOR OIL AND GAS—"SURVEYED LAND."

Under Acts 83d Leg. c. 173, as to permits to prospect for oil and gas upon public lands, where a certain area had been lawfully surveyed in virtue of an application made under the act, but upon which no permit issued, the field notes being approved by the commissioner and filed in the land office, the commissioner was authorized to treat the area, as respects a later application, as "surveyed land" within the meaning of the act.

Original proceeding for mandamus by J. D. Sibley against J. T. Robison, Commissioner of the General Land Office, and others. Writ refused.

McMeans, Garrison & Pollard, of Houston, for plaintiff.

W. W. Searcy, of Brenham, and M. Hirsch and Allan Hannay, both of Houston, for W. J. Fox.

Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for W. C. Wolff and C. D. Keen.

E. E. Townes and G. P. Dougherty, both of Houston, for Humble Oil & Ref. Co.

O. M. Cureton, Atty. Gen., and W. F. Schenck, Asst. Atty. Gen., for J. T. Robison.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



PHILLIPS, C. J. The relator seeks a mandamus to compel the Land Commissioner to issue him a permit under the Act of 1913 (Chapter 173, General Laws of 1913) to prospect for oil and gas upon submerged land belonging to the State in Tabb's Bay in Harris County. The relator's application for the permit was refused by the Commissioner because of an outstanding similar permit covering the same area, issued under the Act of 1913 originally to W. J. Fox. If the permit issued to Fox was valid, the relator is not entitled to a permit. It is contended that the Fox permit is invalid because of its being based upon an application not filed in accordance with the law. Fox, in making his application, treated the area as "surveyed land," within the meaning of the Act of 1913, and filed his application with the county clerk of Harris County. This was proper, if the area was then "surveyed land" within the intentment of the act. Some time prior to the filing of Fox's application, the area had been duly and lawfully surveyed in virtue of a previous application made under the act but upon which no permit issued, the field notes being approved by the Commissioner and filed in the Land Office. As the area had been once lawfully surveyed and its field notes were duly on file in his office, the Commissioner treated it as "surveyed land" within the meaning of the act, and accordingly recognized Fox's application as valid and issued him the permit. Upon the advice of the Attorney General, this construction of the act has governed the Land Office for a number of years.

While the act directs that an application for a permit to prospect in any of the State's bays, lakes, etc., shall be filed with the county surveyor of the county, the only purpose of the requirement is the ascertainment of the area for which the permit is sought by a proper survey. Upon the filing of such an application, it is accordingly the duty of the county surveyor, under the act, to make the survey and deliver the field notes to the applicant for filing in the Land Office. Where the area has been thus duly surveyed and the survey approved by the Commissioner and filed in his office, there could be no reason for having it resurveyed for the purpose of a subsequent permit. The Legislature is not to be credited with an intention to impose any such useless procedure. With such a survey once made, the area becomes "surveyed land" within the meaning of the act. Such is its status because it has been "surveyed" in the manner provided by law. This is the common-sense construction of the act, and such, therefore, as should be given it.

The mandamus is refused.

Associate Justice HAWKINS will later file a statement of his views.

# TRAVELERS' INS. CO. v. HARRIS. (No. 85-2886.)

(Commission of Appeals of Texas, Section B.  
June 11, 1919.)

## INSURANCE — 646(6) — ACCIDENT POLICY — EXCEPTIONS — BURDEN OF PROOF.

In suit on accident policy containing exception clauses, such as a clause providing that the policy shall not cover accidents resulting from trying to enter a moving conveyance using steam as motive power, plaintiff has the burden of establishing that the accident on which suit is based does not fall within the exceptions; the exception clauses being construed as taking something out of the general portion of the contract so that the promise is to perform only what remains after the part excepted is taken away.

## Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Sallie Lou Harris against the Travelers' Insurance Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (178 S. W. 816) and defendant brings error. Judgment of the Court of Civil Appeals and of the trial court reversed and cause remanded.

Thompson, Knight, Baker & Harris and Geo. S. Wright, all of Dallas, for plaintiff in error.

Lacy & Bramlette and Young & Stinchcomb, all of Longview, for defendant in error.

SADLER, J. The Travelers' Insurance Company issued an accident policy to George V. Harris on March 31, 1908, in which it insured him against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means, wherein it promised in event of death to pay to his wife, Sallie Lou Harris, the sum of \$5,000, with certain accumulations. Within the policy there were certain exception clauses, the ninth of which is:

"This insurance shall not cover \* \* \* injuries \* \* \* from voluntary overexertion, from voluntary exposure to unnecessary danger. \* \* \* Nor shall this insurance cover accidents, injuries, death, \* \* \* resulting directly or indirectly from entering or trying to enter or leave a moving conveyance using steam as a motive power, \* \* \* or happening while being in any part thereof not provided for occupation by passengers, or while being on a railway bridge or roadbed."

The assured was injured at Longview, Tex., on July 9, 1912, and died therefrom a few days later. The policy was in full

force at the time of the injury. From a judgment favorable to the beneficiary, writ of error was brought to the Court of Civil Appeals, and the judgment affirmed. 178 S. W. 816.

In the trial court the plaintiff pleaded that the accident came within the terms of the policy and was covered thereby, although not setting up the exception clauses specifically. The defendant pleaded these clauses, and on the trial the plaintiff introduced the contract in evidence.

The proof showed that the insured was injured at Longview, under such circumstances as tended to raise the issues of (a) whether the assured was endeavoring at the time of the injury to enter a moving passenger train using steam as a motive power, and (b) whether it occurred while assured was on a railway roadbed.

The defendant sought to have the trial court peremptorily charge in its favor, on the ground that the burden was on the plaintiff to plead and prove that the injury to the insured did not fall within the terms of the exceptions set forth in clause 9 of the policy, and on the ground that the evidence failed to show an accident coming within the terms of the policy. It also asked a charge placing the burden on the plaintiff to establish that the accident did not fall within the exception.

The trial court and the Court of Civil Appeals held against the contentions of the insurance company on both propositions, and writ of error was granted by the Supreme Court in the view that the rule announced in *Insurance Co. v. Co-operative Association*, 77 Tex. 225, 13 S. W. 980, should be applied in the instant case.

The consideration of these questions has necessitated a very comprehensive search of the authorities, in an effort to ascertain the rule which on principle should be applied. The courts of the country are not a unit on the application of the rule governing in such cases.

The contra holdings of the court can, however, be accounted for on the difference in the construction of the contracts by the courts. Those courts which treat the contracts as being general, and the clauses declaring what they shall not cover as "stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse," hold that these clauses are defensive, and must be pleaded and sustained by the insurer; while the courts which construe the exception clauses as "taking something out of the general portion of the contract, so that the promise is to perform only what remains after the part excepted is taken away," place the burden of pleading and proof upon the assured to negative them by showing that his cause

of action does not come within the exception.

The latter construction of the contract and rule on the burden of pleading and proof is supported in the following cases: *Maryland Casualty Co. v. Hudgins*, 97 Tex. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252; *Insurance Co. v. Co-operative Association*, 77 Tex. 225, 13 S. W. 980; *Insurance Co. v. Boren*, 83 Tex. 97, 18 S. W. 484; *Maryland Casualty Co. v. Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1062; *Fidelity & Casualty Co. v. Weise*, 182 Ill. 496, 55 N. E. 540; *American Accident Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473; *Tolmie v. Fidelity & Casualty Co.*, 95 App. Div. 352, 88 N. Y. Supp. 717, affirmed 183 N. Y. 581, 76 N. E. 1110; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Markland v. Clover Leaf Casualty Co. (Mo.)* 209 S. W. 602.

Cases which have been decided in other jurisdictions, announcing a different rule, will be found in notes under *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L. R. A. (N. S.) 636. Our Courts of Civil Appeals have held contra to the rule announced in *Co-operative Association*, supra, in the following cases: *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453; *General Accident Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 900; *Employers' Liability Assurance Corp. v. Rochelle*, 35 S. W. 896; *Hartford Fire Ins. Co. v. Watt*, 39 S. W. 200. These cases are in conflict with decisions of our Supreme Court, by which we are bound.

In view of the decisions by our Supreme Court, and the indication made in granting the writ in this case, we are of the opinion that the burden rests upon the plaintiff to show that her cause of action does not fall within the excepting clause.

We think the court erred in refusing to give a proper charge on the burden of proof.

The plaintiff in error also insists that under the evidence judgment should be rendered for it. We do not think so. The evidence taken as a whole raises the issues, and the jury should determine them under appropriate instructions.

In our opinion, the Court of Civil Appeals correctly disposed of the other assignments.

We therefore recommend that the judgments of the Court of Civil Appeals and of the trial court be reversed, and the cause remanded.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

**LASATER et al. v. RAMIREZ et al.**  
(No. 67-2820.)(Commission of Appeals of Texas, Section A.  
June 11, 1919.)**1. TENANCY IN COMMON ⇐45 — DEED FROM  
SINGLE TENANT—VALIDITY AND EFFECT.**

A deed from one tenant in common to a specific part of the common property will be recognized and the purchaser thereof protected by setting apart to him the specific part so conveyed, if this can be done without prejudice to the other owners.

**2. TENANCY IN COMMON ⇐45 — DEED FROM  
SINGLE TENANT—RIGHTS OF PURCHASERS.**

The right of a purchaser from one tenant in common to a specific tract conveyed to him does not depend upon the nonjoining tenants' assent to or recognition of the sale, nor is it created through estoppel, but is conditioned solely upon whether its enforcement would prejudice the other owners.

**3. TENANCY IN COMMON ⇐45—DEED BY SINGLE  
TENANT — RIGHTS OF PURCHASERS —  
PREJUDICE TO NONJOINING TENANTS.**

Where one tenant in common has conveyed a specific part of the common property and there remains a sufficient estate out of which the interests of the nonjoining tenants can be satisfied, the remaining acreage being exactly the same in kind and value as the tract sold, the nonjoining tenants cannot be prejudiced, and the right of the purchaser should be enforced.

**4. TENANCY IN COMMON ⇐45—CONVEYANCE  
BY SINGLE TENANT—RIGHTS OF PURCHASERS—  
EFFECT OF INCOMPETENCY OF NONJOINING  
TENANT.**

Since the right of a purchaser of a specific portion of lands held in common from one of the tenants does not depend upon their assent or upon estoppel, it is immaterial that a nonjoining tenant against whom it is sought to enforce the right is mentally incompetent, or that an estoppel cannot arise from his conduct, where his rights will not be prejudiced by the sale.

**5. PARTITION ⇐9(1)—TENANCY IN COMMON—  
VALIDITY AS AGAINST INCOMPETENT TENANT.**

Where certain tenants in common conveyed a specific portion of common property and one of the nonjoining tenants was non compos mentis, a private partition of the unsold portion of the common property among all the tenants equally was not binding upon the incompetent tenant, since he should have received an equal share of the entire tract, and not merely of the unsold portion.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action in trespass to try title and for partition by Maria Ramirez and others against Ed C. Lasater and others. Judgment for defendants was affirmed by the

Court of Civil Appeals as to two of the plaintiffs and reversed as to the third (174 S. W. 706), and defendants bring error. Reversed and judgment of the district court affirmed in part and reversed in part, as recommended by the Commission of Appeals.

Dougherty & Dougherty, of Beeville, for plaintiffs in error.

S. H. Woods, of Alice, and T. O. Woldert, of Houston, for defendants in error.

SONFIELD, P. J. Action in trespass to try title, and for partition, brought by Maria Ramirez and others, plaintiffs, against Ed C. Lasater and others, defendants.

The following are the material facts as agreed upon between the parties and found by the court: In June, 1894, Jose Ramirez, who owned in fee simple as his separate estate 3,824.98 acres of land out of the San Pedro de Charco Redondo grant in Duval county, mortgaged 2,500 acres of this land to secure a note in the sum of \$2,500. Jose Ramirez died intestate in August, 1894, without having disposed of the 3,824.98 acres, of which 2,500 acres continued subject to the mortgage, and left surviving him a wife and 11 children. On or about July 9, 1898, the surviving wife and 8 of the children executed a warranty deed, conveying to Francis Smith, the holder and owner of the above-mentioned note and mortgage, a specific 2,500 acres out of the 3,824.98-acre tract, describing the same by metes and bounds. The consideration for the conveyance was the surrender and liquidation of the note, which consideration was the reasonable market value of the land at that time. In March, 1899, Smith conveyed the 2,500-acre tract to Ed C. Lasater by deed with covenants of special warranty. Lasater went into immediate possession, and fenced and improved the tract. Subsequently Lasater conveyed a specific tract of 1,200 acres of said 2,500 acres to defendants Jose Guerra, Emeterio Guerra, Antonio Guerra, Francisco Guerra, Zaragosa Guerra, and Rafael Guerra; and 400 acres of the remainder thereof, described by metes and bounds, to defendant Manuel Pinada and wife. All the vendees went into immediate possession of the respective tracts purchased, making valuable improvements thereon; and defendant Lasater continued in possession of the remaining 900 acres. The whole 3,824.98 acres were of exactly the same kind, character, and value, acre for acre, and the 2,500 acres were of the same kind, character, and value, acre for acre, with the 1,324.98 acres remaining unsold. The only difference in the value of the land resulted from the improvements placed thereon by defendants.

Plaintiffs Maria Ramirez, Rafael Ramirez, and Cesario Ramirez were the 3 of said

11 children that did not join in the conveyance of the 2,500-acre tract to Smith. They seek herein to recover three-elevenths of said tract, and for partition thereof. It is alleged that Cesario Ramirez is non compos mentis, and the suit is prosecuted by his next friend, Maria Ramirez.

After the filing of the suit, plaintiffs and the 8 other children, heirs of Jose Ramirez, who had been made defendants in the case, without the knowledge or consent of the court or of the other defendants, made a partition of the 1,324.98 acres remaining, dividing same up in equal parts, each taking one-eleventh thereof. It was admitted that this partition was effected for the purpose of making it impossible for plaintiffs to recover their interests out of the 1,324.98 acres, and to enable them to recover same out of the 2,500-acre tract. By supplemental petition, plaintiffs alleged that the parties to said petition had received and accepted their respective shares under said partition and prayed its confirmation.

On the trial, the plaintiffs, through their attorney, on suggestion by the court that they should recover their interest out of the 1,324.98-acre tract, which was ample for that purpose, stated in open court that they declined to have their interests set apart to them out of that tract, and insisted on a confirmation of the partition made.

The trial court rendered judgment for defendants, quieting them in their title to and possession of the 2,500-acre tract, and confirmed the partition as prayed for.

On appeal, the Court of Civil Appeals affirmed the judgment of the trial court as to Maria and Rafael Ramirez. As to Cesario Ramirez, the judgment of the trial court was reversed, and judgment rendered awarding him one-eleventh of the 2,500-acre tract, on the ground that, being non compos mentis, the sale by some of the tenants in common was not binding on him, and that no estoppel could be invoked against him. 174 S. W. 706.

[1] It is well settled in this state that a deed from one tenant in common to a specific part of the common property will be recognized, and the purchaser thereof protected, by setting apart to him the specific part so conveyed, if this can be done without prejudice to the other owners. *Arnold v. Cauble*, 49 Tex. 527; *Camoron v. Thurmond*, 56 Tex. 22; *Furth v. Winston*, 66 Tex. 521; *Maverick v. Burney*, 88 Tex. 560, 32 S. W. 512. This rule was recognized by the Court of Civil Appeals, and, under the undisputed facts and the findings of the court, held applicable to plaintiffs other than Cesario Ramirez.

The question presented is: Is the authority of the court to protect the defendants, by setting apart to them the specific 2,500 acres, affected by reason of the disability of Cesario Ramirez?

[2-4] The right of a purchaser from one tenant in common to the specific tract conveyed to him does not depend, and is not based upon, the nonjoining tenants' assent to, acquiescence in, or recognition of, the sale; nor is it created through estoppel. The right exists independent of any act or conduct on the part of the nonjoining tenants, and is conditioned solely upon the question whether its enforcement would prejudice or injuriously affect the other owners. Where, as in this case, there remains a sufficient estate out of which the interests of such nonjoining tenants can be satisfied, the remaining acreage being exactly the same in kind and character, and of the same value, acre for acre, as the tract sold, there can be no prejudice, and the right exists and should be enforced. As the right does not depend upon assent, acquiescence, ratification, or estoppel, it is immaterial that the one against whom it is sought to be enforced is incapable of mental decision, and that an estoppel cannot arise from his conduct. If the sale and the attendant right to the specific tract was without prejudice to Maria and Rafael Ramirez, sane, in what manner could it be prejudicial to Cesario Ramirez, insane? His rights in this respect are precisely the same, regardless of his mental state. He is entitled to an interest of one-eleventh in the whole, approximately 348 acres. His interest is in the tract in its entirety. If, however, from the unsold portions of the land his interest can be equitably adjusted, the court will protect defendants by setting apart to them their specific tracts. Such protection is predicated upon a recognition of the equities of the respective parties, unaffected by the mental incapacity of one of the cotenants.

[5] The trial court confirmed the partition of November, 1908, whereby the remaining 1,324.98 acres were partitioned equally between the 11 children and heirs of Jose Ramirez, including the 8 who were grantors in the deed to Smith conveying the 2,500 acres. The Court of Civil Appeals affirmed this part of the judgment. Cesario Ramirez, being, as found by the Court of Civil Appeals, non compos mentis, was not bound by the partition or the deed evidencing the same, and in said partition he should have received an interest equal to one-eleventh of the entire 3,824.98 acres. To award defendants the 2,500 acres, and confirm the partition of November, 1908, would be to deny him a part of his interest in the land.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the district court in all things affirmed, except the confirmation of the partition of November, 1908; and as to this, the judgment of the district court should be reversed, and the cause remanded.

WEST TEXAS BANK & TRUST CO. V. MATLOCK (212 S.W.)  
PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the questions discussed.

**WEST TEXAS BANK & TRUST CO. v. MATLOCK et al. (No. 61-2790.)**

(Commission of Appeals of Texas, Section A. June 11, 1919.)

**1. PERPETUITIES ⇨4(1)—WHAT CONSTITUTES.**

A perpetuity is a limitation of property taking the subject thereof out of commerce for a longer period than a life or lives in being and 21 years thereafter (citing Words and Phrases, Perpetuity).

**2. PERPETUITIES ⇨7(1)—DEPOSIT TO BE PAID ON CONTINGENCY—LIMITATION OF TIME FOR PERFORMANCE.**

Where a vendor of land which was divided into many lots and farms agreed to pay \$50,000 bonus to the first railroad that should come through the land, and to deposit the bonus with trustees, *held* that when the funds were delivered to trustees it was proper for the vendor to insist that the trustees' bond should provide for return of the money within a reasonable time if no railroad was constructed, for if such provision were not incorporated in the agreement, the trust would be invalid under Const. art. 1, § 26, as creating a perpetuity.

**3. TRUSTS ⇨61(4)—AGREEMENT—CONSTRUCTION.**

Where a vendor of large parcel of land which was subdivided into lots and farms agreed to deposit \$50,000 with trustees to be paid by them as a bonus to the first railroad constructing line through the property, *held* that the vendor was entitled to have the fund revert to him if the trust should terminate within a reasonable time without attainment of object.

**4. TRUSTS ⇨153—INTEREST ON FUND.**

Where a vendor of land which was subdivided into many different parcels agreed to deposit \$50,000 with trustees to be paid as bonus to the first railroad coming through the land, *held* that under the agreement the vendor or his heirs were entitled to the interest on the fund during the time it was held by the trustees, before a railroad was constructed.

**5. TRUSTS ⇨227—COUNSEL FEES—RIGHT TO.**

Trustees should be allowed to pay out of trust fund expenses of litigation concerning such fund in event the litigation is forced on them; hence trustees of fund, deposited by vendor of large parcel of land to hold as a bonus to first railroad coming through, are entitled to pay attorney's fees out of trust fund, where it was sought by the executor of the vendor to recover the fund.

**6. TRUSTS ⇨227—ATTORNEY'S FEES—BENEFICIARIES.**

Where vendor of land deposited \$50,000 with trustees to be paid as a bonus to the first railroad coming through the land, *held* that, where the executors of vendor sought to recover the amount on the theory that a reasonable time had expired without the construction of a railroad, purchasers who because of their interest intervened are not entitled to have allowed attorney's fees out of the corpus of trust fund because the trustees represented them and persons similarly situated.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by the West Texas Bank & Trust Company, executor, against A. L. Matlock and others, trustees, in which Walter Brown and others intervened. Judgment for defendants was affirmed by the Court of Civil Appeals (172 S. W. 162), and plaintiff brings error. Judgment reformed and affirmed.

McFarland & Lewright and W. H. Kennon, all of San Antonio, for plaintiff in error.

Butler L. Knight and A. L. Matlock, both of San Antonio, for defendants in error.

**TAYLOR, J.** The plaintiff, West Texas Bank & Trust Company, as executor of the last will and testament of Dr. C. F. Simmons, deceased, instituted this suit against the defendants, A. L. Matlock, A. M. Avant, and A. W. Eastman (who died prior to the trial below), to recover from them, as trustees a trust fund of \$50,000. Walter Brown and nine others, acting for themselves and all others similarly situated, intervened.

The cause was submitted to the jury upon one special issue of fact; and upon the answer to that issue, together with other facts found by the court, judgment was rendered for the defendant trustees and interveners. The Court of Civil Appeals affirmed the judgment of the trial court. 172 S. W. 162.

Dr. Simmons was the owner of 60,000 acres of land in Live Oak county, Tex. On the 4th day of June, 1906, he conveyed the said land to J. P. Barclay, R. L. Ball, and E. P. Simmons, in trust, to convey to prospective purchasers in compliance with a certain plan of distribution theretofore devised and set forth in 22 rules hereafter referred to. The land, in accordance with the provisions of said rules, was laid out into a certain town site containing 4,200 lots, later designated as Simmons City, and 4,205 farm tracts, as provided for in the plan of distribution.

Dr. Simmons, through his agents, sold, for a consideration of \$120 each, applications to purchase to about 4,100 persons, residing in different parts of the United States. The applicants prior to September 9, 1907, paid for their respective applications, and thereby became entitled each to a lot and farm.

On the 24th day of July, 1906, Dr. Simmons entered into a trust agreement with the said Barclay, Ball, and Simmons, as trustees, under the terms of which the accumulation of a fund of \$50,000 was provided for, known as a "Railroad Bonus Fund." The agreement required the said trustees to hold the fund so accumulated in trust, to be paid over in compliance with the requirements of said rules, particularly rule 22; that is to say, if any railroad having an eastern or northern connection should build and operate a railroad through said tract of land and town site, in accordance with the conditions laid down in said booklet, the trustees were authorized to pay over the bonus to the railroad company. The agreement provided that if a railroad should be completed and in operation before the time for the distribution of the lots and farms, the money should be paid to the railroad company on the day of distribution, but if no railroad was completed through the town site prior to such time, then the said trustees were authorized to turn over the \$50,000 to three trustees to be selected as provided in rule 9.

The agreement further provided that said bonus should be turned over to the trustees selected only on the execution and delivery by them, within one year from the date of distribution, of a bond payable to Dr. Simmons, his heirs or assigns, conditioned that said trustees should hold the fund, in trust, to pay to any railroad company that should build and operate a railroad through said town site within a reasonable time.

The agreement was conditioned also that if no railroad was so built and operated within a reasonable time, then said \$50,000 should revert to Dr. Simmons, his heirs or assigns, and stipulated further that the trustees, during the time they were authorized to hold said fund, should place the same at interest, to be paid annually to the said Simmons, or his estate.

At the time of the distribution September 9, 1907, no railroad had been built to the town site. On that occasion A. L. Matlock, A. M. Avant, and A. W. Eastman were duly selected as trustees. It was agreed between them, Dr. Simmons, and the purchasers, that they, as trustees, should give a bond for the protection of the purchasers on the delivery of the bonus, but neither the trustees nor the purchasers then knew that the foregoing stipulations, relating to the building of the railroad within a reasonable time, the payment of interest, and the reversion of the fund, would be incorporated in the bond. The said Matlock, Avant, and Eastman, on learning that the fund would be turned over to them only on the conditions stated, and being desirous of securing possession thereof, and of preventing a reverter within the year to Dr. Simmons, executed the bond conditioned as required, and the sum of \$50,000 was paid

over to them by the said Barclay, Ball, and Simmons, to be held and administered as stipulated in the bond.

The booklet referred to, *Home Sweet Home*, is a part of each purchaser's application to buy a lot and farm. It is vividly, and we may say, aptly, described by Chief Justice Fly in the opinion of the Court of Civil Appeals as a rose-colored pamphlet issued under an alluring title. It is indeed calculated to arouse by its songs, not only the sentiments of the lovers of homes, but their religious feelings as well. It contains, in addition to songs and customary prospectus inducements, a comparison between the productivity of said 60,000-acre tract and Texas lands generally with that of lands in other states, which is no wise unfavorable to the lands in the vicinity of Simmons City. Its relevancy, however, is due to the fact that it contains the rules above referred to, particularly rules numbered 9 and 22. Those rules relate to many irrelevant matters, such as the establishment and naming of the town site, the numbering, description, and distribution of the lots and farms, the plan of making payments therefor, etc. Rules 9 and 22, however, are vital to a determination of the issues involved, and will be later set out in full.

The plaintiff declares upon the bond executed by the defendant trustees. Recovery of the bonus fund is prayed for under the allegation that a reasonable time for the building of the railroad has expired, and that the failure to construct a railroad within such time has terminated the trust.

The surviving trustees deny that a reasonable time has expired for the accomplishment of the purpose of the trust, and assert that they would not have executed the bond sued on, except that they could not otherwise get possession of the fund, and did not desire to jeopardize the interests of the purchasers by permitting the bonus to revert. The foregoing pleadings of the defendant trustees, as briefly above stated, include, in view of the evidence adduced, all of their material allegations, except those made the basis of a recovery of attorney's fees. They ask the court to construe the contracts to purchase, of which rule 22 was a vital part, and to establish, define, and declare the rights of the parties at interest thereunder, and to declare their duties as trustees, under the trust.

The intervening purchasers resisted the action upon practically the same grounds as those urged by the trustees, and asserted an interest, not only in having the trust administered under the provisions of rule 22, but a vested interest in the trust fund itself, and prayed that the court so declare. They allege further that the bond is void for the reason that the provisions relating to a reversion of the fund, the payment of interest, and the building of a railroad within a reasonable time, were made without their knowledge or

consent, and are less advantageous to them than the terms imposed under their applications to purchase, as provided in rule 22; that their rights under the trust should be ascertained from their respective purchase contracts, and particularly by reference to the rule. The interveners prayed also that a fee be paid the attorney representing them, and that they recover \$4,000 interest theretofore paid the Simmons estate by the defendant trustees.

The court submitted only the issue of reasonable time, and the jury found in answer thereto that a reasonable time had not expired for the building of a railroad to the town site. The court made further findings of fact substantially in accordance with the pleadings of the trustees and purchasers as above stated, and made in substance the following conclusions of law:

(a) That the interveners and other purchasers similarly situated have a vested interest in said \$50,000 fund and the uncollected interest thereon from September 8, 1908. (b) That said interveners and purchasers have such equitable rights in and to said trust fund as to preclude plaintiff in error from recovering the same regardless of whether a reasonable time has expired for the construction of the railroad. (c) That the said \$50,000, together with all accrued uncollected interest thereon, when collected, is a trust fund in the hands of the defendants for the benefit of the interveners and those similarly situated. (d) That the sum of \$2,000 be paid, as attorney's fees; \$1,000 to A. L. Matlock, one of the attorneys for the defendant trustees, and \$1,000 to the attorney representing the intervening purchasers. (e) That the defendant trustees are estopped from contending that the payment of \$4,000 of accrued interest to the Simmons estate was illegal or wrongful, inasmuch as the same is in accordance with the provisions of their bond as trustees.

[1, 2] That part of the decree based on the finding of the jury correctly denies to the plaintiff recovery of the fund sued for. The further provisions of the decree are in accordance with the foregoing conclusions of law, and deny plaintiff any right, title, or interest of any character in and to said fund, either absolute or reversionary.

No complaint is made that Dr. Simmons has failed to do any of the things required to be performed by him under the provisions of the booklet and the rules incorporated therein. The land was platted, sold and distributed in accordance with the plan therein set forth. The trustees were selected as provided in rule 9. The required sum was turned over to the trustees so selected to be held by them in trust to pay over on the contingency stated in rule 22, and is still in their custody for such purpose.

The first question presented is whether the

rights of the parties should be ascertained under the provisions of rules 9 and 22, or the bond sued upon, or both.

The rules referred to are as follows:

9. In order that each applicant will know that their interest is fairly represented in the distribution, the applicants, by their representatives, when they assemble to make the distribution, will elect three trustees from their number, to whom owner will convey this town site and farm property by warranty deeds; except the town reservations and except the reservations for public roads, churches and school purposes and railroads, and will furnish said trustees complete abstract of title, with the opinion of three eminent attorneys, showing the title good and clear of incumbrance, together with blank deeds for the trustees to distribute among the purchasers.

22. One of the proposed railroads through this property already has 10 miles graded, and owner has agreed to pay \$50,000.00 bonus for the first railroad to come through this land down the river on the side of the new town and through it. This bonus, owner hereby contracts to pay when road located as above is running passenger trains, provided the road is running passenger trains before the day of farm and lot distribution, but, if no railroad located as above is running trains on the day of distribution, then owner hereby guarantees that he will on that day turn over to the three trustees, in trust, fifty thousand dollars in gold, to be by said trustees given as a bonus to the first railroad having an eastern or northern connection, which runs passenger trains through this property on line above indicated. This bonus guarantees to each purchaser, free of cost, the first railroad just where it should be, and it will doubtless make a race between the railroads to get there first.

Rule 22 does not purport to be a trust agreement. By its terms the owner contracts either to pay to a railroad on the day of distribution on the conditions named the sum specified, or, in the event the conditions have not on that day been met, to pay over to trustees, in trust, the said sum. In other words, the owner by the language of the rule contracts to create a trust for the accomplishment of the object therein stated. Clearly in the performance of his contract obligation, as set forth in the rule, the settlor not only had the right, but owed to the purchasers the legal duty, to create a valid trust for the purpose of inducing a railway company to build its line of railroad to the town site. Whether the purchasers contemplated the execution of a bond conditioned that the trust fund should revert to Dr. Simmons in the event the purpose of the trust should not be accomplished within a reasonable time is immaterial, if their rights are not affected by such condition.

The bond, being intended to secure the performance of the duties of the trustees, more minutely defines such duties than the provisions of the rule, and its conditions do no violence to such provisions. If the rule and

bond jointly contain the terms of a trust as proposed and guaranteed by the rule, neither the executor of the estate of the settlor nor the purchasers should be heard to say that either is void. One who has contracted as a settlor to create a private contingent trust for the accomplishment of the object stated has no authority to impose conditions upon the trustees affecting adversely the interests of the other contracting parties, or at variance with the contract terms; but such settlor has the right to require of the trustees such reasonable safeguards, within the limits stated, as are essential to the security of the trust fund and a due administration of the trust. The bond executed by the trustees in this case serves no other purpose, and Dr. Simmons was within his right in requiring it. Certainly, in the absence of an express inhibition in the applications to purchase, the purchasers have no ground to complain of the "reasonable time" provision of the bond, if without this provision the trust agreement is void.

What then would be the effect of the omission of such provision from the conditions of the bond?

Article 1, § 26, of the state Constitution provides that "perpetuities and monopolies \* \* \* shall never be allowed."

A perpetuity is a limitation of property, taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years thereafter. Words and Phrases, vol. 6, p. 5319; *Purvis v. Sherrod*, 12 Tex. 140; *McIlvain v. Hockaday*, 86 Tex. Civ. App. 1, 81 S. W. 54. *Gray on Perpetuities* (3d Ed.) p. 252, says:

"The tying up of property was attempted in two ways, first, by making vested estates inalienable, and, when the judges stopped this, then by the creation of indestructible future contingent estates; and to restrain these last the rule against perpetuities was devised."

The same author (page 174) states the rule as follows:

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

The rule is not applicable to charitable trusts, but to trusts for private purposes, (R. C. L. vol. 21, p. 306) and to contracts (Id. p. 303; *Gray on Perp.* p. 308). "When an estate is given to trustees, but it is possible that no equitable interest under it may arise within the limits of the rule, the whole trust is bad, \* \* \* as when property is given upon trusts to arise when a gravel pit was worked out, or upon trusts to arise when a parcel of land could be sold at a certain price." Id. p. 361.

It is apparent that if rule 22 alone is looked to as expressly stipulating in detail all of the terms of the trust, the agreement is invalid,

in that it is possible that the railroad may not be built, if at all, until after the expiration of the time allowed under the rule of perpetuities. The only provision of the bond affecting the interests of the purchasers, not expressly stated in the rule, is that the contingency in which the trustees are to pay over the fund must happen within a reasonable time. If the bond prescribing the limitation stated is void, then the trust agreement, lacking such limitation, offends against the rule, and is likewise void.

It is urged that under the terms of rule 22 the purchasers have a vested interest in the bonus fund itself, and that the agreement is therefore not within the rule of perpetuities.

[3] The only obligation guaranteed to be performed under the stipulations of rule 22 is that the owner (Dr. Simmons) will, at the time stated, turn over to three trustees, in trust, the said bonus fund to be paid over by them on the contingency and in the manner stated. The conveyance was under a clear limitation by apt words that the fund be held in trust. It is not stated in the rule, nor is it implied, that in the event no railroad fulfills the conditions imposed, the fund will be turned over to the purchasers as a gift. The trustees are given no authority to make an absolute conveyance of the fund to any one other than a railroad company, and their authority to pay it over under any circumstances is contingent. Under no condition, expressed or implied, is the fund to become vested in the purchasers. The greatest and only benefit that could accrue to them in the event of the accomplishment of the object of the trust, or in any event, is such increase in the value of their lands as would result from the building of a railroad as contemplated. Their interest is not in the fund itself, but in its due administration in accordance with the trust declaration. There is no implication of law that arises whereby any other or greater interest in the fund is divested out of Dr. Simmons than that with which the purchasers are invested. All interest therein is to be conveyed to the railroad company, and not to the purchasers, and to the company only upon the happening of the contingency stated. The reversionary interest in the trust fund, not being divested out of the owner under its terms, remains in him, his heirs and assigns, so long as the trust continues. If the trust terminates without the attainment of the ultimate object thereof, the bonus fund reverts to Dr. Simmons, his heirs and assigns. 39 Cyc. p. 109, subd. (f); Id. p. 213, subd. (b); Id. p. 437, subd. (b).

The next question arises by virtue of the interest earnings on the fund. To whom are they payable?

[4] The bond provides the interest shall be paid annually to Dr. Simmons, his heirs or assigns, and does not contravene the contract provisions of rule 22. It appearing that the corpus of the fund only can be applied to the



purposes of the trust, no one other than the settlor, or his legal representatives, regardless of the provisions of the bond, has any rights growing out of the interest accumulations. The stipulation is to pay the cestui que trust the sum of \$50,000, and no authority is conferred for the payment under any circumstances of a greater sum. The rights of the purchasers are therefore not affected by that provision of the bond relating to the payment of interest. The conclusion of the Court of Civil Appeals that the trustees should be denied a recovery of the sum of \$4,000 interest on said fund collected by the Simmons estate is correct. The said estate is, in our opinion, entitled to receive, not only the said \$4,000, but also the entire interest earnings of the fund, to be paid as stipulated in the bond.

The remaining question is whether the attorney representing the purchasers should recover attorney's fees.

[5] We concur in the holding of the Court of Civil Appeals in affirming that part of the judgment allowing a fee out of the corpus of the bonus fund to the attorney representing the trustees. It is well settled that trustees should be allowed to pay out of the trust fund all expenses of litigation concerning such fund, in the event the litigation is forced upon them. *Perry on Trusts*, vol. 2, § 910. It is usual to allow a reasonable compensation to trustees for extraordinary services, for the performance of which they would have the right to employ another person. The rule should not be otherwise merely because one of the trustees is an attorney and accepts employment from his associates in such capacity to render necessary legal services. *Turnbull v. Pomeroy*, 140 Mass. 117, 3 N. E. 15.

[6] We see no reason for the allowance of a fee to the attorney representing the interveners and those similarly situated. Their interest in the trust is in its due administration only. The trustees are charged with and are engaged in the performance of the administrative duties, and their attorney alone should be compensated.

We are of the opinion, therefore, that the judgments of the trial court and the Court of Civil Appeals should be so reformed as to: (a) Establish plaintiff's right, title, and interest in and to the reversionary interest in said trust fund, and declare its right to recover the same on the termination or dissolution of the trust, after the expiration of a reasonable time for the accomplishment of its object; (b) establish plaintiff's right to all interest accrued and to accrue in said fund, and declare its right to collect the same, as provided in said bond; and (c) deny payment of attorney's fees for services rendered on behalf of the intervening purchasers; and that, as reformed, said judgments should be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is

adopted, and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the questions discussed.

### O'BRIEN v. BARCUS. (No. 69-2827.)

(Commission of Appeals of Texas, Section B. June 11, 1919.)

#### 1. EXECUTION $\Leftrightarrow$ 172(2) — INJUNCTION AGAINST — TENDER OF EXCESS OVER CLAIM OF PLAINTIFF IN GARNISHMENT.

A judgment debtor who had been garnished in an action against his creditor is entitled to restrain execution on the judgment under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4647, though he fails to tender the excess of the amount of the judgment over the claim of plaintiff in garnishment, in view of article 279, which prevents garnishees from paying any debt to the defendant in garnishment after service of writ.

#### 2. GARNISHMENT $\Leftrightarrow$ 106 — CLAIMS BY THIRD PERSONS — RIGHTS OF CLAIMANT.

The assignee of a judgment occupies no better position than the judgment creditor, and, if he took the assignment after service of garnishment on the judgment debtor he took it subject thereto, and if he has failed to require his assignor to file the replevy bond under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 279, or to take other steps to protect himself, he cannot complain of delay in collection of his judgment by reason of the garnishment proceeding.

Appeal from Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by W. O'Brien for a restraining order against Henry Hicks and G. W. Barcus. From an order of the district court granting a temporary restraining order, Barcus appealed to the Court of Civil Appeals (171 S. W. 492), which reversed the order, and plaintiff appeals. Judgment of the Court of Civil Appeals reversed, and order of district court affirmed.

W. H. Russell, of Hereford, for appellant.

Knight & Slaton, of Hereford, and G. W. Barcus, of Waco, for appellee.

SADLER, J. On August 12, 1914, W. O'Brien filed his petition with the judge of the Sixty-Ninth judicial district, seeking a temporary restraining order against Henry Hicks and G. W. Barcus prohibiting the collection of a judgment in favor of Henry Hicks against O'Brien, which had been assigned to Barcus, and on which an execution had been issued at the instance of Barcus. Substantially, the petition charged: That on

November 10, 1913, Henry Hicks recovered judgment in the district court of Deaf Smith county against W. O'Brien, on which there was a balance due of \$362.22; that on June 12, 1912, the First National Bank of Hereford obtained a judgment in the county court of Deaf Smith county against C. M. Hicks and Henry Hicks, and that on December 24, 1913, there was due on said judgment a balance of \$302.50, with 10 per cent. interest from June 12, 1912, and \$27.40 costs, less a credit on August 6, 1912, of \$172.60; that a writ of garnishment was sued out by the bank on this judgment in the county court against O'Brien, and served on the 25th day of December, 1913; that by agreement of plaintiff in garnishment and the garnishee, answer to the writ might be made at any term of the court thereafter when the cause was called for trial; that the garnishee answered May 27, 1914, admitting an indebtedness to Hicks under the district court judgment of \$362.22, and alleging that on January 6, 1914, the judgment had been transferred to G. W. Barcus by proper assignment, and asking that he be made party to the suit, tendered into court the amount of the judgment, and prayed for an adjudication of the rights of plaintiff, the defendant Hicks, and Barcus, with reference to the fund; that on the 8th day of January, 1914, Barcus caused an execution to issue on the district court judgment against O'Brien, which was returned not executed; and that shortly prior to the filing of plaintiff's petition for injunction a second execution on the district court judgment had been issued; and that Barcus was seeking to enforce collection of the judgment against the petitioner—prayed for injunction prohibiting the enforcement of the judgment by execution.

On August 12, 1914, G. W. Barcus filed his answer to plaintiff's petition for injunction, alleging, among other things, that he was the owner of the district court judgment against O'Brien, by virtue of written transfer from Hicks, that the judgment sought to be garnished was not a final judgment at the time of the issuance and service of the writ of garnishment, nor at the time same was transferred to him, and did not become final until some time after it had been assigned to him, alleging that he had purchased the judgment, and that there had been a verbal assignment prior to the issuance of the writ of garnishment.

On the petition and answer the district court granted a temporary restraining order, from which order Barcus appealed, and the Court of Civil Appeals reversed the judgment and remanded the cause.

In its opinion the Court of Civil Appeals held against the appellant on all propositions, save only that the application for injunction showed that the district court judg-

ment sought to be enjoined is in the sum of \$362.22, and the balance of the judgment in the county court against Hicks is only \$129.90, with interest and costs, that there was no tender of the amount over and above the total sum due as principal, interest, and costs of the county court, and that before the injunction should have been granted plaintiff should have tendered payment of the difference between the amount of the county court obligation and the district court judgment.

On application of O'Brien, writ of error was granted.

#### Opinion.

The Court of Civil Appeals holds that, under article 4647, providing that no injunction shall be granted to stay any judgment or proceeding at law, except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs, made it incumbent upon the plaintiff to show a tender of the difference between the amount of the county court judgment, interest and costs, and the amount of the district court judgment, before he would be entitled to the relief sought.

[1] This brings before us the consideration of whether or not the plaintiff in error shows himself entitled to the equitable relief sought, when it appears from his petition that the amount of his indebtedness to Hicks, and owned by the assignee Barcus, exceeded the demand of plaintiff in garnishment, and a failure on his part to tender this excess to the owner of the judgment on which execution has issued.

It becomes necessary to determine the effect of two statutory provisions: First, the garnishment statute, article 279, Vernon's Sayles' Statutes, which provides that "from and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects"; and, secondly, article 4647, providing that "no injunction shall be granted to stay any judgment or proceedings at law, except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs."

Under the garnishment statute it is declared to be unlawful for the garnishee, after service of the writ, to pay out any money or deliver any effects to the defendant in garnishment. The harshness of this inhibition is urged. It is contended that under this statute, if given full force and effect, a plaintiff in garnishment may tie up a very large indebtedness as security for a small amount due him from the principal debtor, and held in custodia legis during

the pendency of the garnishment proceedings, thus leaving the owner of the indebtedness without remedy. It is also contended that, as O'Brien has come into a court of equity seeking relief, he must do equity, and under the provisions of article 4647 will be required to tender the difference between the judgment sought to be enjoined and the judgment involved in the garnishment proceeding.

We are of the opinion that the petitioner has brought himself within the purview of article 4647 when he shows that the owner of the judgment is seeking to enforce same against him while he is resting under the prohibition contained in article 279. Gause v. Cone, 73 Tex. 239, 11 S. W. 162.

[2] As disclosed by this record, the assignee of Hicks occupies no better position than Hicks occupied; and, if in fact he took the judgment after garnishment had been served, he took it subject to the legal embarrassment then resting upon its enforcement; and, should he be required to await the determination of the county court garnishment suit, he rests under this burden by a failure on his part to protect himself against same in the purchase of the judgment. At the time he bought the judgment, if purchased after garnishment, it rested within his power to require Hicks, as defendant in the garnishment suit, to have filed the replevy bond authorized under article 279, or take such other steps as he might have deemed sufficient to protect him. Having failed in this, he ought not to be heard to complain of the delay which might result in the collection of his judgment by reason of the garnishment proceeding.

It would be extremely hazardous to require the garnishee in this instance to presuppose the amount of recovery which the plaintiff in garnishment might obtain, and for which he might be responsible at the end of the garnishment litigation. It would be necessary for him to do this before he could, with safety to himself, have tendered any amount to the owner of the district court judgment at the time he sought the writ of injunction.

We are therefore of the opinion that, as the record has been presented, the Court of Civil Appeals erred in reversing and remanding this case, and that the temporary injunction was correctly issued. As to what may be developed by the facts on the trial of the injunction proceedings is not before us at this time for consideration.

We recommend that the judgment of the Court of Civil Appeals be reversed, and the order of the district judge be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

## GOUGH v. JONES. (No. 73-2838.)

(Commission of Appeals of Texas, Section A. June 11, 1919.)

### 1. JUDGMENT $\Leftrightarrow$ 524—CONSTRUCTION.

When the language of a decree is susceptible of two constructions, from one of which it follows that the law has been correctly applied to the facts, and from the other that the law has been incorrectly applied, that construction should be adopted which correctly applies the law.

### 2. VENDOR AND PURCHASER $\Leftrightarrow$ 285(4), 292 — VENDOR'S LIEN—FORECLOSURE—COSTS.

In suit to foreclose vendor's lien against vendee and one purchasing the land from him subject to the lien, but not assuming the lien, in which suit no apportionment of the costs between defendants was made by the decree, it was the right of such purchaser to have the costs satisfied out of the proceeds of the foreclosure sale before applying such proceeds to paying the lien, and the decree, being ambiguous in this respect, would be interpreted to accord such right.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by C. E. Gough against Mrs. R. E. Jones. Judgment for plaintiff was reversed and rendered by the Court of Civil Appeals (175 S. W. 1107), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

Snodgrass, Dibrell & Snodgrass, of Coleman, for plaintiff in error.

Critz & Woodward, of Coleman, for defendant in error.

TAYLOR, J. O. E. Gough, plaintiff in error, filed this suit to restrain the sale under execution of a block of land owned by him in Coleman county. The injunction was granted, and upon hearing was perpetuated by the trial court. The Court of Civil Appeals reversed the judgment of the court below and rendered judgment dissolving the injunction. 175 S. W. 1107.

The injunction proceedings grew out of a prior suit filed by Mrs. R. E. Jones, defendant in error, against H. J. Cobb and the plaintiff in error. Cobb had theretofore purchased two tracts of land from Mrs. Jones, executing therefor eight promissory vendor's lien notes. The plaintiff in error subsequently purchased from Cobb subject to the vendor's lien, and, at the time Mrs. Jones filed suit, was in possession of the land. The purpose of the suit was to recover as against Cobb on the notes, and as against both defendants for foreclosure of the lien.

Judgment was rendered by default in favor of Mrs. Jones. The recitations of the judgment material for the purposes of this opinion are as follows:

$\Leftrightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"And it further appearing to the court that defendant C. E. Gough is now the owner and in possession of the aforesaid premises, and that he purchased said land subject to the aforesaid notes, and that this plaintiff is entitled to a judgment against said defendant C. E. Gough for a foreclosure of her lien as prayed for: It is therefore considered, ordered, and adjudged by the court that the plaintiff, Mrs. R. E. Jones, a widow, do have and recover of and from the defendant H. J. Cobb the amount of her notes, principal, interest, and attorney's fee, to wit, the sum of \$3,325.00, principal, \$268.73, interest thereon, and the further sum of \$359.37, attorney's fee, total, \$3,953.10, for which she may have her judgment and a foreclosure of her vendor's lien against the above-described land and premises against the said defendant H. J. Cobb and the defendant C. E. Gough, and that plaintiff do have and recover all costs of this suit against the defendants H. J. Cobb and C. E. Gough jointly and severally, for which execution may issue. It is the further order and judgment of the court that the vendor's lien against said above-described property as it existed on the 4th day of November, 1913, be and the same is hereby foreclosed; that the clerk of this court issue an order of sale, directed to the sheriff or any constable of Coleman county, commanding him to seize and sell said land as under execution; that he apply the proceeds thereof to the payment and satisfaction of the judgment herein rendered against the defendant H. J. Cobb and costs of suit, and, if said land sells for more than enough to satisfy said judgment herein rendered, then the officer shall pay the excess, if any, to the defendant C. E. Gough, and, in the event said lands do not sell for enough to satisfy said judgment, then said officer shall make the balance out of the defendant H. J. Cobb as under execution."

The sheriff duly sold the land, which was bought in for the sum of \$3,953, the amount of the judgment, exclusive of costs. His return on the order of sale shows that the entire proceeds of the sale were paid by him in satisfaction of the judgment for the indebtedness evidenced by the notes, leaving unpaid the costs of suit, amounting to \$113.60. Thereafter Mrs. Jones caused an execution to issue against the plaintiff in error for the costs, which was levied upon a block of land in Coleman county owned by him. He thereupon filed this suit to restrain the sale of the land.

This case turns upon the construction of the foreclosure decree. The question in effect presented by all of the assignments is whether, under the terms of the decree, Mrs. Jones was entitled to have execution issued against the plaintiff in error, after return of the order of sale showing the land sold for more than sufficient to satisfy the judgment for costs. If the issuance of the execution was authorized, the injunction should be dissolved; if not, the judgment of the trial court perpetuating the injunction restraining the sale should be affirmed.

Judge Gaines in Craddock et al. v. Edwards, 81 Tex. 609, 17 S. W. 228, says that—

"Decrees, like other writings, frequently require construction, and when such is the case the nature of the rights asserted in the suit by the parties respectively should be looked to in order to throw light upon their interpretation."

It is a rule of construction applicable to judgments that they should be construed like other writings. 1 Black on Judgments, §§ 116, 118, 123. When the judgment is ambiguous, the pleadings and entire record may be looked to in aid of construction. Richardson v. Trout, 135 S. W. 677 (writ denied); Freeman on Judgments (4th Ed.) vol. 1, § 45.

Plaintiff in error purchased the land subject to the vendor's lien recited in the Cobb notes. He did not assume their payment. No personal judgment could have been rendered against him legally, except for costs of suit. The decree correctly cast both plaintiff in error and Cobb in the costs of the suit, but does not provide in clear terms that upon sale of the land the officer apply the proceeds thereof first to the payment of the costs.

Chief Justice James says, in San Antonio v. Campbell, 56 S. W. 131:

"The plaintiff had judgment for the costs of the district court, including the cost of the transcript which had been incurred by the defendant, and the foreclosure was for the judgment and these costs. The city contends that it was subject to have deducted from the purchase money that part of the costs incurred by it only. *But it appears to be the well-settled rule that in such cases, when the purchase money is not sufficient to pay both, the costs are to be preferred in the payment.*" (Italics ours.)

The rule is announced by Judge Gaines in City of San Antonio v. Berry, 92 Tex. 327, 48 S. W. 499, in the following language:

"The principle applicable to the case is that the costs of enforcing a lien are incident to the debt and become part of it. It has been the common practice to enforce the rule in this state, and we are cited to no decision to the contrary. \* \* \* In Freeman on Judgments, § 338, the rule is announced that, 'if costs are incurred in enforcing a lien, these are to be paid out of the proceeds realized and are to be preferred to the lien.' In Knight v. Whitman, 6 Bush [Ky.] 51 [99 Am. Dec. 652], the Court of Appeals of Kentucky applies the principle to the case of a homestead; and it is also distinctly recognized in Long v. Walker, 105 N. C. 90 [10 S. E. 858]. \* \* \* We think the court did not err in its ruling."

Chief Justice Brown applied the rule in McLennan County v. Graves, 94 Tex. 639, 64 S. W. 861.

[1] When the language of a decree is susceptible of two constructions, from one of which it follows, that the law has been correctly applied to the facts, and from the other that the law has been incorrectly applied, that construction should be adopted which correctly applies the law.

[2] No apportionment of the costs between the defendant in the foreclosure suit is made in the decree. It was plaintiff in error's right, in the absence of such apportionment, to have the costs satisfied out of the proceeds of the foreclosure sale, and, in our opinion, the judgment contemplates that the proceeds of the sale should be so applied.

While it is true the decree provides in general terms that "execution may issue" against both Cobb and plaintiff in error for the costs of suit, its subsequent provisions considered in connection with the entire record and the decree as a whole indicate that execution should issue against the plaintiff in error only in the event the proceeds of the sale are not sufficient to pay the costs. It is stated in clear terms in the decree that the officer, in the event the lands do not sell for enough to satisfy "said judgment," shall make the balance out of the defendant Cobb as under execution. The court evidently intended to include both the award on the notes and for costs in the term "said judgment," if the award on the notes only is meant, the judgment for costs, which is against both defendants, remains unsatisfied if the proceeds are insufficient. If the proceeds are applied first to the payment of costs, and are sufficient to pay the same, the only judgment remaining unsatisfied is against Cobb. The court doubtless intended such application should be made, as the officer is directed, in the event of a judgment deficit, to make the balance out of Cobb, and is not instructed specifically to make it out of the plaintiff in error in any event.

Such construction is not at variance with the general provision of the decree awarding judgment for costs against both defendants, "for which execution may issue," in that the plaintiff, under the terms of the decree as we interpret it, is entitled to her execution against plaintiff in error in the event the proceeds of the sale of the land are insufficient to satisfy the award for costs.

The proceeds of the sale, to wit, the sum of \$3,953, applied first to the satisfaction of the judgment for costs, would have discharged such judgment, thereby leaving no basis for the issuance of execution against the plaintiff in error. The fact that the officer did not so apply the proceeds does not affect the right of the plaintiff in error to enjoin the sale of his land under the execution levied for costs. The issuance and levy of the execution were not warranted, and the judgment of the trial court, perpetuating its order restraining the sale thereunder, should be affirmed.

We have construed the decree as it was entered, and are not to be understood as holding that the costs could not have been apportioned with propriety under the facts, and plaintiff in error made liable primarily

for that part thereof incurred in making him a party defendant.

We recommend that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the trial court be affirmed.

PHILLIPS, O. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

ALLEN v. TRAYLOR et al. (No. 70-2831.)

(Commission of Appeals of Texas, Section A. June 11, 1919.)

1. VENDOR AND PURCHASER ⇨265(3) — RE-SALE—ABSENCE OF ASSUMPTION OF DEBT.

A purchaser who does not assume payment of the prior vendor's lien is not personally liable for the debt.

2. VENDOR AND PURCHASER ⇨265(3) — ASSUMPTION OF PRIOR LIEN—INDEBTEDNESS.

A grantee assuming payment of a lien indebtedness for which his grantor is personally liable thereby becomes liable to and can be sued by the holder and owner of such indebtedness.

3. CONTRACTS ⇨187(1)—CONTRACT FOR BENEFIT OF THIRD PERSON—RIGHT OF ACTION.

Where one person for valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action thereon.

4. VENDOR AND PURCHASER ⇨265(5), 294—RESALES OF LAND—ASSUMPTION OF VENDOR'S LIEN NOTES.

Where land was sold, resold to one who did not assume payment of the vendor's lien, and part of it again sold by him to defendant, who as part consideration assumed payment of the sum of \$4,784, with interest accrued and to accrue, representing part of the unpaid principal sum due on the vendor's lien notes, assuming and agreeing to pay on the principal and interest of the notes an amount equivalent to \$23 a lot on each lot conveyed to him, defendant was liable to the holder of the vendor's lien notes for the specific amount on the principal and interest thereof, but was not liable for attorney's fees.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Harry Traylor against Frank Allen and others. From judgment for plaintiff, defendant Allen appealed to the Court of Civil Appeals, which affirmed (174 S. W. 923), and Allen brings error. Judgment of the Court of Civil Appeals affirming the judgment of the district court reformed, and, as reformed, affirmed on recommendation of the Commission of Appeals.

McFarland & Lewright, of San Antonio, for plaintiff in error.

Gunn & McNeill and J. C. Lamkin, all of San Antonio, for defendants in error.

SONFIELD, P. J. Harry Traylor and the Rockport Land Company conveyed to D. W. McKey and W. L. Pridgen certain land in the town of Rockport, Tex.; and in part payment therefor the purchasers executed and delivered their four vendor's lien notes, payable to the order of the Rockport Land Company. The company transferred the notes to Traylor. Subsequently McKey and Pridgen conveyed the land to M. Ucovich, subject to the vendor's lien. Thereafter Ucovich, who had conveyed a part of the land to other parties, conveyed the remaining portion thereof to Frank Allen, who, as a part of the consideration therefor, assumed the payment of the sum of \$4,784 of the vendor's lien indebtedness against the lots, together with accrued interest thereon or an amount due on principal and interest in the sum of \$23 per lot on the 32 lots conveyed.

Traylor brought suit against Frank Allen, D. W. McKey, and W. L. Pridgen, to recover a balance of principal and interest on said notes and attorney's fee as stipulated therein.

Defendant, Allen, made no appearance in the case, and judgment was rendered against him by default, and also against McKey and Pridgen, who had answered, in the sum of \$616.95, being the balance of principal, interest unpaid, and attorney's fee, and the vendor's lien foreclosed on the property so purchased by Allen from Ucovich; and Pridgen and McKey, as prayed for in their answer, recovered against Allen in the event they were compelled to pay such judgment. On appeal by Allen, the Court of Civil Appeals affirmed the judgment of the district court. 174 S. W. 928.

[1] Ucovich, defendant's vendor, purchased the property subject to, but without assuming payment of, the vendor's lien, and was therefore not personally liable for the debt. Through his deed from Ucovich, defendant assumed payment of part of the indebtedness. Ucovich, the grantor, not being liable on the notes, did the promise of defendant to his grantor inure to the benefit of plaintiff, the holder and owner of the notes, and give him a right of recovery against defendant? The question appears to be of first impression in this state, and in other jurisdictions the authorities are in irreconcilable conflict.

[2] It is well settled in this state, and held with practical unanimity in the various states, that a grantee, assuming payment of a mortgage or lien indebtedness, for which his grantor is personally liable, thereby becomes liable to, and can be sued thereon by, the holder and owner of such indebtedness. *Hill v. Hoeldtke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672; *Brannin v. Richardson*, 108

Tex. 112, 185 S. W. 562; *Hoeldtke v. Horstman*, 61 Tex. Civ. App. 148, 128 S. W. 642.

In some states, the liability of the grantee assuming the payment of a mortgage or lien is based upon an application or extension of the equitable doctrine of subrogation. The grantee becomes the principal and the grantor a surety for him, and in equity the creditor, the holder of the mortgage or lien, is entitled to the benefit of all collateral obligations for the payment of the debt which the surety has received for his indemnity, and is permitted to proceed directly against such grantee to avoid circuity of action. The logical conclusion from such holding is that the mortgagee or lienholder is denied the right of recovery against the grantee in the absence of liability on the part of the grantor, for without such liability the relation of principal and surety and the resultant right of subrogation could not arise.

[3] In a majority of the states, however, the liability of the grantee is held contractual in its nature. It is based upon the broad and well-settled principle, supported by the overwhelming weight of authority in the courts of this country, that where one person for a valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action thereon. 3 Pomeroy, Eq. Jur. § 1207.

In *Brannin v. Richardson*, supra, wherein the grantee had assumed payment of the vendor's lien, the grantor being personally liable therefor, there is recognition of the application of the doctrine of subrogation.

In *Hill v. Hoeldtke*, supra, the court held the relation created between the grantee, thus assuming payment of the lien, and the lienholder purely contractual; such grantee becoming directly liable to the lienholder.

In *Spann v. Cochran & Ewing*, 63 Tex. 240, the court said:

"It thus appears that, at the time Cochran & Ewing acquired the interest of Watson in the copartnership property, they obligated themselves to pay the debts or liabilities, and this as the chief consideration on which the sale by Watson was based. It, however, does not appear that Spann was a party to that contract; nor that the instrument by which the obligation of Cochran & Ewing to pay the debt due to Spann is claimed to have been fixed was signed by them. It is believed, however, that such an agreement between a debtor and a third person, made upon valuable consideration, gives to the creditor a cause of action on which he may sue and recover from the person who has so contracted to pay to him a debt originally due only by the person to whom the promise is made. This seems to be in accordance with the great weight of American authority."

In each of the above-cited Texas cases, and, so far as we have been able to discover, all the cases in our courts dealing with the right of a third person for whose benefit a contract is made, but to which contract he is a stran-

ger, there was some privity, by contract or otherwise, between the promisee and such third person, some liability or obligation from the former to the latter, giving the third person a legal or equitable claim to the benefit of the promise. In a number of jurisdictions, this is held necessary in order to the enforcement of the contract by such third person.

[4] Upon a careful consideration of the authorities, we are inclined to the view that the liability under a contract, for the benefit of a third person, a stranger thereto, and the right of such third person to enforce the contract, should not be limited by the requirement that there be some obligation or duty owing from the promisee to such third person. The right "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, \* \* \* but upon the broader, and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded." *Brewer v. Dyer*, 7 Cush. (Mass.) 337; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467.

Allen and his vendor contracted for the purchase and sale of the land and the consideration to be paid therefor. It is wholly immaterial, as far as Allen is concerned, to whom the purchase money or any part thereof was to be paid, and, if to some third person, whether his vendor was under any legal obligation to such third person. If his vendor directed the payment of part of the purchase price to one to whom he was under no obligation, the same being intended as a mere gratuity, Allen has no ground for complaint; such agreement being upon a valuable consideration. The lien debt assumed by Allen was a part and parcel of the consideration for the purchase of the land. The amount so assumed constitutes in legal effect a debt due by Allen which he agreed to pay to the holder of the notes instead of to his vendor, from whom the consideration for the promise moved. *Spann v. Cochran & Ewing*, supra.

The assumption clause cannot be construed as a mere indemnity to the grantor. There was no personal liability on the part of the grantor; hence no liability against which to indemnify him. Such clause, standing alone, without more, evidences a promise for the benefit of the holder of the notes. The promise was upon a sufficient consideration, and no good reason is perceived for denying to Traylor the right to enforce performance thereof.

We have not, in the discussion, cited the numerous cases from the other states passing upon the question here presented. The great majority are cited and quoted from in the notes in 22 L. R. A. (N. S.) 492, and 39 L. R. A. (N. S.) 151.

Included in plaintiff's recovery was 10 per

cent. of the principal and interest of the notes as attorney's fees amounting, as stated by defendant in error, to \$56.09.

Writ of error was granted herein, because the court was inclined to the view that, under the contract as pleaded, plaintiff was not entitled to such recovery.

The petition alleged that Allen "assumed the payment of the sum of \$4,784, together with interest accrued and to accrue thereon, representing a part of the unpaid principal sum then due and owing upon said vendor's lien notes, the said Allen assuming and agreeing to pay on the principal and interest of said notes an amount equivalent to \$23 per lot on each of the said 32 lots therein conveyed to him."

The notes stipulated for the payment of attorney's fees. Had Allen assumed the payment of the notes, his liability would include attorney's fees. He did not, under the allegations of the petition, assume the payment of the notes, but only of a specific amount "on the principal and interest of said notes." It was error to permit a recovery of attorney's fees.

We are of opinion that the judgment of the Court of Civil Appeals, affirming the judgment of the district court, should be here reformed by deducting therefrom the sum of \$56.09 allowed as attorney's fees, and, as so reformed, the judgment in all respects affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### PARK v. RICH et al. (No. 86-2888.)

(Commission of Appeals of Texas, Section B.  
June 11, 1919.)

#### 1. CORPORATIONS §244(1) — LIABILITY ON UNPAID STOCK—EFFECT OF TRANSFER—GOOD FAITH OF TRANSFERORS.

Where incorporators and subscribers made affidavit that the stock was fully subscribed and paid, caused the corporation's books to so show, had stock issued to themselves as fully paid and nonassessable, and represented, in sale of the stock, that it was fully paid, purchaser paying full face value therefor, but, although they had paid for the stock the amount of merchandise recited in their affidavits, the cash amounts recited as paid were in fact not paid by them, the question of their good faith in their sale of the stock was immaterial on the question of their liability for amounts unpaid on their stock.

#### 2. CORPORATIONS §232(1) — STOCKHOLDERS' LIABILITY—UNPAID SUBSCRIPTIONS—RECITALS IN APPLICATION FOR CHARTER.

Where original incorporators and subscribers, in their affidavit in application for charter,

For other cases see same topic and KEY-NUMBERS in all Key-Numbered Digests and Indexes

ter, set forth, as fully paying for stock subscribed by them, payments partly in merchandise and partly in cash, they could not claim, as a defense to their liability for the amounts recited as cash, which were, in fact, not paid, that their valuation in such affidavit of the merchandise turned over by them was too low.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by M. C. H. Park, trustee in bankruptcy, against B. T. Rich and others. Judgment for plaintiff was reversed and remanded by Court of Civil Appeals (177 S. W. 184), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

J. D. Williamson, of Waco, for plaintiff in error.

Spann & Spann, of Temple, and Sleeper, Boynton & Kendall, of Waco, for defendants in error.

SADLER, J. B. T. Rich, S. B. Stitt, Frank Leahy, and Joe S. Thompson organized the Rich Dry Goods Company with a capital stock of \$15,000, and procured a charter from the state October 21, 1909.

The subscriptions for the stock were made as follows: Rich, 50 shares; Stitt, 64 shares; and Leahy, for himself and Thompson jointly, 36 shares. The shares were of the par value of \$100 per share.

In the application for the charter Rich, Stitt, and Leahy made affidavit that the capital stock was fully subscribed and paid up. Payments were set forth as follows: Rich, \$3,360 in goods, wares, and merchandise, and \$1,640 in cash; Stitt, \$4,240 in goods, wares and merchandise, and \$2,160 in cash; Leahy, acting for himself and Thompson, \$2,400 in goods, wares and merchandise and \$1,200 in cash. On the acceptance and filing of this charter, organization was had, and Rich, Stitt, and Leahy became the officers of the corporation. Certificates of stock were issued to each of the subscribers, in accordance with the subscriptions set forth in the affidavit, that is, 50 shares to Rich, 64 to Stitt, and 36 to Leahy, shown to be fully paid and nonassessable. Entry was made on the books of the corporation showing the amount of capital stock to be \$15,000, and that it was fully paid. The association was chartered as a mercantile company, and thereafter conducted a dry goods business.

About the 31st day of January, 1910, the incorporators sold their shares of stock to one Hallenbeck, who paid the full par value therefor; and he and his sons, as stockholders, continued to operate the business of the corporation for about one month, when they sold their entire stock to one Cordell, who operated until February 17, 1911, when the corporation was adjudged a bankrupt. M. C. H. Park was thereafter

elected, and qualified as trustee about March 20, 1911.

Thereafter the trustee applied to the referee for an order making a call upon defendants for the unpaid balance due by them on their stock subscriptions, wherein they answered. On a hearing before the referee in bankruptcy it was determined that in the organization of the corporation the defendants had not paid their stock subscriptions, and an assessment was made against them. The trustee was authorized to file suit to recover from them the amount unpaid. This order undertook to determine the amount which each original subscriber had failed to pay in on his stock, but permitted the shareholders to urge any defenses against the recovery which might be authorized at law. The amounts found due by the referee were in excess of the amounts found due by the jury.

Suit was filed in the district court of McLennan county against all of the original subscribers, and judgment recovered by the trustee against Rich for \$1,640, Stitt for \$2,160, and Leahy and Thompson jointly for \$1,200; these being the amounts of cash which were shown in the affidavit to have been paid in by each subscriber on his respective stock and found by the jury not to have been paid.

On an appeal to the Court of Civil Appeals by the defendants the judgment of the district court was reversed and remanded. 177 S. W. 184.

On motion for rehearing, while receding from some of the holdings announced in its original opinion, the Court of Civil Appeals adhered to the judgment reversing and remanding the case.

It will perhaps be of assistance in understanding the decision of the questions presented by the writ of error to give a further statement of the record.

The defendants in the district court, among other defenses, sought to avoid liability on the proposition that they had in good faith, for full face value, sold and transferred their stock to the Hallenbecks, at a time when the corporation was a going and solvent concern, and that they should thereby be relieved from liability for any unpaid portion of their subscription, on the theory that Hallenbeck should be held therefor. They also contended that, in order to hold them liable, it was necessary for the trustee to show want of good faith in them, and also to show that Hallenbeck did not know that they had not fully paid their subscriptions, or that he did not have knowledge of facts sufficient to put on inquiry which would disclose the fact of nonpayment by them.

The defendants admitted that they had not paid the amounts of cash subscriptions recited in the affidavit in the purchase of their stock; that the stock had been issued to them



fully paid up and nonassessable; that the books of the company showed the stock to be fully paid; that in the sale to Hallenbeck they represented to him that it had been fully paid; and that he paid them full face par value therefor. The uncontradicted evidence shows that the only payments made by the stock subscribers upon their stock to the corporation was by the transfer of certain merchandise which they owned jointly, being goods, wares, merchandise, fixtures, notes and accounts, bought by said parties from the Shotwell Dry Goods Company, a corporation, on the 13th day of September, 1909, same being located in the J. B. King building, on the corner of Mosquite avenue and Market street, in the city of Rogers, in Bell county, Tex., and of the reasonable cash value of \$10,000, the interest of each respective subscriber being therein as follows, to wit: Rich, \$3,360; Stitt, \$4,240; Leahy and Thompson, \$2,400—that they did not make any other payments on their stock.

#### Opinion.

[1] We think that the decision of this case rests upon the question of the primary liability of the defendants in error on their contracts of subscription as shown by the uncontradicted evidence. We are presented with a statement of facts which shows without contradiction that the defendants in error, as the original subscribers for the stock, made affidavit that it was fully subscribed and paid, that they had caused the books of the corporation to so show, and had issued stock certificates to themselves as fully paid and nonassessable; that in the sale to Hallenbeck they represented the stock to be fully paid, and that he paid them the full face value therefor; that the stock was unpaid in the amounts of cash asserted in the affidavit to have been paid by the respective subscribers; that Leahy was acting for himself and Thompson in the transaction.

Under this record we think that good faith on the part of the defendants in their sale to Hallenbeck is immaterial, but, if material, that it does not arise on the evidence. Their testimony as to their good faith in the transaction with Hallenbeck is, at most, only their conclusion based upon the facts shown. These facts unquestionably establish, in our view, the want of good faith, since defendants admit that they had not paid into the treasury of the corporation the amounts of money shown in their affidavit; that they knew that the stock was unpaid when they sold to Hallenbeck; that they represented it as fully paid, and accepted property from him at a valuation which compensated them for the stock as fully paid. Their acts, as disclosed, evidence a want of good faith on their part in the disposition of the stock, and the conclusion testified to cannot find its support in any fact established by

the evidence. We apprehend that it cannot with reason be maintained that the bona fides of the defendants in this transaction arises.

However, we are not to be understood as holding that their good faith in selling to Hallenbeck would relieve them from the payment of any balance due to the corporation by virtue of their contract in subscribing for the stock.

We are of the opinion that there is no evidence in this record tending in the slightest to charge Hallenbeck at the time of the purchase of this stock from the defendants with any information which would put him on notice or on inquiry as to whether the defendants had paid for their stock or not. All the circumstances brought to his knowledge, as shown by the record, were to the effect that the stock had been fully paid up. But, even should there have been circumstances presented to him which required investigation on his part, the evidence shows that every source to which he could have gone for information would have sustained the contention of the defendants that the stock had been fully paid up. The affidavit on which the charter was issued, the books of the corporation, and the stock certificates themselves, all were confirmatory of the assertion made by the defendants in the sale of the stock to Hallenbeck.

This is not a case wherein there has been a sale of a stock subscription prior to organization; but here every step necessary to a completion of the transaction had been taken, and the stock on its face was a certificate of payment in the nature of a receipt acknowledging full performance by each subscriber of his obligation to the company. Parties dealing with this stock in the hands of the certificate holders had the right, and the creditors dealing with the corporation were authorized, to assume that the transactions between the original subscribers and the corporation were free from any vice, and that the contract of organization had been legally and fully carried out.

[2] The real issue presented in this case is as to the payment for the stock by the subscribers. The uncontradicted evidence is to the effect that goods, wares, and merchandise were put into the concern at a valuation of \$10,000. This was the property which the defendants had taken in their purchase of the assets of the Shotwell Dry Goods Company. This was the valuation placed upon the property by them. It was accepted at that valuation as a payment of that amount of money upon the capital stock of the corporation. If this property was of value in excess of that amount, the corporation simply profited thereby; but defendants were bound by the value at which they tendered it and at which it was accepted. The subscribers offered in payment on their stock subscriptions property at a fixed valuation.

The corporation when organized accepted this property at that valuation as the equivalent of a cash payment on the obligation of the subscribers. They are bound by that valuation, and cannot defeat their further obligation and promise to pay cash for the remainder of their subscription by showing that the property at the time of its transfer to the corporation was of a greater cash value than fixed by them in the sale. That would be in violation of their contract of sale to the corporation.

What we have said here relative to the situation of a subscriber who transfers property at a fixed valuation to the corporation in payment for his stock must not be construed as applying to the corporation or creditors in the event it should be shown that the property so given had been fraudulently foisted on the corporation at a fictitious value.

As we construe the contract of the original subscribers to this stock, they bound themselves to convey to the corporation organizers for its benefit certain property at an agreed valuation in payment for \$10,000, of the stock for which they subscribed, and then agreed to pay the balance in cash. They failed to perform the latter part of their contract. They were the organizers of the company, and, as its trustees, failed to require payment as contracted, but accepted less than the full performance on the part of themselves. The corporation, under their trusteeship, issued the full amount of stock, thus receipting for full payment. Whether it was intended thus to defraud the corporation and its creditors is of no moment. To permit subscribers to take advantage of such a transaction would be compounding a fraud upon the company and those who dealt with it in the faith of its stock having been fully paid and in the conscious recognition of the verity of defendants' affidavit and the records of the corporation made under their authority. 7 R. C. L. §§ 236, 254, 389, 395.

The uncontradicted facts in this record show that these defendants in error promised to pay to the corporation certain amounts in cash in the purchase of stock and the satisfaction of their subscriptions. They received the full amount of stock from the corporation. They have not paid their cash obligations. The creditors of the corporation are entitled to have them made to comply with their promise to the company. The judgment of the trial court, based on the jury verdict, imposes no greater burden upon them than is laid upon them by the law and by justice. The right of this matter having been determined by the judgment of the trial court, we see no reason, in justice or law, for sending this case back to the trial court. Such errors as may have crept into the record on the trial have not resulted in an un-

just verdict, nor in a judgment which is not supported by the facts and the law. Eliminating every error charged to have been committed on the trial of the case, and still no other judgment than that which was rendered by the lower court would be justified by the record thus purged.

There are perhaps errors pointed out in the opinion of the Court of Civil Appeals which, but for the condition of this record, might justify a reversal; but we are of opinion that these errors become immaterial under the record as presented here.

We therefore recommend that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the trial court be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

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WALSH v. METHODIST EPISCOPAL CHURCH, SOUTH, OF PADUCAH, TEX., et al. (No. 63-2806.)

(Commission of Appeals of Texas, Section A. June 21, 1919.)

1. DAMAGES §§122—BUILDING CONTRACTS—DELAY IN PERFORMANCE—MEASURE OF DAMAGES.

Church's measure of damages for contractor's failure to complete construction of church building within stipulated time is the value of the use of the building during the time it should have been used after date provided for completion.

2. DAMAGES §§80(1)—LIQUIDATED DAMAGES OR PENALTY.

Where it cannot be ascertained from the face of the contract that the damages stipulated to be paid in case of a breach are excessive, and it cannot be determined from evidence whether the stipulated amount reasonably approximates the actual damages, the provision cannot be construed as a penalty.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by the Methodist Episcopal Church, South, of Paducah, Tex., and others against E. L. Walsh and the Texas Fidelity Bonding Company. Judgment for plaintiffs affirmed by Court of Civil Appeals (173 S. W. 241) as to defendant Walsh, and reversed and rendered as to defendant surety company, and defendant Walsh brings error. Judgment of Court of Civil Appeals affirmed.

J. M. Blankenship, of Wichita Falls, for plaintiff in error.

Browne & Hawkins and James M. Whatley, all of Paducah, for defendants in error.

SONFIELD, P. J. The Methodist Episcopal Church, South, of Paducah, Tex., and the trustees thereof, plaintiffs, brought action against E. L. Walsh and the Texas Fidelity Bonding Company, defendants, to recover damages sustained by plaintiffs through the failure of defendant Walsh to complete a church building in the town of Paducah, Tex., according to the terms of a written contract. The Texas Fidelity & Bonding Company was sued as surety on the bond of Walsh. The cause was tried to the court, and judgment rendered against defendants in the sum of \$1,029.36, of which amount \$840 was for 84 days' delay in completing the building after the stipulated time at the rate of \$10 per day. On appeal, the judgment of the district court was affirmed as to defendant Walsh, and as to the surety company reversed and rendered. 173 S. W. 241. Writ of error was granted on the application of defendant Walsh.

The question for determination is, Should the provision for the payment or forfeiture of \$10 for each day's delay in completing the building after the specified date be construed as a stipulation for liquidated damages or as a penalty? The provision reads as follows:

"The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit, September 1, 1913; and in the event the contractor fails to complete the same within the time specified, he forfeits the sum of \$10.00 per day for every day it remains incomplete on his contract as liquidated damages; and party of the second part (the trustees) shall deduct the same out of the contract price if sufficient funds then remain in their hands; otherwise party of the first part to pay same at Paducah, Texas, on demand."

The Court of Civil Appeals held that the damages for failing to complete the church building within the time provided would necessarily be uncertain and their amount indeterminate; therefore the provision should be construed as fixing by stipulation the amount of the recovery; in other words, liquidated damages rather than a penalty.

In the view we take of the case, we deem it unnecessary to inquire into the correctness of this holding, being of opinion, upon an examination of the record, that the court reached a correct conclusion in construing this provision.

[1] In the Court of Civil Appeals defendant assigned as error the refusal of the trial court to permit the witness J. A. Lester to state what amount, if anything, plaintiff had paid out as rent for a building in which to hold public worship after the time the church building should have been completed under the terms of the contract and the time when it was actually completed, for the rea-

son mentioned and set out in his bill of exception No. 1. The Court of Civil Appeals held the testimony irrelevant, the damages recoverable being the value of the use of the building during the time it should have been in use after September 1st. We concur in this holding.

Defendant's first assignment in his application for writ of error herein is as follows:

"The Court of Civil Appeals erred in sustaining the objections of plaintiffs and thereby refusing to permit the witness, J. A. Lester, to state what amount, if anything, plaintiff had paid out as rent for a building in which to worship after the time said church building should have been completed under the terms of the contract and the time when it was actually completed, and the probable rental value of said church."

The italicized portion of this assignment of error does not appear in the assignment presented to the Court of Civil Appeals, nor does the bill of exception show any effort on the part of defendant to prove by the witness the probable rental value of the church. Had defendant proven or sought to prove rental value, a different case would have been presented.

Defendant did not plead that the provision in the contract for liquidated damages was intended as a penalty, or that there was no approximation between the stipulated amount and the actual damages suffered, nor was there any evidence of the amount of actual damages.

In *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467, in refusing a writ of error, the Supreme Court discussed the question of liquidated damages passed upon by the Court of Civil Appeals.

In that case, suit was brought to recover a balance due under a building contract. The contract stipulated that the building should be completed by the 1st day of October, 1889, failing in which contractor should pay to Collier, the owner, as liquidated damages, \$10 per day for every day the completion should be delayed. Defendant Collier in his answer prayed damages for delay in the completion of the house, as a counterclaim, relying solely, so far as shown by the record before the Supreme Court, upon a stipulation in the contract as fixing the amount. The trial judge charged the jury, in effect, to allow the defendant damages upon his counterclaim at the rate of \$10 a day from October 1, 1889, to November 12, 1889, the time at which defendant entered and occupied a part of the house. Pursuant to the instruction, the jury found for the defendant \$420 offset against the balance otherwise due on the contract price, and gave verdict for the plaintiff for the difference. In passing upon the question of the correctness of the ruling of the trial court, the Court of Civil Appeals said:

"We do not think the action of the trial court upon this issue can be complained of by the appellant. We think the stipulation in the contract for \$10 per day as liquidated damages for each day of delay in the completion of the building should have been construed and treated as a penalty. \* \* \* Under such a construction there was not proof of damages to the extent of the recovery, and the appellant [Collier] suffered no injury from the charge as given."

The Supreme Court, discussing the construction, of the provision with reference to damages, said:

"The principle would appear to be that although a sum be named as 'liquidated damages,' the courts will not so treat it, unless it bears such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss—if there be no approximation between them, and this being made to appear by the evidence—then it seems to us, and then only, should the actual damages be the measure of the recovery."

Applying the rules of law to the facts in that case, the court continued:

"In this case as presented to us there is no evidence by which the actual damage resulting from the failure to complete the building at the time stipulated can be ascertained, ten dollars per day is apparently a very large sum to pay for the rent of a house which cost \$5,670 to construct; but we do not know the value of the lot. Nor is it clear that, even if the evidence disclosed the entire value of the property, we would be justified in assuming even approximately, its rental value. Such being the state of the case, we are not prepared to concur in the ruling of the Court of Civil Appeals upon the point just discussed."

[2] The contract price of the church building to be erected was \$5,200. There is no evidence of the value of the lot, nor of the rental value of the property. Where, as in this case, it cannot be ascertained from the face of the contract that the damages stipulated to be paid in case of a breach are excessive, and there is no evidence of the amount of damages actually suffered, so that it cannot be determined from the evidence whether the stipulated amount reasonably approximates the actual damages, the provision cannot be construed as a penalty.

We conclude that the facts in this case bring it clearly within the rule announced in *Collier v. Betterton*, supra, and under the record the provision must be construed as a stipulation for liquidated damages.

We are of opinion that the judgment of the Court of Civil Appeals, affirming the judgment of the district court, should be affirmed,

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

#### EMBERLINE v. STATE. (No. 5330.)

(Court of Criminal Appeals of Texas. June 4, 1919.)

#### 1. CRIMINAL LAW §1098—APPEAL—STATEMENT OF FACTS—FORM.

A statement of facts, on appeal in a criminal case, consisting of questions and answers, is objectionable, and will be stricken.

#### 2. ANIMALS §36—TICK ERADICATION PROSECUTIONS—COMPLAINT—FORM.

In prosecutions for violating the tick eradication statute, it is sufficient to substantially charge that the election was legal and held in a certain county to determine whether said county should prosecute the work of tick eradication, at which election the majority of legal votes were cast in favor thereof, and thereafter said law was put in effect as prescribed by statute, and thereafter on named date in said county and state a named person was the owner and caretaker of certain animals specified, and refused to dip such animals after being directed to do so by the live stock sanitary commission at the time and manner set out.

#### 3. CRIMINAL LAW §400(3)—TICK ERADICATION STATUTE—SECONDARY EVIDENCE.

In a prosecution for violating the tick eradication statute, it was error to permit the county judge orally to testify as to the fact of the publication of the result of the election for taking up the work of tick eradication in the absence of a showing that such proof was necessary because of the loss or destruction of the certificate provided for by section 7 of the act (Vernon's Ann. Civ. St. Supp. 1918, art. 7314e).

#### 4. CRIMINAL LAW §429(1), 430—EVIDENCE—TICK QUARANTINE — PROCLAMATION — CERTIFIED COPY.

In a prosecution for violating tick eradication statute, a supplemental proclamation of the Governor, declaring the county under tick quarantine, was not inadmissible as against the objection that it did not appear that the proclamation had been published in any newspaper, although it would have been inadmissible on objection that it was not a copy certified by the secretary of state, as prescribed by section 9 (Vernon's Ann. Civ. St. Supp. 1918, art. 7314g) of that statute.

#### 5. CRIMINAL LAW §400(3)—SECONDARY EVIDENCE—TICK QUARANTINE ORDER.

In a prosecution for violating the tick eradication statute, evidence as to what the order by the live stock sanitary commission, directing the defendant to dip his cattle contained, was inadmissible; the order itself being the best evidence.

**6. ANIMALS**  $\S$  30—**TICK QUARANTINE—CATTLE SUBJECT TO DIPPING ACT.**

Cattle need not be actually infested with ticks in order to make them subject to the tick eradication statute and to the requirement of the live stock sanitary commission that they be dipped; the requirements applying to all cattle within the specified quarantine zone.

**7. ANIMALS**  $\S$  34—**CRIMINAL LAW**  $\S$  322—**TICK QUARANTINE.**

That free dipping vats have not been provided by the county does not excuse an owner of cattle from refusing to obey the tick eradication statute; the presumption being that the commission would refuse to order cattle dipped in any vat where exorbitant charges were attempted.

**8. ANIMALS**  $\S$  29—**TICK QUARANTINE—VALIDITY OF STATUTE.**

The tick eradication statute held not unreasonable as against certain grounds urged.

Appeal from Palo Pinto County Court;  
W. F. Smith, Judge.

J. R. Emberline was convicted of violating the tick eradication statute, and he appeals. Reversed and remanded.

S. D. Goswick, of Mineral Wells, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted in the county court of Palo Pinto county, Tex., of a violation of the tick eradication statute (Acts 35th Leg. c. 60), and his punishment fixed at a fine of \$25, and he appeals.

[1] The Assistant Attorney General moves to strike out the statement of facts prepared by the stenographer, because the same is not incorporated in the transcript, and also because the same consists of questions and answers. The last objection is unquestionably good, and said motion is sustained. However, there appears in the transcript what purports to be a statement of facts in narrative form, properly approved and filed, which we will consider.

[2] Appellant moves to quash the complaint and information for various reasons. While unnecessarily long and containing matters which are surplusage, we are of opinion that said pleading sufficiently charged a violation of the law. The act being recent and there being no form laid down, we take the liberty of suggesting that if it be substantially charged that the election was legal and held in a certain county to determine whether said county should take up and prosecute the work of tick eradication therein, at which election a majority of the legal votes cast were in favor thereof, and thereafter said law was put in effect in the

manner and form prescribed by statute, and thereafter, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in said county and state, one A. B. \_\_\_\_\_ was the owner and caretaker of certain domestic animals, to wit, \_\_\_\_\_, and did fail and refuse to dip said animals after being directed in writing so to do by the live stock sanitary commission of Texas, at a time and manner set out in said written direction, against the peace and dignity of the state; that this is substantially a sufficient allegation where the charge is a failure to dip, and same can be changed to meet any other form of violation of said statute.

[3] The county judge should not have been permitted to orally testify to the fact of the publication of the result of the election unless such character of proof was found to be necessary by reason of the loss or destruction of the certificate of such fact, provided for by section 7 of the act (Vernon's Ann. Civ. St. Supp. 1918, art. 7314e). Said section specially provides that such certificate shall be admissible in evidence in the courts.

[4] Appellant complains of the admission in evidence of what purported to be a supplemental proclamation of the Governor, declaring Palo Pinto county under tick quarantine. If the objection had been, because said document was not a copy certified by the secretary of state, as prescribed by section 9 of said act (article 7314g), same would have been good, but we observe from appellant's bill of exception thereto it was because it did not appear that said proclamation had been published in any newspaper, which objection was not tenable.

[5] No order, or copy of any order, issued by the live stock sanitary commission directing that appellant should dip his cattle at any time or manner, appears in the record. In the McGee Case, 81 Tex. Cr. R. 210, 194 S. W. 951, this court held it could not take judicial cognizance of such orders. Appellant objected to the testimony of Sheriff Abernathy as to what was in the order he had received from said commission, because the order was the best evidence and the objection should have been sustained, unless it was made to appear that the order was lost or destroyed.

[6] It was not necessary that the cattle of appellant should be actually infected with ticks in order to make them subject to the law and to the requirement of the commission that they be dipped. The requirements apply to all cattle within the specific quarantine zone.

[7] Nor do we think the appellant could refuse to obey the law because free dipping vats had not been provided by the county. Section 8 of the act, providing for treatment

at the expense of the county, applies only to certain forms of diseases therein named. The presumption will obtain until rebutted that the commission would refuse to order the cattle of any citizen dipped at any vat where an exorbitant charge was attempted. The law is intended for the betterment of the people, and not an instrument of oppression. No complaint was made of the small amount charged for dipping in the instant case.

[8] We cannot agree with appellant that the law is unreasonable because, as he puts it in his brief, it deprives "the old boney cow of the pleasure of rubbing off the ticks on his neighbor's 'fiancé,' and then, after being deprived of these privileges, the poor old hard-shell preacher was deprived of his milk and butter for several days after each dipping."

For the errors above mentioned, the judgment of the lower court is reversed, and the cause remanded.

#### LOPEZ v. STATE. (No. 5196.)

(Court of Criminal Appeals of Texas. June 4, 1919.)

#### BAIL §64—APPEAL—SUFFICIENCY OF RECOGNIZANCE.

An appeal in a felony case will be dismissed where the recognizance neither binds appellant to abide by the decision of the Court of Criminal Appeals, nor shows the court in which the accused was tried, nor follows the form prescribed by Code Cr. Proc. 1911, art. 908.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

Arnoldo Lopez was convicted of a felony, and he appeals. Appeal dismissed.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. This is an appeal from a felony conviction in the district court of the Thirty-Fourth district of El Paso county.

The Assistant Attorney General has filed a motion to dismiss the appeal because of a defective recognizance. The recognizance does not bind the appellant to abide by the decision of the Court of Criminal Appeals of Texas. *Lindsey v. State*, 59 Tex. Cr. R. 273, 128 S. W. 386. Nor does the same show the court in which the accused was tried. *Hughes v. State*, 62 Tex. Cr. R. 288, 136 S. W. 1068. Nor does said recognizance follow the form prescribed by our statutes. See article 903, C. C. P.; *Black v. State*, 68 Tex. Cr. R. 151, 151 S. W. 1053.

The motion of the Assistant Attorney General will be sustained, and the appeal dismissed.

#### STANDIFER v. STATE. (No. 5370.)

(Court of Criminal Appeals of Texas. June 4, 1919.)

#### 1. HOMICIDE §194—SELF-DEFENSE—UNCOMMUNICATED INTENTION OF PERSON KILLED.

Where defendant prosecuted for murder pleaded self-defense and claimed that deceased had come to the place in question to carry out a threat to kill defendant before sundown, testimony of the wife of deceased, explaining her husband's presence by detailing his intention, undisclosed to defendant, to meet witness at that place for the purpose of accompanying her home, was inadmissible.

#### 2. HOMICIDE §116(2)—SELF-DEFENSE—APPARENT DANGER.

The law of self-defense requires that the jury should view the matter of apparent danger from the standpoint of the accused.

Appeal from District Court, Milam County; John Watson, Judge.

Fount Standifer was convicted of manslaughter, and he appeals. Reversed and remanded.

R. Lyles, of Cameron, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

MORROW, J. Under an indictment for murder appellant was convicted of manslaughter.

He shot and killed Ben Johnson. Both parties were negroes. The homicide took place in the village of Gause. The difficulty began on a gallery in front of a restaurant kept by a negro named Perry. The adjoining house belonged to Mrs. Rhodes. It had been occupied by deceased and used for a restaurant, but a short time before the homicide she had leased it to appellant, who intended to use it for a like purpose. There is evidence that the deceased was opposed to the use of the premises by the appellant, and that he had on several occasions expressed his intention to kill the appellant in the event he did occupy Mrs. Rhodes' premises, some of these threats having been made in the presence of appellant, and others communicated to him. One witness testified that a very short time before the homicide he met deceased, who told witness that he had been mistreated, and that he was going to kill the appellant before sundown; that later he met the appellant and communicated to him this fact, and advised him not to go about the premises. Appellant testified that he had refrained from opening the restaurant in the building that he had rented from Mrs. Rhodes on advice from her, awaiting the departure of the deceased and fearing injury from him; that he had put some property belonging to his uncle

in the building; that the deceased's wife had obtained a note for \$20 against him, which note belonged to a man by the name of Williams, and had insisted upon its payment on the day of the homicide, and that he had notice of a fire about his premises and had gone to investigate its cause, and met the deceased, who upbraided him about not paying the note, and told him if he did not do so he would kill him, and that at that time he made an assault upon him, kicking his shins and exhibiting a pistol; that he called upon Mr. Rhodes, a white man, who interfered, and he then went to his home and got his pistol, and on his route back to town received the information that the deceased had said he was going to kill him before sundown; that at the request of his uncle he went to the building which he had rented to permit the property belonging to his uncle to be removed. He said:

"I walked on up on the restaurant gallery and deceased run around behind me, and I whirled around and pulled my gun on him, because he had been threatening my life, knowing he would injure me if he could. He run under me like, and I struck at him with the gun, and the gun went off."

A struggle followed, and the parties went into Perry's restaurant. Appellant said they both fell to their knees, and that Mary Johnson, the wife of deceased, joined in the affray, using a knife, and that in the struggle the deceased appeared to be trying to get something from his clothing; that during the struggle appellant jerked loose and fired at deceased, who ran to the back door, and appellant, thinking deceased was trying to get his gun, followed him and fired again. There was evidence that the appellant's uncle and wife also engaged in the affray after it begun and while they were in the restaurant. The deceased received two gunshot wounds; one of them fatal.

[1, 2] Appellant's theory was that the deceased had come to the premises for the purpose of carrying his threats into execution. The state explained his presence at the place of the difficulty by the testimony of his wife, upon the admissibility of which there arises one of the legal questions presented by a bill of exceptions, and is, in substance, that she testified that after having an altercation with the appellant some time before the fatal encounter on the same day, the deceased had left the premises, and that he and witness were ready and preparing to go to their home, when the deceased remarked that he had not mailed his letters, and she told him to go by the post office and mail his letters and meet her at the restaurant; that he went to the post office, and she went to Perry's restaurant, where he had told her to wait and had said that he would come straight there, and they would go home together. Appellant

insists that, he having no knowledge of this conversation, or the intent which is attributed to the deceased, and that the actions of the appellant were governed by the information in his possession, there was error prejudicial to him in admitting in evidence the undisclosed motive of the deceased. The same question of law arose in the case of *Adams v. State*, 44 Tex. Cr. R. 66, 68 S. W. 270, in which the presence of the deceased at the place of the homicide was explained by evidence that he was in the habit of making visits to his father, and that he was at the time on such a journey. The court held its admission erroneous, quoting *Johnson v. State*, 22 Tex. App. 222, 2 S. W. 600, in which case exception was reserved to the admission of testimony "that deceased was going on the next day to make up a party at Grade Smith's on Monday night." The court said:

"Obviously the purpose of this testimony was to show that deceased was entertaining no deadly purpose or intent when he went to Caddo Mills, the place of the homicide, and that he did not go there to carry out the threats he had previously made against defendant's life. We are of opinion the evidence was inadmissible, it being hearsay so far as defendant was concerned, and as such it was not binding upon him. \* \* \* It is a maxim of the law that a man is only bound so far as matters reasonably appear to him; he cannot be bound by motives locked up and hidden in the breasts of others. Deceased's undisclosed and undiscovered motive in going to Caddo Mills was not a material issue, and could throw no light whatever upon the guilt or innocence of defendant, whose motives alone were the important issue to be tried."

This principle has been applied in a number of instances, among them *Pratt v. State*, 53 Tex. Cr. R. 269, 109 S. W. 138; *Gray v. State*, 47 Tex. Cr. R. 378, 83 S. W. 705; *Burnett v. State*, 46 Tex. Cr. R. 119, 79 S. W. 550; *Clay v. State*, 44 Tex. Cr. R. 137, 69 S. W. 413; *Nelson v. State*, 58 S. W. 108; *Stell v. State*, 58 S. W. 76; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108. We think its application in the instant case is obvious. The appellant, in going to his property, on discovering deceased running behind him and preparing to attack him, would most naturally attribute his presence and conduct as an intent to carry into execution the threats that he had made to kill the appellant. He had no knowledge that the deceased had made an appointment to meet his wife at that time and place, and had no knowledge that it was the deceased's intention to go peacefully home with his wife and abandon any intention to injure the appellant. In the absence of such knowledge, these motives, if the deceased had them, could not be considered against the appellant. The admission of them in evidence, over his objection, invited the jury to consider them against him. This was antagonistic

to the law of self-defense, which requires that the jury shall view the matter from the standpoint of the accused, and this they cannot do if they consider against him those facts of which he had no knowledge.

As presented, we discover no error in the matters touched in the other bills of exception.

For the error mentioned, the judgment is reversed, and the cause remanded.

### Ex parte BROOKS. (No. 5305.)

(Court of Criminal Appeals of Texas. June 4, 1919.)

#### 1. HEALTH §24—CITY FARM—COMMITMENT OF PERSON AFFLICTED WITH DISEASE—ORDER.

Order of city health officer for commitment of woman to city farm because afflicted with disease is not void because authorizing delivery to quarantine officer who has, since remand to him, ceased to hold office, as any officer having charge of farm would have legal custody of her.

#### 2. HABEAS CORPUS §3—ORIGINAL APPLICATION—OTHER REMEDY.

Original writ of habeas corpus cannot be granted to secure release of woman committed to city farm because afflicted with syphilis on showing that both positive and negative results have come from various tests, since application for writ of habeas corpus to local courts would furnish the remedy.

#### 3. HEALTH §24—DISEASED PERSONS—QUARANTINE TREATMENT BY PRIVATE PHYSICIAN.

There is nothing in Acts 35th Leg. (Fourth Called Sess.) c. 85, authorizing health officer to quarantine prostitutes afflicted with communicable disease, which prohibits treatment by private physicians while in quarantine.

#### 4. HEALTH §21—DISEASED PERSONS—QUARANTINE—VALIDITY OF ACT.

Legislature has power to declare that prostitution is a source of communicable diseases, and that its suppression is a public health measure, and to direct, as is done by Acts 35th Leg. (Fourth Called Sess.) c. 85, that health officers hold such persons in quarantine, and such act is not violative of provisions of Constitution, or discriminatory, arbitrary, or unreasonable.

Original application for writ of habeas corpus by Grace Brooks to secure her release from custody under restraint of Searcy Baker, Chief of Police of Houston, on an order of John M. Holt, City Health Officer, directing that she be confined at city farm. Writ dismissed, and relator remanded to custody.

Turnley & Clark, of Houston, for appellant.

H. T. Branch, Dist. Atty., of Houston, and E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. This is an original application for writ of habeas corpus sued out by the relator, Grace Brooks, who is detained by Searcy Baker, chief of police at Houston, by reason of an order issued by John M. Holt, U. S. P. H. S., director of sanitation, and chief health officer of said city of Houston, which order directs that the relator be confined at the city farm until discharged by said health officer. A copy of said order is attached to the application, and it is substantially stated therein that relator has been examined and is infected with syphilis, and is ordered into quarantine at the said municipal farm, there to be detained until released by order of said health officer.

The first ground of the application is that the said city health officer has no right or power to act in the premises because of the fact that he holds two offices in derogation of the provisions of our Constitution. This contention is wholly unsupported, and is negated by the facts.

[1] The second contention is that the order is void because it authorizes the delivery of the relator into the hands of P. M. Creagh, who is not a quarantine officer and who has, since relator was remanded to his custody, severed his connection with the city farm and the city administration. The order of the health officer remanded relator to confinement at the city farm, and the mention of Creagh was incidental. If said officer has resigned or been removed his successor, the chief of police or other officer having charge of said farm would have legal custody of relator.

The next contention made is that the farm is not suitable place for such patients, is too remote from the city and transportation facilities, and the friends of the relator, etc. There is nothing supporting any of these propositions suggested by the statement of facts.

[2] The fourth contention is that there have been numerous tests given relator since her confinement, and that some of the same showed positive and some negative results. Nothing is thus presented for our decision. If relator is free from syphilis or gonorrhea she may present her application for writ of habeas corpus to the local courts under the authority of ex parte Hardcastle, decided by us at this term, and if free therefrom may be discharged. The courts will understand that the health officers have no right or power to hold in quarantine citizens who do not show the presence of some of the



diseases named in chapter 85 of the Acts of the Fourth Called Session of the Thirty-Fifth Legislature.

[3] It is claimed that relator is denied treatment at the hands of other physicians than the city health officer, by the terms of said act. We find nothing in the statute, or facts adduced and agreed to, to support such contention.

[4] We have carefully examined all of the contentions of the relator, and hold them without merit. The Legislature has power to declare that prostitution is a source of communicable diseases, and that its suppression is a public health measure, and to direct, by enactment, that reasonable steps be taken, in the manner, and with the latitude necessarily accorded to the enforcement of sanitary and health statutes, to suppress same. The discovery in patients of the diseases at which the provisions of chapter 85, supra, are directed is confided to the medical profession, and the care and treatment thereof is of necessity in the hands of the members of the same noble fraternity. There is nothing in the act which prevents or forbids any suspect, or persons detained, from perfect freedom of treatment by any reputable physician while in the custody of the officials charged with the enforcement of the law; and nothing which deprives any persons so confined for treatment of a speedy hearing at the hands of the court if there be oppression or detention without a cause. The object of the law is not punishment for the unfortunates who are afflicted with these maladies, so easily transmitted and so fearful in results, but the well-being of these and the remainder of the people.

In the instant case relator is shown to be a married woman, with a hard-working husband and four children, the youngest being 18 months old, but the record discloses that she declines to live with them, stating that she prefers the life of the streets. She is shown to be a common prostitute and a street walker, unwilling to stay at home and preferring to live by the profligate use of her body. Testimony was adduced showing numerous bestowals of carnal favors upon soldiers and other persons, also that relator was afflicted with gonorrhea and syphilis. We think the provision of said act that such patients should be confined for treatment until declared cured by official pronouncement is not unreasonable, unjust, or arbitrary. Our attention is not called to any authorities holding this or other similar acts violative of any of the provisions of our Constitution, or discriminatory, arbitrary, or unreasonable.

The writ is dismissed and relator remanded to the custody of the chief of police of the city of Houston, subject to the orders of the city health officer of said city.

## TORRENCE v. STATE. (No. 5318.)

(Court of Criminal Appeals of Texas. May 21, 1919. Rehearing Denied June 18, 1919.)

### 1. CRIMINAL LAW §792(2)—PRINCIPALS AND ACCESSORIES—EVIDENCE—INSTRUCTIONS.

In a prosecution for the theft of an automobile subsequently recovered from a third party who claimed to have purchased it, evidence held to show that defendant assisted in the sale and was a principal, so as to justify the court in charging with reference to the law of principals.

### 2. CRIMINAL LAW §517(2)—CONFESSIONS—ADMISSIBILITY.

In a prosecution for theft of an automobile subsequently recovered from a third party who claimed to have purchased it, a confession by defendant was admissible where it led to the finding of the stolen property, notwithstanding that the number and means of identification were obtained from the sheriff of another county.

### 3. LARCENY §82(1)—INDICTMENT—ALLEGATIONS OF OWNERSHIP.

Where the owner of an automobile sold it and received a check in payment, but was to keep the car until the purchaser could call and get it, and it was stolen while in the possession of the original owner, the ownership, so far as the prosecution for larceny was concerned was properly alleged to be in the original owner; he having the control, care, and management of the property.

### 4. LARCENY §82(1)—INDICTMENT—ALLEGATIONS AS TO OWNERSHIP OF PROPERTY STOLEN.

In larceny prosecutions, while ownership may be generally alleged to be in the general or special owner, under the statute ownership must be alleged to be in the party who has the actual control, care, and management of the property, and it is not sufficient to allege ownership only in the real owner, although an allegation that possession is in the real owner does not detract from the indictment.

### 5. CRIMINAL LAW §351(3)—EVIDENCE—ADMISSIBILITY—FLIGHT.

In a prosecution for the larceny of an automobile, evidence that defendant, while in custody under a charge in the county court for taking the car, broke jail and fled, was admissible in the district court; the cases not being separate or distinct, but involving the same act and the same facts.

### 6. CRIMINAL LAW §530—ORAL AND WRITTEN CONFESSIONS.

In a prosecution for the larceny of an automobile, an oral confession by defendant which led to the finding of the stolen property was admissible, notwithstanding a subsequent written confession.

Appeal from District Court, Hill County;  
Horton B. Porter, Judge.  
Dan Torrence was convicted of theft, and  
appeals. Affirmed.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

J. Webb Stollenwerck, of Hillsboro, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of an auto; his punishment being assessed at five years' confinement in the penitentiary.

The facts show that at night from the public square at Hillsboro an automobile was stolen. Shortly afterwards it was sold at Gorman, Eastland county. Appellant was arrested, and made a verbal confession, substantially, that "we" took the car at Hillsboro and sold it to Jones at Gorman. This confession was made to the sheriff of Coke county, who went to Gorman, saw Jones, who showed him a Ford car, but it proved not to be the one stolen from Hillsboro. He returned to Coke county, and shortly afterwards was called up by Jones stating that he had the car. He returned to Gorman and recovered a car, which proved to be that which had been stolen. Jones had the car when the sheriff first went to Gorman, but did not show it.

[1] It is contended, inasmuch as the sheriff had, after the confession, received information from the sheriff of Hill county as to the number of the auto, that therefore this confession did not lead to the recovery of the car. Jones testified that Allsup and defendant came to Gorman with the car and he bought it. Without going into detail of his statements, his evidence is, in substance, that their conversations and acts showed they were acting together in selling the car, and were interested in it. The testimony is sufficient to show that appellant was interested and assisted in the sale, and that the evidence makes him a principal within the contemplation of the law, which justified the court in charging with reference to the law of principals.

[2] With reference to the confession, we are of opinion that it was admissible. The statement led to the finding of the stolen property. The whereabouts of the car was not known until this confession was made. Appellant's contention that the sheriff of Coke county received information as to the number of the car from others would render the confession inadmissible. We cannot agree to that proposition. The car was fully identified independent of the number and by an array of testimony. If the confession leads or conduces to the recovery or finding of the property, it would be sufficient to admit it. The authorities hold that, if the statement be with regard to where the fruits of a crime, or the instruments with which a crime was committed, are secreted or to be found, it is not essential, in order to render the confession admissible, that such property or instruments be found in the exact place stated; but it is sufficient that they

be found in the immediate vicinity of such place, and be found in consequence of the information afforded by the defendant. See *Buntain v. State*, 16 Tex. App. 485; *Davis v. State*, 8 Tex. App. 510. The facts and circumstances stated and found to be true must be such as conduce to establish the guilt of the defendant, and if they are not of this character, the confession will not be admissible. Where the fact or circumstance stated and found to be true, and which is inculpatory, conducing to establish his guilt of the crime for which he is on trial, it will render the confession admissible. *Owens v. State*, 16 Tex. App. 448; *Ortiz v. State*, 68 Tex. Cr. R. 527, 528, 151 S. W. 1056. The car was located, by reason of the confession, in possession of Jones at Gorman. Some of the circumstances put in evidence as a means of identifying the car would not, therefore, render the confession inadmissible, especially in view of the fact it was fully identified independent of the number of the car mentioned.

[3, 4] It is also contended that there is a variance between the allegation and the proof as to ownership. There were two counts, one alleging ownership in Howard, and the other in Harper. The count alleging ownership in Howard alone was relied upon and submitted to the jury. The testimony is uncontroverted to this effect that Howard sold Harper the car, receiving a check for it. Howard was to keep the car until Harper could call and get it; he not being able to take charge of it at the time he purchased it. He was to return in a day or two and get it. Howard did keep the car, and had it in possession and was using it the night it was stolen. We are of opinion that this would put the ownership, so far as this case is concerned, in Howard; he having the control, care, and management of it until it was delivered to Harper. It may be well to state a few general rules in support of the above conclusion. Ownership may be alleged in the general or special owner. This is a general rule legally to be recognized as correct in theft cases. While this is true, there is another rule, which is statutory, to the effect that ownership must be alleged in the party who has the actual control, care, and management of the property alleged to have been stolen. This question was fully discussed in *Bailey v. State*, 18 Tex. App. 426, and *Frazier v. State*, 18 Tex. App. 434. The real ownership may be in one person and the actual control, care, and management in another, and, where this is the case, ownership must be alleged in the party having the actual control, care, and management. In such case it would not be sufficient to only allege ownership in the real owner. It would not detract from the indictment that possession be alleged in the real owner under such circumstances, but the indictment would not be complete nor

sufficient to meet the facts unless it alleged ownership in the party who had the actual control, care, and management of the property. To allege ownership in both would place the burden upon the state of proving such alleged ownership and want of consent; whereas, if the ownership in the real owner was not alleged, and the facts would show that the control, care, and management of the property was in the special owner, it would be sufficient to show, and it would have to show, such possession. These rules are found collated in Mr. Branch's Ann. P. C., in notes, on pages 1816 and 1317. Ownership may be alleged in the special owner whether the special owner would be responsible to the real owner or not. The proposition is he must be under such circumstances in actual control, care, and management of the property at the time it was taken. See *King v. State*, 43 Tex. 351; *King v. State*, 100 S. W. 387-389; *Howard v. State*, 77 Tex. Cr. R. 185, 178 S. W. 506. That the ownership may also be alleged in all joint owners or partners, heirs, etc., does not relieve the state from alleging ownership in the special owner when such is the fact. If one of the heirs has the actual control, care, and management, ownership must be alleged in such heir. It would not detract from the indictment to allege the others were joint owners. It would place the burden on the state to prove their nonconsent. Applying these rules to the facts here, we are of opinion that the ownership was properly alleged in Howard.

[5] Objection was urged to the introduction of flight. In this connection the record discloses that there was a charge lodged against appellant in the county court in Hill county for taking this car, and under this he was held in custody in jail in Coke county, and while so held broke jail and fled. When the indictment in the instant case was returned, that case passed off the county court docket, and appellant was held and tried under the felony charge. Appellant's contention is based upon the idea that the case in the county court was an entirely separate and distinct case from that found against him in the district court under the indictment. We are of opinion this is not maintainable. It was not a separate case in the sense in which appellant urges it. It was an arrest for the taking of the same auto for which he was tried in the district court. It involved the same act and the same facts, and it was from the arrest for this matter that he fled from jail in Coke county. Had he been arrested and placed in jail in that county for some other offense not connected with this transaction, his position would have been maintainable and should have been sustained.

There was also exception reserved to the manner of proving that the case was filed in

the county court. The papers, it seems, had disappeared and could not be located. This was shown only as a predicate for oral testimony. The pendency of the case was offered for the purpose of showing that flight was from the arrest for theft of this particular car. It was a relevant fact to connect his flight with his arrest in connection with the same theft.

[6] There was objection urged to the introduction of the oral confession because there had been a written confession subsequent to the oral confession. We think this was without merit. The oral confession led to the finding of the auto, and in pursuance of it the auto was found. This written confession if in accordance with the statute, might have been introduced, but was not. We are of opinion that the fact the oral confession was made under the circumstances here detailed would not be excluded because appellant had subsequently made a written confession.

There are some objections to the charge which we think are without merit, and as the record is presented to us we are of opinion the judgment should be affirmed, and it is accordingly so ordered.

#### DUNN v. JACKSON. (No. 2143.)

(Court of Civil Appeals of Texas. Texarkana.  
June 9, 1919. Rehearing Denied  
June 19, 1919.)

#### HABEAS CORPUS $\S$ 90(1, 6) — CUSTODY OF CHILD — PERSONS ENTITLED — WISHES OF CHILD.

The fact that defendant had cared for plaintiff's infant daughter for 14 years, is much attached to her, and is of good moral character, and that such child for some unknown reason is estranged from her father, stepmother, and half-sisters, does not justify giving defendant custody of such child when her father is a suitable person and able to care for her.

Error from District Court, Marion County;  
J. A. Ward, Judge.

Habeas corpus proceedings by J. T. Jackson to recover from Mrs. L. A. Dunn the custody of his minor child. From a judgment for plaintiff, defendant brings error. Judgment affirmed.

R. R. Taylor, of Jefferson, for plaintiff in error.

Schluter & Singleton, of Jefferson, for defendant in error.

LEVY, J. J. T. Jackson, the appellee, brought this action by writ of habeas corpus to recover possession of his child, a girl of

about 14 years of age. The case was tried before the judge without a jury, and he filed the following findings of fact and conclusions of law:

"(1) I find that Annie R. Jackson was born in February, 1905, in Marion county, Tex., and while she was an infant only two weeks old her mother died, and her grandmother, Mrs. L. A. Dunn, was present at the death of Mrs. J. T. Jackson, her daughter, and that the applicant herein, J. T. Jackson, consented for Mrs. L. A. Dunn to take his infant daughter and care for her, and consented at that time not to retake the custody of the child from its grandmother.

"(2) Mrs. Dunn took the care and custody of Annie Jackson, and cared for her tenderly and well from that time to this date. \* \* \*

"(5) I find that Mrs. L. A. Dunn is of good moral character and an indulgent grandmother, but for the past three years has been practically an invalid, but is now somewhat improved; that she and her husband have separated and are not now living together, but she is living with a single son about 25 years of age, and she and this single son and another son who is working in the oil fields of Louisiana, and a daughter who is married, are very fond and almost passionately attached to Annie Jackson, and that she likewise is very fond of them and does not want to leave them. The grandmother does not oppose Annie going with her father if she wishes to go.

"(6) I find that J. T. Jackson is a man of honorable deportment and integrity, is kind and good to his family, but of a temperament that is not enthusiastically demonstrative in his affections; that he loves his daughter and is able and in all ways a proper person to have the care and custody of his own children; that he is now earning \$140 per month. \* \* \*

"(8) I find that in recent years there has become an estrangement from some cause of the child against her father, stepmother, and half-sisters, and that she now bears no more affection for them than if they were rank strangers about whom she knew nothing, and I am unable to determine what the cause is.

"(2) I conclude that the agreement of J. T. Jackson with the grandmother of Annie to never retake the custody of Annie from her grandmother cannot in any way alter, change, or affect the right of J. T. Jackson to the custody of his daughter nor his parental and legal obligations to care for, educate, and maintain her.

"(3) I conclude that the welfare of Annie, according to the law, should be the sole criterion in determining her custody, and unless it is satisfactorily shown to me that the parent is an improper person to have the custody of his child, I conclude that the welfare of the child will be better served by being in the custody of the parent than in the custody of any one else; therefore on the foregoing findings of fact I awarded the custody of Annie Jackson to her father."

The first assignment of error challenges the above finding of fact No. 8. It is concluded that the assignment should be overruled.

The case of State ex rel. Wood v. Deaton,

93 Tex. 243, 54 S. W. 901, has settled the question presented by the second assignment of error.

Judgment affirmed.

# ROWE v. GUDERIAN et al. (No. 6036.)

(Court of Civil Appeals of Texas. Austin. Feb. 24, 1919. On Motion for Rehearing April 9, 1919.)

## 1. SALES $\Leftrightarrow$ 149—BILLS OF SALE—CONSTRUCTION.

A bill of sale, which does not mention a motor sales company or any member of that firm as grantor, but specifically states that the automobile sold was the property of H., and on its face purports to be made and executed by H., who warrants the title, although bearing the names of the company and H. in the place for signatures, construed as from H., and not from the company.

## 2. SALES $\Leftrightarrow$ 149—BILLS OF SALE—CONSTRUCTION.

A third person, who prepared a bill of sale for an automobile, may not claim that a company whose name appears as signed thereto was a grantor, where the language of the instrument is not ambiguous, and designates the other signer as grantor.

## 3. ESTOPPEL $\Leftrightarrow$ 75—SALES $\Leftrightarrow$ 235(1)—CLAIM OF OWNERSHIP—BONA FIDE PURCHASER.

Where plaintiff drew a bill of sale of a car from H. to B. without reference to a company, except that its name appeared thereon above H.'s signature, and plaintiff took a mortgage upon the car from B., plaintiff may not claim that the company is estopped by the bill of sale, or that he is an innocent purchaser as against the company.

## 4. ESTOPPEL $\Leftrightarrow$ 75—CLAIM OF OWNERSHIP—BONA FIDE PURCHASER—RELIANCE ON TITLE.

A company owning an automobile described in a bill of sale as the property of H., and therein transferred to B. and mortgaged to plaintiff, but showing no connection of the company with the bill of sale, except its name appearing above H.'s signature, is not estopped to claim ownership on the ground that company placed H. in possession of automobile.

## 5. PARTNERSHIP $\Leftrightarrow$ 131—OFFICERS—POWER OF MERGER—EXECUTION OF MORTGAGE TO SECURE DEBT OF ANOTHER.

A general manager of a partnership is without authority to execute a mortgage on the property of his principal to secure a debt of a third person, where the principal is not liable for such debt, nor can he authorize another to so do.

## 6. APPEAL AND ERROR $\Leftrightarrow$ 1062(5)—HARMLESS ERROR—IMMATERIAL SPECIAL ISSUE.

Where the court submitted an immaterial special issue, containing nothing to cause the jury to be prejudiced against the appellant, he is not entitled to a reversal.

On Motion for Rehearing.

7. APPEAL AND ERROR  $\Leftrightarrow$  2—REFUSAL OF INSTRUCTIONS—NECESSITY FOR EXCEPTION.

Acts 35th Leg. c. 177 (Vernon's Ann. Civ. St. Supp. 1918, art. 1974), amending Rev. St. art. 1974, nullifies the amendment of 1913 (Acts 33d Leg. c. 59), which required the complaining party to take a bill of exceptions to the action of the trial court in refusing a requested instruction, so that in a case tried in February, 1918, it was the court's duty to indorse the word "refused" on refused requested instructions, or the words "Modified as follows," if modified and given; such indorsements constituting a bill of exceptions, so that appellant need save no formal bill of exceptions.

8. PRINCIPAL AND AGENT  $\Leftrightarrow$  124(2)—AUTHORITY TO EXECUTE MORTGAGE—QUESTION FOR JURY.

In an action by plaintiff, claiming under a mortgage against defendants, for conversion of the mortgaged automobile, where there was testimony tending to show that one of the defendants, claiming to be owners, authorized the mortgagor to execute the mortgage in question, it was error for the court to refuse to give requested instruction requiring the jury to find whether or not such defendant authorized the mortgagor to execute such mortgage.

Appeal from District Court, McLennan County; H. M. Richey, Judge.

Suit by John F. Rowe against O. J. Guderian and others, as partners doing business under the firm name of the Dixie Motor Sales Company. Before trial suit was dismissed as to the defendant L. P. Bain. Judgment for the defendants, and plaintiff appeals. Reversed and remanded on rehearing.

W. L. Eason, of Waco, for appellant.  
Johnston & Hughes, of Waco, for appellees.

**KEY.** O. J. John F. Rowe instituted this suit against O. J. Guderian, E. A. Polly, and L. P. Bain, alleged to be a partnership doing business under the firm name of the Dixie Motor Sales Company. Before the trial the suit was dismissed as to Bain. The plaintiff founded his suit upon allegations to the effect that he had a valid mortgage on an automobile, executed by L. P. Bain, which automobile he alleged had been converted by the defendants to their own use. In their answer the defendants interposed numerous exceptions to the plaintiff's petition, and set up a general denial. The plaintiff filed a supplemental petition, elaborating and enlarging the pleas contained in his original petition. We copy the following statement from appellant's brief:

"Bain, with whom plaintiff was associated as a silent partner, was conducting an installment jewelry business. This business was conducted from plaintiff's office, and the assets of the part-

nership were under the control of the plaintiff. The plaintiff had advanced money to the partnership, which had not been repaid to him. The plaintiff and Bain desired to dissolve partnership, and Bain desired to acquire the partnership assets. Plaintiff agreed that for a consideration of \$700 he would sell to Bain his interest in all of the partnership assets, and release his partnership lien on the partnership assets, and deliver all of the assets to Bain. Bain was unable to pay the \$700. Bain reported to plaintiff that he had procured an automobile from the Dixie Motor Sales Company, and would execute to plaintiff a note for \$700 and a mortgage on the automobile. Before accepting the note and mortgage, the plaintiff conferred with Haddick, who plaintiff knew was the general agent of the Dixie Motor Sales Company, and Haddick informed plaintiff that the automobile was the property of Bain, and that Bain had authority to execute the mortgage. The automobile was delivered by the Dixie Motor Sales Company to Bain, and he used same in the city of Waco and elsewhere, but when not in use he generally kept it in the storeroom of the Dixie Motor Sales Company, Bain's place of employment. At that time Bain was conducting the jewelry business and maintained his office with the Dixie Motor Sales Company, and he was also selling automobiles on a commission for the Dixie Motor Sales Company. The note and mortgage in suit were executed by Bain and delivered to the plaintiff, but before plaintiff had the mortgage recorded or before he would consummate the deal, he required Bain to procure a bill of sale to the automobile. Bain did procure the bill of sale and did deliver same to plaintiff, and the transaction between Bain and plaintiff was then consummated. The chattel mortgage was placed of record, and Bain removed from plaintiff's office all of the partnership assets and carried them with him to his new location, the Dixie Motor Sales Company. \* \* \* The mortgaged automobile was sold to Newberry for \$750, and the check was made payable to Bain, and was delivered by Newberry to Bain, and Bain, in turn, indorsed and delivered the check to Guderian, and Guderian deposited it in the bank to the credit of the Dixie Motor Sales Company. This is not disputed. It is plaintiff's contention that the automobile was sold by Bain and the defendants to Newberry and thereby converted by them, and also that the proceeds of the sale, the \$750 check, was converted and appropriated by the defendants."

The case was submitted to a jury by the court's main charge upon the following special issues, and the jury answered them as indicated:

"Question No. 1: Did the defendant Guderian expressly authorize J. C. Haddick to deliver the car in question to L. P. Bain before the said L. P. Bain and J. C. Haddick should execute their notes to him in payment thereof?" To which the jury answered, "No."

"Question No. 2: Did the defendant Guderian authorize L. P. Bain to sell the automobile in issue herein to one Newberry?" To which the jury answered, "No."

"Question No. 8: Was the particular car upon which the mortgage was given to plaintiff herein at the time and after the said mortgage was executed, one of the stock cars exposed for daily sale at the place of business of defendant?" To which the jury answered, "Yes."

"Question No. 4: Did the defendant Guderian at the time L. P. Bain delivered the \$750 check to him tell the said Bain that he would satisfy or make satisfactory arrangements with the plaintiff Rowe herein for the debt that the said Bain owed plaintiff?" To which the jury answered, "No."

"Question No. 5: What was the reasonable market value of the automobile in issue at the time and place of its sale to J. T. Newberry?" To which the jury answered, "\$750."

At the request of the plaintiff, the court submitted to the jury the following questions, which were answered as indicated:

"Question No. 1: At the time the bill of sale was executed, was J. C. Haddick the duly authorized agent and general manager of the Dixie Motor Sales Company?" To which the jury answered, "No."

"Question No. 2: At the time Haddick executed the bill of sale to Bain, was he acting within the scope of his authority?" To which the jury answered, "No."

"Question No. 3: At the time Haddick executed the bill of sale to Bain, was he acting within the apparent scope of his authority?" To which the jury answered, "No."

"Question No. 7: After execution of the mortgage and bill of sale, did Guderian, after having information thereof, ratify and confirm such transaction?" To which the jury answered, "No."

Also, at the request of the defendants, the following issues were submitted to and answered by the jury:

"Special Issue No. 6: Was the automobile which Bain wanted to buy from Guderian or the Dixie Motor Sales Company ever delivered to Bain by Guderian or the Dixie Motor Sales Company before Bain gave the bill of sale, with chattel mortgage provision, dated February 15, 1917, to John F. Rowe?" To which the jury answered, "No."

"Special Issue No. 12: Did John F. Rowe have notice that Bain and Haddick were looking to Guderian personally for authority for Bain to buy the car?" To which the jury answered, "Yes."

"Special Issue No. 13: Before accepting from Bain the chattel mortgage dated February 15, 1917, did plaintiff Rowe make reasonable effort to learn whether Guderian had given his authority for the purchase of the car by Bain?" To which the jury answered, "No."

"Special Issue No. 19: Did L. P. Bain sell the automobile in issue to J. T. Newberry as his (Bain's) own property?" To which the jury answered, "No."

The trial court rendered judgment against the plaintiff and in favor of the defendants, and the former has appealed.

The bill of sale referred to reads as follows:

"The State of Texas, County of McLennan.

"Know all men by these presents that I, J. C. Haddick, of Waco, McLennan county, Texas, am the owner of a certain Dixie roadster automobile, which is new and which is now in our automobile showrooms, at 620 Franklin street, Waco, Texas.

"Which said Dixie roadster automobile, I have this day for a valuable consideration sold, transferred and delivered to L. P. Bain, the title to same I forever warrant and defend unto the said L. P. Bain, there being no incumbrance whatsoever against the said automobile.

"Witness my hand at Waco, McLennan county, Texas, on this the 21st day of February, A. D. 1917.

Dixie Motor Sales Co.  
"J. C. Haddick."

### Opinion.

[1-3] The first assignment of error complains of the action of the trial court in refusing to give a requested instruction directing a verdict for the plaintiff for \$750. While appellant has submitted 11 separate propositions under that assignment, when reduced to final analysis, his contention is that the undisputed proof shows that J. C. Haddick, as general manager of the Dixie Motor Sales Company, had both real and apparent authority to sell the automobile in question to Bain; that as such agent he made such sale before Bain executed the mortgage in question, and therefore, as the undisputed testimony showed that Bain, thereafter acting as agent for the Dixie Motor Sales Company, sold the car and delivered to Mr. Guderian the proceeds received therefor, which the latter placed to the credit of the Dixie Motor Sales Company, and inasmuch as appellant's debt amounted to more than \$750, which was the value of the car and the sum for which it was sold, the court should have directed a verdict for appellant.

The undisputed proof does not show that the car was sold to Bain by the Dixie Motor Sales Company, unless it be that the bill of sale heretofore referred to had the effect of divesting title out of that company and vesting it in Bain; and we have reached the conclusion that such is not a correct construction of that instrument. It will be noted that neither the Dixie Motor Sales Company nor any member of that firm is mentioned as the grantor in that instrument. On the contrary, the document specifically states that the automobile referred to was at that time the property of J. C. Haddick, and that designates him as the vendor. The instrument purports upon its face to be made and executed by J. C. Haddick, and not only describes the automobile as being owned by him, but specifically designates him and no one else as the vendor or seller, and he alone warrants the title. True it is, that the "Dixie Motor Sales Co." is signed at the bottom of the instrument as well as the name, "J. C. Haddick," but that fact does not justify

a construction which would vary the unambiguous language of the instrument, and bind the Dixie Motor Sales Company as the vendor or seller of the automobile, though it be conceded that J. O. Haddick had the power, as general manager of the company, to sell the automobile in question, and to execute a bill of sale in the name of the company by him as agent. The undisputed proof shows that appellant himself wrote the bill of sale, and therefore he is not entitled to claim that the name of the Dixie Motor Sales Company signed at the bottom of it renders it ambiguous, and that it should be given a construction favorable to the grantee. The rule referred to should have no application, when it is made to appear that the grantee himself has prepared the instrument which is being construed. Hence we conclude that no error was committed in refusing to direct a verdict for the plaintiff, and the assignment under consideration is overruled.

[4] The second assignment of error involves the same question which has just been decided against appellant; and the further question that appellees are estopped because of the fact that their agent and manager executed the bill of sale, and allowed Bain to use it for the purpose of obtaining possession of a stock of jewelry and removing it to appellant's place of business.

As appellant himself wrote the bill of sale, and as it did not purport to, and in fact did not, convey any title from the Dixie Motor Sales Company, nor either of the appellees, but stated on its face that the automobile referred to belonged to J. O. Haddick, and as neither of the appellees did anything to lead him to believe that it was a bill of sale from any one other than J. O. Haddick, he is not in a position to claim estoppel or innocent purchaser as against appellees. Furthermore, the mortgage was taken for an existing debt, and it created a lien upon the stock of jewelry, the possession of which appellant claims that he surrendered to Bain, upon faith of the mortgage; the instrument further stipulated that title to the property conveyed should remain in appellant until all the indebtedness was paid, and that appellant should have full power to take possession of the same at any time he deemed himself insecure, and sell it at public or private sale, and that the property should not be removed out of the county without his written consent. The facts referred to do not place appellant in the category of an innocent purchaser, nor show that appellees were estopped from claiming the automobile in question.

The third assignment complains because the court refused to give a requested instruction, requiring the jury to find whether or not appellant, Guderian, authorized Bain to execute the mortgage in question.

The record does not show that appellant excepted to the action of the court in refus-

ing to give the requested instruction referred to; and therefore, under the statute regulating such procedure, he must be deemed to have acquiesced in the action of the trial court, and is not entitled to have such action reviewed by this court.

[5] The fourth assignment complains of the action of the trial court in refusing to submit at appellant's request, this question to the jury:

"Did J. O. Haddick, as manager of the Dixie Motor Sales Company, authorize Bain to execute the mortgage to plaintiff?"

Appellant excepted to the action of the court in refusing to submit that question, but we hold that the ruling of the trial court was correct. A general manager has no authority to execute a mortgage on the property of his principal to secure a debt of a third person, where the principal is in no wise liable for such debt; and having no power to do so himself, of course he lacks authority to authorize some one else to do that which he himself is not authorized to do.

[6] The fifth and sixth assignments relate to the question of estoppel, which has been already considered and decided against appellant, and therefore those assignments are overruled.

The seventh and last assignment complains of the action of the trial court in submitting question No. 3 to the jury.

We are disposed to agree with appellant's contention that the question referred to and the answer of the jury thereto were both immaterial; but that is no reason why the judgment should be reversed, if the answers to other questions will support the judgment. The question referred to being immaterial, and there being nothing in it to cause the jury to be prejudiced against appellant, he is not entitled to have the case reversed merely because that question was submitted to the jury.

No reversible error has been pointed out, and therefore the judgment will stand affirmed.

**Affirmed.**

#### On Motion for Rehearing.

[7] As shown by our original opinion, we declined to pass upon the third assignment of error, which complained of the action of the trial court in refusing to give an instruction requested by appellant, requiring the jury to find whether or not appellee Guderian authorized Bain to execute the mortgage in question. While the record shows that the requested instruction referred to was marked "Refused" by the trial judge, it does not affirmatively show that appellant excepted to the act of the judge in refusing to give that instruction, and therefore we held that,

under the law passed by the Legislature in 1913, the failure of appellant to reserve a bill of exception to that ruling denied him the right to have that action of the trial court reviewed by this court.

It is not denied that such is the proper construction of the act of 1913 (Acts 33d Leg. c. 59), but the motion for rehearing calls our attention to the fact that the law regulating such matters was again amended by an act approved April 2, 1917 (Acts 35th Leg. c. 177 [Vernon's Ann. Civ. St. Supp. 1918, art. 1974]), and which act was in force when this case was tried in February, 1918. That act amends article 1974 of the Revised Statutes so as to make it read as follows:

"When a special instruction is requested and the provisions of this law have been complied with and the trial judge refuses the same, he shall indorse thereon, 'Refused,' and sign the same officially, and such charge, when so indorsed, shall constitute a bill of exceptions and it shall be conclusively presumed on appeal that the party asking said charge presented the same at the proper time and excepted to its refusal, and that all of the requirements of law have been observed, and the same shall entitle the party requesting such charge to have the action of the trial judge in refusing the same reviewed on appeal without preparing a formal bill of exceptions.

"If the trial judge modify such special charge, he shall indorse on said charge, 'Modified as follows (stating in what particular he has modified the charge) and given, and exception allowed plaintiff (or defendant, as the case may be),' and sign the same officially. Such charge when so indorsed shall constitute a bill of exceptions and it shall be conclusively presumed that the party asking said charge presented the same at the proper time, excepted to the modification thereof, and that all of the requirements of law have been observed, and the same shall entitle the party requesting such charge to have the action of the trial judge in modifying the same reviewed without preparing a formal bill of exceptions."

That article, as it now reads, nullifies the amendment of 1913, which required the complaining party to take a bill of exception to the action of the trial court in refusing a requested instruction, and declared that the failure to do so should be construed as approving and acquiescing in such refusal.

[8] From this it follows that this court fell into error in not considering the third assignment. As above stated, that assignment complains of the action of the trial judge in refusing to give a requested instruction requiring the jury to find whether or not the defendant Guderian authorized Bain to execute the mortgage which Bain had given upon the automobile in question, and after careful consideration of that question we have reached the conclusion that the requested instruction should have been given, and

that the third assignment of error must be sustained, and the case reversed.

Without setting out the testimony in full, we content ourselves with the statement that there was testimony tending to show that the defendant Guderian authorized Bain to execute the mortgage in question; and, if he did so, appellant was entitled to recover against appellee Guderian, because the undisputed testimony shows that he received from Bain and appropriated to his own use the money for which the automobile was sold.

Hence the motion for rehearing will be granted, and the judgment appealed from will be reversed, and the cause remanded.

Motion granted.

Judgment reversed and cause remanded.

#### EARLY-FOSTER CO. v. EL CAMPO RICE MILLING CO. (No. 2134.)

(Court of Civil Appeals of Texas. Texarkana. May 17, 1919. Rehearing Denied May 22, 1919.)

#### 1. CONTINUANCE ⇨20(5)—ABSENCE OF ONE OF DEFENDANT'S COUNSEL—DISCRETION.

Where an action for breach of contract was filed March 22, 1917, and was called for trial July 23d following, when a postponement was obtained until August 23d, at which time continuance because of the absence of one of defendant's attorneys was refused, the trial court did not abuse its discretion where there was nothing to indicate that defendant was deprived of any defense or that it was not ably and fully represented.

#### 2. APPEAL AND ERROR ⇨1054(1)—REVIEW—INTRODUCTION OF EVIDENCE.

Where the case is tried to the court, and there is sufficient evidence not objected to to sustain his findings upon all the material facts to support the judgment, the case will not be reversed because of objections to the introduction of testimony.

Appeal from District Court, McLennan County; Geo. N. Denton, Judge.

Action by the El Campo Rice Milling Company against the Early-Foster Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gallagher & McCullough, of Waco, for appellant.

D. A. Kelley, of Waco, and Geo. P. Willis, of El Campo, for appellee.

HODGES, J. This appeal is from a judgment against the appellant of \$1,808.75 as damages for the breach of a contract. The case was tried before the court, and the following are, in substance, the findings of



fact filed: On November 1, 1916, the appellee and the appellant entered into a written contract whereby the appellee was to sell and the appellant to purchase 3,000 bags of Blue Rose rice of 100 pounds each at 4 cents per pound, and 500 bags of 100 pounds each of Honduras rice at 4½ cents per pound, the rice to be delivered f. o. b. the cars at El Campo, Tex., during November and December, 1916. It was further agreed that, if the rice was held over till January, an additional amount of one-sixteenth of a cent a pound was to be added to the purchase price. The total amount of the contract price, including brokerage charges, was \$14,188.75. The appellee was at all times ready and willing to perform its contract, and repeatedly asked the appellant for shipping instructions, which were never given. Appellant refused to accept and pay for the rice according to the terms of the agreement. In February, 1917, after giving the appellant notice that it would do so, the appellee sold the rice in the open market for the sum of \$12,880, leaving a net balance of \$1,808.75, for which judgment was rendered. The court also finds that the sale of the rice was fairly made, and that the price realized was the reasonable market value of the rice at that time. An examination of the record shows that, while upon some of the issues of fact the testimony was conflicting, there was sufficient evidence to support all of the findings made by the court.

[1] The appellant complains of the refusal of the court to grant a continuance of the case because of the absence of its attorney, Judge J. N. Gallagher. The bill of exception shows that the suit was filed March 22, 1917, by Hon. Allen D. Sanford, who later withdrew from the case because of other business engagements. On July 23d following the case was called for trial, when Judge Gallagher appeared as counsel for the appellant and secured a continuance, or postponement, till August 23d. When the case came up for trial the second time Judge Gallagher was absent at Mineral Wells, and the appellant was represented by Judge J. L. McCullough, who presented the application for a continuance. The application was sworn to by an agent of the appellant, who stated, upon information and belief, that Judge Gallagher was absent because of ill health. Upon the refusal of the motion to continue Judge McCullough filed a special answer and represented the appellant in the trial of the case. There is nothing in the record to indicate that the appellant was deprived of any defense by reason of the failure to be represented on that occasion by Judge Gallagher, or that it was not ably and fully represented by the attorney who tried the case. We cannot say that the trial court abused

his discretion in refusing to grant the continuance.

[2] There are some objections urged to the introduction of certain testimony relating to some correspondence between the parties prior to the time the rice was sold. The trial was before the court, and there was sufficient evidence not objected to to sustain his findings upon all the material facts to support the judgment.

The judgment will therefore be affirmed.

### BAUSS v. BAUSS et al. (No. 7688.)

(Court of Civil Appeals of Texas. Galveston.  
May 15, 1919. Rehearing Denied  
June 12, 1919.)

#### 1. FRAUDS, STATUTE OF §158(2) — PAROL TRANSFER OF PROPERTY—EVIDENCE.

In action to recover interest in land, in which plaintiff relied on agreement between stepmother and his father that property, title of which was in mother, would become common property of both, evidence held insufficient to sustain such parol transfer of property.

#### 2. TRUSTS §378 — AGREEMENT TO HOLD LAND FOR ANOTHER—QUESTION FOR JURY.

In action to recover interest in land in which plaintiff relied on agreement of half-brother made on transfer of title to him by his mother that plaintiff would receive his share, evidence held sufficient to raise an issue for the jury.

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Suit by Douglass L. Bauss against Theodore L. Bauss and others. From a judgment entered on verdict directed for defendants, plaintiff appeals. Reversed and remanded.

T. O. Turnley and V. M. Clark, both of Houston, for appellant.

James B. & Charles J. Stubbs, of Galveston, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against appellee and others to recover an undivided interest in a lot or parcel of land situate in the city of Galveston and described as the east 31 feet of lot 3 in block 317 in said city.

The petition alleges, in substance, that the property in controversy was the community property of Mary Bauss and Louis Zimmerman, the deceased mother and father of the plaintiff; that the said Louis Zimmerman, plaintiff's father, was the second husband of plaintiff's mother, Mary Bauss, and that plaintiff's real name is Douglass Zimmerman, but that he has always been called

and known by the name of Douglass Bauss and has adopted and accepted such name; that he is the sole heir of his deceased father, and as such is entitled to his father's interest in said property.

The title and interest of plaintiff's father in the property are set out in the petition as follows:

"That at the time of the marriage of plaintiff's said father with plaintiff's mother, the said Mary Bauss, deceased [she] owned the lots of land above described with some improvements thereon, and that since and during said marriage many and divers improvements were made thereupon with community funds of plaintiff's said mother and father, and that the sum expended by the plaintiff's said father towards the improvements, buildings, and structures on said property was of a total sum of about \$3,500, and that it was then and there mutually agreed, contracted, and understood by and between the plaintiff's said father and mother, at and before the expenditure of said sum for said improvements, for and in consideration of said contribution by plaintiff's father, that the said lot, land, and premises, together with the improvements thereon, should be and were the common property of the plaintiff's said father and mother; that at the time of the said agreement and contract above described and at the time of the contribution for said improvements aforesaid the reasonable cash market value of said lot was about \$1,200; that at said time the reasonable cash market value of the improvements on said property prior to the making of the improvements by plaintiff's said father was about \$1,000."

It is then alleged:

That the defendant Theodore Bauss, who is the half-brother of plaintiff, being the son of plaintiff's mother by her first husband, had, by fraud and false representations that plaintiff was a spendthrift and would dissipate his portion of the property if it was left to him, induced their said mother shortly before her death to convey all of the property in controversy to him; that said deed was so made by plaintiff's mother to defendant Theodore Bauss because of his repeated representations in regard to plaintiff and his insistent entreaty, and upon the express agreement and promise of said defendant that he would hold the property in trust for plaintiff and himself "and would see that plaintiff should get his share thereof, and but for her belief in said representation last named she would not have executed said deed even under the persuasion and entreaty above set forth, but plaintiff avers that said conveyance, while appearing to be directly to and for the benefit of defendant Theodore Bauss, that it was expressly agreed, understood, and contracted by and between plaintiff's said mother and defendant Theodore Bauss that he would thereafter hold one-half of the estate of said mother for plaintiff, and would see that plaintiff should obtain the same, and that said mother, in executing the said deed to the entire estate, as was done in said conveyance, was moved so to do, as to the one-half thereof intended for the use and benefit of plaintiff, by the representation of defendant

Bauss that he would hold said one-half for the benefit of plaintiff, and in trust for him, and said deed was made in consideration of the contract and agreement between plaintiff's said mother and said defendant, as above set forth with respect thereto.

"Plaintiff further shows that immediately after the death of said mother defendant Theodore Bauss openly repudiated his said contract and agreement with his said mother as to the share of plaintiff, and has ever since claimed all said property, even the whole of said lot and improvements, in opposition to and to the exclusion of any claim of plaintiff thereto, and yet claims the whole of said property in repudiation of said agreement by which he obtained said deed."

The defendant Theodore Bauss answered by plea in abatement general and special exceptions to the petition, and general denial of the allegations of the petition. He further by alternative plea set up various sums of indebtedness due him by the deceased Mary Bauss in satisfaction of which he averred the land was conveyed to him, and sought, in event he was not allowed to recover the land, a foreclosure of a lien thereon for the amount of the indebtedness claimed by him against the said Mary Bauss.

The other defendants, who were heirs, or the children of heirs, of Mary Bauss, were eliminated from the case during the progress of the trial, and were properly disposed of by the judgment.

The cause as between appellee and appellant Theodore Bauss was tried with a jury.

After hearing the evidence, the court instructed the jury to return a verdict in favor of the defendant, and upon the return of such verdict rendered judgment in accordance therewith.

Under sufficient assignments of error appellant assails the judgment on the ground that the evidence was sufficient to raise the issue of his right and title to the interest in the property as claimed in his petition, and therefore the trial court erred in instructing the jury to find for the defendant.

[1, 2] We agree with the trial court that neither the pleading nor the evidence are sufficient to raise the issue of title in appellant to any interest in the property as the heir of his deceased father, Louis Zimmerman. The title to real estate cannot under our law be transferred by any such parol agreement as that alleged in the petition to have been made between plaintiff's father and mother, and the evidence offered in support of these allegations is less definite and more wanting in showing the facts necessary to make a valid parol transfer of the title to land than the allegations of the petition. The most that could be made from the pleadings and evidence upon this issue would be a right in plaintiff for reimbursement out of the property for the amount of his father's interest in the community funds

which was invested in improvements on the property; but this relief is not sought by the petition, and, if it had been, the evidence is too indefinite and uncertain as to the agreement and as to what, if any, funds of plaintiff's father were expended in making said improvements to sustain any judgment for plaintiff. *Parrish v. Williams*, 53 S. W. 79. But, conceding that plaintiff's father had no title to nor interest in the property, if his mother, intending that he should have a one-half interest therein, conveyed the whole property to appellee upon his express agreement and promise that he would hold one-half thereof in trust for plaintiff, such trust can and should be enforced. Upon this issue Anna Briggs, a witness for plaintiff, testified:

"I have lived in Galveston all my life. Am employed at Garbade Eiband, and have been working there four years. I knew Mrs. Mary Bauss in her lifetime; knew her about six years. She is the mother of Douglass and Theodore Bauss. I lived with her for six years, and she considered me a part of the family, as I did a great deal around the house for her as her daughter. I was there prior to 1913 quite a little bit. I left there about a year ago. I am not very well acquainted with Theodore Bauss; only knew him by his coming to the house, his mother's house. I saw him there on several occasions in 1913. In 1913 I saw Theodore Bauss come to see his mother. They talked on various things, and I was there several times, and soon saw that I was not wanted and walked away, but it seemed that they were talking about various things about Douglass. I could not tell what they said, only what Mrs. Bauss told me after the conversation was over when she came over to my house crying. Right after the time he talked to her was when he left. I don't know how many times, but I know that he came over there quite often and talked at various times. On these occasions when I saw Mrs. Mary Bauss immediately after he left she came over crying, and she was very much depressed about Theodore Bauss. After they had got through talking, she came over to my house very much depressed and crying, and she said that Mr. Theodore Bauss had been trying to poison her mind against Douglass. The way she appeared toward Douglass was she loved him better than anything else in the world. These conversations that I have just testified about between Mrs. Bauss and Theodore were in 1913 and 1914. The conversations occurred very often, and I did not take any particular notice how often. As far as I can remember there was a year of the time when Theodore did not visit his mother. They had some misunderstanding. In the year 1913, when I saw Theodore Bauss talk to his mother after which she came to me crying, and on the occasion when she told me Theodore was trying to poison

her mind against Douglass, Mrs. Bauss told me that she had it fixed; that Mr. Theodore Bauss had promised her faithfully that, if anything should happen to her, he would dispose of her property equally amongst him and his brother. When Douglass was at home, as far as I know, and as well as I know, he was very nice to his mother, and he did everything that she asked him to do, and he repaired the property and done the painting and fixed everything that had to be fixed, and transacted all her business when he was there. Mrs. Bauss understood and spoke very little English. She used to get me to read her letters when they came in English. When Theodore visited his mother his conferences were secret. If there was any one upstairs, they would go downstairs, and, if any one downstairs, they would go upstairs. It was Mr. Theodore Bauss that would suggest that they go upstairs or downstairs, as the case may be."

Miss Alvina Ueckert testified:

"I live at 1709 Avenue G. I worked 12 years for Mr. Taylor in the O. K. Laundry business. My position is checking out. I am not married. Have been rooming with Mrs. Mary Bauss 7 years. Was intimate with her."

About a conversation occurring between Mrs. Bauss and appellee Theodore Bauss, said witness testified as follows:

"They were talking in 1914, in the sitting room. I was in the kitchen eating my breakfast, and Mr. Bauss did not know I was there. He came up the side steps. She let him in her room, and they both was sitting in her room, and he said, 'Good morning, how do you feel?' and she said: 'I don't feel so well,' and he asked about the deed, and she said, 'There you go again about the deed.' Then she asked him if she could trust him, and he said, 'You can trust me faithfully.' She said that 'you let Douglass have his half?' Then she go to the bank and have it deeded. That was in 1914, first part in the summer. Then when I walked in he walked out. This was either the last part of April or first part of May. I could not fix the month exactly. I could fix the year exactly, because it was the year before the storm."

The deed in question was executed June 26, 1914, and recited as the consideration \$10 and other considerations.

We think this evidence was sufficient to sustain a finding that the land was, as alleged in the petition, conveyed to the appellee in trust for himself and plaintiff, and the trial court erred in not submitting that issue to the jury.

For the error indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

**ST. LOUIS, S. F. & T. RY. CO. v. WHATLEY.** (No. 2127.)

(Court of Civil Appeals of Texas. Texarkana.  
May 8, 1919. Rehearing Denied  
May 22, 1919.)

**1. RAILROADS ⇐282(13)—INJURIES FROM ESCAPING STEAM—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.**

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, an instruction on contributory negligence, making it the duty of plaintiff to exercise ordinary care, *held* to sufficiently cover the issue as raised by the evidence.

**2. RAILROADS ⇐282(13)—INJURY FROM ESCAPING STEAM—INSTRUCTIONS—PROXIMATE CAUSE.**

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, an instruction on proximate cause *held* not misleading.

**3. JURY ⇐97(4)—CHALLENGE FOR CAUSE—GROUNDS.**

In a personal injury suit that juror was engaged in preparing for injured persons their suits against railroads was not ground for challenge for cause when he stated that he had no interest in instant case and could decide case impartially, record not showing that he was interested in any suit against defendant.

**4. RAILROADS ⇐282(5)—INJURIES FROM ESCAPING STEAM—SUFFICIENCY OF EVIDENCE.**

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, conflicting evidence *held* sufficient to support verdict for plaintiff.

Appeal from District Court, Hunt County;  
A. P. Dohoney, Judge.

Action by S. J. Whatley against the St. Louis, San Francisco & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dinsmore, McMahon & Dinsmore, of Greenville, and J. L. Lockett, Jr., of Ft. Worth, for appellant.

Clark & Sweeton, of Greenville, for appellee.

**HODGES, J.** This appeal is from a judgment in favor of the appellee for the sum of \$1,000 as damages for injury to his eye caused by the escape of steam from one of the appellant's locomotives. The injury occurred under the following circumstances: The appellee and his son were engaged in delivering lumber for shipment at Celeste, a station in Hunt county on the appellant's line of rail-

road. Each of them was upon this occasion driving a team for the purpose of unloading at the depot platform. The appellee drove his team in between the platform and the main line of the railway, a space of approximately 13½ feet. It was near nightfall, and was beginning to grow dark. According to the appellee's testimony, just as he had proceeded a part of the way into this narrow space he discovered the headlight of a passenger train approaching from the north. He states that at that time he could not go back or forward. When the train was within about 50 or 75 feet of him the engine began to emit a large volume of steam and he got down from his wagon for the purpose of holding the animal nearest to the train, fearing that it would become frightened by the steam; that put him within about 3 feet of the railway track. The train passed, still emitting steam, which burned the side of his face and injured one of his eyes, causing, as he claims, great pain and the permanent impairment of the vision of that eye. Witness could not tell from what portion of the boiler the steam came, but stated that it was in such a volume and so dense and hot that it forced him to abandon his team in order to get out of danger. He also says the engineer in charge of the locomotive was looking at him at the time. This, however, was denied by the engineer, who testified that he saw no one at that place as his train passed through Celeste on that occasion. He also denied that he permitted his engine to emit any steam at that time or place.

[1] Among other defenses pleaded by the appellant was contributory negligence on the part of the appellee in driving his team between the main line and the platform. It was alleged that other places had been provided for unloading lumber at the depot, and that the appellee knew that the train would soon pass over that line. The court submitted the issue of contributory negligence in the following portion of his general charge:

"It was the duty of the plaintiff upon the occasion in question to exercise ordinary care for his own safety, and a failure upon his part to do so would be contributory negligence. Contributory negligence as used in this charge means some negligent act upon the part of the plaintiff which, combining or concurring with the negligence, if any, of the defendant, proximately caused or contributed to the injury complained of.

"Now, bearing in mind the instruction in the preceding paragraph as to contributory negligence, if you believe from the evidence that the plaintiff could have caused his wagon to have been driven to some other portion of the platform further from the track, and that causing or permitting the same to be driven in the position it was in was negligence, and that such negligence on his part caused or contributed to the injuries, if any, sustained by the plaintiff, you will find for the defendant."

Appellant complains of the refusal of the court to give two special charges requested by it upon that issue. Counsel for the appellee insists that the evidence did not raise an issue of contributory negligence; and we think there is much force in the argument. If the testimony of the appellee be true, the jury was fully warranted in finding that the appellant's employes in charge of the engine on that occasion were guilty of negligence in causing the emission of an excessive volume of steam. The only danger, according to the record in this case, to which the appellee exposed himself by driving between the platform and the railway track was that resulting from the unnecessary escape of steam from the passing locomotive. Both he and his team were beyond danger of collision, and he testified without contradiction that his team was gentle and would not have been frightened by the ordinary passage of a train.

The principal question, then, before the jury was, not whether the act of letting off steam at that time or place was negligence, but whether any such deed was committed. It was not disputed that if the engineer was guilty of letting off steam in the manner testified to by the appellee such conduct was wholly uncalled for by any operative requirement. Appellant's master mechanic, who testified upon the trial, stated that it was contrary to order for steam to be let off at such times and places. Appellee could hardly be charged with contributory negligence unless it could be said that a reasonably prudent man would have anticipated such negligent conduct on the part of the engineer. In any event, we think the charge of the court on contributory negligence was sufficient to cover all defenses upon that issue raised by the evidence.

[2] There was nothing misleading about the definition of proximate cause given by the court in his general charge. The jury were plainly told that—

"If you do not believe from the evidence that the employes of the defendant, St. Louis & San Francisco Railway Company of Texas, caused steam or hot water to escape from its engine upon the occasion in question as alleged by the plaintiff, and that the same was negligence, and that such negligence, if any, was the proximate cause of the injuries, if any, to the plaintiff, you will find for the defendant."

If the plaintiff was injured in the manner alleged, and that was the issue, there can be no room for doubt as to what was the proximate cause of his injury.

[3] Appellant complains of the refusal of the court to sustain its challenge of the juror Branche for cause. The bill of exception shows that Branche, in reply to questions propounded to him on his voir dire, answered that it had been for a long time a large part

of his business to help plaintiffs in suits against railway companies for personal injuries, in making claims therefor and in preparing such claims for suits and in managing such claims of plaintiffs against railroads; that there was at that time a suit pending in the district court of Hunt county, and which he was expecting would be tried at the current term of the court, in which he was so interested and in which the attorneys for plaintiff in this case were the plaintiff's attorneys. He further said he had no interest in this case, and that he believed he could hear and decide the case fairly and impartially, and that in trying this case he would not be influenced by the interest which he had in other cases, or which he had heretofore had in other cases. Upon these answers the appellant challenged the juror for cause, upon the ground that it appeared he would not and could not be a fair and impartial juror. The objection to the juror was overruled by the court, and his name left on the list furnished to the parties for peremptory challenge. Branche was thereafter challenged peremptorily by the appellant. The appellant complains that when the court overruled its challenge of Branche it was forced to challenge him peremptorily and to accept other jurors who were unsatisfactory to it. The court thus qualifies the appellant's bill:

"While it is true that defendant exhausted its peremptory challenges, no statement was made that defendant desired to challenge other jurors, or that it was forced to take any juror that was objectionable to it. Nothing of this kind was called to the attention of the court. The challenge to the juror Branche was passed on when made during voir dire examination of jurors by counsel."

The juror was not disqualified, unless it can be said that his answers conclusively show that he was biased in favor of the plaintiff in the suit. While his statements regarding his business are such as to show probable bias in favor of plaintiffs generally in damage suits against railroads, we are not prepared to say that his further statements that he was unbiased in this controversy should have been disregarded by the court. *Ellis v. Brooks*, 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196. The record does not show that the juror was interested in any suit against the appellant.

The assignment objecting to the charge of the court on the measure of damages, upon the ground that it permitted a recovery for conditions not pleaded, is not sustained by the record. The charge did not exceed the limits of the facts alleged.

[4] We think the evidence, though conflicting, is sufficient to support the verdict, both as to the fact of injury and its extent.

The judgment will be affirmed.

**SCHAFF v. MERCHANT et al. (No. 2126.)**

(Court of Civil Appeals of Texas, Texarkana.  
May 22, 1919. Rehearing Denied  
June 5, 1919.)

**1. RAILROADS — §348(1) — COLLISION AT CROSSING—EVIDENCE.**

In an action for death of driver of automobile truck struck by a train at a crossing, evidence *held* sufficient to sustain jury finding of negligence proximately causing the injury.

**2. RAILROADS — §348(6) — COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

In an action for death of driver of automobile truck struck by a train at a crossing, evidence *held* insufficient to show that driver was guilty of contributory negligence.

Willson, C. J., dissenting.

Appeal from District Court, Hunt County;  
A. P. Dohoney, Judge.

Action by Odelle Merchant and another against C. E. Schaff, receiver of the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed.

Dinsmore, McMahon & Dinsmore, of Greenville, and Chas. C. Huff, of Dallas, for appellants.

Clark & Sweeton, of Greenville, for appellees.

LEVY, J. The regular south-bound passenger train of appellant struck and demolished an automobile truck at Combs Crossing, instantly killing the driver, Mr. Charles Merchant, Sr. The wife and minor son of the deceased sued for damages, alleging that the death was proximately caused by negligent failure on the part of the operatives of the train to blow the whistle and ring the bell for the crossing. The defendant specially pleaded contributory negligence on the part of deceased. The case was submitted to the jury on special issues, and they made findings as follows: (1) That the operatives of the locomotive failed to blow the whistle and ring the bell 80 rods from the crossing and while approaching same; (2) that the failure to give the signals was the proximate cause of the collision and of the death of Charles Merchant, Sr.; and (3) that the plaintiffs sustained damages in the amount given in the verdict, which included the value of the automobile truck. In deference to the verdict of the jury these findings are here adopted.

[1, 2] The assignments of error are based on contentions: (1) That the evidence does not warrant the jury finding of negligence proximately causing the injury; and (2) that the driver of the automobile truck was guilty

of contributory negligence as a matter of law. The first contention should be overruled, it is thought; and it is believed by a majority of the court that the second contention also should be overruled.

The railroad runs in a southwesterly direction from Greenville. The Greenville and Caddo public road runs for 600 yards through open country obliquely with and across the railway at Combs Crossing. The public road is slightly elevated, and the railway track is slightly down grade in approaching the crossing. The rails of the track at the crossing projected above the ground about 3 inches. Charles Merchant, Sr., was driving an automobile truck loaded with six barrels of gasoline. The regular south-bound passenger train was running about 50 minutes late and at a speed of about 40 miles an hour. After the train struck the automobile truck on the crossing it was stopped within about 860 yards. The evidence was conflicting as to whether there was failure to give the signals at the place and in the manner required by the statute. The fireman and the engineer, as they testified, did not see the deceased at any time before the automobile truck was actually struck. The engineer testified:

"On this occasion I did not even know that there was a truck on the road until a barrel knocked down a post. That was the first intimation I had. I commenced to stop right now when I saw that. I put on the full service brakes."

The fireman had been putting coal into the engine up to the moment of the collision. It was shown that an automobile truck running 5 or 6 miles an hour, as the evidence indicated was about the rate of speed at which deceased was driving towards the crossing, could be stopped within 16 feet if the brakes were in good shape; and there are facts and circumstances in evidence authorizing the conclusion that at the time the deceased entered upon the right of way, 230 feet from the track, the train was about 500 yards from the crossing, and that, situated as the deceased was, he did not know of the approach of the train by reasonable observation, and that at the time deceased saw the train he was practically on the crossing. A witness testified as follows:

"At the time the engine blew the whistle my opinion is Merchant could not have escaped being struck by the train, as Merchant was almost on the crossing when the train blew the whistle."

And there is evidence authorizing the conclusion that deceased might have passed the crossing without being struck by the train but for the condition of the crossing, which impeded the passage of the automobile truck.

There was no error in giving the charge complained of in the third assignment of error.

The twelfth and thirteenth assignments should be overruled, it is concluded, as not warranting a reversal upon the grounds complained of.

Chief Justice WILLSON does not agree to the result of the appeal. He is of the opinion that under the evidence in the record it should be held that the deceased was guilty of contributory negligence as a matter of law. The judgment is affirmed.

WILLSON, C. J. (dissenting). On special issues submitted to them the jury found that Charles Merchant "looked to see whether or not a train was approaching the crossing before he drove his truck thereon." It appeared from undisputed testimony that the view from the road he was traveling of the railroad track for a distance of at least 600 yards in the direction from which the train approached the crossing was wholly unobstructed. It thus appearing that said Merchant looked for the train, and that there was nothing to prevent him from seeing it, it seems to me the only reasonable inference is that he did see it approaching the crossing before he drove thereon. If he did, I think the inference that he was guilty of negligence in attempting nevertheless to cross the track is not escapable. *Schaff v. Combs*, 194 S. W. 1159. Therefore I respectfully dissent from the conclusion of the other members of the court that the judgment should be affirmed.

# SZANTO v. FIRST STATE BANK OF MT. CALM. (No. 2130.)

(Court of Civil Appeals of Texas. Texarkana. April 17, 1919. On Rehearing, May 22, 1919.)

## On Rehearing.

### 1. GARNISHMENT $\S$ 87 — AFFIDAVIT — SUBPUSAGE.

Where all the statutory requirements of an affidavit for garnishment have been met, that affidavit contains other allegations is immaterial.

### 2. GARNISHMENT $\S$ 62 — COMMUNITY PROPERTY.

Community funds in name of wife may be impounded by garnishment in aid of judgment against husband.

### 3. GARNISHMENT $\S$ 89 — BOND — JUDGMENT.

Garnishment proceedings may be maintained after judgment obtained, without giving bond.

Appeal from District Court, McLennan County; H. M. Richey, Special Judge.

Action between John Szanto and the First State Bank of Mt. Calm. From a judgment for the latter, the former appeals. Reversed and remanded.

Spivey, Bartlett & Carter, of Marlin, and Scott & Ross, of Waco, for appellant.

Williams & Williams, of Waco, for appellee.

LEVY, J. The case was tried before the court without a jury, and a judgment was entered against the appellant on July 24, 1917, containing a notice of appeal therefrom. The appeal bond was filed August 14, 1917. The term of court was authorized by law to continue more than eight weeks. After the notice of appeal was given a motion for new trial was filed. This motion for new trial was never acted on by the court, and therefore must be considered as overruled by operation of law upon the adjournment of the court for the term, which was on August 11, 1917. In view of the record, this court is without jurisdiction to entertain the appeal, because the appeal bond was not filed in the time required by law. According to the statute, the time for filing the bond in this case commenced when the notice of appeal was given. *Rev. St. 1911, art. 2084; Railway Co. v. Elliston*, 128 S. W. 875; *Eclipse Paint & Mfg. Co. v. Roofing & Supply Co.*, 55 Tex. Civ. App. 553, 120 S. W. 532.

Appeal dismissed.

## On Rehearing.

The record in the above appeal has been corrected since the ruling of this court dismissing the appeal. It is now made to appear that this court had jurisdiction to determine the appeal, and therefore the former order of dismissal is set aside.

[1-3] The appeal is from the judgment of the trial court quashing the affidavit and writ of garnishment and dismissing the proceedings. It appears that the appellant had an unsatisfied judgment for debt against H. E. Barrett, and he made and filed an affidavit for garnishment, which reads, omitting the description of the judgment, as follows:

"That the said H. E. Barrett, defendant, has not within the knowledge of the affiant, property in his (H. E. Barrett's) possession within this state subject to execution sufficient to satisfy said judgment; that affiant has reason to believe and does believe that the First State Bank of Mt. Calm, a corporation, whose place of business is in Hill county, Texas, of which B. H. Oates is the president and R. J. Moore is the cashier, both of whom reside in Hill county, and that the First National Bank of Mt. Calm, a corporation, whose place of business is in Hill county, Texas, of which B. H. Oates is the president, and Burl Hillyer is the cashier, both of whom reside in Hill county, are severally indebted to the defendant, H. E. Barrett, and that they severally have in their hands effects belonging to the said H. E. Barrett; and that affiant has reason to believe and does believe that said two banks are severally indebted to

one Mrs. Mattie K. Barrett, the wife of said H. E. Barrett, or severally have in their hands effects belonging to the said Mattie K. Barrett, which effects and funds affiant believes, and so charges, are the community property of the said H. E. Barrett and wife. Affiant further states that the writs of garnishment now applied for are not sued out to injure either the defendant, or the said First State Bank of Mt. Calm, or the said First National Bank of Mt. Calm, garnishees, or the said Mattie K. Barrett, or any of them. Affiant prays for writs of garnishment against the said First State Bank of Mt. Calm and the First National Bank of Mt. Calm, mentioned and described above."

It is believed that the grounds for quashing the writ should have been overruled. All the statutory requirements of an affidavit for garnishment being met, it is immaterial that other allegations are made. *Cawthon v. Bank*, 193 S. W. 783. And the community property could be impounded, no matter in whose name it stood. *Bank v. Rogers*, 170 S. W. 258. It was not necessary to give bond after the alleged judgment was obtained.

The judgment is reversed, and the cause remanded for trial.

#### EASON et ux. v. EASON et al. (No. 2139.)

(Court of Civil Appeals of Texas. Texarkana.  
May 30, 1919. Rehearing Denied  
June 5, 1919.)

#### PARTITION §12(3) — PROPERTY SUBJECT — HOMESTEAD.

Where in partition suit the evidence establishes that the actual uses made of land claimed as a homestead were contrary to an abandonment or intention to abandon and residence on other tract of land was consistent with right to claim homestead of tract in suit, the land was not subject to partition under direct provisions of Rev. St. art. 3424.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Partition suit by J. A. Eason and others against J. T. Eason and wife. From a judgment allowing partition, defendants appeal. Reversed, and cause remanded.

J. W. Gross, of Bonham, for appellants.  
R. T. Lipscomb, of Bonham, for appellees.

LEVY, J. The suit is for partition of four tracts of land contiguous to each other and aggregating 214.32 acres. The land is the community property of J. T. Eason and his wife, S. M. Eason. S. M. Eason died April 5, 1913, intestate, in Fannin county, Tex., leaving her husband and their ten children surviving her. The children bring this suit against the father for partition of the land.

The defendant pleaded that the land was the homestead of himself and wife and family, and not subject to partition under the law. The plaintiffs by supplemental petition pleaded abandonment of the homestead on the part of the father. The case was tried before the judge without a jury, and the finding made "that the defendant J. T. Eason abandoned the land described in the plaintiffs' petition, and that he has no homestead rights therein, and that since the death of S. M. Eason he has secured a new homestead." This finding of fact of the trial court is assailed as being contrary to the evidence.

It appears from the evidence, we think, that the actual uses made of the land in suit by the father would be contrary to an abandonment or intention of abandonment of the same by him as a homestead. And his residing upon the 110-acre tract in evidence is, it is concluded, consistent with, and not contrary to, the continuing of the homestead right in the tracts in suit. The actual facts and the uses of the property on the part of the father make it, as a matter of law, his homestead. *Speer on Marital Rights* (Ed. 1916) § 395. A homestead is not subject to partition. Article 3424, Rev. Civ. Stat.

It is concluded that the premises in suit, except the surplus acreage above 200 acres, was exempted from partition as a homestead, and that the judgment of partition was error.

The judgment is therefore reversed, and the cause remanded.

#### COOPER v. HINMAN et ux. (No. 982.)

(Court of Civil Appeals of Texas. El Paso.  
May 15, 1919. Rehearing Denied June 12,  
1919.)

#### 1. PLEADING §428(7)—IMMATERIAL ISSUES—ABSENCE OF EXCEPTIONS—OBJECTIONS TO EVIDENCE.

Though it is the better practice to present exceptions to pleadings setting up supposed immaterial issues, failure so to do does not necessarily constitute a waiver or an estoppel, and prevent objection to supporting proof when offered.

#### 2. PLEADING §228—WANT OF PARTICULARITY—EXCEPTION—TIME.

If plaintiff's pleading was defective for want of particularity, defendant should have excepted on such ground, following up the general rule that an exception touching the legal sufficiency, formally or substantially, of a pleading, should be made before a trial on the issues of fact.

#### 3. PLEADING §404—PRESENTATION OF IMMATERIAL ISSUES—FAILURE TO EXCEPT.

The rule that failure to except to pleadings setting up supposed immaterial issues consti-



tutes a waiver or an estoppel in regard to the defect is applicable only when the issue pleaded could be saved by amending the pleading.

**4. EVIDENCE  $\Rightarrow$  444(4) — DELIVERY IN ES-CROW—PAROL EVIDENCE.**

It may be shown by parol testimony that an ordinary written instrument was executed under agreement that it should not become effective except on certain conditions, but the principle is not applicable to a deed delivered to the grantees and not to a third person.

**5. VENDOR AND PURCHASER  $\Rightarrow$  282(2)—CLAIM BY THIRD PERSON—NOTICE—POSSESSION.**

Regardless of what the recorded title would show as to the ownership of land, possession is also evidence of title, and notice to a prospective purchaser of such title as the possessor has.

**6. DEEDS  $\Rightarrow$  179—DELIVERY BACK—EFFECT.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1108, requiring conveyance of realty to be in writing and signed by grantor, where the purchaser of land and his wife had received title by reason of the seller's deed to them, mere delivery of the deed back to the seller did not divest them of title, and revest the seller, to effect which a conveyance in writing back to the seller was necessary.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

Suit by Ellis Cooper against H. R. Hinman and wife. From judgment for defendants, plaintiff appeals. Affirmed.

R. B. Truly, of Ballinger, Scott & Breisford, of Eastland, and A. J. Power, of Ft. Worth, for appellant.

J. R. Stubblefield, of Eastland, for appellees.

**WALTHALL, J.** This suit was brought by appellant, Ellis Cooper, against appellees, H. R. Hinman and wife, Ella Hinman, to recover 50 acres of land in Eastland county. The suit is in the nature of an action of trespass to try title. The pleadings are lengthy, and we think we need not fully state them to make sufficiently clear the controlling points in controversy. The facts, briefly stated, are as follows:

On or about the 1st day of October, 1915, Dan Wagoner owned and was in possession of 160 acres of land, of which the 50 acres in controversy is a part, and on which 160 acres was a mortgage securing a loan of about the sum of \$1,100, due the 1st of November, 1917. Wagoner desired to dispose of a part of the 160 acres for the purpose of satisfying said loan and releasing the remaining portion of the 160 acres of said debt. For that purpose, Wagoner and wife duly executed and delivered to H. R. Hinman and wife a warranty deed conveying said land to Hinman and wife for the consideration of two notes, one for \$150 and one for \$1,100, expressed in the

deed and secured by the vendor's lien, due, respectively, in 1916 and 1917. The deed was never recorded. Hinman and wife went into possession of said 50 acres at the time of the purchase, and have continued to occupy same as their home ever since. Hinman paid the \$150 note and the interest thereon. On the 20th day of August, 1917, Hinman and Wagoner agreed that Hinman should turn the 50 acres back to Wagoner. The terms agreed upon were that Wagoner should pay to Hinman \$100, release him from any obligation for rent on the 50 acres, and cancel the \$1,100 note, and that in consideration therefor, Hinman would deliver back to Wagoner the unrecorded deed he had received from Wagoner. Wagoner paid Hinman the \$100 and, while the evidence is not clear, we assume that Wagoner canceled and delivered to Hinman the \$1,100 note. Hinman delivered to Wagoner the deed he had received to the 50 acres, and the deed, when so received, was put in the fire by Mrs. Wagoner and destroyed. Hinman and wife made no deed to Wagoner reconveying the land. Hinman told his wife that it would be necessary to reconvey to Wagoner by the execution and delivery of a deed, but Mrs. Hinman claimed the 50 acres as her home and refused to reconvey to Wagoner.

On the 6th day of October, 1917, Dan Wagoner and wife by warranty deed conveyed the 50 acres of land in controversy to appellant, Ellis Cooper, for a consideration of \$1,300, the sum of \$700 paid in cash, and the balance due on time payments. At the time Cooper bought from Wagoner he lived about a mile from Wagoner, and about one-half mile from Hinman. At the time Cooper bought, he had heard from the neighbors around—it seemed to be current rumor—that Wagoner had bought the 50 acres back from Hinman. Dan Wagoner told Cooper that he had bought the place back from Hinman, and Cooper believed it. Hinman and wife were then living on and occupying the 50 acres. Cooper had lived in that neighborhood for many years, knew Hinman and wife, knew they were in possession of the place, and that they had been using, occupying, and living on the place as a home. Cooper did not ask Hinman or Mrs. Hinman anything about the place, or any claim they or either had or would make to the place. He bought the place solely on Dan Wagoner's statement that he had the property back. Much evidence was introduced to the effect that Hinman and wife had said they had sold the place back to Wagoner, and were intending to leave the place and go elsewhere, and that they had so stated to the neighbors, and, while Cooper had heard such statements, he relied wholly on what Wagoner had told him, that he had bought the place back.

Hinman retained the \$100 he had received from Wagoner on the return of the deed. Mrs. Hinman knew that the \$100 had been paid to her husband in order to get the place back, but received no part of it. When Wagoner conveyed the land to Cooper, he did not then know that Mrs. Hinman was making or would make any claim to the place. Mrs. Hinman, before the \$1,100 note was due, told Wagoner that she had the money and would pay him the \$1,100 and would pay him the \$100 he had given her husband for the return of the deed; but Wagoner refused to receive either, claiming the matter had been closed by the arrangements with Hinman, as above stated.

#### Opinion.

Appellant had pleaded and offered evidence to show a parol understanding and agreement between Dan Wagoner and Hinman to the effect that the deed executed and delivered by Wagoner and wife to Hinman and wife was delivered temporarily, for the specific use and purpose, and in trust, to aid Wagoner in obtaining the means, by the use of the 50 acres in question, to satisfy the debt secured by the mortgage, and for no other purpose, and that in redelivering the deed Hinman was only carrying into effect said agreement; that Hinman had abandoned the idea of making any further efforts to procure, through the use of the 50 acres, the means to discharge said mortgage debt; that because of said agreement, and because Hinman had abandoned any further effort to procure said means to discharge said mortgage debt, Hinman and wife had voluntarily returned said deed to Wagoner, and did not demand its return, and did not object to its destruction, and did not claim or assert title to the 50 acres, but submitted without objection to the recorded title of Wagoner and wife to the 160 acres of land. Hinman presented no exception to appellant's petition setting up said parol agreement, but made objection to the evidence offered to show the agreement, and the facts above stated, and evidence offered to show why Hinman and wife, after the delivery of the deed to Wagoner, concluded to assert title in themselves to the 50 acres. The evidence offered was the recent bringing in of an oil well. The court sustained the objections and the rulings thereon, and the court's rulings are made the grounds of several assignments presented in different forms.

[1-4] While it is the better practice to present exceptions to pleadings setting up supposed immaterial issues, we think a failure to do so would not, necessarily, constitute a waiver, or an estoppel, as claimed, and prevent objection to the proof when offered. If the pleading was defective for want of particularity, the appellee should have excepted on that ground, following out the general rule that an exception touching the le-

gal sufficiency, whether of form or substance, of the pleading, should be made before a trial upon the issues of fact. *G. C. & S. F. Ry. Co. v. Preston*, 74 Tex. 181, 11 S. W. 1108, and cases cited. The rule claimed is applicable only when the issue pleaded could be saved by amending the pleading. But the case at bar presents the question whether the parol agreement pleaded, if established, could ingraft upon the deed delivered by Wagoner and wife to Hinman and wife any condition inconsistent with its terms, and make of the deed an escrow, to take effect on condition not expressed on its face, as might be done if delivered to a third party, a stranger to the deed. The rule is well established in this state that it may be shown by parol testimony that an ordinary written instrument was executed under an agreement that it was not to become effective except upon certain conditions, as was held in *Loving v. Dixon*, 56 Tex. 75. But, as said by our Supreme Court in *Holt v. Gordon*, 107 Tex. 137, 174 S. W. 1097:

"That principle has never been recognized by this court as applicable to a deed to land, or a deed of trust affecting the land, where the delivery of the instrument was made to the grantee, and not to a third person. It has, upon the contrary, been distinctly held that a deed or deed of trust cannot be an escrow where it is delivered to the grantee in the instrument." *Holt v. Gordon*, 176 S. W. 902.

See, also, *Heffron v. Cunningham*, 76 Tex. 313, 13 S. W. 280.

[5] Under the facts stated, appellant was not an innocent purchaser for value without notice. Hinman and wife were in actual possession of the 50 acres of land, she, at least, if not both, claiming it as a home. Regardless of what the recorded title would show as to ownership, possession is also evidence of title, and notice to a prospective purchaser of such title as the possessor has. *Collum v. Sanger Brothers*, 98 Tex. 162, 82 S. W. 459, 83 S. W. 184; *Ramirez v. Smith*, 94 Tex. 184, 59 S. W. 258.

[6] It is immaterial, we think, what Hinman's intention or agreement with Wagoner was in delivering the deed back to Wagoner. He and his wife had received the title to the land by reason of the deed to them. That meant more than simply the delivery to them of the instrument; it conveyed to them the title to the land. Conveyance of real estate must be in writing and signed by the party disposing of it. Article 1103, *Vernon's Sayles' Civil Statutes*. Hinman and wife having title by reason of the Wagoner deed, to get the title back to Wagoner a conveyance in writing by Hinman to Wagoner was necessary.

Under the undisputed facts shown in the record, the court was not in error in instructing the jury to find for appellees.

The case is affirmed.

WALL & STABE CO. v. BERGER.  
(No. 461.)(Court of Civil Appeals of Texas. Beaumont.  
May 20, 1919.)1. APPEAL AND ERROR ⇨1114—DISPOSITION  
OF CAUSE.

A judgment of the county court rendered on appeal from justice court from a judgment allowing neither party any relief will on appeal be reversed and the case dismissed if the county court did not acquire jurisdiction of the cause of action by appeal.

## 2. EVIDENCE ⇨121(1), 123(1)—RES GESTÆ.

Not only are declarations or exclamations uttered by parties to a transaction contemporaneous with and accompanying it admissible as res gestæ, but also such as are made under such circumstances as will raise a reasonable presumption that they were the spontaneous utterances of thoughts created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption of premeditation or design.

3. EVIDENCE ⇨123(12) — RES GESTÆ —  
AGENT'S DECLARATION AFTER COLLISION.

In an action for damages arising from a collision of automobiles, a declaration relative to the accident made 15 minutes thereafter by employé who was driving defendant's automobile was not admissible as a part of the res gestæ.

4. APPEAL AND ERROR ⇨1050(1)—PREJUDICIAL  
ERROR—EVIDENCE.

In an action for damages to an automobile in a collision, admission of testimony regarding a declaration of defendant's driver, not a part of the res gestæ: "He allowed the ambulance had the right of way over everybody, and they ought to keep out of his way; it didn't matter if he did kill him"—was prejudicial, although part of the declaration was but the expression of the opinion of the driver; there being a sharp conflict in the evidence as to who caused the accident.

5. EVIDENCE ⇨258(1) — ADMISSIONS —  
AUTHORITY TO MAKE.

In an action for damages to an automobile in a collision, statement of defendant's secretary that he would settle for the damages to plaintiff's automobile and would put it in as good shape as it was before the accident should not have been admitted, in the absence of evidence as to secretary's authority to make such a statement or promise.

Appeal from Harris County Court; W. E. Montelth, Judge.

Suit by A. Berger against Wall & Stabe Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Fred R. Switzer, of Houston, for appellant.

Ellis P. Collins and S. H. Brashear, both of Houston, for appellee.

HIGHTOWER, C. J. This suit was filed by the appellee, A. Berger, against appellant, Wall & Stabe Company, a corporation, in one of the justice's courts of Harris county, in which appellee sought to recover damages caused to his automobile in consequence of a collision between the automobile and an automobile ambulance owned and operated by appellant. The collision occurred at or near the intersection of Travis and Preston streets in the city of Houston.

It was the contention of appellee that the collision was caused by a failure on the part of appellant's driver to observe several of the ordinances of the city, then in force, relative to the operation of automobiles in the city.

Appellant answered by general demurrer and general denial, and then specially alleged that the collision was caused, not by any fault or negligence on the part of appellant's driver, but solely in consequence of negligence of appellee in failing to observe certain ordinances of the city, which were alleged to be in force at the time and place of the collision; that by the collision appellant's ambulance was damaged, and appellant prayed recovery against appellee therefor.

The result in the justice's court was a judgment to the effect that appellee recover nothing by his suit, and that appellant take nothing by his cross-action. From that judgment appellee, Berger, appealed to the county court at law, where a jury, in answer to special issues, returned a verdict in favor of appellee, and judgment was entered in his favor, and appellant was denied recovery on its cross-action. From that judgment appellant prosecutes this appeal.

The first three assignments complained, in effect, that the county court at law acquired no jurisdiction on appeal from the justice's court, and that therefore this court should reverse the county court's judgment and dismiss the case.

[1] If the county court did not acquire jurisdiction of appellee's cause of action by the appeal, then appellant would be correct in its contention that this court should reverse the county court's judgment and dismiss the case. *Pecos & N. T. Ry. Co. v. Canyon*, 102 Tex. 478, 119 S. W. 294; *T. & N. O. R. Co. v. Coleman*, 185 S. W. 1053. In making this contention, appellant assumes that appellee's suit in the justice's court was for an amount in excess of the jurisdiction of that court; that is to say, for more than \$200. This assumption is not supported by the record; and, since the points involved present no new or debatable legal question, we shall not go further into detail, and these assignments are overruled.

The fourth, fifth, and sixth assignments are overruled, because they point out no

reversible error, and we do not discuss them, for the reason that the questions involved will not probably arise on another trial.

The seventh assignment complains of the action of the trial court in admitting the testimony of appellee's witness Bunyard relative to a statement made to him by the driver of appellant's ambulance, about 15 minutes after the collision which gave rise to this suit.

The witness Bunyard was a policeman of the city of Houston, and was present at the time of the collision in question. His testimony in this connection was as follows:

"I talked with the driver of the ambulance. \* \* \* I talked with him at the time of the accident, and then afterwards. At the time of the accident he wanted me to get in the ambulance and make the call with him, wanted me to talk to him, and I told him, 'No, that is not my business,' and he went and came back in a few, about 15, minutes, without any one, and then put his wagon up and came back down there (meaning the place of the collision) and got awful raw."

Appellee's counsel, at this point, asked the witness this question: "What did the driver say when he came back after having put up his ambulance?" To this question, appellant's counsel objected on the ground that any statement made by the driver at such time could not bind the defendant, that the same would be hearsay, and would be no part of the *res gestæ*, and would be therefore inadmissible. The court overruled the objection of appellant, and permitted the witness Bunyard to answer the question, his answer being as follows:

"He (the driver) allowed the ambulance had the right of way over everybody, and they ought to keep out of his way; it didn't matter if he did kill him."

This evidence was not offered by appellee by way of impeachment of anything that had been stated by appellant's driver, but was offered and admitted as original evidence on the theory, as claimed by appellee, that it was admissible as a part of the *res gestæ*.

The record shows, without dispute, that at the time of the collision in question appellant's ambulance was responding to an emergency call at some point in the city of Houston, and that after the accident appellant's driver proceeded on his journey and mission and answered the call for the ambulance, and then returned, coming back by the place of accident, and then proceeded to appellant's place of business, and put up the ambulance, and thereafter returned to the place of accident, where it is claimed by the witness Bunyard the declaration objected to was made.

The case of *Railway Co. v. Anderson*, 82 Tex. 519, 17 S. W. 1040, 27 Am. St. Rep. 902, is a leading case in this state on the

point here involved, and in that case it was said that declarations or exclamations, uttered by parties to a transaction, and which are contemporaneous with and accompanying it, and are calculated to throw light upon the motives and intentions of the parties to it, are always admissible as part of the *res gestæ*. It was there further remarked by the court that respectable authority could be found which restricts the rule to this definition, but that the rule is more liberal in this state, and then the court adds:

Not only are such declarations admissible "as accompanying the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design."

[2] The appellate courts of this state have had frequent occasion to discuss the *res gestæ* rule since the opinion in *Railway v. Anderson*, *supra*, was rendered, and in most of them that case is referred to and the rule there announced approved without qualification, and, undoubtedly, that case announces the correct rule as it prevails in this state to-day. So the rule as to what constitutes a part of the *res gestæ* of a transaction is clearly announced, but difficulty frequently arises in its application. Unquestionably, it cannot be said that the declaration of appellant's ambulance driver in this instance, admitted as a part of the *res gestæ* of the transaction in question, was made at the time of the occurrence, but the undisputed testimony shows that it was at least some fifteen minutes thereafter, and the testimony further shows that the driver did not remain at the place of the accident, but thereafter continued on in the prosecution of his mission or errand, and after its accomplishment, and after he had returned to appellant's place of business and put up his ambulance, he then returned to the place of accident and made the declaration that was introduced over appellant's objection.

[3, 4] After a careful review of the authorities cited by both sides in this case, and without discussing them, we have concluded that the statements or declarations of the driver of the ambulance, if made as claimed by the witness Bunyard, were not admissible against appellant upon the theory that they constituted a part of the *res gestæ* of the collision in question, and that therefore the testimony of the witness Bunyard should have been excluded from the evidence, upon objection of appellant's counsel, and that the error of the court in admitting the testimony was calculated to and probably did result prejudicially to appellant. That such declaration or statement, if made by

appellant's driver, was highly calculated to prejudice the jury against appellant cannot be plausibly denied. Especially that part of the declaration, "It didn't make any difference if he did kill him," was, we think, highly prejudicial to appellant, and calculated to arouse the feelings of the jury against appellant. Of course, that part of the declaration was but the expression of the opinion of the driver, and was really not the declaration of any fact shedding any light upon the transaction, but, on the contrary, tended strongly to indicate a feeling of malice or anger on the part of the driver towards the appellee, and surely appellant ought not to be, and cannot be, affected by such opinion or feeling entertained by its driver. We think that no case in this state, when carefully considered, can be found that would support appellee's contention that the testimony objected to was admissible against appellant in this case as a part of the res gestæ. See, also, *De Walt v. H. B. & W. T. Ry. Co.*, 22 Tex. Civ. App. 403, 55 S. W. 534; *City of Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405; *Railway Co. v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442.

In this case the evidence was in sharp conflict as to the cause of the collision, that is to say, whether it was the fault or negligence of appellant's driver that caused the collision, or whether it was that of appellee himself, and, this being true, it cannot be said, in reason, that the error of the trial court, in admitting this damaging evidence, was harmless. The seventh assignment is therefore sustained.

[5] The eighth assignment complains of the action of the trial court in permitting appellee's same witness Bunyard to testify, over the objection of appellant, to statements claimed by the witness to have been made to him by appellant's secretary, Mr. Perry, some 15 or 20 minutes after the collision, which statements were, substantially, to the effect that he, Perry, would settle for the damages to appellee's automobile, and would put it in as good shape as it was before the accident.

The objection to this testimony was, substantially, that such statement on the part of Perry, if made, was a statement concerning a past transaction, of which Perry had no personal knowledge, and could not be in any sense admissible and binding against appellant, especially since it was not shown that Perry had authority to make any such statements or promise, or that such statement arose out of or in the course of the performance of any duty imposed upon him by appellant.

We are inclined to think that as the matter appears in this record, appellant's objection to this testimony should have been sustained, and since the case must be re-

versed, as already indicated, we would suggest that before the trial court, on another trial, should admit the evidence here complained of, Mr. Perry's authority to make any such statement or promise, as indicated, should be more fully and definitely shown.

The other assignments of error relate to matters which will not probably occur on another trial, and we do not discuss them for that reason.

For the error indicated by the seventh assignment, it is the opinion of this court that the trial court's judgment should be reversed, and the cause remanded for a new trial; and it will be so ordered.

Reversed and remanded.

## SOUTHWESTERN PORTLAND CEMENT CO. v. SCHWARTZ. (No. 1002.)

(Court of Civil Appeals of Texas. El Paso.  
May 29, 1919.)

### 1. CONTRACTS — 28(2) — AGREEMENT FOR REBATE — EVIDENCE — RELEVANCY.

In an action by owner of building against cement company to recover an alleged agreed rebate, the owner's testimony as to his preference for a steel building over a concrete one, and the effort of cement company to induce him to change to concrete, and of his being so induced by confidential rebate agreement held relevant to the issue as to the amount of agreed rebate.

### 2. APPEAL AND ERROR — 1170(7) — HARMLESS ERROR — EVIDENCE — IRRELEVANT AND IMMATERIAL — INJURY.

In an action on an alleged agreement for a rebate on a sale of cement, admission of evidence as to plaintiff, owner, being induced by the defendant cement company to contract for a concrete instead of a steel building, the rebate agreement being an inducement for using concrete, if immaterial and irrelevant testimony, was harmless, because not resulting in injury. Court Rule 62A (149 S. W. x).

### 3. COSTS — 262 — APPEAL — SUGGESTION OF DELAY — CONSIDERATION OF ENTIRE RECORD.

An appellee's suggestion that the appeal was taken for delay opens the entire record for consideration.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Action by A. Schwartz against the Southwestern Portland Cement Company. From judgment for plaintiff, defendant appeals. Affirmed.

Borges & Borges, of El Paso, for appellant.  
Goldstein & Miller, of El Paso, for appellee.

HIGGINS, J. Appellee, Schwartz, in contemplation of the erection of a six-story building with basement in the city of El Paso, had two sets of plans and specifications drawn, one set being for a re-enforced concrete structure, the other for a structure upon a steel frame. Appellant was a manufacturer of cement in or near said city. Schwartz was undecided as to which character of building he would erect, and as an inducement for him to erect the concrete structure and use appellant's product appellant, acting through its sales manager, McCurdy, agreed with Schwartz that it would make a rebate to him upon the purchase price of every barrel of cement used in the construction of the building. Schwartz accepted the proposal, and constructed the building of concrete, using in so doing 6,988 barrels of cement manufactured by appellant. It is admitted by appellant that an agreement was made for a refund, and the only controversy between the parties is as to the amount per barrel of the refund. Schwartz brought this suit to recover the sum of \$1,747, alleging that the refund agreed upon was 25 cents per barrel. Appellant tendered in court \$349.40, contending that the agreed refund was to be 5 cents a barrel. The only issue submitted to the jury was how much per barrel did appellant agree to refund to Schwartz. Their answer was 25 cents per barrel.

[1] The only error assigned is to the admission of testimony of appellee, Schwartz, as follows:

"When I had this discussion with Mr. McCurdy in New York, I discussed with him then the question of my preference for a steel over a concrete building. I showed him the plans and we went all over them, and I stated to him why I preferred steel. One of the reasons was, if I would start a steel building—you know we were crowded for time, the Popular Dry Goods Company was crowded for time—and a steel building, after you get the material on the ground, you can build much quicker than concrete. The next was, in a steel building the columns are smaller, which was a big inducement to tenants; the concrete columns are practically twice as big as steel columns would be. I certainly did state those to Mr. McCurdy. We also had a discussion as to the relative values of steel and concrete. He told me how much it would cost, and I says, 'I know it will cost more, but I am willing; it is worth more. If I want to change it, you can change steel easier than concrete.' I discussed with him as to which made a better building, steel or concrete. That a steel building, the way I was to build, with hollow tile for the floor instead of cement, to use hollow tile around the columns and also the floor. I had bids on that too, from the Union Brick Company; he knew about that. Anyhow, we discussed it quite a while, and he told me, 'Schwartz, we can't afford to let you put up a steel frame building in El Paso, because we are in the cement business, and I will make you a proposition where it

will be worth while. Of course, it will have to be strictly confidential.'"

The Popular Dry Goods Company referred to in the foregoing testimony was to occupy the proposed building. It is objected that the only issue in the case was the amount of the agreed rebate and the testimony complained of was immaterial and irrelevant to that issue.

The other members of the court are of the opinion that the objection was not well taken, and that the testimony was admissible. Schwartz's testimony discloses that for various reasons he was inclined to construct the steel frame building, although a concrete structure would cost 10 or 15 per cent. less. He had been advised by the contractor that the concrete structure would require about 9,000 barrels of cement. The evidence further discloses that the lowest bid for the construction of a concrete building was about \$180,000. Mr. Greenleaf, in discussing the general rules as to relevancy of evidence, says that evidence "is admissible if it tends to prove the issue." 1 Green. on Ev. 51a. A rebate of 25 cents per barrel upon the basis of 9,000 barrels would have meant a substantial discount to Schwartz, whereas a rebate of 5 cents per barrel might be regarded as insignificant, considering the cost of the building. The other members of the court, therefore, consider the evidence objected to as tending to prove the issue as contended for by appellee, and therefore not irrelevant. The writer also is inclined to the view that the objection was not well taken, but considers that it may be doubtful. He, therefore, concurs in the affirmance upon the ground now indicated as to which we all agree.

[2] Conceding that the testimony was irrelevant and should have been excluded, the error in refusing so to do did not harm appellant, and therefore is not reversible.

Cases may be found where reversals were based upon the admission of irrelevant evidence, but in all of them we believe it will be found that the evidence was of a nature or character calculated to in some wise improperly influence the jury in the determination of the issues before them. It is well settled that the erroneous admission of irrelevant and immaterial testimony is not ground for reversal where no injury was done. *Railway Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110; *McClelland v. Fallon & Lehr*, 74 Tex. 238, 12 S. W. 60; *Railway Co. v. Williams*, 194 S. W. 1154; *Loftus v. Sturgis*, 167 S. W. 14; and other cases cited in 1 *Michie Dig.* 806-7.

We think no harm resulted to appellant by the admission of the testimony of Mr. Schwartz above set forth, and overrule the assignment. Rule 62A (149 S. W. x).

[3] Appellee has suggested that the appeal

was for delay. This opens the entire record for consideration. No reversible error is shown by the record, but we are not prepared to hold that the appeal was taken for the purpose of delay.

**Affirmed.**

**TEICH et al. v. McAULEY. (No. 2115.)**

(Court of Civil Appeals of Texas. Texarkana.  
May 15, 1919. Rehearing Denied  
May 29, 1919.)

**FRAUDULENT CONVEYANCES — 47 — BULK SALES ACT—DEALER IN MONUMENTS CEASING TO DO BUSINESS — "MERCHANT" — "TRADER."**

Under Rev. St. 1911, art. 3971, relating to sales in bulk, a dealer in monuments, having on hand marble, granite, etc., was a "merchant" or "trader" within the act, though at time he sold his entire stock of goods without complying with act he was not engaged in that business, but was engaged in other lines of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Merchant; Trader.]

**Appeal from Grayson County Court; Dayton B. Steed, Judge.**

Action by Frank Teich against I. E. Provence, in which Mrs. E. N. McAuley was brought in as garnishee, and plaintiff filed contest to answer for garnishee. From judgment for garnishee plaintiff appeals. Judgment rendered for plaintiff.

J. P. Leslie, of Sherman, for appellant.  
G. C. Harney, of Sherman, for appellee.

**HODGES, J.** On March 22, 1916, the appellants recovered a judgment against I. E. Provence in the county court of Grayson county for the sum of \$305, with interest and costs of suit. Thereafter a writ of garnishment was issued and served upon the appellee, Mrs. E. N. McAuley, who answered, denying that she owed Provence anything, or that she had any effects belonging to him in her possession. A contest was filed to this answer, and upon the trial the following facts were shown by the evidence: For several years prior to October 1, 1917, I. E. Provence was engaged in the business of making and selling monuments, under the name of the North Texas Monument Works. He bought at wholesale rough and smooth marble and granite. His place of business was located on Houston street in Sherman, Tex. His business house was kept open about one-third of the time. During the other two-thirds he was absent, soliciting trade, and during his

absence his house was closed. He continued in business in that manner until about October 1, 1917, when his house was closed permanently and a part of the building rented to other parties for an office; the other part was retained by Provence for the storage of his stock of marble and tools. On the 24th of January, 1918, Provence sold his entire stock of marble, together with his tools, to his mother-in-law, the appellee herein, for the sum of \$2,357.13, in satisfaction of a debt which he owed her. No notice was given to any of the creditors of Provence as required by the Bulk Sales Law. It is conceded that no fraud was shown, and that the sale was made to satisfy a pre-existing debt. The appellants are wholesale marble dealers located at Llano, Tex.; and they and other creditors had sold marble and granite to Provence. After the sale to Mrs. McAuley she took the exclusive charge and control of the stock of granite and fixtures, and had the same in her possession at the date of the levy of the writ of garnishment.

In a trial before the court judgment was rendered in favor of the garnishee, the court holding that the sale was not made in violation of the bulk sales statute. That ruling seems to have been based upon the fact that Provence, having ceased to do business, and being at the time of the sale engaged in other lines of employment, was not a merchant or a trader within the terms of article 3971 of the Revised Civil Statutes. The assignments of error challenge the correctness of that legal conclusion. The article of the statute above referred to provides:

"The sale or transfer in bulk of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller or transferor, shall be void as against the creditors of the seller or transferor unless the purchaser or transferee demand and receive from the seller or transferor a written list of names and addresses of the creditors of the seller or transferor, with the amount of the indebtedness due or owing to each and certified by the seller or transferor under oath to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser or transferee shall at least ten days before taking possession of such merchandise or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. Any purchaser or transferee who shall not conform to the provisions of this act shall, upon application of any of the creditors of the seller or transferor, become a receiver and be held accountable to such creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale or transfer."

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The proof shows that the goods sold by Provence was a stock of merchandise bought for the purpose of trade. The fact that the owner closed his business house and ceased to make daily sales in the due course of trade did not alter the character of his goods or affect the right of his creditors under the statute. If the creditors ever had any right to resort to that stock of goods for the satisfaction of their debts, that right remained, and was not defeated by the closing of the store for the period indicated by the evidence. *Owosso O. & S. Co. v. McIntosh & Warren*, 107 Tex. 307, 179 S. W. 257, L. R. A. 1916B, 970; *Mayfield Co. v. Harlan*, 184 S. W. 313.

We are of the opinion that the trial court erred, and that a judgment should here be rendered for the appellants.

### CAMPBELL et al. v. WYLIE et al. (No. 2137.)

(Court of Civil Appeals of Texas. Texarkana.  
May 28, 1919. Rehearing Denied  
May 29, 1919.)

#### VENUE $\Leftrightarrow$ S—ACTIONS FOR INJURY BY AUTOMOBILE—"TRESPASS."

Under Rev. St. 1911, art. 1830, subd. 9, providing that where the foundation of a suit "is some crime or offense or trespass" for which a civil action lies it may be brought in the county where committed or where defendant is domiciled, suit may be brought in the county where a person is run over and killed by an automobile, negligently driven by the owner's agent acting within the scope of his authority, "trespass" being "some wrongful act committed, and not merely a tort resulting from the negligent omission to perform a duty."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trespass.]

Appeal from District Court, Franklin County; J. A. Ward, Judge.

Action by H. A. Wylie and others against Ralph Campbell and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

M. D. Carlock and W. D. Suiter, both of Winnsboro, for appellants.

J. H. Beavers, of Winnsboro, and Wilkinson & Davidson, of Mt. Vernon, for appellees.

LEVY, J. This is an action by the appellees against the appellants to recover damages for the death of their child, seven years of age, who was run over and killed by an automobile. The sole question on appeal is whether the suit should have been brought in the county where the defendants have their domicile, or may be brought in the county where the child was killed. The petition alleged that—

(1) "The plaintiff resides in Franklin county, Tex., and the defendants reside in Wood county, Tex.;" (2) "plaintiff would show to the court that at the time the plaintiff's said child was run over and killed the said automobile was being operated by the servant and employé of the defendants in Franklin county, Tex., and said child was killed in said Franklin county, Tex.;" and (3) "the child was standing by the side of the road in full view of the driver of the car at the time he was killed, was on a straight road for over a hundred yards, and the said driver could, by the use of ordinary care, have prevented the killing, but he negligently ran the car at an unusual high rate of speed and in a careless and negligent manner, and failed to keep a proper lookout for persons along the road, and failed to stop the car to avoid striking the child."

The venue statute (Rev. St. 1911, art. 1830, subd. 9) provides:

"Where the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie, the suit may be brought in the county where such crime, or offense, or trespass was committed, or in the county where the defendant has his domicile."

"Trespass," as used in the provision quoted, has been construed as meaning to embrace "some wrongful act committed, and not merely a tort resulting from the negligent omission to perform a duty." *Wettermark v. Campbell*, 93 Tex. 517, 56 S. W. 331; *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Winslow v. Gentry*, 154 S. W. 260. And under the above rule it is thought that suit may be brought in the county where the injury occurred, against whoever negligently, as alleged, drives an automobile whereby another is run over and killed. And the appellants could be sued in the county where the trespass was committed by the alleged agent, acting within the scope of his authority. *Carver Bros. v. Merrett*, 184 S. W. 741.

The ruling of the trial court, it is concluded, should be affirmed.



RIO GRANDE, E. P. & S. F. R. CO. et al.  
v. KRAFT & MADERO. (No. 989.)

(Court of Civil Appeals of Texas, El Paso.  
May 22, 1919. Rehearing Denied  
June 19, 1919.)

1. CARRIERS ⇨228(5)—CARRIAGE OF LIVE STOCK—ACTION FOR INJURIES TO SHIPMENT—EVIDENCE—SUFFICIENCY.

In a shipper's action against a carrier for injuries to a shipment of live stock, evidence held sufficiently definite and certain as to the number and kind of animals injured or killed and the amount of damages to sustain a verdict for plaintiff.

2. CARRIERS ⇨230(11)—CARRIAGE OF LIVE STOCK—INSTRUCTION—LIABILITY AS DEPENDENT UPON AGENCY.

In a shipper's action for injuries to live stock, it was not error to refuse to instruct that defendant was not liable for injuries occurring while the cattle were being switched by another road at destination, where such road was not acting as a connecting carrier, but as defendant's agent to do the switching.

3. APPEAL AND ERROR ⇨1068(5)—REVIEW—HARMLESS ERROR.

In a shipper's action for injuries to shipment of live stock, error in refusing to charge that defendant was not liable for damages accruing during switching operations by the agent of a connecting carrier was harmless, where it appeared that no damages were assessed against defendant for injuries incurred during the switching operation.

4. TRIAL ⇨256(13)—AMBIGUOUS INSTRUCTIONS—NECESSITY OF REQUEST.

Where in a shipper's action against connecting carriers a proper instruction is not sufficiently clear that damages are to be assessed separately, a special charge to that effect must be requested.

5. CARRIERS ⇨219(1)—LIVE STOCK—INTERSTATE SHIPMENTS—ISSUANCE OF NEW BILL OF LADING.

Where a shipment of live stock is interstate, the terms of the original bills of lading issued by the initial carrier cover the entire transportation and the liability of the initial carrier, notwithstanding that new bills of lading are issued by the connecting carrier.

6. CARRIERS ⇨230(12)—CARRIAGE OF LIVE STOCK—INSTRUCTIONS—EVIDENCE.

In a shipper's action for injuries to a shipment of live stock, it was not error to refuse to instruct that there was no evidence of the kind or character of the animals killed, and in no event to find value in excess of the cheapest grade of animals in the shipment, where there was evidence that the dead animals were an average of the shipment.

7. CARRIERS ⇨219(5)—CARRIAGE OF LIVE STOCK—LIABILITY OF CONNECTING CARRIERS—DESTINATION OF SHIPMENT.

Where a connecting carrier transporting a shipment of live stock delivers it to another

road acting as its agent, and not as a connecting carrier to be switched to stockyards for unloading at destination, the initial carrier is liable for injuries sustained during such switching operations; the destination of the shipment being the stockyards, and not the railroad yards.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Action by Kraft & Madero against the Southern Pacific Company, the Rio Grande, El Paso & Santa Fé Railroad Company, and the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs against all the defendants, and the two last-named defendants separately appeal, while the defendant first named brings error. Affirmed.

Beall, Kemp & Nagle and Turney, Burges, Culwell, Holliday & Pollard, all of El Paso, for appellants.

E. M. Whitaker, of El Paso, for appellees.

HIGGINS, J. This action was brought by Kraft & Madero, appellees, against the Southern Pacific Company, Rio Grande, El Paso & Santa Fé Railroad Company, and Atchison, Topeka & Santa Fé Railway Company, appellants, to recover damages to two shipments of cattle made in May and June, 1917. The first shipment consisted of 27 cars containing about 1,300 head and originated at Amada and Calabasas stations on the line of the Southern Pacific in Arizona. The second shipment consisted of ten cars containing about 470 head and originated at Tucson station, on the line of the Southern Pacific in Arizona. The shipments moved from their points of origin over the line of the Southern Pacific to El Paso, Tex., where they were unloaded, rested, fed, and watered. Thence they moved to Denver, Colo., over the lines of the two Santa Fé Companies. The evidence discloses that the initial carrier billed the shipments for through transportation to Denver, but that, when they were received at El Paso by the Rio Grande, El Paso & Santa Fé Railroad Company, such company issued new bills of lading for through shipment from El Paso to Denver. The court in its charge submitted the issues of negligent rough handling and negligence in furnishing a defective car with a hole in its floor. Verdict was returned and judgment rendered in favor of plaintiffs against the Southern Pacific Company and Atchison, Topeka & Santa Fé for \$4,176.90, and against the Southern Pacific Company and Rio Grande, El Paso & Santa Fé for \$120. The two Santa Fé Companies prosecute separate appeals, and the Southern Pacific prosecutes writ of error. The appeals of the Santa Fé Companies are presented in one brief and will be first considered.

## Opinion.

The first assignment questions the sufficiency of the evidence in that it is indefinite and uncertain as to the number of animals of the various ages and kinds killed or injured as well as the amount of damages thereto.

[1] The first shipment contained 1,300 head of one, two, and three year old steers. There is evidence that at least 40 head thereof died as the result of rough handling. The yearlings were the least valuable in the shipment, and witness Riddle testified they would have been worth \$39 per head if they had arrived in proper condition. These 40 yearlings were therefore worth \$1,560. As to the remaining 1,260 head the evidence is not altogether satisfactory, but we believe the testimony of the witnesses Lunt and Riddle was sufficient to support a finding that there was an average damage of at least \$3 per head thereto, which in the aggregate would total \$3,780. This, added to the value of the dead animals, would make \$5,340, while the verdict and judgment is for but \$4,176.90. The assignment is therefore overruled.

[2] Upon arrival of the first shipment at the Denver railroad yards, the Atchison, Topeka & Santa Fé turned the same over to the Colorado & Southern Railway Company to be switched to the Denver stockyards for unloading. There is evidence that some damage thereafter occurred while the cattle were in the possession of the Colorado & Southern. The Atchison complains of the refusal of an instruction that it was not liable for death or injury occurring while the cattle were being switched by the Colorado & Southern. The record discloses that the Colorado & Southern does the switching to the stockyards for the Atchison at Denver. It thus was not acting as a connecting carrier, but as the agent of the Atchison in this switching movement. The charge was properly refused. *Wilburn v. Railway Co.*, 148 Mo. App. 692, 129 S. W. 484; *Railway Co. v. Jackson*, 55 Tex. Civ. App. 407, 118 S. W. 853; *Railway Co. v. Scoggin*, 40 Tex. Civ. App. 526, 90 S. W. 521; *Railway Co. v. Phillips*, 197 S. W. 1031.

[3] The Rio Grande, El Paso & Santa Fé Railroad Company likewise complains of the refusal of a charge to the effect that it was not liable for any damages accruing during the switching operation in Denver. This charge should have been given, as this carrier was an intermediate carrier, and liable only for the damages accruing on its own line. But upon the record the refusal of the charge resulted in no injury. The charge of the court submitting plaintiff's theory of the case was as follows:

"Now, if you find that the defendants, or either of them, while the cattle were in the charge of them, or either of them, for transportation, bumped, jerked, and jarred the same, and you further find that the defendants, or

either of them, were negligent in so bumping, jerking, and jarring the cattle in the cars, if they did so, and that the cattle were damaged and injured by such bumping, jerking, and jarring, if they were, and you further find that the negligence of the defendants was a proximate cause of the injury and damage to the cattle, if any, you will find for the plaintiffs against the defendant or defendants so negligent and the defendant Southern Pacific Company, notwithstanding, as the court instructs you, that no negligence was shown on the part of the Southern Pacific Company. If you find that one of the cars furnished by the defendants, or either of them, for the transportation of said cattle, had a hole in the floor at the time it was so furnished, and you further find that the defendants, or one of them, were negligent in providing a car, if any, with a hole in the floor, and you further find that such negligence, if any, proximately caused the injury and damage to three head of plaintiffs' cattle, as complained of by plaintiffs, the defendant so furnishing and using said car and the Southern Pacific Company would be liable to plaintiffs for the damage so caused, not to exceed, however, \$142, as damages caused by such hole, if any."

The verdict and judgment against the Rio Grande, El Paso & Santa Fé was for \$120 only. The injuries inflicted in Denver by the switching movement was to the first shipment. The only evidence tending in any wise to charge the Rio Grande, El Paso & Santa Fé was for injuries to three steers in the second shipment killed by getting their feet in a hole in the floor of a car furnished by this appellant when it received the cattle at El Paso. It is thus manifest that the jury by its verdict has assessed against this appellant only the value of these three animals killed by reason of the hole in the car furnished by it, and assessed no damages against it for any of the injury to the first shipment inflicted by the switching operation in Denver. It thus being apparent that no injury resulted to this appellant by the refusal of the charge, its refusal is not reversible error. *Rule 62A* (149 S. W. x).

The fourth assignment which is presented by both of the Santa Fé Companies is as follows:

"The court erred in failing and refusing to confine the recovery as to these defendants to such loss or injury as may have occurred on their respective lines, as neither of them were the initial carrier, and were only liable for such loss or injury as occurred while the shipments were in their respective possessions."

[4] There was no negligence shown on the part of the Southern Pacific Company, and the court so instructed the jury. Considering the quoted portion of the charge, we think it fairly indicated to the jury that as against the two Santa Fé Companies the damages assessed, if any, were to be assessed respectively against the company upon whose line

the injury and damage was inflicted. If it was not sufficiently clear in this particular, a special charge should have been requested. Considering the evidence in the case, the jury evidently severally assessed against the Santa Fé Companies the damages for which they were respectively liable and no more.

What has heretofore been said disposes of the remaining assignments of the Santa Fé Companies.

[5] We pass now to the consideration of the appeal of the Southern Pacific Company. Its first assignment is predicated upon the theory that the court erred in submitting any issue of liability on the part of the Southern Pacific Company, because the uncontroverted evidence discloses that all of the damage to the two shipments occurred after they had passed from its possession at El Paso, at which point they were received by the Rio Grande, El Paso & Santa Fé, which issued new bills of lading for transportation from El Paso to Denver. The circumstances under which these second bills were issued is not disclosed by the record. It appears that the Southern Pacific Company, the initial carrier, issued bills of lading for through transportation from the points of origin to Denver. Since these were interstate shipments, the terms of the original bills issued by the Southern Pacific Company govern the entire transportation, and the liability of the initial carrier was not altered by the issuance of the second bills by the Rio Grande, El Paso & Santa Fé Railway Company at El Paso. *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. Under the federal law the Southern Pacific Company, as the initial carrier, was liable to the appellees for any damage accruing upon the line of any of the connecting carriers. There is, therefore, no merit in this assignment.

[6] The second assignment complains of the refusal of an instruction that there was no evidence of the kind or character of the animals killed in the first shipment, and in no event to find a value in excess of the cheapest grade of the animals in this ship-

ment on account of the dead ones. This charge was properly refused because there was evidence that the dead animals were an average of the shipment.

[7] The third assignment proceeds upon the theory that the Southern Pacific Company could not be held liable for any injury accruing to the shipment after its arrival at Denver and while they were being switched to the Denver stockyards by the Colorado & Southern Railway. As has been heretofore indicated, when the first shipment reached the Denver railroad yards the Atchison Company turned the same over to the Colorado & Southern to be switched to the stockyards for unloading. The Colorado & Southern in this matter acted, not as a connecting carrier, but as the agent of the Atchison in making the switching operation. The duty of the carriers in this case did not terminate upon the mere arrival of the shipment in the railroad yards at Denver. It was their duty to deliver the same in Denver at the proper unloading place, which, of course, was the stockyards, and not the railroad yards. Therefore the liability of the Southern Pacific Company, as the initial carrier, did not terminate until the shipments had been delivered at the stockyards in Denver, and there was therefore no error in refusing a charge which relieved it from liability for damage accruing while the cars were being switched from the railroad yards of the Atchison Company in Denver to the stockyards.

The fourth assignment asserts that the evidence is insufficient to support the judgment. This has heretofore been considered and passed upon in considering the appeal of the Santa Fé Companies.

The remaining assignments of this appellant relate to questions which have been determined adversely in what has heretofore been said, and there is no occasion to further discuss the same.

Finding no reversible error the judgment is affirmed.

**TEMPLE HILL DEVELOPMENT CO. v. LINDHOLM et ux. (No. 6232.)**

(Court of Civil Appeals of Texas. San Antonio. May 28, 1919. Rehearing Denied June 18, 1919.)

**APPEAL AND ERROR 6719(8)—REVIEW—NECESSITY OF ASSIGNMENTS.**

In the absence of an assignment challenging the accuracy of the trial court's findings, the reviewing court will not question their accuracy.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Suit by the Temple Hill Development Company against Eric A. Lindholm and wife. Decree for defendants, and plaintiff appeals. Affirmed.

W. C. Church and T. F. Mangum, both of San Antonio, for appellant.

Barrett, Eskridge & Barrett and Hood Boone, all of San Antonio, for appellees.

COBBS, J. This suit was instituted by appellant to recover from appellees Lot Nos. 3 and 4 in block No. 4 in section A of Temple Hill addition to the city of San Antonio, Bexar county, and for damages and rent, at \$20 per month, and for amounts already paid to be held and recovered as liquidated damages, together with all improvements erected and placed upon the premises by appellees. Plaintiff prays for a writ of possession and a permanent injunction restraining defendants from interfering with the possession of said land or from occupying and holding possession.

Appellant alleges it instituted the suit to enjoin defendants from interfering with the possession of the land and occupying the premises, and thereafter entered into a new agreement and contract, and agreed that the cause be held on the docket until such agreement would be complied with.

In said new agreement dated April 30, 1918, it was provided all unsightly objects, and especially the pile of wood now located thereon, would be removed and keep the same therefrom, and also all exposed hay and material of any kind would be removed. It also provided:

"Further, to turn said shed around so that the same shall face the street in front of said lots or the alley in the rear of said lots and to paint said sheds and building with three coats of good paint and to screen said building and place window and electric lights therein in accordance with the plans for its construction and to construct cesspool and toilet in sanitary manner."

It was agreed that the building could be used for residence purposes only until a residence shall be built, according to their agreement, then its use as a residence to cease. It was agreed that the appellees were permitted to remain on said premises for a period of six months until a residence be erected in accordance with the contract, then to reside in it, and all improvements thereon to be forfeited to appellant in case of the breach. The former contract was forfeited, and this contract made in lieu thereof.

The appellant sold said lots for \$900 to appellees, the sum of \$155 having already been paid, and balance to be paid in installments of \$20 per month on the 20th day of each month until paid. Upon the payment of all the installments appellant agreed to convey the property by a general warranty title with certain reservations and conditions. The one was:

"No building for residence purposes costing less than twelve hundred dollars shall ever be erected on said property; any building for residence purposes shall front on the street running east and west in front, and no building shall be erected on said property 20 feet on the street.

"The appellant agreed to furnish abstract of title showing good and merchantable title free and clear of incumbrances."

The appellant alleged a breach of the contract in that appellees have "failed to remove from said lots all unsightly objects, and especially the pile of cordwood located thereon, and to keep the same therefrom, and also all exposed hay and material of any kind so as make said lots an incentive to prospective purchasers of lots in said addition instead of the unsightly place that it has been, and further to turn said shed round so that the same shall face the street in front of said lots or the alley in the rear of said lots, and to paint said shed and building with three coats of good paint, and to screen said buildings and place electric lights therein in accordance with the plans for its construction, and to construct cesspools and toilet in a sanitary manner," and further violated contract in occupying same for a residence, and have failed to build the residence on the lot that should cost not less than \$1,200.

The prayer was to recover all improvements thereon and all money paid as liquidated damages, for writ of possession, and permanent injunction.

Appellee answered by general denial and that they went upon said premises in good faith and placed permanent improvements thereon of the value of \$1,500, and complied with the contract substantially in every particular; that no electric lights had been placed there, through no fault of theirs, but because of the restrictions the war depart-

ment placed on the public service corporation they were not able to get the building wired and the electric current extended to the premises.

At the time of execution of agreement there were two buildings upon the property described therein, one designated a "shed," and the other as a "building," about which some confusion arose, but clear in the minds of the parties. The "shed" was being completed, and the other building was undergoing construction. That "shed" was changed so as to face street in front of lots. The "building" has been painted, screened. Cesspool and toilet have been constructed in a sanitary condition, so improved as to meet the demands of the contract, and cost more than \$1,200. It was appellees' understanding, if building cost the minimum of \$1,200, no question would be raised, and appellees could continue to use the same as their residence. They allege that they complied with their contract and promptly tendered and offered plaintiff the \$20 to cover monthly installments and made no default therein. Upon appellant's refusal to accept the installments, they promptly legally tendered to appellant the entire purchase price remaining due, and continued to tender said money in court, but the appellant refused to accept the same. Appellees further replied that appellant waived the clause in the contract requiring houses to cost not less than \$1,200. Appellees prayed that plaintiff take nothing by the suit; that writ of injunction be dissolved and not made permanent; that defendants be quieted in their right to occupy said property undisturbed and plaintiff required to accept the monthly payment due and such others as they may fall due on or before the due date or that it be required to accept the full amount of the unpaid purchase money; in case plaintiff be adjudged to recover title and possession, defendant have judgment for his improvements; and for all relief, general and special.

Upon request of appellant the court filed the following findings of fact and conclusions of law:

"I find that on the 2d day of April, 1918, plaintiff filed this suit against the defendants, the same being an ordinary suit in trespass to try title, covering lots 3 and 4 in block 4, section A of the Temple Hill addition to the city of San Antonio; that the plaintiff was a corporation; that theretofore it had entered into a contract of sale with the defendants under the terms of which the defendants were to pay for the property in installments; that in this suit a temporary mandatory writ of injunction was issued without a hearing; that before a hearing to dissolve was had plaintiff and defendants entered into another contract, which is set out fully in the amended petition. I find that at the time of the original contract the plaintiff knew the financial condition of the defendants, and knew that they had some three or four cars

of various kinds of personal property, including lumber, hay, etc., which they intended to place upon the property, and that the plaintiff acquiesced therein; that after the second contract was entered into the defendants in good faith proceeded to comply with the terms of said second contract; and that at the time of the trial of the case each and every one of the terms of same had been substantially complied with.

"I find that the defendants, after going into possession of the property and with the knowledge of the plaintiff, made valuable improvements in good faith amounting to the sum of \$1,500.

"I further find that at the time of the trial of the case the plaintiff did not hold clear and unincumbered title to this property, but that there is a lien outstanding against the Temple Hill addition, including these lots involved in this suit."

#### Conclusions of Law.

"The court finds as a conclusion of law that the plaintiff, Temple Hill Development Company, did not at the time the case was tried own a clear and unincumbered legal title to the property involved in this suit; that the suit is one in trespass to try title, and plaintiff did not show such title in itself under the pleadings as to entitle it to recover. I further find that under the evidence it is shown that the defendants have substantially complied with the terms of their contract; hence it would be inequitable to enter judgment forfeiting what they had paid on the property and the improvements they had placed thereon."

Appellant makes a number of assignments. The first complains that the court erred in rendering judgment for the appellees for the reason that it appears that appellees had agreed to erect another building on the lots in question other than the buildings on said lots at the time of said contract, and that same should be erected within six months from the date of contract, and in case of failure to so erect said building the contract of purchase was to be canceled, and plaintiff was to have possession of the premises in question, but defendants had failed to comply with said agreement.

An examination of the contract shows that appellees were authorized to use the building for residence purposes until a residence shall be built on said lots, and not to use the same for residence purposes after their residence shall be built. The appellees moved from the shed to the new building.

The court found as a fact that at the time of the trial of the case each and every term of the contract had been complied with, and appellees went into possession of the property with knowledge of appellant and made valuable improvements amounting to \$1,500.

The second and third assignments are practically to the same effect, complaining that appellee failed to perform their contract in the particulars stated, and further in not making the character of improvements con-

tracted, and not putting in electric lights. The court has already found the facts against appellant on these issues, as seen from the findings above.

In addition to the findings of fact by the court, there is also a full statement of facts filed.

There was no exception taken and properly preserved in the record or any assignment made challenging the accuracy of the court's findings, which appellant requested to be filed, and in the absence of such an assignment we are not at liberty to question the accuracy thereof, and, as the court found all the facts against appellant and in favor of the appellees, they will not be disturbed.

There is no reversible error assigned, and the assignments are all overruled, and the prayer for injunction is denied.

Judgment is affirmed.

### COMMERCIAL SECURITY CO. v. HULL et al. (No. 6231.)

(Court of Civil Appeals of Texas. San Antonio. May 28, 1919.)

#### 1. ALTERATION OF INSTRUMENTS $\Leftrightarrow$ 378—BILLS AND NOTES $\Leftrightarrow$ 378—INNOCENT PURCHASERS—MATERIAL ALTERATION—DETACHMENT OF ANNEXED CONTRACT.

Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration, invalidating the note in hands of an innocent purchaser.

#### 2. BILLS AND NOTES $\Leftrightarrow$ 382—RIGHTS OF INNOCENT PURCHASERS—STOLEN NOTES.

Note stolen from the maker before delivery without any negligence on his part cannot be enforced by a subsequent innocent holder.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Action by the Commercial Security Company against J. C. Hull and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. C. Church, of San Antonio, and John T. Booz, of Chicago, Ill., for appellant.

T. P. Hull and L. Old, both of Uvalde, for appellees.

MOURSUND, J. Appellant sued Hull Drug Company, a copartnership, and J. C. Hull, one of the members of the firm, upon four promissory notes for \$200 each, signed Hull

Drug Company, payable to Partin Manufacturing Company, and indorsed to appellant.

Appellees answered by plea of non est factum, allegations to the effect that the notes had been stolen before being delivered by defendants to any one, and that there was no consideration for the notes.

By a supplemental petition appellant denied the allegations of the answer and alleged that it purchased the notes for value, before maturity, and without notice of any of the vices or infirmities recited in the answer.

The trial court's findings of fact are as follows:

"I find that the four promissory notes sued upon in this case were stolen from the Hull Drug Company by the Partin Manufacturing Company; that they were fraudulently taken from the Hull Drug Company without the consent of the Hull Drug Company or any of its agents, servants, or employees; that there was no delivery of the said notes by the said Hull Drug Company, or by any of its agents, servants, and employees, or by any person having authority to deliver them; that when said notes were stolen from the said Hull Drug Company they had not become a binding obligation upon the said Hull Drug Company.

"I also find that when the said four notes were stolen from the said Hull Drug Company the Hull Drug Company, through its agents, servants, and employees, used diligence in trying to recover the notes from the said Partin Manufacturing Company, and that the Hull Drug Company was not guilty of any negligence in allowing these notes to be stolen from it, and it was not fault of theirs that said notes were taken.

"I further find that when said notes were signed there was also signed a contract, which contract was attached to said notes, and by its terms were made a parcel and part of the notes, and that said contract referred to said notes as not becoming a binding obligation until said contract had been performed by the said Partin Manufacturing Company. Said contract contained an agreement whereby the said Partin Manufacturing Company was to increase the business of the said Hull Drug Company 100 per cent. within one year, and in carrying out this scheme the Partin Manufacturing Company was to furnish an automobile of a standard make to be placed in the window of the said Hull Drug Company, and said automobile was to be given away to the person holding the lucky number or chance, said chances being obtained from the Hull Drug Company with every one dollar purchase from the said Hull Drug Company. Said contract also stipulated that the said Partin Manufacturing Company was to send an agent to Beeville, Tex., where the said Hull Drug Company was doing business, which agent was to promote the scheme by advertising, and was to remain in Beeville until said contract was performed. The contract further provided that the said Partin Manufacturing Company was to place in the Beeville Bank & Trust Company a bond to secure their performance of the contract. Said contract provided that when

the stipulations contained in said contract were performed, then the notes attached thereto were to become a binding obligation on the said Hull Drug Company.

"I find that said notes were not only stolen from the said Hull Drug Company, but, even after they were taken from the said Hull Drug Company without its consent and before they had delivered them, that then the said Partin Manufacturing Company did not perform any part of the contract, or attempt to perform any part. I find that no automobile was sent to the Hull Drug Company; that no agent was sent to Beeville, Tex.; that no bond was placed in the Beeville Bank & Trust Company; and that the contract was in no way performed, and the consideration totally failed.

"I further find that said notes and contract were one instrument, and that the contract was attached to said notes, and each was made a part and parcel of the other, and I find that after the said Partin Manufacturing Company had stolen said notes and contract they fraudulently detached said notes from the said contract and sold them to the Commercial Security Company, plaintiff herein.

"I find that the detached notes were bought by the Commercial Security Company, plaintiff herein, and that the Partin Manufacturing Company indorsed said notes to the said Commercial Security Company in blank. I also find that the said Commercial Security Company bought these said four notes along with a large batch of other notes, and that the Commercial Security Company paid the Partin Manufacturing Company 92% per cent. of the face value of the total amount of all the notes bought, no particular price being paid for any one note, but, taking all of the notes together, the said Commercial Security paid the said Partin Manufacturing Company 92% per cent. face value."

No request was made for additional findings, nor is any assignment of error presented wherein complaint is made that the findings are unsupported by the evidence.

Appellant simply contends that the undisputed evidence shows that it purchased the notes in the usual course of trade, before maturity, for a valuable consideration, and without notice of the fact that there had been an alteration thereof or that they had been stolen, and that therefore judgment should have been rendered in its favor.

[1] There can be no doubt that the alteration found by the court to have been made was a material one, one which materially changed the liability of appellees. Such an alteration precludes any claim on the part of appellant that he should be protected as an innocent purchaser and holder of the note for value and without notice of any defense thereto. *Landon v. Halcomb*, 184 S. W. 1098; *Spencer v. Triplett*, 184 S. W. 712; *Bank v. Dorsey*, 166 S. W. 54; *R. C. L. vol. 1, p. 990*, and cases cited; *C. J. vol. 2, p. 1176*; *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263, and note, 133 Am. St. Rep. 623.

The appellant does not contend in any assignment of error that appellees were guilty

of such negligence as would estop them from relying on their plea of non est factum, and therefore it will not be necessary to consider the authorities in which that question has been discussed. Appellant relies particularly upon the case of *Landon v. Foster*, 196 S. W. 484, but as we understand the opinion in that case the defense was that the execution of the note was procured by fraud, and that the plaintiff had notice of such fraud. If there was any plea that the instrument has been altered in a material respect the opinion fails to disclose it. In the case of *Landon v. Huston Drug Co.*, 190 S. W. 534, the court held that the rule announced in *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382, had no application to the facts, for the reason that there was no evidence that the notes were ever attached to any other instrument. The contention appears to have been simply that a perforated margin on the notes was sufficient to show that the notes had been given in payment for some contract obligation which might not have been performed, which contention was overruled. The same court cited the Tennessee case referred to with approval in the case of *Landon v. Halcomb*, supra. In the case of *Iowa State Bank v. Milford*, 200 S. W. 883, it appeared that the contract specifically provided for detaching the notes.

In this case the trial court based his judgment on the facts relating to alteration as found by him, and also concluded that the facts relating to the theft of the notes were sufficient to preclude a recovery thereon. In the note to *Cochran v. Bank*, 103 Am. St. Rep. p. 983, we find the following statement:

"A negotiable security stolen from the maker before it becomes effective as an obligation by actual or constructive delivery cannot be enforced by any subsequent innocent holder. This seems to be the better rule, although there is a conflict of authority on the subject. *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433, 50 Atl. 896, 55 L. R. A. 780; *Burson v. Huntington*, 21 Mich. 415, 5 Am. Rep. 497; *Hall v. Wilson*, 16 Barb. [N. Y.] 548; *Branch v. Com'rs*, 80 Va. 427, 56 Am. Rep. 596; note to *Bedell v. Herring*, 11 Am. St. Rep. 313-317."

The question is again referred to in the note to 125 Am. St. Rep. 812, and the editor, after calling attention to the fact that the Michigan case above referred to, was decided at the time when Thos. M. Cooley, the distinguished jurist and author was a member of the court, cites the following additional authorities: *Ledwich v. McKim*, 53 N. Y. 307; *Davis Machine Co. v. Best*, 105 N. Y. 59, 11 N. B. 146, and *Dodd v. Dunne*, 71 Wis. 578, 37 N. W. 430.

This question is discussed in *Daniel on Neg. Instruments* (6th Ed.) in sections 63, 837, 838, 839, and 840. The author's final conclusion appears to be that in order for the purchaser of a note stolen before it is de-

livered to be protected the maker must have done some act which in equity and good conscience should estop him. The question arose in the case of *Cherbonnier v. Bank*, 199 S. W. 307, and the court expressed approval of the rule as stated in section 63, *Daniel on Neg. Instruments*, in support of which statement the case of *Salley v. Terrill*, supra, was cited.

Appellant relies on the case of *Mulberger v. Morgan*, 34 S. W. 148, but in that case the facts disclosed that the note was intrusted to the possession of the payee's agent.

[2] In this case the court found that "the Hull Drug Company was not guilty of any negligence in allowing these notes to be stolen from it, and it was no fault of theirs that said notes were taken." No facts are stated in any of the findings which contradict the conclusion thus announced by the court. This being the case, and there being no attack upon such findings, it appears that under the authorities we must conclude that even an innocent purchaser of the notes cannot recover thereon.

The judgment is affirmed.

#### SMITH v. MOORE et al. (No. 980.)

(Court of Civil Appeals of Texas. El Paso.  
May 15, 1919. On Rehearing,  
June 12, 1919.)

#### 1. JUDGMENT ~~326~~ — CORRECTION — NUNC PRO TUNC.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2015, providing that the judge may on notice correct a judgment according to the truth and justice of the case, the court may correct a judgment entry nunc pro tunc, so as to make it show that the cause was determined as to all parties who joined issue.

#### 2. JUDGMENT ~~315~~ — AMENDMENT — SOURCE — NECESSITY OF MEMORANDUM.

*Vernon's Sayles' Ann. Civ. St. 1914*, art. 2015, does not require the existence on the court's records of some written memorandum or evidence showing the judgment actually rendered, in order to correct a judgment entry to make it speak the truth.

Error from District Court, Jones County; John B. Thomas, Judge.

Suit by R. D. Smith, as next friend of Sarah J. Moore, an incompetent, revived, on the death of the incompetent, in the name of Mrs. T. E. Smith, as administratrix, against Mrs. R. D. Moore and others. Judgment for defendants, and plaintiff administratrix brings error. Affirmed.

J. W. Moffett, of Abilene, and Eugene De Bogory, of Dallas, for plaintiff in error.

Sleeper, Boynton & Kendall and Marshall Surratt, all of Waco, Kirby & Davidson, of Abilene, and Chapman & Pope, of Anson, for defendants in error.

#### Statement of Case.

WALTHALL, J. This suit was originally brought by R. D. Smith, as next friend of Sarah J. Moore, who, he alleged, was a non compos mentis, and had been such from infancy, to annul and set aside two deeds made by her, one to R. D. Moore and one to Margaret K. Moore, conveying certain lands, to recover said lands from defendant in error herein. Sarah J. Moore died pending the suit, and T. E. Smith, wife of said R. D. Smith, joined by her said husband, thereafter appeared and filed herein her petition as administratrix of the estate of Sarah J. Moore, asking that she be permitted to prosecute said suit.

Defendant in error thereupon filed her second amended answer, denying that Sarah J. Moore was non compos when she executed said deeds, and specially averring in substance that, after said deeds were made, R. D. Moore, since deceased, conveyed to Sarah J., in settlement and payment of the note which he had given her for her interest in said lands, a one-half interest in the Delk survey of 474.7 acres of land, and conveyed the other half interest therein to her husband, R. D. Smith, taking his notes therefor, and that he gave said notes to Sarah J. Moore (she being his sister); that shortly thereafter Sarah J. Moore made a deed of gift to her interest in said land to T. E. Smith, plaintiff in error herein, and released to R. D. Smith, without consideration, the vendor's lien retained in said notes, and that thereafter the Wooten Grocery Company acquired R. D. Smith's one-half interest in said land—and made said grocery company a party, and prayed in the alternative that in the event the court should find that said Sarah J. Moore was non compos when she executed said deeds to R. D. Moore and Margaret K. Moore, and annul them, that she recover of said T. E. Smith, R. D. Smith, and said Wooten Grocery Company the said Delk survey, which was the consideration paid by R. D. Moore for Sarah J. Moore's interest in the land he bought from her.

The Wooten Grocery Company appeared and joined issue with this defendant in error on her cross-bill, and not in any way joining in the issue between plaintiff in error and this defendant in error as to the validity of said deeds, or in any other respect.

The case came to trial in the district court on the 19th day of January, 1914, and

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the court submitted the case to the jury on two special issues, as follows:

Special Issue No. 1: "Did Sarah J. Moore, at the time of the signing of the deed from herself to Margaret K. Moors on April 30, 1881, have sufficient mental capacity to execute said deed, as mental capacity is defined in paragraph (b) of this charge?"

Special Issue No. 2: "Did Sarah J. Moore, at the time of signing of deed from herself to R. D. Moore, to wit, December 13, 1889, have sufficient mental capacity to execute same, as mental capacity is defined in paragraph (b) of this charge?"

The jury returned their verdict, and answered each one of said special issues, "Yes." Thereupon the court rendered judgment that the plaintiff take nothing as to the defendant Mrs. R. D. Moore, and that said defendant take nothing on her cross-bill against said Wooten Grocery Company; but in the entry of said judgment, by oversight, it was alleged, no disposition was made as to said Wooten Grocery Company.

Plaintiff in error thereupon filed her motion for a new trial, which, being overruled, she gave notice of appeal, which she perfected to the Ft. Worth Court of Civil Appeals; the transcript and statement of facts being filed therein on May 14, 1914, and the cause being numbered on the docket of that court No. 8050. In September thereafter appellant filed motion in that court to dismiss said appeal, which the court granted, and dismissed said appeal, October 17, 1914.

A short while before the one year expired after the rendition of said judgment, plaintiff in error herein filed her petition for writ of error in the court below from said judgment rendered therein, and, after much delay, removed said cause to the Ft. Worth Court of Civil Appeals by writ of error; the transcript and statement of facts being filed in that court on the 31st day of July, 1915, and said cause being numbered on the docket of that court 8315. Thereafter that court, on November 30, 1915, dismissed said writ of error on motion of the defendant in error, on the ground of plaintiff in error's laches in prosecuting said writ in the lower court.

Thereafter, on July 29, 1916, plaintiff in error filed her motion in the lower court to have said cause set down for trial, basing said motion on the ground that the judgment theretofore entered therein made no disposition of the defendant H. O. Wooten Grocery Company. Said motion remained upon the docket of said court until the January term, 1918, thereof, when, on the 4th day of February, 1918, the defendant in error filed her opposition to said motion, because the case had been theretofore tried and final judgment entered therein, and, in the alternative, if in the opinion of the court the judgment entered was not final, moving the court to amend the same and render its judgment nunc pro

tunc, disposing of all the issues and all the parties thereto, which was filed the 4th day of February, 1918.

Said motion was heard by the court below on February 4, 1918, and on the 9th day of February the court below entered its judgment overruling the plaintiff in error's motion to set down the case for trial, and entered judgment nunc pro tunc, amending its former judgment entered so as to dispose of all the parties and issues in said cause, including the said defendant H. O. Wooten Grocery Company, to which act and ruling of the court the plaintiff in error excepted, and has brought the case to the Court of Civil Appeals by writ of error. By order of the Supreme Court the case has been sent to this court for trial.

#### Opinion.

[1] The one question presented by the record, but presented and discussed by plaintiff in error under four assignments of error, is whether or not it was error for the trial court to refuse to retry the case on its merits, and in amending and correcting in open court its former judgment therein, so as to dispose of the defendant H. O. Wooten Grocery Company, and entering such corrected or amended judgment nunc pro tunc, as appears in the record.

Article 2015, Vernon's Sayles' Texas Civil Statutes, provides that:

"Where there shall be a mistake in the record of any judgment or decree, the judge may, in open court, and after notice of the application therefor has been given to the parties interested in such judgment or decree, amend the same according to the truth and justice of the case, and thereafter the execution shall conform to the judgment as amended."

The provisions of the quoted article seem to fit the conditions presented here. The case is similar to the question discussed on the motion for rehearing in the case of Moore et al. v. Toyah Valley Irrigation Co., 179 S. W. 550. In that case Chief Justice Harper, for this court, said:

"It is thus seen that the trouble in this case is, not that the court did not render a final judgment, but that it failed to enter a final judgment. The latter being the case, it is clear, under the numerous authorities, that the court has authority to correct its minutes, so as to show the judgment actually rendered."

The purpose of the Legislature in enacting the quoted article of the statute, evidently, was to meet just such conditions as are presented here. The judgment finally entered by the trial court states the proceedings had leading up to the final disposition of the case. It shows the announcement of ready of all parties and a trial had on the merits, the jury returning a verdict on the special is-

sues presented, the judgment of the court pronounced thereon, and the only thing suggested as preventing the judgment so announced and entered upon the minutes from being effective as a final judgment is the omission, from the judgment entry, to dispose of the Wooten Grocery Company. The judgment entered recites:

"The court thereupon rendered judgment upon said special issues, refusing, as prayed for by the plaintiffs in the case, to cancel and hold for naught and set aside the deeds above referred to, \* \* \* and also held that the said Mrs. R. D. Moore should take nothing by her suit against H. O. Wooten Grocery Company, as a necessary result of the verdict and judgment and the prayer in her petition," etc.

The only effect of the failure to record as a part of the judgment of the court the rendered judgment as to the Wooten Grocery Company, where the judgment entry was corrected as in this case, was to postpone the entry of the final judgment until the judgment entry was corrected in open court as provided by the statute. A failure, through mistake, to write into the judgment entry the disposition in fact made by the trial court, would necessarily have the effect to set aside the trial had in the case, as is claimed by appellant. But the effect of the correction of the mistake in the omission to dispose of the Wooten Grocery Company by the entry of a final judgment, as provided in the statute, prevents such result. That is the purpose and effect of the statute.

It is insisted that there was no proper or sufficient evidence adduced to show that the trial court in fact originally announced its judgment as to the Wooten Grocery Company; that there is no order or entry, found anywhere in any book or record required by law to be kept, showing a final disposition made of the Wooten Grocery Company, and hence the nunc pro tunc entry of judgment was not authorized. The Wooten Grocery Company was a party defendant to the suit and filed an answer. In support of one of her bills of exception, plaintiff introduced in evidence (as stated in the bill of exceptions) the minutes and trial docket of the court, to the effect and showing that no order or judgment was entered disposing of the Wooten Grocery Company, and such fact is inferred from the motion to enter judgment nunc pro tunc disposing of that party.

[2] The contention of appellant is that the court records themselves, as introduced, must show the fact that judgment was in fact announced or rendered, if not entered, disposing of the Wooten Grocery Company, to justify the entry of the judgment now for then. We do not concur in the contention made. In the first place, the statute quoted above places no such limitation upon the power of the court to correct its own judgment. The

following authorities, we think, clearly hold that the court, in correcting a mistake in the record of its judgment, and acting in conformity to the provision of the statute, may do so in the absence of any written memorandum or evidence found in the court's records: *Ft. Worth & D. C. Ry. Co. v. Roberts*, 98 Tex. 42, 81 S. W. 25; *Partridge v. Wooten*, 63 Tex. Civ. App. 280, 137 S. W. 412. See, also, *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040. In the *Partridge v. Wooten* Case, Chief Justice Conner, of the Ft. Worth Court, uses the following language:

"While some authorities, including some of the earlier decisions of our own courts, seem to support appellant's contention, we think it now settled in this state that in the correction of a judgment, as authorized by the Revised Statutes of 1895, art. 1356 [now 2015], the court may act upon its own recollection of a judgment, or upon such legal evidence, oral or otherwise, as to the court may seem proper."

In the absence of an affirmative showing to the contrary, we must presume that the court acted upon sufficient evidence to sustain the entry of the nunc pro tunc judgment.

The record before us presents no reversible error, and the case is affirmed.

HARPER, C. J. (concurring). This is an appeal from the judgment, or nunc pro tunc order correcting a judgment theretofore entered, in the above-styled cause. From the transcript, the following history of the case is taken:

The suit was filed by R. D. Smith, as next friend of Sarah J. Moore, to set aside two deeds to lands, made by the latter to R. D. and Margaret K. Moore, upon the ground that Sarah J. Moore was non compos mentis. After the latter's death the suit was prosecuted by T. E. Smith as administratrix. The grantees, R. D. and Margaret Moore, executed notes and a deed of trust upon the lands to secure their payment, and the Wooten Grocery Company, having acquired these notes, were made party defendant.

Upon the trial, in 1914, judgment was entered refusing cancellation of the deeds, but making no reference to, or affirmative disposition of, the Wooten Grocery Company. July 29, 1918, appellants filed a motion to set the cause down for trial upon the grounds, that no final judgment had been entered, because all parties defendant were not disposed of. Whereupon appellees filed their motion to enter judgment nunc pro tunc disposing of all issues and parties. Whereupon, February 9, 1918, the court entered its judgment containing order overruling the motion to set the case for trial, and entered its judgment nunc pro tunc correcting the original judgment to the effect that appellants take nothing against the Wooten Grocery

Company. From which it comes to us by appeal.

There is no statement of facts in the record, nor finding of facts by the trial court. The first two assignments complain that it was error for the court to overrule the motion to set the case down for trial on its merits because:

"There had been no trial upon the merits, no final judgment, no verdict of a jury, nor order or judgment of the court entered upon the minutes of the court on trial docket affecting or disposing of the Wooten Grocery Company."

The other assignments charge error in the entry of the nunc pro tunc order appealed from upon the ground: (1) That it was shown by the records of said court and the evidence adduced herein that no judgment was rendered by the court or entered upon the minutes affecting or finally disposing of the Wooten Grocery Company, etc. The other reasons are substantially the same as those given under the other assignments.

It is apparent that such assignments cannot be considered without a statement of facts or finding of facts; for, in the first place, for all this record discloses, the original judgment was final, because the Wooten Grocery Company was disposed of by necessary implication. *Trammel v. Rosen*, 106 Tex. 132, 157 S. W. 1161. And a bill of exceptions does not supply the office of a statement of facts, however full its recital of facts may be. *Holmes v. Coalson*, 178 S. W. 628.

I therefore concur in the affirmance, but upon the ground that the record is insufficient to enable us to consider the errors assigned.

#### On Rehearing.

WALTHALL, J. On motion for rehearing our attention is called to an error in our opinion in stating what the record shows occurred in the trial court after the verdict of the jury was returned. We said:

"The court rendered judgment that \* \* \* defendant take nothing on her cross-bill against said Wooten Grocery Company."

The original judgment sought to be corrected and amended does not so state, as,

had it done so, there would be no need to correct the judgment disposing of the Wooten Grocery Company. Our opinion was not based on the judgment containing the recitation of that fact. We have again reviewed the authorities to which we are referred by plaintiff in error, and are still of the opinion that they do not sustain the contention there made. The nunc pro tunc judgment here was evidently entered under article 2015, Vernon's Sayles' St., quoted in the opinion, and not under article 2016, construed in the cases used by plaintiff in error in her brief. The articles are different in their provisions and purposes, as will be seen by a reference to them.

With the exception of the correction above, the motion is overruled.

#### NEWELL v. FIDELITY & CASUALTY CO. OF NEW YORK. (No. 19806.)

(Supreme Court of Missouri, in Banc. July 9, 1919.)

Appeal from St. Louis Circuit Court; Thomas L. Anderson, Judge.

Action by James P. Newell, administrator of the estate of Ed. T. Bergmann, against the Fidelity & Casualty Company of New York. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Jones, Hocker, Sullivan & Angert, of St. Louis, for appellant.

Fauntleroy, Cullen & Hay, of St. Louis, for respondent.

PER CURIAM. This case is a companion case to that of *Maggie Scales*, Respondent, v. National Life & Accident Insurance Company, Appellant, No. 19888, reported in 212 S. W. 8, which was reversed and remanded, with directions, by the court in banc, for the reasons given in its opinion in the case of *Brunswick v. Standard Accident Insurance Company*, No. 19764, 213 S. W. 45. This case is therefore reversed and remanded, with directions to proceed in accordance with the principles stated in the case of *Scales v. National Life Insurance Company*, supra, and *Brunswick v. Standard Accident Insurance Company*, supra, as applicable to the particular policy in suit in this case.



# INDEX-DIGEST



## THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and Prior Reporter Volume Index-Digests

### ABANDONMENT.

See Adverse Possession, ¶109; Criminal Law, ¶945; Mandamus, ¶151; Master and Servant, ¶305; Mines and Minerals, ¶77; Partition, ¶12; Railroads, ¶57.

### ABATEMENT AND REVIVAL

See Pleading, ¶110.

### VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

¶81 (Tex.Civ.App.) While defendant does not waive his plea of privilege to be sued in the county of his residence by pleading generally to the merits, subject to the plea, his privilege is waived by filing a cross-action demanding affirmative relief.—*McClintic v. Brown*, 212 S. W. 540.

¶85 (Mo.App.) Since the Code contemplates a single answer containing all defenses, coupling of a plea to the jurisdiction, which must be raised by answer, with a plea to the merits, does not waive the matter of jurisdiction.—*Roberts v. American Nat. Assur. Co.*, 212 S. W. 390.

### ABDUCTION.

See Criminal Law, ¶369, 673, 678, 940, 1038; Indictment and Information, ¶110, 119.

### II. PROSECUTION AND PUNISHMENT.

¶9 (Ky.) The rule permitting proof of complaint directly made by the victim of a rape without detailing the occurrence does not authorize proof to be made that a victim of an unlawful detention has made complaint of it.—*Gravitt v. Commonwealth*, 212 S. W. 430.

¶15 (Ky.) In a prosecution for unlawfully detaining a woman, where the evidence of the prosecutrix, if true, clearly demonstrated the guilt of the accused, a peremptory instruction for defendant was properly overruled; the credibility of prosecutrix being for the jury.—*Gravitt v. Commonwealth*, 212 S. W. 430.

¶16 (Ky.) In a prosecution for unlawfully detaining a woman, instruction requiring the jury to believe that accused's acts in detaining the woman were done feloniously and defining the term "feloniously" was not error, where the meaning given the word "feloniously" described substantially the intent which must have actuated accused to make him guilty.—*Gravitt v. Commonwealth*, 212 S. W. 430.

### ACCORD AND SATISFACTION.

See Compromise and Settlement; Estoppel, ¶76; Insurance, ¶550.

### ACCOUNT.

See Frauds, Statute of, ¶14; Interest, ¶18; Partition, ¶85; Partnership, ¶217; Tenancy in Common, ¶37; Trusts, ¶316, 212 S.W.—63

### ACKNOWLEDGMENT.

#### II. TAKING AND CERTIFICATE.

¶20(1) (Tex.Com.App.) Acknowledgment of deed in trust executed by surviving wife to secure note to third party who had taken over purchase-money notes from vendor, taken by agent of surviving wife and vendor, who had no interest in the instrument or its consideration, but only in the transaction by way of commission from the vendor for negotiating the notes, was not void.—*W. C. Belcher Land Mortgage Co. v. Taylor*, 212 S. W. 647.

¶20(2) (Tex.Civ.App.) A grantee directly interested in the deed was not competent to take the acknowledgment of either of the grantors, husband and wife; and acknowledgments taken by him were invalid, and gave no force whatever to the instrument.—*Vauter v. Greenwood*, 212 S. W. 269.

### ACTION.

See Abatement and Revival; Army and Navy, ¶34.

#### II. NATURE AND FORM.

¶25(2) (Tex.Civ.App.) A petition in an action against a corporation by a purchaser of stock on the ground of fraud held one for damages for fraud and deceit, and not one for rescission of a contract.—*Texas Co-op. Inv. Co. v. Clark*, 212 S. W. 245.

¶27(2) (Tex.Civ.App.) A servant injured by negligence of master may elect to sue either on contract or for tort.—*State v. Elliott*, 212 S. W. 695.

### III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

¶50(3) (Tex.Civ.App.) The several owners of separate parcels of land composing a large tract cannot maintain a joint suit for the entire large tract, but each must sue for his respective part.—*Allen v. Vineyard*, 212 S. W. 266.

### IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

¶62 (Ky.) An action to quiet title by one claiming title by adverse possession, instituted before the expiration of the statutory period, is premature, and must be dismissed, if the legal title holder traverses the petition, no matter how long the answer may be delayed.—*Holton v. Jackson*, 212 S. W. 537.

### ADJOINING LANDOWNERS.

See Boundaries.

### ADMINISTRATION.

See Executors and Administrators.

**ADMIRALTY.**

See Shipping.

**ADOPTION.**

See Evidence, ¶291; Habeas Corpus, ¶85, 99; Husband and Wife, ¶230; Trial, ¶255; Wills, ¶506, 552.

¶7 (Mo.) Statutory adoption is the act exclusively of the adopting parent, and does not require the consent of the child or its parents or guardian. Per Blair, Woodson, and Williams, JJ.—Rauch v. Metz, 212 S. W. 357.

¶8 (Mo.) Adoption may be created by the acts and undertakings of the parties fully executed on behalf of the child, the act of adoption being liberally construed in favor of the adopted child. Per Blair, Woodson, and Williams, JJ.—Rauch v. Metz, 212 S. W. 357.

¶17 (Mo.) A child of tender years, without ability to contract or to understand the contracts of others, who is placed in the hands of strangers, should receive the same consideration in respect to the establishment of her adoption that is extended to those able to control their own contractual relations. Per Blair, Woodson, and Williams, JJ.—Rauch v. Metz, 212 S. W. 357.

In an action by executors for the construction of a will under which appellant claimed as the adopted daughter of a sister and legatee of testator, so as to make her either the heir or the descendant of such sister within the will and the statute (Rev. St. 1909, § 546), evidence held to show an adoption by acts and undertakings of the parties fully executed in behalf of the child. Per Blair, Woodson, and Williams, JJ.—Id.

¶21 (Mo.) Under the statute of adoption the child inherits only from his adopting parent, and does not become the heir or the collateral kindred of such parent. Per Blair and Woodson, JJ.—Rauch v. Metz, 212 S. W. 357.

**ADULTERY.**

See Homicide, ¶181.

**ADVERSE POSSESSION.**

See Action, ¶62; Appeal and Error, ¶856; Boundaries, ¶37; Curtesy, ¶12; Easements, ¶7, 36; Ejectment, ¶15; Highways, ¶77; Life Estates, ¶8; Limitation of Actions, ¶39, 118; Remainders, ¶17; Stipulations, ¶18; Tenancy in Common, ¶15.

**I. NATURE AND REQUISITES.****(B) Actual Possession.**

¶23 (Ky.) Occasional cutting of timber on land did not show sufficient possession to give title by adverse possession.—Standifer v. Combs, 212 S. W. 921.

**(F) Hostile Character of Possession.**

¶60(4) (Ky.) If possession in its origin is amicable, it will not become adverse, so as to set the statute of limitations in motion, unless the property is in fact held adversely, and in such manner as to apprise a person of ordinary prudence that the holding is adverse.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

**(G) Payment of Taxes.**

¶94 (Tex.Civ.App.) The five-year statute of limitations does not require, in order to acquire title by adverse possession, that taxes be paid before they become delinquent, but only that such taxes be paid concurrently with the possession held by the occupant, and before adverse suit to recover the land.—Houston Oil Co. of Texas v. Jordan, 212 S. W. 544.

**II. OPERATION AND EFFECT.****(A) Extent of Possession.**

¶100(1) (Ky.) A deed void ab initio conveys no title whatever on the grantee, and, in a suit where one relies upon it, may be used only to show extent of possession, if adverse possession is relied upon.—Miller v. Powers, 212 S. W. 453.

**(B) Title or Right Acquired.**

¶109 (Tex.Civ.App.) After the acquisition of title by adverse possession, the fact that the adverse owner moves from the premises does not constitute an abandonment in law, nor work a forfeiture of the title acquired as against the former owner.—Stark v. Leonard, 212 S. W. 677.

**III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

¶114(2) (Tex.Civ.App.) In a suit for land where plaintiffs set up adverse title, evidence held sufficient to identify the parcel to which they set up an adverse claim.—Stark v. Leonard, 212 S. W. 677.

¶115(1) (Ky.) In action involving title to land, where there was some slight evidence in support of defendants' claim of adverse possession, but there was other evidence contradictory of it, question was for jury.—Prewitt v. Wilborn, 212 S. W. 442.

**AFFIDAVITS.**

See Corporations, ¶232, 244; Counties, ¶189; Courts, ¶202; Criminal Law, ¶211, 1112; Extradition, ¶32; Garnishment, ¶87; Justices of the Peace, ¶174; Statutes, ¶267; Taxation, ¶624; Time, ¶10; Venue, ¶70.

**AGE.**

See Damages, ¶98.

**AGENCY.**

See Principal and Agent.

**AGRICULTURE.**

See Customs and Usages, ¶10; Landlord and Tenant, ¶18.

**ALTERATION OF INSTRUMENTS.**

See Bills and Notes, ¶378.

¶9 (Tex.Civ.App.) Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration.—Commercial Security Co. v. Hull, 212 S. W. 986.

¶12 (Mo.App.) Lessee, by signing blank lease, impliedly authorized the lessor to fill the blank so as to make lease perfect according to its nature and intended use.—Gentry v. Fitzgerald, 212 S. W. 39.

**ANIMALS.**

See Appeal and Error, ¶1068; Attachment, ¶375; Carriers, ¶203-228; Chattel Mortgages, ¶34, 197; Constitutional Law, ¶237; Criminal Law, ¶400, 429, 430; Eminent Domain, ¶2; Evidence, ¶320; Landlord and Tenant, ¶226; Larceny, ¶27, 32, 40; Licenses, ¶7; Railroads, ¶275; Statutes, ¶93, 121; Taxation, ¶42; Trial, ¶251.

¶4 (Tenn.) Priv. Laws 1917, c. 648, § 1, declaring a public nuisance the running at large of dogs not registered, in counties having a population between 29,946 and 29,975, accord-

ing to the 1910 federal census, is constitutional.—Ponder v. State, 212 S. W. 417.

Under Priv. Laws 1917, c. 648, requiring registration of dogs, it is no defense to an indictment for keeping and permitting a dog to run at large in September without first having been registered, which is a misdemeanor under section 6, that the tax is not delinquent under section 12 until October 1st, since the latter section requires registration by July 1st.—Id.

⌚29 (Tex. Cr. App.) The tick eradication statute held not unreasonable as against certain grounds urged.—Emberline v. State, 212 S. W. 952.

⌚30 (Tex. Cr. App.) Cattle need not be actually infested with ticks in order to make them subject to the tick eradication statute and to the requirement of the live stock sanitary commission that they be dipped; the requirements applying to all cattle within the specified quarantine zone.—Emberline v. State, 212 S. W. 952.

⌚34 (Tex. Cr. App.) That free dipping vats have not been provided by the county does not excuse an owner of cattle from refusing to obey the tick eradication statute.—Emberline v. State, 212 S. W. 952.

⌚36 (Tex. Cr. App.) In prosecutions for violating the tick eradication statute, it is sufficient to substantially charge that the election was legal and held in a certain county to determine whether said county should prosecute the work of tick eradication, at which election the majority of legal votes were cast in favor thereof, and thereafter said law was put in effect as prescribed by statute, and thereafter on named date in said county and state a named person was the owner and caretaker of certain animals specified, and refused to dip such animals after being directed to do so by the live stock sanitary commission at the time and manner set out.—Emberline v. State, 212 S. W. 952.

## APPEAL AND ERROR.

See Constitutional Law, ⌚281; Costs, ⌚262; Courts, ⌚202, 231; Criminal Law, ⌚1024-1189; Judgment, ⌚91, 576; Justices of the Peace, ⌚174, 191; Pleading, ⌚8; Time, ⌚10.

For review of rulings in particular actions or proceedings, see also the various specific topics.

### I. NATURE AND FORM OF REMEDY.

⌚2 (Tex. Civ. App.) Acts 35th Leg. c. 177 (Vernon's Ann. Civ. St. Supp. 1918, art. 1974), amending Rev. St. art. 1974, nullifies the amendment of 1913, which required the complaining party to take a bill of exceptions to the action of the trial court in refusing a requested instruction so that in a case tried in February, 1918, it was the court's duty to indorse the word "Refused" on requested instructions, or the words "Modified as follows," if modified and given; such indorsements constituting a bill of exceptions, so that appellant need save no formal bill of exceptions.—Rowe v. Guderian, 212 S. W. 960.

### II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

⌚17 (Mo.) The Supreme Court cannot pass on the merits of any case falling within its appellate jurisdiction except through the medium of an appeal or writ of error taken or sued out as prescribed by statute.—Trapp v. Shull, 212 S. W. 883.

⌚23 (Mo.) As jurisdiction can neither be waived nor conferred by consent, it is the duty of the appellate court to determine sua sponte the question of its own jurisdiction whatever step or stage of the proceeding obtrudes itself.—City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Rueckling Const. Co., 212 S. W. 887.

### III. DECISIONS REVIEWABLE.

#### (A) Courts and Other Tribunals Subject to Review.

⌚32 (Tex. Com. App.) Where a cause was appealed from a county court, the judgment of the Court of Civil Appeals is conclusive upon questions of law or fact, except in probate matters and cases involving the revenue laws of the state, of the validity of a statute (Rev. St. art. 1591) and questions presented, which are not within those exceptions, are not subject to review by the Supreme Court.—Freeman v. W. B. Walker & Sons, 212 S. W. 637.

#### (C) Amount or Value in Controversy.

⌚51 (Tex. Civ. App.) In suit by a railroad's employé for a month's wages of \$84.74, wherein the railroad cited in an assignee of plaintiff's wages, who filed cross-bill seeking to recover, not only the month's wages sued for by plaintiff, but the balance of \$142.90 claimed by him under plaintiff's assignment, \$142.90 was the amount in controversy, and the Court of Civil Appeals has jurisdiction of the appeal.—McKneely v. Armstrong, 212 S. W. 175.

⌚58 (Tex. Civ. App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 1539, subd. 3, giving Court of Civil Appeals appellate jurisdiction in certain cases where amount exceeds \$100, exclusive of interest and costs, applies to a real estate commission claim of \$100 and interest, since interest is recoverable as damages, and not strictly as interest.—Walker v. Alexander, 212 S. W. 713.

⌚65 (Tex. Civ. App.) Where in justice court defendant itemized the two amounts sued for as \$90 and an unpaid balance of \$15.60 for extra work, but stated the total amount due as \$98.64, and defendant in his cross-action asked for judgment for \$180 and costs, the amount in controversy brings the case within the jurisdiction of the Court of Civil Appeals.—Mackay Telegraph-Cable Co. v. Proctor, 212 S. W. 547.

The question of jurisdiction of Court of Civil Appeals in case originating in justice court is fixed by the amount involved in the justice court.—Id.

#### (D) Finality of Determination.

⌚69(3) (Mo.) Under Rev. St. 1909, § 2038, an order sustaining an exception to and setting aside the report of commissioners appointed in a partition case is not appealable, for it does not determine the rights of the parties, and in view of sections 2586, 2587, the court has unhampered power to appoint new commissioners; the rights of the parties being left wholly unaffected.—Trapp v. Shull, 212 S. W. 883.

### V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

#### (A) Issues and Questions in Lower Court.

⌚169 (Ky.) The Court of Appeals, being a court of review and not of original jurisdiction, will not pass on questions not raised or adjudicated below.—Fish v. Fish, 212 S. W. 580.

⌚171(1) (Mo. App.) A theory not embodied in the pleadings or advanced at trial cannot be considered by the Court of Appeals.—Foegel v. Woestendiek, 212 S. W. 411.

⌚172(3) (Mo. App.) In suit by the first lender on property, through a fraudulent agent, who failed to record the deed of trust, and subsequently procured another loan, against the holder of the same deed of trust transferred by the agent as security to the second lender, it not having been urged before the trial court that it should make an order or decree touching the difference between plaintiff's notes and the funds held by defendant, the matter is not open to review by the Court of Appeals.—Foegel v. Woestendiek, 212 S. W. 411.

⇒173(2) (Tex.Civ.App.) In trespass to try title to public free school lands by the purchaser on forfeiture thereof against the original applicant to purchase and his lessee, defendant appellants held unable, for the first time in the Court of Civil Appeals, to question the sufficiency of the procedure of the land commissioner in making forfeiture.—*Nations v. Miller*, 212 S. W. 742.

⇒173(9) (Tex.Civ.App.) A waiver of a right not pleaded cannot be urged for the first time on appeal.—*Western Union Telegraph Co. v. Janko*, 212 S. W. 243.

**(B) Objections and Motions, and Rulings Thereon.**

⇒187(4) (Mo.App.) Court's action in admitting party to suit upon its own application is not available as error on appeal where no objection or exception thereto was saved.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

⇒193(9) (Mo.App.) The point that the petition fails to state a cause of action, since it seeks to recover for the conversion of money not described or identified as a specific chattel, can be raised for the first time on appeal.—*Anderson Electric Car Co. v. Savings Trust Co.*, 212 S. W. 60.

⇒193(9) (Mo.App.) Sufficiency of petition to state cause of action can be attacked in appellate court for the first time only where it is wholly insufficient to state any cause of action whatever.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

⇒204(1) (Ky.) Error in admitting evidence is not reviewable, where no objection thereto was taken.—*Larue v. Barbee*, 212 S. W. 142.

⇒204(7) (Mo.App.) Objections to hypothetical question propounded to an expert, which were not made in the court below, cannot be considered in the appellate court.—*Buzan v. Kansas City Rys. Co.*, 212 S. W. 905.

⇒213 (Tex.Civ.App.) The error of the trial court in failing to submit the issue of proximate cause is one of omission and to be available as reversible error appellant must have presented a special charge curing the omission.—*Texas & Pacific Coal Co. v. Ervin*, 212 S. W. 234.

⇒230 (Tex.Civ.App.) An objection to a juror on the ground of disqualification cannot be heard when made for the first time after verdict.—*St. Louis, R. & M. Ry. Co. v. Broughton*, 212 S. W. 664.

⇒230 (Tex.Civ.App.) Under Acts 33d Leg. c. 59, in trespass to try title to recover former free school lands from the original purchaser and his lessee, if definitions in the charge of "actual settler" and "continuous residence" were erroneous, the error was waived by defendants' failure to object at proper time.—*Nations v. Miller*, 212 S. W. 742.

⇒231(3) (Mo.App.) Where the only objection to testimony was that the question was leading and suggestive, complaint cannot be made that the evidence was admitted; the court having sustained the objection made.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

⇒231(3) (Mo.App.) Statements, "I object to that," "I move that be stricken out," are no objections at all, and are insufficient to preserve for review the propriety of the admission of evidence.—*Green v. Strother*, 212 S. W. 399.

⇒231(5) (Mo.App.) A general objection as incompetent, irrelevant, and immaterial to evidence which was most relevant and material is insufficient to present for review on appeal the objection that the evidence was hearsay.—*Green v. Strother*, 212 S. W. 399.

⇒231(9) (Tex.Civ.App.) Complaint cannot be made that a charge submitted the issue of negligence, generally, and did not specifically submit the acts of negligence pleaded for the first time on motion for new trial, where it was not objected to on that particular ground on the trial.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

⇒232(2) (Tex.Civ.App.) Where witness was asked as to testimony given in another case, objection that appellant was not a party to that suit and did not have a chance to cross-examine witnesses is insufficient to preserve point that question was incompetent because calling for hearsay testimony.—*Clark v. Scott*, 212 S. W. 728.

⇒242(5) (Mo.App.) Testimony should not be taken subject to objection, and no ruling afterwards made thereon; but the rule has no application to testimony by deposition, the whole of which is incorporated in the abstract, and is before the Court of Appeals reviewing the case, a suit in equity.—*Foege v. Woestendiek*, 212 S. W. 411.

**(C) Exceptions.**

⇒260(3) (Mo.) In an action against a city for injuries sustained by stumbling over manhole cover, error cannot be predicated on the court's action in regard to an offer by plaintiff to exhibit his person to the jury to show his injuries, where plaintiff saved no exception to the court's failure to rule on the offer, in view of Rev. St. 1909, § 2081, providing that no exception shall be taken to any proceedings, except such as shall have been expressly decided by the court.—*Shanahan v. City of St. Louis*, 212 S. W. 851.

⇒263(1) (Ky.) Where no exceptions were taken to any of the instructions given by the court on its own motion, nor did defendant offer any instruction, defendant cannot complain of the action of the court in instructing the jury.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

⇒273(10) (Tex.Com.App.) Where but one general exception is taken to the action of the court in refusing to give several distinct charges or issues, it is not entitled to consideration on appeal if one or more of such charges or issues should not have been given.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 212 S. W. 155.

⇒274(7) (Tex.Com.App.) An exception by defendant in a personal injury action "to the rulings of the court in not submitting to the jury defendant's special issues Nos. 1 to 12" is insufficient, under Acts 33d Leg. c. 59, amending Rev. St. 1911, art. 2061 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 2061), providing that the ruling of the court as to instructions shall be regarded as approved unless excepted to as provided in the act, since it fails to show that the request was made in the time and manner required by the act.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 212 S. W. 155.

**(D) Motions for New Trial.**

⇒282 (Tex.Civ.App.) When the trial is before the court without a jury, the appellant is not required to file a motion for new trial presenting alleged errors as a prerequisite to urging them in the appellate court, where the court has filed his findings of fact and conclusions of law, and exceptions have been taken.—*McClintic v. Brown*, 212 S. W. 540.

⇒285 (Tex.Civ.App.) If exceptions to pleading were special exceptions and not assigned as error in compliance with *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1612, requiring motion for new trial and assignments of error, the appellate court would not be required to consider them, but where they are addressed to the merits and not the sufficiency of the allegations they are general demurrers, the overruling of which presents fundamental error.—*Richardson v. Terry*, 212 S. W. 523.

⇒302(1) (Mo.) Motion for new trial held not so general in its assignments as to prevent review of errors occurring at trial.—*Kilpatrick v. Robert*, 212 S. W. 884.

⇒302(4) (Mo.App.) Objections to the giving and refusal of instructions were not properly preserved in a motion for new trial by merely stating that error was committed "in giving to



the jury illegal and erroneous instructions for and on behalf of plaintiffs," and that error was committed "in refusing to give to jury legal and proper instructions requested by defendant."—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

↪302(4) (Mo.App.) Reference to plaintiff's instructions, "The court erred in giving the instructions requested," in motion for new trial, is not a sufficient assignment of error upon which to base any point in the court on appeal with reference to instructions.—*Ennis-Hanly-Blackburn Coffee Co. v. Olin*, 212 S. W. 561.

## VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

### (A) Time of Taking Proceedings.

↪345(2) (Tex.) It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing.—*Flattery v. Miller*, 212 S. W. 932.

### (C) Payment of Fees or Costs, and Bonds or Other Securities.

↪395 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3832, requiring bonds in appeals from county to district court to be fixed by county court and made payable to county judge, a bond not fixed by county court and made payable to appellee is defective, and appeal should be dismissed, unless bond is amended under article 2104.—*Sparkman v. Stout*, 212 S. W. 526.

## X. RECORD AND PROCEEDINGS NOT IN RECORD.

### (A) Matters to be Shown by Record.

↪501(1) (Mo.App.) Errors in the argument of counsel cannot be reviewed, where the record does not disclose an exception or a ruling thereon.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

↪511(1) (Mo.App.) Where the record, under a heading "Bill of Exceptions," shows that a "bill of exceptions was duly signed, approved, and filed herein, the same being at the May term of said court and in due time, which, omitting the caption, is in words and figures as follows: 'Plaintiff, to sustain the issues upon his part, offered and introduced evidence as follows, to wit'"—there is a sufficient showing that a bill of exceptions was filed in the case.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

### (B) Scope and Contents of Record.

↪516 (Ky.) Misconduct of counsel in argument to jury cannot be considered on appeal, unless shown by bill of exceptions, since the only way in which matters occurring on a trial in the circuit court may be brought up for review is by bill of exceptions.—*Hurst v. Southern Ry. Co. in Kentucky*, 212 S. W. 461.

↪518(5) (Ky.) In action at law, the pleadings stating the issues and showing the records of a prior action, such records could have been used as evidence only, and by such use alone could have become part of the record in the action.—*Prewitt v. Wilborn*, 212 S. W. 442.

Under *Civ. Code Prac.* § 128, subsecs. 1-3, in an action at law, writings filed as exhibits, and which a party intends to rely upon as evidence, do not become part of record, unless it shows they were used, or offered to be used, on trial, or unless they were filed with and relied on as foundation of cause of action.—*Id.*

### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

↪544(1) (Tex.Civ.App.) Refusal of continuance because of absence of witness is not reviewable, in the absence of a bill of exceptions.—*Parker v. Harrell*, 212 S. W. 542.

### (D) Contents, Making, and Settlement of Case or Statement of Facts.

↪569(1) (Tex.Civ.App.) Paper purporting to be a statement of facts and stating in its beginning and conclusion that it is a statement of facts proved on the trial and indorsed, approved as statement of facts in the case, and signed by the trial judge and appellee's counsel, will be treated as a statement of facts in the case, though not signed by appellant's counsel.—*Bigham v. Stamps*, 212 S. W. 775.

### (E) Abstracts of Record.

↪590 (Mo.App.) A supplemental abstract, filed after the original opinion and at the time of filing of motion for rehearing, may be considered upon the rehearing.—*Reed v. John Gill & Sons Co.*, 212 S. W. 43.

### (F) Making, Form, and Requisites of Transcript or Return.

↪604 (Tex.Com.App.) An agreement between attorneys of plaintiff and defendant that a bill of exceptions was presented and filed at the trial and could be considered by the Court of Civil Appeals as part of the transcript cannot be considered by the Supreme Court for any purpose when not filed in the trial court, authenticated by the trial judge, nor incorporated in the transcript.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 212 S. W. 155.

### (I) Defects, Objections, Amendment, and Correction.

↪635(3) (Mo.) Where plaintiff appealed, complaining only of error in instructions, and the bill of exceptions did not set out the evidence, and respondents objected to its sufficiency, and the appellant did not bring up the testimony of the witnesses, respondent's motion to dismiss must be allowed, in view of Court Rule 6 (186 S. W. vii).—*Odell v. Metropolitan St. Ry. Co.*, 212 S. W. 849.

### (K) Questions Presented for Review.

↪690(6) (Tex.Civ.App.) In an action on notes given for the price of a piano, testimony of the buyer as to the market value of the instrument will not be held inadmissible on the ground the buyer was not an expert, but that his testimony was mere hearsay; the bill of exceptions failing to rebut the presumption that the buyer qualified himself to testify as an expert.—*Lee v. Buie*, 212 S. W. 230.

↪707(2) (Tex.Civ.App.) In an action to foreclose vendor's lien against the vendee and purchasers of part of land, where there was a judgment against the vendee for the amount due on notes sued upon and against the other defendants foreclosing the lien, but providing in event the land should sell for more than sufficient to satisfy plaintiff's judgment, for payment of the excess to the "defendants," it cannot be said on appeal that the direction to pay the excess to the "defendants" was not proper, where there was no pleading between the defendants, and the only allegation as to the ownership of the land was an allegation in plaintiff's petition that part of the tracts had been sold by the vendee to the other defendant, and where there is no statement of facts with the record.—*Clark v. Taylor*, 212 S. W. 231.

## XI. ASSIGNMENT OF ERRORS.

↪719(1) (Tex.Civ.App.) The Court of Civil Appeals cannot take cognizance of an error not properly assigned, unless it be an error of law apparent on the face of the record, or a fundamental error.—*Nations v. Miller*, 212 S. W. 742.

↪719(4) (Tex.Civ.App.) If exceptions to pleading were special exceptions and not assigned as error in compliance with *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1612, requiring motion for new trial and assignments of error, the appellate court would not be required to consider them, but where they are address-

ed to the merits and not the sufficiency of the allegations they are general demurrers, the overruling of which presents fundamental error.—*Richardson v. Terry*, 212 S. W. 523.

—719(8) (Tex.Civ.App.) In the absence of an assignment challenging the accuracy of the trial court's findings, the reviewing court will not question their accuracy.—*Temple Hill Development Co. v. Lindholm*, 212 S. W. 984.

—719(9) (Tex.Civ.App.) In an action for delay in transmitting to plaintiff a message announcing the death of his brother, error in that the verdict for \$1,120 was excessive held not fundamental so as to be reviewable by the Court of Civil Appeals under rule 29 (142 S. W. xiii), without an assignment of error.—*Western Union Telegraph Co. v. Campbell*, 212 S. W. 720.

—722(1) (Tex.Civ.App.) In cases tried before the court without a jury, the objection is no longer available that assignments cannot be considered because they are not the same as contained in the motion for new trial and were not filed at the same time.—*Wyss v. Bookman*, 212 S. W. 297.

—722(1) (Tex.Civ.App.) An assignment, complaining of a charge in "that it makes the defendant liable for the injury alleged to have been sustained by the plaintiff without reference to any negligence on the part of plaintiff that could attribute (contribute) to what was the true and proximate result (cause) of plaintiff's injuries," the words in parentheses, not being in the ground of error contained in the motion for new trial, will be considered; the changes not being material.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

—736 (Tex.Civ.App.) On appeal from judgment for plaintiffs, assignment of error held multifarious, in that it complains of four express errors alleged below.—*City of Ft. Worth v. Weisler*, 212 S. W. 280.

—739 (Tex.Civ.App.) A single assignment of error complaining of refusal of trial court to submit 19 special issues requested, the charges not being germane to each other but presenting several propositions of law and fact, will not be considered, in view of Court of Civil Appeals Rule 26 (142 S. W. xii).—*Burkett v. Chestnutt*, 212 S. W. 271.

—742(1) (Tex.Civ.App.) Assignments followed by neither proposition nor statement, or in which no sufficient reference is made to record where the proceedings out of which the alleged error arose, are to be found, are insufficient.—*Water, Light & Ice Co., of Weatherford, v. Barnett*, 212 S. W. 236.

—742(5) (Tex.Civ.App.) An assignment of error, in a suit by a shipper against carriers for a shipment of cabbage damaged, to a certain paragraph of a charge, which does not show what such paragraph contained and is not followed by any statement as to what such paragraph contained, cannot be considered on appeal.—*Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

—743(1) (Tex.Civ.App.) Assignments followed by neither proposition nor statement, or in which no sufficient reference is made to record where the proceedings out of which the alleged error arose are to be found, are insufficient.—*Water, Light & Ice Co., of Weatherford, v. Barnett*, 212 S. W. 236.

—754(2) (Tex.Civ.App.) One who asked a special instruction on contributory negligence, which would cure the omission of such issue from a paragraph of the charge, but did not assign error for the failure to give it, error of the court in omitting such issue from the charge, was waived.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

## XII. BRIEFS.

—758(3) (Mo.App.) Appellant's brief, raising only one point, that court erred in giving instruction containing statement fully covering

facts of the case, and immediately thereafter a statement, under heading entitled "Brief," giving instruction complained of in full and discussing it, with citation of authorities relied on, held to comply with rules of court requiring separate statement of errors and points relied on.—*Ward v. Stutzman*, 212 S. W. 65.

—759 (Tex.Civ.App.) In order to entitle a party to the benefit of a ground of error contained in a motion for new trial, it must be correctly copied as an assignment in the brief; that is, the assignment must be at least substantially the same as the grounds shown in the record.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

—761 (Mo.App.) Appellant's brief, raising only one point, that court erred in giving instruction containing statement fully covering facts of the case, and immediately thereafter a statement, under heading entitled "Brief," giving instruction complained of in full and discussing it, with citation of authorities relied on, held to comply with rules of court requiring separate statement of errors and points relied on.—*Ward v. Stutzman*, 212 S. W. 65.

—773(4) (Tex.Civ.App.) Where one who filed assignments of error in the trial court has not briefed the case in the appellate court, the judgment will be affirmed, unless fundamental error is apparent on the face of the record.—*Houston Oil Co. of Texas v. Jordan*, 212 S. W. 544.

## XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

—781(2) (Tex.Com.App.) The relief prayed for by plaintiff in an injunction suit against the sale of property by the sheriff cannot be granted, where the sale has taken place subsequently to the rendition of judgment in the trial court, so that the appeal therefrom involves only moot questions, except in so far as the determination of costs is concerned.—*Brown v. Fleming*, 212 S. W. 483.

The Supreme Court will not decide moot questions in an injunction suit merely to ascertain who is liable for costs.—*Id.*

## XVI. REVIEW.

### (A) Scope and Extent in General.

—843(4) (Tex.Civ.App.) Since defendants' plea of privilege cannot be sustained, it is unnecessary to consider whether it was waived.—*Sykes v. Fischl*, 212 S. W. 217.

—846(5) (Tex.Civ.App.) No findings of fact or conclusions of law having been filed by the court below, the judgment must be sustained, if there is sufficient evidence to support it upon any theory of the case.—*Pennington v. Fleming*, 212 S. W. 303.

—846(6) (Tex.Civ.App.) Inconsistencies in the evidence, in the absence of findings of fact, must be resolved on appeal so as to support the judgment.—*Crisp v. Christian Moerlein Brewing Co.*, 212 S. W. 531.

—854(2) (Ky.) Judgment of trial court, based by it on an erroneous reason, will not be reversed, if justifiable for any other reason.—*Prewitt v. Wilborn*, 212 S. W. 442.

—856(1) (Ky.) That trial court erred in sustaining plaintiff's right to property in question by adverse possession is not prejudicial error, where appellants could not have sustained a cause of action for the property at the time they first asserted their claim, and judgment will be affirmed.—*Holton v. Jackson*, 212 S. W. 587.

—856(1) (Tex.Civ.App.) If a decree refusing to grant an injunction was permissible under the verified pleadings of the parties, and did not constitute a clear abuse of discretion, its validity is not affected, nor will it be reversed on appeal, merely because the trial court based his decision upon an erroneous ground.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

(C) Parties Entitled to Allege Error.

⇒880(3) (Tex. Civ. App.) Where there was full proof as to appealing defendants they cannot raise any question as to whether or not the judgment against other parties defendant not appealing rested on any evidence.—Wyss v. Bookman, 212 S. W. 297.

⇒882(12) (Mo. App.) A defendant cannot complain that an instruction given for plaintiff included a certain element, where he included such element in his own instructions.—Argeropoulos v. Kansas City Rys. Co., 212 S. W. 369.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

⇒889(3) (Ark.) Pleadings will not be treated as amended on appeal so as to allege a fact which appears in the testimony, not as a direct affirmation, but only as an inference from the testimony.—Smith v. Buckeye Cotton Oil Co., 212 S. W. 88.

(E) Presumptions.

⇒901 (Ky.) Appellant, if he would secure reversal, must exhibit in the Court of Appeals a record showing affirmatively that the decision appealed from is erroneous, after indulging presumption, which follows a showing on the record presented, that a portion of the record of the case has been omitted.—Prewitt v. Wilborn, 212 S. W. 442.

⇒907(1) (Ky.) Where transcript as made shows that a portion of the record of the case is omitted, which must have been considered by the court in reaching a decision, it must be presumed that omitted portion justified the decision.—Prewitt v. Wilborn, 212 S. W. 442.

Presumption on appeal that omitted portion of record was considered by trial court, and justified his decision, does not arise from omission of parts of record which were not considered by trial court, could not have influenced its decision, and which, if present, would not have been necessary to be considered to determine correctness of decision.—Id.

Even if absence of part of record on appeal appears from record as presented, if record affirmatively shows that decision below was erroneous, it will be reversed.—Id.

Where record fails to show that anything omitted from transcript, or bill of exceptions, was considered by trial court, or before it to be considered, Court of Appeals will not presume judgment to be correct, because certain orders in the case, or the records of prior suits pleaded, but not introduced in evidence, are omitted from the transcript.—Id.

⇒907(2) (Ky.) In the absence of sufficient evidence in the record to enable appellate court to determine whether trial court acted properly, appellate court will presume that the judgment is correct.—Wolfe v. Bailey, 212 S. W. 579.

⇒907(3) (Tex. Civ. App.) Where no statement of facts accompanies record, trial court's finding that services were performed in a certain county is conclusive upon appeal.—Walker v. Alexander, 212 S. W. 713.

⇒917(1) (Ky.) On review of judgment sustaining demurrer to petition asking equitable relief, appellate court must take allegation of petition as true.—Bickel v. Henry Bickel Co., 212 S. W. 602.

⇒927(7) (Mo. App.) In determining whether trial court properly refused to direct a verdict for defendant, plaintiff is entitled to every reasonable inference arising from his own testimony aided by any evidence adduced by defendant, which may help to make out plaintiff's case.—Brown v. Missouri, K. & T. Ry. Co., 212 S. W. 26.

⇒927(7) (Tex. Civ. App.) In determining correctness of peremptory instruction for defendant, the Court of Civil Appeals must plaintiff's evidence its strongest probative fact.—Irwin v. Moore, 212 S. W. 710.

⇒931(1) (Ark.) Where the record does not affirmatively show that the findings of the court are contrary to evidence or negative in it, the appellate court must assume that the findings are sustained by the evidence.—Free v. Maxwell, 212 S. W. 825.

⇒931(3) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, the Court of Civil Appeals will presume a finding of the trial judge necessary to sustain the judgment.—Rupert v. Swindle, 212 S. W. 671.

⇒931(4) (Tex. Civ. App.) In trespass to try title, where there was evidence to authorize finding that appellee grantee did not promise to pay mortgage on land conveyed, it will be presumed, in order to support judgment rendered, that court so found.—Clark v. Scott, 212 S. W. 728.

⇒934(1) (Tex. Civ. App.) Every reasonable presumption should be indulged in favor of a judgment.—McClintic v. Brown, 212 S. W. 540.

(F) Discretion of Lower Court.

⇒954(1) (Tex. Civ. App.) The granting or refusing of a temporary injunction is largely within the sound discretion of the trial court, the exercise of which will not ordinarily be interfered with upon appeal, unless there has been a clear abuse of power.—Houston Electric Co. v. City of Houston, 212 S. W. 198.

⇒966(1) (Ark.) The granting or refusing of a continuance is within the sound legal discretion of the trial court, and will not be reviewed on appeal, save for an abuse of discretion to the prejudice to the party appealing.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

⇒966(2) (Tex. Civ. App.) Where defendant's motion for continuance for absent witnesses was excepted to on ground that there is no pleading on which to predicate the testimony, that testimony was not material, and that no diligence was shown, and court overruled motion without showing basis of his ruling in his order, court's ruling is available as error, on appeal, notwithstanding inadmissibility of testimony under general denial, since it will be assumed that defendant would have amended pleading if motion had been overruled on such ground.—Ft. Worth & R. -G. Ry. Co. v. Jones, 212 S. W. 552.

(G) Questions of Fact, Verdicts, and Findings.

⇒994(3) (Tex. Civ. App.) The credibility of witnesses and the weight to be given to their testimony was to be judged by the court who was trying the case without a jury.—Currie v. Glasscock County, 212 S. W. 533.

⇒1001(1) (Ky.) The verdict of a jury based on evidence is conclusive on the facts.—Terhune v. Louisville & N. R. Co., 212 S. W. 915.

⇒1002 (Ark.) Where there was a conflict in the testimony as to an issue, the appellate court must treat the issue as settled by the jury's verdict.—Edwards v. Harris, 212 S. W. 89.

⇒1002 (Ky.) Where the evidence is conflicting and the jury's verdict not flagrantly against the weight of the evidence, a reversal on such ground cannot be ordered.—Huff v. Woosley, 212 S. W. 597.

⇒1003 (Tex. Civ. App.) Verdict to authorize trial or Appellate Court to set it aside must be against the preponderance of the evidence to a degree showing that manifest injustice has been done, at least it must be affirmatively wrong.—Nations v. Miller, 212 S. W. 742.

⇒1006(4) (Ky.) Under Civ. Code Prac. § 341, where there have been three verdicts for the same party, the court will not disturb the third one upon the ground that it is flagrantly against the weight of the evidence and not sustained thereby, where the same complaint was made against the first two verdicts and urged as grounds for setting them aside; and although the first two judgments were

reversed or set aside for errors of law.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

⇒1009(3) (Ky.) The appellate court will not disturb the finding of a chancellor upon question of fact, where the evidence is conflicting and on a consideration of the whole case the mind is left in such doubt that it cannot be said with reasonable certainty that the chancellor erred.—*Alexander v. Lewis*, 212 S. W. 440.

⇒1009(3) (Ky.) The finding of the chancellor upon conflicting evidence will not be disturbed, where upon consideration of the whole case the mind is left in doubt as to correctness of the judgment, and the court is not convinced that the chancellor has erred to the prejudice of appellant's substantial rights.—*Tutt v. Smith*, 212 S. W. 920.

⇒1010(1) (Ark.) On appeal in a proceeding under Acts 1917, p. 1243, § 8, to reduce an assessment and valuation of land, Supreme Court cannot reverse unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous.—*Doniphan Lumber Co. v. Cleburne County*, 212 S. W. 308.

⇒1010(1) (Tex.Civ.App.) In an action tried to the court, a finding of fact supported by evidence will not be disturbed on appeal.—*Williams v. Davenport*, 212 S. W. 675.

⇒1012(1) (Ark.) Decree must be affirmed where court's finding is not clearly against the preponderance of the evidence.—*Evans v. Wells*, 212 S. W. 328.

#### (H) Harmless Error.

⇒1032(1) (Ky.) Before a judgment should be reversed, an error prejudicial to the rights of appellant should affirmatively appear from the record.—*Prewitt v. Wilborn*, 212 S. W. 442.

⇒1033(7) (Mo.App.) In an action for breach of covenant, there was no error against the defendant in finding the value of the 10 acres lost to be the average value of all the land, since there was evidence that the 10 acres was bottom land and worth more per acre than the remainder.—*Donner v. Whitcotton*, 212 S. W. 378.

⇒1039(9) (Tex.Civ.App.) Error of the court in calling upon plaintiff to elect as to whether he would prosecute his suit as one for rescission of contract or as one for the recovery of damages for fraud and deceit was harmless, where it appeared the action was barred by limitations.—*Texas Co-op. Inv. Co. v. Clark*, 212 S. W. 245.

⇒1040(1) (Tex.Com.App.) The consideration of special exceptions to petition after court had sustained general demurrer thereto was harmless, where the special exceptions were but expository of the general demurrer.—*City of Dallas v. Shows*, 212 S. W. 633.

⇒1040(11) (Tex.Civ.App.) Any error in overruling demurrers to petition in trespass to try title is harmless, where evidence and findings supplied any deficiency.—*Clark v. Scott*, 212 S. W. 728.

⇒1047(1) (Mo.App.) In an action for personal injuries, a layman's testimony as to physical appearance of plaintiff and conversations with him, admitted only on question of his ability to come into court to testify, if error, was not prejudicial, where defendant did not object to introduction of testimony of plaintiff given at former trial.—*Slinkard v. Lamb Const. Co.*, 212 S. W. 61.

⇒1048(5) (Mo.) In action for death from injuries in falling downstairs, where the witness called by plaintiff to prove that a railing was subsequently placed by defendant on the side of the steps where the injury occurred answered "I do not know" to the question, it was rendered harmless.—*Kuenzel v. City of St. Louis*, 212 S. W. 876.

⇒1050(1) (Mo.App.) Where a matter was testified to without objection in chief, the admission of the same testimony on rebuttal over objection will not be held prejudicial error.—

*Brown v. Missouri, K. & T. Ry. Co.*, 212 S. W. 28.

⇒1050(1) (Mo.App.) Where, in action for commission for procuring a tenant for defendant, defendant's counsel was permitted by the plaintiffs' counsel to ask a question calling for a conclusion on the sole issue in the case on terms suggested by plaintiffs that he would do likewise, *held*, case would not be reversed because plaintiffs in rebuttal were permitted to ask a question calling for the conclusion of another witness on the same subject.—*Davis v. Geiger*, 212 S. W. 384.

⇒1050(1) (Tex.Civ.App.) The improper admission of testimony on an essential point of fact does not furnish ground for reversal, where another witness properly testified to the same fact.—*Sugarland Ry. Co. v. Dew Bros.*, 212 S. W. 190.

⇒1050(1) (Tex.Civ.App.) The improper admission of alleged expert testimony as to value was harmless error, where two other witnesses testified to the same fact of value, one without objection.—*Lee v. Buie*, 212 S. W. 230.

⇒1050(1) (Tex.Civ.App.) In action involving reasonableness of order requiring construction of depot building and sidings at certain place, admission of evidence of population and growth of nearby town was not reversible error, where other testimony had been introduced without objection comparing the two places.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

⇒1050(1) (Tex.Civ.App.) Admission of testimony as to telephone conversation, by witness to whom conversation had been related by one of the parties thereto, was not prejudicial to plaintiff, where only fact testified to by such witness, not testified to by the party who had related conversation to him, was a fact alleged by petition, and as to that fact party stated he could not remember.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒1050(1) (Tex.Civ.App.) In trespass to try title, any error in admitting judgment in a former case for purposes of establishing plaintiff's title *held* no ground for reversal.—*Clark v. Scott*, 212 S. W. 728.

Error in admitting recitals in deeds as evidence against strangers is not reversible error, where similar evidence was introduced without objection.—*Id.*

⇒1050(1) (Tex.Civ.App.) In an action for damages to an automobile in a collision, admission of testimony regarding a declaration of defendant's driver, not a part of the *res gestæ*: "He allowed the ambulance had the right of way over everybody, and they ought to keep out of his way. It didn't matter if he did kill him"—was prejudicial, although part of the declaration was but the expression of the opinion of the driver; there being a sharp conflict in the evidence as to who caused the accident.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

⇒1050(2) (Tex.Civ.App.) In an action for loss of barges tried on the third amended petition, admission in evidence of defendant's abandoned original and first amended answers, if incompetent and irrelevant as to any issue, *held* harmless.—*Freesport Town-Site Co. v. S. H. Hudgins & Sons*, 212 S. W. 287.

⇒1050(2) (Tex.Civ.App.) If evidence complained of was immaterial and could not affect proper disposition of the case, its admission would at most constitute harmless error, for which court on appeal cannot reverse judgment.—*St. Louis, B. & M. Ry. Co. v. Broughton*, 212 S. W. 664.

⇒1052(2) (Tex.Civ.App.) Admission of parol evidence as to the terms of a written contract is not prejudicial error, where the writing is admitted in evidence, and its terms conform in all respects to the parol testimony adduced.—*Haynie v. Stovall*, 212 S. W. 792.

⇒1052(8) (Tex.Civ.App.) In an action for loss of barges, improper admission of opinion tes-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

timony as to what was reasonable care in his own management of the barge of another party held harmless, where without such testimony the result of the trial would have been the same.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, 212 S. W. 287.

⇨1052(8) (Tex.Civ.App.) Any error in admitting abstract of records destroyed by fire is harmless where, if admitted, there was not sufficient evidence to authorize a recovery by plaintiff who offered them.—Ball v. McDuffie, 212 S. W. 844.

⇨1053(5) (Tex.Civ.App.) In action for loss by fire of cotton shipped, admission in evidence of bills of lading covering consignments not embracing cotton in suit held harmless to railroad, in view of fact jury merely passed on value of cotton at time of destruction, and were not asked to determine whether or not it had been received by railroad for shipment.—Sugarland Ry. Co. v. Dew Bros., 212 S. W. 190.

⇨1054(1) (Tex.Civ.App.) Where the case is tried to the court, and there is sufficient evidence not objected to to sustain his findings upon all the material facts to support the judgment, the case will not be reversed because of objections to the introduction of testimony.—Early-Foster Co. v. El Campo Rice Milling Co., 212 S. W. 964.

⇨1056(4) (Ky.) In an action for wrongful attachment of live stock, where all the losses sustained were due to natural causes, and not to the attachment, plaintiff was only entitled to nominal damages, and he cannot complain of the exclusion of evidence of losses not recoverable.—Crawford v. Staples, 212 S. W. 119.

⇨1060(1) (Mo.App.) Statement of counsel, in action for injuries to employé, that plaintiff could not afford to call defendant employes as witnesses because they would lose their jobs, held not prejudicial, in view of plaintiff's counsel's admission that there was no such evidence.—Brown v. Missouri, K. & T. Ry. Co., 212 S. W. 26.

⇨1060(1) (Tex.Civ.App.) Impertinent remarks of counsel will not be held reversible error, although it prejudices the jury and increases the verdict, where no complaint was made as to the size of the verdict, and liability was established by other testimony.—Evans v. McKay, 212 S. W. 680.

⇨1060(1) (Tex.Civ.App.) In suit by married woman to set aside general warranty deed executed by herself and husband to a defendant, on ground that it was a mortgage, and had been executed under duress to prevent jailing of husband by a defendant for embezzlement, plaintiff's inflammatory argument, discussing in strong language matters not in evidence or based on matters not supported by evidence, was reversible error, especially where evidence was circumstantial, and jury found against defendant.—Houston Ice & Brewing Co. v. Harlan, 212 S. W. 779.

Improper argument alone is sufficient to reverse the case.—Id.

⇨1060(1) (Tex.Civ.App.) In an action for damages for breach of an employment contract, statement of plaintiff's counsel, "Remember, if you want the plaintiff to recover, answer the first question, 'No,'" held improper, since it ought not to be assumed that an impartial jury wanted to return a verdict for either party, but that they desired to return such verdict upon special issues as the evidence demanded, but such misconduct did not constitute reversible error where the jury must have known how such first question must be answered in order that plaintiff might recover.—Merchant's Life Ins. Co. v. Griswold, 212 S. W. 807.

⇨1060(2) (Mo.App.) In an action against a street railroad company for the death of one struck by a car, where objection was sustained to a question to the conductor of the car that struck deceased as to whether he testified before the coroner's jury, that the question was asked a second time held not prejudicial, where

objection was duly sustained to it.—Buzan v. Kansas City Rys. Co., 212 S. W. 905.

⇨1060(2) (Tex.Civ.App.) In action against defendant light company for injuries sustained by plaintiff, who, when walking along sidewalk, stepped upon a meter box lid, which lid gave way and caused her to fall into the opening, permitting introduction of evidence showing that defendant was insured in an indemnity company held error and prejudicial to rights of defendant.—Water, Light & Ice Co. of Weatherford v. Barnett, 212 S. W. 236.

⇨1061(1) (Mo.) Where a demurrer should have been sustained to plaintiff's evidence, but the court submitted the same to the jury, which found for defendant, error in the instructions does not warrant new trial, because it was harmless.—Giles v. Michigan Cent. R. Co., 212 S. W. 873.

⇨1062(1) (Tex.Civ.App.) In an action for damages based on wrongful acts of defendant's alleged agent, submission of issue which deprived defendant of the right to have the jury decide whether such other person was the authorized agent of defendant was harmless and immaterial, where it was established that defendant ratified and adopted such third person's wrongful act.—Evans v. McKay, 212 S. W. 680.

⇨1062(1) (Tex. Civ. App.) Submission of ground of negligence, not supported by sufficient evidence, was harmless, where the jury found against such ground of negligence.—Texas & Pacific Coal Co. v. Sherbley, 212 S. W. 758.

⇨1062(1) (Tex.Civ.App.) In an action by an agent against an insurance company for breach of employment contract, compensation of which was based upon new and renewal assessment premiums, the court was technically in error in referring, in question submitted to jury, to compensation as a debt; but, where the verdict as to this item was neither more nor less by reason of the misnomer, the error must be deemed harmless.—Merchants' Life Ins. Co. v. Griswold, 212 S. W. 807.

⇨1062(5) (Tex.Civ.App.) Where the court submitted an immaterial special issue, containing nothing to cause the jury to be prejudiced against the appellant, he is not entitled to a reversal.—Rowe v. Guderian, 212 S. W. 960.

⇨1064(1) (Mo.) One act of negligence, sufficient to authorize recovery, being alleged in the petition, and properly submitted by the instruction, and required to be found to permit of a recovery, any error of the instruction in submitting another act of negligence was not prejudicial to defendant.—Rigg v. Chicago, B. & Q. R. Co., 212 S. W. 878.

⇨1064(1) (Tex.Civ.App.) In servant's action against a master for personal injuries, a charge giving undue prominence to the amount sued for held not commendable, although not reversible error.—Texas & Pacific Coal Co. v. Ervin, 212 S. W. 234.

⇨1067 (Mo.App.) In an action for breach of contract to deliver ties, while a requested instruction refused was more accurate and more in conformity to the petition and proof than that given by the court, its refusal held not substantial error.—Cavender v. B. Johnson & Son, 212 S. W. 53.

⇨1068(3) (Mo.App.) In replevin by the holder of a bill of sale of mares against the purchaser at execution sale against the owner, an instruction too broad in stating the instrument called a bill of sale was not in effect such, and gave plaintiff no right to reduce the property

to his possession, was proper nevertheless where its effect was to instruct that as against the execution creditor and defendant purchaser at execution sale the bill of sale was void, which was the case.—Miller v. Tallent, 212 S. W. 73.

⇨1068(3) (Tex.Civ.App.) Where the evidence was of such a conclusive character as to make it doubtful whether any other conclusion could reasonably have been reached by the jury, it

was harmless error for the court in its instructions to place the burden of proof upon the wrong party.—*First Nat. Bank v. Todd*, 212 S. W. 219.

§1068(5) (Tex.Civ.App.) In a shipper's action for injuries to shipment of live stock, error in refusing to charge that defendant was not liable for damages accruing during switching operations by the agent of a connecting carrier was harmless, where it appeared that no damages were assessed against defendant for injuries incurred during the switching operation.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

#### (J) Decisions of Intermediate Courts.

§1082(2) (Tex.Com.App.) Where the trial court overruled all exceptions to the petition, thus holding it sufficient, and no error on appeal to the Court of Civil Appeals was assigned to the ruling, the Supreme Court, on error to review the judgments of the trial court and Court of Civil Appeals, should treat the petition as if no objection to its sufficiency had been made.—*Northcutt v. Hume*, 212 S. W. 157.

#### (K) Subsequent Appeals.

§1096(3) (Ky.) The rule as to opinion on prior appeal being the law of the case not only precludes considering on subsequent appeal errors relied upon on prior appeal, and mentioned in the opinion thereon, but also considering errors relied upon on the prior appeal and not noticed in the prior opinion, as well as errors appearing in the record and which might have been but were not relied on.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

§1097(1) (Tex.Civ.App.) On subsequent appeal, Court of Civil Appeals will follow law as announced by decision on former appeal, where it has not been reversed or modified by Supreme Court.—*Roberts v. Armstrong*, 212 S. W. 227.

§1099(7) (Ark.) A ruling upon a former appeal that a written contract was competent evidence to prove ownership of the flour in question became the law of the case.—*Edwards v. Harris*, 212 S. W. 89.

§1099(7) (Ky.) In personal injury case, the sufficiency of plaintiff's proof that he was exercising due care, and that defendant's negligence was the sole and proximate cause of his injuries, having been involved, presented, and argued on prior appeal, upon substantially the same evidence, such questions cannot be considered on subsequent appeal.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (A) Decision in General.

§1114 (Tex.Com.App.) Where Court of Civil Appeals on issues presented by pleadings and evidence correctly applied the law favorable to contention of plaintiffs in error, and where there was no further issue to be developed or determined, it should have rendered judgment for plaintiffs in error, in view of Rev. St. 1911, art. 1626, and its judgment reversing cause would be affirmed, and its judgment remanding it would be reversed, and judgment rendered for plaintiffs in error.—*Arno Co-op. Irr. Co. v. Pugh*, 212 S. W. 470.

§1114 (Tex.Civ.App.) A judgment of the county court rendered on appeal from justice court from a judgment allowing neither party any relief will on appeal be reversed and the case dismissed if the county court did not acquire jurisdiction of the cause of action by appeal.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

§1116 (Tex.Civ.App.) In suit on vendor's lien notes, where some of the vendors, owning 55 acres of the land among themselves, were under the consent judgment entitled to have their lands free through releases on payment of costs, but the matter was not originally assigned as constituting error, and the incoherent and

bulky record does not disclose precisely who the parties were, or what tracts were owned, the Court of Civil Appeals cannot declare the judgment void, or reform it to decree releases to those entitled.—*Wyss v. Bookman*, 212 S. W. 297.

#### (B) Affirmance.

§1140(2) (Mo.) There being no suggestion of incorrect attitude of jury during trial, except the size of the verdict, still too large after remittitur in trial court, this can be cured by a further remittitur on appeal.—*Rigg v. Chicago, B. & Q. R. Co.*, 212 S. W. 878.

#### (C) Modification.

§1152 (Tex.Civ.App.) A judgment, which grants improper relief to a seller suing the buyer, under a conditional sale contract, cannot be reformed and affirmed where neither the verdict, the lower court's finding of fact, nor the evidence in the record shows what judgment should have been rendered, so that the judgment will be reversed, and the cause remanded.—*Black v. Southern Film Service*, 212 S. W. 295.

#### (D) Reversal.

§1165 (Tex.Civ.App.) The failure of the trial judge, though requested to file findings of fact and conclusions of law within the time provided by Rev. St. art. 2075, necessitates reversal; the court on appeal being unable to review case without a statement of facts which is not before it.—*Stryker v. Van Velzer*, 212 S. W. 674.

§1170(7) (Tex.Civ.App.) In an action on an alleged agreement for a rebate on a sale of cement, admission of evidence as to plaintiff, owner, being induced by the defendant cement company to contract for a concrete instead of a steel building, the rebate agreement being an inducement for using concrete, if immaterial and irrelevant testimony, was harmless, because not resulting in injury. Court Rule 62A (149 S. W. x).—*Southwestern Portland Cement Co. v. Schwartz*, 212 S. W. 977.

§1171(1) (Ky.) Where only general damages are sought, Court of Appeals will not grant a new trial solely on account of the inadequacy of damages awarded.—*Hurst v. Southern Ry. Co. in Kentucky*, 212 S. W. 461.

§1175(4) (Tex.Civ.App.) Where Court of Civil Appeals reverses sustaining of plea of privilege by defendant, which is only point that prevented recovery by plaintiffs, judgment will be rendered for plaintiffs in appellate court.—*Walker v. Alexander*, 212 S. W. 713.

§1177(7) (Tex.Civ.App.) Where plaintiff was led to believe by trial courts that he had made a perfect case, appellate court in reversing for insufficient evidence will remand case to give him opportunity to produce legal testimony to sustain in case, if he can do so.—*Ft. Worth & R. G. Ry. Co. v. Fleming*, 212 S. W. 233.

#### (F) Mandate and Proceedings in Lower Court.

§1187 (Mo.App.) The handing down of an opinion reversing a judgment does not affect the judgment of the lower court until there is a judgment of the appellate court and the filing of a mandate based thereon, and hence a judgment of the lower court was not affected by an opinion reversing the judgment and remanding the case, where the opinion never ripened into a judgment, but was superseded by the sustention of a motion for rehearing and an argument and submission on rehearing.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

§1198 (Tex.Civ.App.) On retrial, lower court is required to obey orders of appellate court in remanding case.—*Roberts v. Armstrong*, 212 S. W. 227.

§1203(5) (Mo.App.) Under Rev. St. 1909, §§ 1979, 1980, a nonsuit may be taken after reversal and remand for new trial at any time before trial, as the cause then stands for trial de novo.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.



For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

## APPEARANCE.

See Constitutional Law, 281; Drains, 36; Landlord and Tenant, 291.

9(1) (Mo.App.) The test whether a defendant has made a general entry of appearance is whether he has become an actor in the cause.—*Roberts v. American Nat. Assur. Co.*, 212 S. W. 390.

23 (Mo.App.) In an action on a life policy, where defendant insurer properly coupled with a plea to the merits a plea of lack of jurisdiction based on improper venue, by serving notice to take, and taking, depositions, and stipulating as to the truth of certain facts, before the plea to the jurisdiction was filed, the insurer did not waive the lack of jurisdiction.—*Roberts v. American Nat. Assur. Co.*, 212 S. W. 390.

If defendant's complaint of lack of jurisdiction had been based on want of notice or defective or insufficient service, the taking of depositions and the signing of a stipulation as to facts conceded would have constituted a waiver of the defect.—*Id.*

## ARBITRATION AND AWARD.

### II. ARBITRATORS AND PROCEEDINGS.

35 (Ky.) Award was not invalidated by fact that one of the arbitrators was not present all the time, but spent three hours elsewhere, where, upon returning, his colleagues explained to him what had been done in his absence, and he went over their work and approved it.—*Tutt v. Smith*, 212 S. W. 920.

## ARGUMENT OF COUNSEL

See Criminal Law, 699-730; Trial, 115-133.

## ARMY AND NAVY.

See Criminal Law, 1159; Indictment and Information, 125; Insurance, 129, 392, 433; Intoxicating Liquors, 158, 236; Statutes, 55.

24 (Tex.Civ.App.) Where defendant solicited the services as chief night operator of plaintiff, then employed by the United States as censor at the office of defendant, with full knowledge of the law and facts and orders of the military authorities, and the work was actually performed, defendant cannot recover the amount paid for such services, it not appearing that the services conflicted with the federal statute, forbidding enlisted men from engaging in any pursuit in civil life for hire when the same shall interfere with customary employment.—*Mackay Telegraph-Cable Co. v. Proctor*, 212 S. W. 547.

34 (Mo.App.) Soldiers' and Sailors' Civil Relief Act March 8, 1918, § 201 (U. S. Comp. St. 1918, § 3078¼c), leaves the granting of a motion to stay proceedings within the sound discretion of the court.—*State ex rel. Clark v. Klene*, 212 S. W. 55.

Where an army officer had procured a divorce, and his wife had filed a motion to set aside the judgment of divorce on the ground of fraud, court held not to have abused its discretion in refusing to stay proceedings under Soldiers' and Sailors' Relief Act, § 201 (U. S. Comp. St. 1918, § 3078¼c), although officer made a request for leave of absence, which was refused.—*Id.*

## ARREST.

See Criminal Law, 518, 519, 530.

### II. ON CRIMINAL CHARGES.

63(4) (Ky.) In view of Cr. Code Prac. 36, peace officers may arrest any person whom they upon reasonable ground believe has committed a felony, although it afterwards ap-

pears that no felony was actually perpetrated.—*Klotz v. Cook*, 212 S. W. 917.

68 (Tex.Cr.App.) It is not necessary to make an arrest in formal words, and the fact of arrest can be shown by surrounding facts and circumstances.—*Bonatz v. State*, 212 S. W. 494.

70 (Ky.) One arrested without a warrant by an officer who received a telegram from another state, having consented to accompany the officer of the other state, cannot complain that the officer who arrested her did not take her before a magistrate as provided in Cr. Code Prac. § 46.—*Klotz v. Cook*, 212 S. W. 917.

## ASSAULT AND BATTERY.

See Criminal Law, 211; Homicide.

## ASSESSMENT.

See Drains, 85; Municipal Corporations, 407-522; Taxation, 317-499.

## ASSIGNMENTS.

See Appeal and Error, 51; Chattel Mortgages, 34, 197; Contracts, 237; Estoppel, 76, 102; Evidence, 121; Fraud, 11, 59, 65; Insurance, 121; Interest, 53; Judgment, 725, 741, 744, 840, 841, 844; Libel and Slander, 10, 81, 88, 120; Mines and Minerals, 75; Mortgages, 372; Partnership, 84; Pledges, 30; Principal and Agent, 169; Subrogation, 31, 41; Trial, 352.

### I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

12 (Tex.Civ.App.) When wages to be earned under an existing or known and identified employment are assigned, there may be a reasonable expectation by the parties that the wages will be earned, and, such possibility or expectancy being coupled with an interest, the thing assigned has a potential existence, and the assignment is valid.—*McKneely v. Armstrong*, 212 S. W. 175.

13 (Tex.Civ.App.) An assignment of "any sum of money due, or which may become due, me as salary or wages for any subsequent month, or months, within the period of four years from the date of this instrument, from any person, firm, or corporation whomsoever for whom I may work," was not valid as to wages earned in an employment other than that in which the servant was when he executed the assignment, and not then anticipated.—*McKneely v. Armstrong*, 212 S. W. 175.

## ASSOCIATIONS.

See Insurance.

## ASSUMPTION OF RISK.

See Master and Servant, 204-221.

## ASYLUMS.

See Wills, 515.

## ATTACHMENT.

See Appeal and Error, 1056; Garnishment; Judgment, 206; Justices of the Peace, 86, 174.

### LIABILITIES ON BONDS OR UNDERTAKINGS.

331 (Mo.) Where an action of slander was begun, and defendant's property attached, he appeared, and plaintiff secured general judgment, on which execution issued, in the absence of appeal bond, and the attached property was sold, plaintiff and his surety on the attachment bond were not liable thereon.—

State ex rel. and to Use of *Fenn v. Conran*, 212 S. W. 869.

Where the sheriff had in his hands a general execution properly issued in the absence of appeal bond, and there came to his hands certain property of the judgment debtor, it was his duty to make his execution out of the property which he levied upon and applied, not by force of an attachment, but by virtue of the general execution on a general judgment, so that the judgment creditor and the surety on his attachment bond are not liable for such application in the judgment debtor's action on the bond.—Id.

The voluntary action of a judgment debtor in setting off against the judgment creditor's judgment three judgments held by himself against the judgment creditor cannot be charged to the attachment bond in his suit thereon against the judgment creditor and the surety.—Id.

The statute prescribing bonds to be given in attachment suits covers only the damages occasioned by the attachment, and orders, judgments, processes, and proceedings under such branch of the case.—Id.

### XI. WRONGFUL ATTACHMENT.

§360 (Ky.) That plaintiff's property was wrongfully attached in another action is concluded by the judgment therein dismissing the attachment, and his right to maintain an action directly against those who wrongfully caused the attachment to be issued, instead of suing upon the attachment bond, is specifically conferred by Ky. St. § 7.—*Crawford v. Staples*, 212 S. W. 119.

§375(1) (Ky.) In an action for damages for wrongful attachment of personal property, where plaintiff owner of the property was not deprived of its use and possession, he having given a bond for its retention, he only bore the cost of maintenance of the live stock attached as he would have done had there been no attachment, and is not entitled to recover the cost of feeding them.—*Crawford v. Staples*, 212 S. W. 119.

In an action for damages for wrongful attachment of plaintiff's live stock in an action against one other than plaintiff, *held*, that plaintiff suffered no loss of profit from failure to consummate a sale upon a purchase offer made while the attachment was pending, which loss was the proximate result of the attachment, where he still retained property equivalent in value to the price offered, and his only loss was to horses from disease and mules from increased age, both of which were natural causes not resulting from attachment.—Id.

In an action for wrongful attachment of plaintiff's live stock, a claimed loss from being prevented by the attachment from accepting an offer of sale *held* too remote, improbable, and speculative to justify damages, at least until notice of the possibility of the sale was brought to the parties securing the attachment.—Id.

§375(2) (Ky.) In an action for wrongful attachment of live stock, where all the losses sustained were due to natural causes, and not to the attachment, plaintiff was only entitled to nominal damages, and he cannot complain of the exclusion of evidence of losses not recoverable.—*Crawford v. Staples*, 212 S. W. 119.

§375(3) (Ky.) In an action for damages for wrongful attachment of live stock, the criterion of damages for the loss of the use of property owned and held for use is the value of such use, and for property owned and held for sale the value is estimated on the basis of the deterioration or depreciation in salable value caused by the attachment.—*Crawford v. Staples*, 212 S. W. 119.

### ATTORNEY AND CLIENT.

See Appeal and Error, §501, 516, 569, 604, 1060; Constitutional Law, §189; Continu-

ance, §12, 20; Costs, §173; Criminal Law, §855, 699, 703, 708, 719, 721, 721½, 730, 1171; Insurance, §514, 602, 675; Judgment, §143, 840, 841; Master and Servant, §398; Trial, §115-133; Trusts, §227; Vendor and Purchaser, §294.

### IV. COMPENSATION AND LIEN OF ATTORNEY.

#### (B) Lien.

§190(1) (Mo.App.) Under Rev. St. 1909, §§ 964, 965, where it appears that litigation is such that it would, if successful, result in judgment on which counsel would have a lien for fees earned in the case, plaintiff cannot, over the attorney's objection, withdraw an appeal or writ of error, much less dismiss his cause of action, after it has become merged in the judgment.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

### ATTORNEY GENERAL

See Mandamus, §151.

### AUTOMOBILES.

See Appeal and Error, §1050; Constitutional Law, §43; Criminal Law, §351, 517, 530, 792; Estoppel, §75; Evidence, §123, 258, 271; Exemptions, §16; Frauds, Statute of, §117; Intoxicating Liquors, §236; Larceny, §32; Master and Servant, §302; Negligence, §83; Principal and Agent, §124; Railroads, §346, 348, 350; Sales, §149, 199, 235; Street Railroads, §114, 117, 118; Venue, §8.

### BAIL.

#### II. IN CRIMINAL PROSECUTIONS.

§64 (Tex.Cr.App.) An appeal in a felony case will be dismissed where the recognizance neither binds appellant to abide by the decision of the Court of Criminal Appeals, nor shows the court in which the accused was tried, nor follows the form prescribed by Code Cr. Proc. 1911, art. 903.—*Lopez v. State*, 212 S. W. 954.

### BAILMENT.

See Pledges.

### BANKS AND BANKING.

See Bills and Notes, §147; Clerks of Courts, §70; Estoppel, §76; Forgery, §19; Insurance, §2, 151, 390, 624; Pledges, §30; Telegraphs and Telephones, §66; Trover and Conversion, §2, 32.

### III. FUNCTIONS AND DEALINGS.

#### (H) Actions.

§227(1) (Mo.App.) It being a presumption that identity of name is evidence of identity of person, and the presumption being in favor of correct dealing, and against forgery, the burden was upon defendant drawer to plead and prove that A. Parish, who cashed the check in question, was not the same person as A. Parish named as payee.—*Produce Exch. Bank v. North Kansas City Development Co.*, 212 S. W. 898.

§228 (Mo.App.) In view of Rev. St. 1909, § 9988, question whether check was originally drawn for \$80.90, or for \$8.90, *held*, under the evidence, for the court sitting as a jury.—*Produce Exch. Bank v. North Kansas City Development Co.*, 212 S. W. 898.

### BASTARDS.

See Criminal Law, §656; Witnesses, §344.

### BENEFICIAL ASSOCIATIONS.

See Insurance, §807.



**BILLHEADS.**

See Partnership, 49.

**BILLS AND NOTES.**

See Acknowledgment, 20; Alteration of Instruments, 9; Appeal and Error, 172, 690, 707, 1116; Banks and Banking, 227, 228; Chattel Mortgages, 157, 197; Commerce, 46; Courts, 475; Damages, 85; Evidence, 208, 318, 383; Forgery, 19; Fraud, 11, 59, 65; Homestead, 96, 146; Insurance, 602, 624, 675; Judgment, 21, 91, 736; Limitation of Actions, 28; Mortgages, 235, 305, 333, 372; Principal and Agent, 145; Sales, 38, 179; Specific Performance, 58; Subrogation, 41, 41; Telegraphs and Telephones, 68; Trover and Conversion, 2, 32; Vendor and Purchaser, 265, 294.

**I. REQUISITES AND VALIDITY.****(F) Validity.**

106 (Ky.) Notes given by a dealer for a popularity contest involving deceitful methods are based on a vicious consideration, defeating their collection in hands of the original holder.—Harrison v. Perry, 212 S. W. 911.

**II. CONSTRUCTION AND OPERATION.**

119 (Mo.App.) One who takes a negotiable instrument contracts only with the parties who upon the face of the instrument are bound for its payment, and is presumed to look only to those parties, and not elsewhere.—Donner v. Whitecotton, 212 S. W. 378.

**IV. NEGOTIABILITY AND TRANSFER.****(A) Instruments Negotiable.**

147 (Tex.Civ.App.) A check on one bank payable to depositor, and not to order or bearer, and indorsed by the depositor for deposit only to its credit, and deposited in another bank, is not a negotiable instrument.—Sweetwater Ice & Cold Storage Co. v. Continental State Bank of Sweetwater, 212 S. W. 740.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 582, 584, a check on one bank payable to drawer, and not to order or bearer, and containing a restrictive indorsement for deposit only, and deposited in another bank, was non-negotiable and subject to the defense of failure of consideration in the hands of third person to whom the deposit bank transferred it in payment of a draft.—Id.

**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.****(D) Bona Fide Purchasers.**

378 (Tex.Civ.App.) Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration, invalidating the note in hands of an innocent purchaser.—Commercial Security Co. v. Hull, 212 S. W. 986.

382 (Tex.Civ.App.) Note stolen from the maker before delivery without any negligence on his part cannot be enforced by a subsequent innocent holder.—Commercial Security Co. v. Hull, 212 S. W. 986.

**VIII. ACTIONS.**

497(4) (Ky.) Where maker shows vice in the inception of a note, as that it was given for a fraudulent popularity contest, the burden shifts to a holder to show that he is a holder in due course under Negotiable Instruments Law, § 52.—Harrison v. Perry, 212 S. W. 911.

525 (Ky.) Where note was shown to be based on a vicious consideration, holder's evi-

dence held insufficient to show want of notice of the infirmity.—Harrison v. Perry, 212 S. W. 911.

**BONDS.**

See Appeal and Error, 395; Attachment, 331, 360, 375; Clerks of Courts, 75; Corporations, 312; Courts, 202, 231; Drains, 60; Eminent Domain, 238; Estoppel, 68; Evidence, 271, 317; Fraud, 11, 59, 65; Garnishment, 89, 108; Guardian and Ward, 13; Injunction, 178; Insurance, 2, 151, 624; Intoxicating Liquors, 45, 88; Judgment, 504; Justices of the Peace, 86, 191; Landlord and Tenant, 291; Levees, 2; Parent and Child, 17; Perpetuities, 7; Pleading, 8; Replevin, 125; Schools and School Districts, 111; Sheriffs and Constables, 157; Time, 10; Waters and Water Courses, 216, 230, 231.

**BOUNDARIES.**

See Deeds, 118; Frauds, Statute of, 70; Navigable Waters, 36; Trespass to Try Title, 41.

**I. DESCRIPTION.**

6 (Tex.Civ.App.) Contention that to trace the footsteps of the original or locating surveyor one must begin at the corner at which he began, or the point ascertained to be approximately near said corner, rather than at a well established and known corner of an adjoining survey called for by the locating surveyor in fixing the boundaries in question, is untenable.—Barrow v. Murray, 212 S. W. 178.

6 (Tex.Civ.App.) If surveyor in locating survey was under belief that the northwest corner and west line were 136 varas west from where they were in fact located upon the ground, and located section in question under such mistaken belief, resulting in a conflict in the calls, the calls for course and distance from the undisputed northwest corner and west line should be adopted.—Houston Oil Co. of Texas v. W. R. Pickering Lumber Co., 212 S. W. 802.

14 (Tex.Civ.App.) The words, "near the river bank," as used in field notes locating the corner of a survey, mean the same as "on the river bank" (citing Words and Phrases, First and Second Series, Near).—Burkett v. Chestnutt, 212 S. W. 271.

**II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.**

33 (Tex.Civ.App.) In action to establish boundary line, plaintiff has the burden of showing not only title, but that boundary line was where he claimed it to be on the ground.—Ball v. McDuffie, 212 S. W. 844.

35(3) (Tex.Civ.App.) In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, held that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant and an ambiguity appeared, court did not err in admitting evidence of surveyors as to the true location of the east boundary line of the leagues.—Barrow v. Murray, 212 S. W. 178.

36(3) (Tex.Civ.App.) In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, held that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant, and an ambiguity appeared, court did not err in admitting original English field notes, maps, and plats of adjoining grants.—Barrow v. Murray, 212 S. W. 178.

The original English field notes and maps prepared by the surveyor to locate surveys are part of the original title, and may be consider-

ed in aid of description contained in the grant, and to supply what is omitted therefrom.—Id. ¶36(3) (Tex.Civ.App.) The plat filed as a part of the description of a survey by the original surveyor, showing a river to be the southern boundary of the survey, is the best of evidence that the river is such boundary in fact.—Burkett v. Chestnutt, 212 S. W. 271.

¶36(5) (Tex.Civ.App.) In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, *held* that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant, and an ambiguity appeared, court did not err in admitting original English field notes, maps, plats, and field notes of adjoining grants, and evidence of surveyors as to the true location of the east boundary line of the leagues.—Barrow v. Murray, 212 S. W. 178.

The original English field notes prepared by the surveyor to locate surveys are part of the original title, and may be considered in aid of description contained in the grant, and to supply what is omitted therefrom.—Id.

¶37(1) (Tex.Civ.App.) Evidence *held* to support finding that there was no conflict between two surveys.—Houston Oil Co. of Texas v. W. R. Pickering Lumber Co., 212 S. W. 802.

¶37(3) (Tex.Civ.App.) In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, evidence *held* to justify court's finding that the east boundary line of leagues was at the place contended for by appellees claiming adversely to plaintiffs.—Barrow v. Murray, 212 S. W. 178.

¶37(5) (Tex.Civ.App.) Evidence *held* to justify finding against defendant's contention that boundary claimed by him had been fixed by agreement between him and plaintiff's predecessor which was binding upon plaintiff.—Bigham v. Stamps, 212 S. W. 775.

## BREACH OF THE PEACE.

See Habeas Corpus, ¶30; Indictment and Information, ¶125; War, ¶4.

## BRIBERY.

See Elections, ¶231.

## BRIDGES.

See Limitation of Actions, ¶55; Municipal Corporations, ¶741; Trial, ¶207, 350; Waters and Water Courses, ¶178, 179.

## BRIEFS.

See Appeal and Error, ¶758-759.

## BROKERS.

See Appeal and Error, ¶58; Deeds, ¶58; Evidence, ¶472; Executors and Administrators, ¶97; Interest, ¶18; Sales, ¶179; Trusts, ¶316; Venue, ¶7.

## IV. COMPENSATION AND LIEN.

¶40 (Mo.App.) If defendant either verbally agreed that plaintiffs should undertake to procure for him a tenant or consented that plaintiffs should endeavor to secure such tenant, and such tenant was procured, and a lease made, defendant would be liable.—Davis v. Geiger, 212 S. W. 384.

¶41 (Mo.App.) If plaintiff brokers were not agents of lessee, but were acting for defendant lessor, who had knowledge of and received benefits of services rendered in inducing lessee to lease property, defendant would be liable unless the dealings he had with plaintiffs and the services performed by the latter were not such as would lead a person of ordinary understanding

under like circumstances to believe that plaintiffs were acting for defendant and expecting to be paid therefor.—Davis v. Geiger, 212 S. W. 384.

¶55(1) (Tex.Civ.App.) Where owner of land did not give a broker exclusive right to sell, at any time before the broker procured and presented a purchaser ready, able, and willing to buy on the owner's terms, the owner had a right to sell the land himself or through another agent.—Irwin v. Moore, 212 S. W. 710.

¶56(1) (Tex.Civ.App.) Where owner of land did not give a broker exclusive right to sell, at any time before the broker procured and presented a purchaser ready, able, and willing to buy on the owner's terms, the owner had a right to sell the land himself.—Irwin v. Moore, 212 S. W. 710.

Where realty broker without exclusive right to sell, on bringing a prospective purchaser to the owner, learned that the owner had agreed to sell through another agent to an unknown party for a certain cash payment down, and had agreed to wait until the evening for the cash, but promised to sell to the broker's client if such cash payment was not made, the owner, despite his promise, had a right when the other party returned without the cash to accept a written contract and sell to them.—Id.

## V. ACTIONS FOR COMPENSATION.

¶86(1) (Mo.App.) In action by broker against purchasers of land, *held*, there was substantial evidence that defendants agreed to pay, in addition to taxes on the land, plaintiff's commission.—Davis v. Greenlee, 212 S. W. 22.

## VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

¶106 (Mo.App.) Evidence *held* to warrant finding that plaintiff's financial and realty agent induced her to make a loan on a deed of trust executed by a realty and investment company in fact owned and managed by the agent.—Foegel v. Woestendiek, 212 S. W. 411.

## BULK SALES.

See Fraudulent Conveyances, ¶47.

## BURGLARY.

See Criminal Law, ¶396; Witnesses, ¶358.

## II. PROSECUTION AND PUNISHMENT.

¶42(1) (Tex.Cr.App.) Where a breaking is shown, the recent possession of property that came from the premises entered, if unexplained, may warrant a conviction.—Jefferson v. State, 212 S. W. 505.

¶42(1) (Tex.Cr.App.) If the state show that a burglary had been committed and that soon thereafter appellant was found in possession of part of the property taken, and no explanation is made by him of such possession, such evidence will support a conviction for burglary.—Smith v. State, 212 S. W. 660.

¶42(3) (Tex.Cr.App.) Evidence that defendant was found in a neighboring town in possession of an overcoat exactly similar to one taken from the burglarized store, that he had on no overcoat the afternoon of the burglary, and carried tools and keys in his cap with which entrance to the burglarized store could be effected, that he tried to secretly dispose of articles corresponding with those taken when the overcoat disappeared, *held*, in the absence of explanation or attempted explanation, sufficient evidence to sustain a verdict of guilty.—Smith v. State, 212 S. W. 660.

¶42(4) (Tex.Cr.App.) In a prosecution for burglary, where the one who broke and entered the premises was not identified, and the only evidence to connect defendant with the offense was his possession of a knife which the owner of the premises identified as having been taken, such evidence will not support a conviction

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

where defendant explained his possession, and the evidence tended to show that the knife was taken from him a few days before the burglary, when he was arrested for fighting.—*Jefferson v. State*, 212 S. W. 505.

⚡45 (Tex.Cr.App.) The sufficiency of the evidence to identify an overcoat found on defendant as having been taken from the burglarized store was one for the jury.—*Smith v. State*, 212 S. W. 660.

## CANALS.

See Property, ⚡4; Waters and Water Courses, ⚡249.

## CANCELLATION OF INSTRUMENTS.

See Judgment, ⚡255, 443, 725, 741, 744; Principal and Agent, ⚡169; Taxation, ⚡535; Waters and Water Courses, ⚡230.

## II. PROCEEDINGS AND RELIEF.

⚡59 (Ark.) Where heirs prevailed in suit to cancel administrator's sale and conveyance of their intestate's homestead, decree against defendants for net amount of rents, after deducting repairs, for the years since the commencement of the action, will not be disturbed on the theory that defendants should not be charged with rents accruing from improvements made by them where there was no evidence as to the rents and profits during the 10 years of defendants' occupation prior to the commencement of the action to furnish data to determine the extent, if any, to which defendants lacked compensation for improvements up to time of commencement of the action.—*Bowman v. Ragsdale*, 212 S. W. 566.

## CARMACK AMENDMENT.

See Carriers, ⚡26, 32, 177, 180, 186.

## CARRIERS.

See Appeal and Error, ⚡742, 1053, 1068; Commerce; Constitutional Law, ⚡189, 284; Evidence, ⚡20, 271, 317, 320, 477, 543; Intoxicating Liquors, ⚡17, 132, 261; Railroads, ⚡136, 275; Sales, ⚡179, 420; Statutes, ⚡47; Taxation, ⚡608; Trial, ⚡194, 251, 252, 256.

## I. CONTROL AND REGULATION OF COMMON CARRIERS.

### (A) In General.

⚡12(5) (Tex.Civ.App.) In order to enjoin enforcement of an ordinance reducing fares to be charged by a street railway, it was not incumbent upon the railway company to show that the reduced rate was confiscatory within the meaning of the federal Constitution, being entitled to restrain its enforcement, where the reduced rate is unreasonable, unjust, and insufficient to maintain a fair return upon the value of the property.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

In a proceeding by a street railway to restrain a city from enforcing an ordinance reducing fares, bill held not to show that reduced fare was unreasonable, unjust, or insufficient to maintain and pay a fair return upon the value of the property.—Id.

⚡18(6) (Tex.Civ.App.) Where, on account of the war, a city passed an ordinance increasing street railway fares, it cannot be said that the court abused its discretion in refusing an injunction to restrain city from enforcing an ordinance repealing the ordinance, where the city officials made affidavit that when armistice was signed most of material necessary for operation of street railway had declined, and that conditions which impelled council to grant temporary relief had ceased to exist, and that the "jitney" menace had then become so nearly obliterated that earnings of company had reached practically the highest point in its ex-

istence, the street railway not having shown in its bill the actual statistics to support its allegation that the normal fare was unreasonable.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

### (B) Interstate and International Transportation.

⚡26 (Mo.App.) Where a shipper delivered an interstate shipment of goods to a carrier and directed it to be sent over a route having an established through charge, the initial carrier was charged with the duty to make necessary notations on the waybill, and the shipper had the right to assume compliance with that duty, and he was not responsible for any misrouting.—*Lancaster v. Schreiner*, 212 S. W. 19.

In an action by a carrier to recover charges, where neither the bill of lading nor the waybill issued by the initial carrier was introduced in evidence, it must be presumed that they designated the routing of the shipment as stated in a receipt issued by such carrier to the shipper, especially in view of Interstate Commerce Act, § 20 (U. S. Comp. St. §§ 8604a, 8604aa), providing a penalty for issuing a false bill of lading.—Id.

A connecting carrier receiving a shipment of goods which was not routed over its line will be charged with knowledge that it was aiding in misrouting the shipment, where the bill of lading and waybill designated the proper route.—Id.

An interstate carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates, and the shipper must make good any deficiency not collected, regardless of the cause, freight rates established by the approval of the Interstate Commerce Commission dominating every shipment and contract, and this rule applies to a through rate made up of the sum of local rates of connecting carrier.—Id.

Where a shipper delivers goods to a carrier, he is entitled to have the goods sent over the cheapest route, and that without even making a selection.—Id.

In case an interstate shipment of freight is misrouted so that the shipper or consignee is compelled to pay a larger amount of freight charges than the established through rate, the carrier or carriers, whether initial or connecting, which are guilty of the misrouting must stand the loss, and cannot collect the excess charges caused by the misrouting, and, if paid by the shipper or consignee, must refund the overcharge, especially in view of Interstate Commerce Rule 214, § (d), relating to misrouting shipments.—Id.

Where shipper ascertained through rate and designated the proper route and paid the correct amount of charges for the through shipment, the initial carrier was responsible for the through shipment, though part of the route was over a connecting carrier, the connecting carrier becoming in a measure at least the agent of the initial carrier to complete the shipment, and there was such contractual relation between the two carriers that the connecting carrier could hold the initial carrier for its lawful share of freight charges.—Id.

The spirit of the Interstate Commerce Act with the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) is to treat connecting lines of transportation as one line so far as the shipper is concerned, and to compel the different companies forming a through route to deal as a unit with the shipper, and to then adjust all differences as to individual liability among themselves, and thus, where a shipment was misrouted and the proper charges were paid to the terminal carrier, such terminal carrier should not be allowed to sue the shipper for the local established charges over the actual route of the shipment, but should be required to settle the matter with the other carriers, because to collect the money from the

shipper would be to collect money for the benefit of an offending carrier, money which must again be returned to the shipper by the offending carrier.—Id.

—32(2) (Tex.Civ.App.) The terminal carrier of an interstate shipment by rail, when sued for damage to the shipment, could not waive provision as to damages of the standard form bill of lading issued as required by an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa).—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

## II. CARRIAGE OF GOODS.

### (F) Loss of or Injury to Goods.

—113 (Tex.Civ.App.) Where shippers having 100 bales of cotton on the platform of a compress company, which was the carrier's agent for shipment, gave orders for their shipment, and after 99 bales had been compressed, inspected, and loaded into two freight cars, a fire destroyed the 49 bales in the second car before the remaining bale could be found and before the bill of lading was signed, there was a sufficient delivery of the cotton to the carrier for transportation to make its liability as a carrier attach at the time of the fire.—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., 212 S. W. 814.

Where, after all except 1 of 100 bales of cotton to be shipped had been delivered on cars of the railroad company for shipment, part of the cotton so delivered was destroyed by fire, that the railroad company kept an inspector to inspect cotton shipments, and would not issue a bill of lading until the entire shipment had been inspected, will not exempt the company from liability for the loss by fire, as the issuance of a bill of lading is not the sole criterion for the carrier's liability.—Id.

—134 (Tex.Civ.App.) Evidence held to show that defendant railway company, sued for the loss of cotton by fire, had in fact accepted such cotton for transportation, to initiate its liability as carrier.—Sugarland Ry. Co. v. Dew Bros., 212 S. W. 190.

—134 (Tex.Civ.App.) In an action against a railroad company for the value of cotton destroyed by fire after having been loaded into one of its cars from the platform of a cotton compress company, to whom shipping instructions over defendant's line had been given, and while search was being made for one more bale on the platform to make the shipment complete, evidence held to sustain a finding that the compress company was defendant's agent for receiving and loading the cotton.—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., 212 S. W. 814.

—136 (Tex.Civ.App.) In an action against a railroad for destruction by fire in transit of cotton shipped over its line, question of value of cotton held for the jury.—Sugarland Ry. Co. v. Dew Bros., 212 S. W. 190.

### (G) Carrier as Warehouseman.

—139 (Tex.Civ.App.) Where a railroad had received cotton for transportation, and its failure to issue bills of lading for and to move it promptly was due to the action of its agent, the conductor of train, for his own convenience, and not for the benefit of the shippers, nor because of lack of information as to destination or assignees, the road's liability was that of carrier, rather than a mere warehouseman, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 709, 710.—Sugarland Ry. Co. v. Dew Bros., 212 S. W. 190.

### (H) Limitation of Liability.

—158(2) (Tex.Civ.App.) In view of Interstate Commerce Commission Rule 13, §§ (a), (b), and (c), unless a shipper declares a value greater than 50 cents per hundredweight, and pays the excess rate for the higher valuation, the lia-

bility of the express company is limited to such lower rate, and that, even though the contract is oral and nothing is said about rates or value, all express charges to be paid at destination.—Wells Fargo & Co. Express v. Bollin, 212 S. W. 283.

### (I) Connecting Carriers.

—177(4) (Tex.Civ.App.) The terminal carrier of an interstate shipment under the standard form bill of lading issued under order No. 787 of the Interstate Commerce Commission of June 27, 1908, pursuant to the Carmack Amendment of the Interstate Commerce Act, held required to respond only for such damages as occurred to the shipment on its own line, despite the consignees' allegation that the terminal and initial carrier were partners, and the amendment of the Carmack Amendment on March 4, 1915 (U. S. Comp. St. § 8604a), subsequent to the contract of shipment.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

—180(5) (Tex.Civ.App.) The consignees of onion sets shipped in interstate commerce could recover from the terminal carrier for damage only on the basis of the bona fide invoice price of the property, including freight charges, if prepaid, as its value as stipulated by the standard form bill of lading, issued by the initial carrier in compliance with order No. 787 of the Interstate Commerce Commission, dated June 27, 1908, pursuant to the Carmack Amendment to the Interstate Commerce Act, despite the consignees' allegation that the terminal and initial carriers were copartners, and despite the amendment of the Carmack Amendment on March 4, 1915 (U. S. Comp. St. § 8604a), subsequent to the contract of carriage.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

—185(1) (Tex.Civ.App.) There is a presumption against a terminal carrier which delivers goods in bad condition that the damage occurred on its own line, though it may have transported the goods over its line in the same through and sealed car in which it received them.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

—185(3) (Tex.Civ.App.) In an action against the terminal carrier of an interstate shipment of onion sets to recover damage by wetting in transit, evidence held sufficient to raise the issue as to whether or not some of the damage occurred before the sets came upon the terminal carrier's line.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

—186 (Tex.Civ.App.) Under a standard form bill of lading issued on an interstate shipment under an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act (U. S. Comp. St. §§ 8604a, 8604aa), such bill providing no carrier should be liable for loss not occurring on its own road or its portion of the through route, if damage to the shipment occurred before it came on the terminal carrier's line, the consignees' damages must be apportioned in their action as against the terminal carrier; the initial carrier having been dismissed for insufficient service.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., 212 S. W. 208.

—187 (Tex.Civ.App.) It was not error for the court, in a suit by a shipper for damages to a shipment of cabbage, to instruct a verdict in favor of a connecting carrier, where there was no evidence of negligence on the part of such connecting carrier.—Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son, 212 S. W. 530.

## III. CARRIAGE OF LIVE STOCK.

—203 (Mo.App.) A case involving a live stock shipping contract executed and fully performed wholly in a particular state is governed and controlled by the laws and decisions of such state.—Strother v. Atchison, T. & S. F. Ry. Co., 212 S. W. 404.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⇒218(1) (Mo.App.) In view of General Statutes of Kansas 1915, § 8435, under the order of May 1, 1901, of the Board of Railroad Commissioners of Kansas, where the intrastate shipper of a stallion in Kansas declared a valuation, and so obtained a lower rate, provision in shipping contract limiting liability to amount of declared valuation was valid, and shipper cannot recover in excess of the amount.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒219(1) (Tex.Civ.App.) Bill of lading, showing destination of live stock beyond issuing carrier's own line and name of consignee under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 716, would not of itself have bound such carrier to transport shipment beyond its own lines.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒219(1) (Tex.Civ.App.) Where a shipment of live stock is interstate, the terms of the original bills of lading issued by the initial carrier cover the entire transportation and the liability of the initial carrier, notwithstanding that new bills of lading are issued by the connecting carrier.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

⇒219(2) (Mo.App.) Acceptance of a stallion for shipment by defendant railroad sued for failure to transport expeditiously after acceptance did not arise merely from the fact that another connecting railroad set the shipper's car on the transfer track connecting the two roads, where it was snowing at the time so as to tie up traffic.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒219(5) (Tex.Civ.App.) Where a connecting carrier transporting a shipment of live stock delivers it to another road acting as its agent, and not as a connecting carrier, to be switched to stockyards for unloading at destination, the initial carrier is liable for injuries sustained during such switching operations; the destination of the shipment being the stockyards, and not the railroad yards.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

⇒227(3) (Tex.Civ.App.) In action against initial carrier for negligent delay in delivery of live stock shipment, where petition did not allege negligence by connecting carrier, but predicated liability on negligence of initial carrier alone, plaintiff could not recover upon proof of connecting carrier's negligence, notwithstanding *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 731, 732.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒228(1) (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914*, art. 732, providing that any connecting carrier of a through shipment may be held liable for negligence of any other connecting line, does not relieve party suing of the burden of alleging and proving the negligence of such other connecting line upon which the cause of action is based.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒228(3) (Mo.App.) In action against carrier of stallion for failure to transport as expeditiously as required by statute after accepting for transportation, inquiry must be confined to ascertaining whether there was a failure to obey the statute after acceptance of the shipment, and the court can consider only evidence in relation to the movement of the shipment from and after it was accepted.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒228(3) (Tex.Civ.App.) In action against initial carrier for negligent delay in delivery of live stock shipment, where there was no allegation of negligence by connecting carrier, evidence tending to show that connecting carrier's failure to deliver shipment sooner was due to congestion of traffic, and not negligence on part of such carrier, was material to show delay by initial carrier, if any, was no proximate cause of loss, and to controvert plaintiff's contention of negligent delay by connecting car-

rier after receiving shipment from initial carrier.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒228(5) (Mo.App.) In action against railroad for having failed to transport a stallion as required by a Kansas statute which called for a speed of 15 miles an hour exclusive of particular stops and causes mentioned, evidence held to justify finding that transportation was not affected as expeditiously as required, and that, after acceptance of stallion for shipment, the railroad was not prevented from transporting expeditiously by unavoidable accidents or snow conditions.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

Evidence held to sustain finding that delay and slowness of transportation after stallion was accepted for shipment caused and enabled a slight cold it contracted to develop into pneumonia which caused its death.—Id.

In an action against a railroad for death of a stallion caused by failure to transport as expeditiously as required by a Kansas statute, slight evidence is sufficient to maintain the shipper's burden of proof as to the cause of death to make a case for the jury.—Id.

⇒228(5) (Tex.Civ.App.) In action for delay in delivery of shipment of horses, shippers' testimony as to death of mare from lockjaw that, "I suppose that this was caused by placing the horses in this hot pen and feeding them on this coarse sedge grass hay," without evidence as to real cause of mare's death, was insufficient basis for judgment of damages, since contraction of lockjaw from such source, being contrary to general rule, should have been established by something more than mere supposition.—*Ft. Worth & R. G. Ry. Co. v. Fleming*, 212 S. W. 233.

⇒228(5) (Tex.Civ.App.) In a shipper's action against a carrier for injuries to a shipment of live stock, evidence held sufficiently definite and certain as to the number and kind of animals injured or killed and the amount of damages to sustain a verdict for plaintiff.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

⇒230(1) (Tex.Civ.App.) In action for delay in delivery of live stock shipment, where there was no testimony of any contract by the carrier to transport the shipment to place of its destination, the court erred in submitting that issue to the jury and authorizing a recovery thereon.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⇒230(10) (Mo.App.) In action by intrastate shipper of a stallion in Kansas, under the declared valuation on which the rate was based, an instruction was erroneous which submitted to the jury the question of whether the shipper knowingly accepted the reduced rate based on the declared value; the shipper's knowledge of the lawful rate being conclusively presumed by Kansas law, which controlled.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒230(11) (Tex.Civ.App.) In a shipper's action for injuries to live stock, it was not error to refuse to instruct that defendant was not liable for injuries occurring while the cattle were being switched by another road at destination, where such road was not acting as a connecting carrier, but as defendant's agent to do the switching.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

⇒230(12) (Tex.Civ.App.) In a shipper's action for injuries to a shipment of live stock, it was not error to refuse to instruct that there was no evidence of the kind or character of the animals killed, and in no event to find value in excess of the cheapest grade of animals in the shipment, where there was evidence that the dead animals were an average of the shipment.—*Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero*, 212 S. W. 981.

**IV. CARRIAGE OF PASSENGERS.****(D) Personal Injuries.**

☞315(3) (Mo.) Where the petition of a passenger on defendant's train averred that a vestibule door was negligently left open, and that as a result of a sudden jar or jolt he was thrown from the car platform onto the tracks, proof of the concurring acts of negligence is essential to recovery.—*Giles v. Michigan Cent. R. Co.*, 212 S. W. 873.

☞320(29) (Tex.Com.App.) Where plaintiff, who had assisted his mother and two children to board defendant's train, was injured while alighting from the train after it had started, on the conductor's refusal to stop the train to let him off after being requested to do so and with notice of plaintiff's object in boarding the train, the issues of negligence and contributory negligence were for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 212 S. W. 155.

**(E) Contributory Negligence of Person Injured.**

☞340 (Mo.) Where deceased got off a car running on the north track and stood in the passageway between tracks while a car was approaching on the south track, and then stepped in front of it and was struck and killed, the motorman in charge of the car which struck had the right to presume that he would not leave a place of safety and thrust himself suddenly in front of the car, and an instruction to that effect, etc., was proper.—*Schall v. United Rys. Co. of St. Louis*, 212 S. W. 890.

☞347(12) (Tex.Com.App.) Where plaintiff, who had assisted his mother and two children to board defendant's train, was injured while alighting from the train after it had started, on the conductor's refusal to stop the train to let him off after being requested to do so and with notice of plaintiff's object in boarding the train, the issues of negligence and contributory negligence were for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 212 S. W. 155.

**CENSORS.**

See Army and Navy, ☞24.

**CENSUS.**

See Evidence, ☞83.

**CERTAINTY.**

See Deeds, ☞139.

**CHANCERY.**

See Equity.

**CHATTEL MORTGAGES.**

See Criminal Law, ☞882, 1189; Exemptions, ☞123; Limitation of Actions, ☞45; Principal and Agent, ☞124; Trusts, ☞356.

**I. REQUISITES AND VALIDITY.****(A) Nature and Essentials of Transfers of Chattels as Security.**

☞12 (Tex.Civ.App.) Where a tenant under a valid contract with owner agrees to pay a crop rent and thereafter actually plants and cultivates the specified crop, the crop may be mortgaged even though at the time of the mortgage the crop has not actually been planted.—*Sanger Bros. v. Hunsucker*, 212 S. W. 514.

☞34 (Mo.App.) A bill of sale whereby the owner of horses assigned and set them over to an indorser on his notes as security was in the nature of a mortgage to secure or protect the indorser, rather than a present transfer of absolute title.—*Miller v. Tallent*, 212 S. W. 73.

☞34 (Tex.Com.App.) Though an instrument may contain all of the terms of an absolute conveyance, if it is apparent from the language used that it was intended as security for a debt,

it will be treated as a mortgage.—*Walker v. Wilmore*, 212 S. W. 655.

A bill of sale covering two race horses, but providing in a separate defeasance clause that, if the seller should within ten days repay the recited consideration, etc., held to be a chattel mortgage, and not a sale; "repay" meaning "to pay back; to refund; as, to repay money borrowed or advanced."—*Id.*

That a bill of sale contains a stipulation that the title to the property is to become absolute on default of the repayment by the seller of the consideration does not prevent the instrument from being construed as a chattel mortgage; such provision being ineffectual, as oppressive to creditors and contrary to public policy.—*Id.*

☞40 (Tex.Com.App.) Where it clearly appears from the language of a bill of sale that it is intended as a mortgage, it is error to leave its construction to the jury.—*Walker v. Wilmore*, 212 S. W. 655.

**III. CONSTRUCTION AND OPERATION.****(D) Lien and Priority.**

☞157(2) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5655, providing that chattel mortgages shall be void as against subsequent mortgages or lienholders in good faith unless forthwith deposited and filed in the office of the county clerk, the burden is upon the subsequent mortgage or lienholder to show by a preponderance of the evidence that he was a bona fide purchaser or holder for value.—*First Nat. Bank v. Todd*, 212 S. W. 219.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5655, providing that chattel mortgages shall be void as against subsequent mortgages or lienholders in good faith unless deposited in the office of the county clerk, proof by subsequent mortgagee of the execution of his mortgage together with the fact that a note was taken for a less amount than an old one evidencing the same indebtedness, and that an extension was granted, was not sufficient to show that the subsequent mortgagee was a bona fide mortgagee for value, there being no showing that the extension was not a mere incidental; such an extension not constituting a new consideration (citing *Words and Phrases*, First and Second Series, Consideration).—*Id.*

In action by a subsequent chattel mortgagee to foreclose a mortgage, where a prior mortgagee intervened, evidence held to warrant a finding that plaintiff was not a bona fide subsequent mortgagee for value, although the mortgage was executed in renewal of an older mortgage, and although the mortgagee advanced the fees or charges for preparing the instrument, and although mortgagor was credited with a balance left over of \$1.60.—*Id.*

**V. RIGHTS AND REMEDIES OF CREDITORS.**

☞197(2) (Mo.App.) Under *Rev. St. 1909*, § 2861, bill of sale whereby owner of horses assigned and set them over to an indorser of his notes as security, which bill was a mortgage rather than a present transfer of absolute title, was void as to execution creditors of the owner, and the horses might be levied upon and sold in satisfaction of judgment against him, though the judgment creditors and purchaser were informed of existence of the bill of sale, not recorded; no possession of the horses having been given the indorser mortgagee.—*Miller v. Tallent*, 212 S. W. 73.

**CHILDREN.**

See Infants; Parent and Child.

**CITIES.**

See Municipal Corporations.

**CIVIL RELIEF.**

See Army and Navy, 434.

**CLERKS OF COURTS.**

See Judgment, 840.

70 (Mo.) Circuit clerk has the right to deposit funds deposited with him under order of court with banks in his name as clerk.—State ex rel. Ridge v. Shoemaker, 212 S. W. 1.

Circuit clerk who has custody of fund deposited with clerk under order of court, and who does not loan the money or receive interest thereon, is not liable for interest on the fund, in view of Rev. St. 1909, §§ 4557-4559.—Id.

If circuit clerk receives a benefit from banks by reason of improper arrangements as to deposit of funds, a party who has deposited money in court, pending litigation, under court's order, is not entitled to recover the benefit; such right being exclusively in the state, under Rev. St. 1909, § 4558.—Id.

75 (Mo.) In action against circuit clerk and his bondsman for interest on fund deposited with clerk upon order of court, evidence held conclusive that clerk did not loan any portion of the fund nor receive interest thereon.—State ex rel. Ridge v. Shoemaker, 212 S. W. 1.

**COAL HOLES.**

See Municipal Corporations, 819.

**COMMERCE.**

See Carriers, 26, 32, 158, 177, 180, 185, 186, 219; Intoxicating Liquors, 261.

**I. POWER TO REGULATE IN GENERAL.**

14 (Tex.Civ.App.) Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, in so far as it interferes with interstate commerce, is made valid by Webb-Kenyon Act (U. S. Comp. St. § 8739).—Gulf, C. & S. F. Ry. Co. v. State, 212 S. W. 845.

**II. SUBJECTS OF REGULATION.**

46 (Tex.Civ.App.) A foreign corporation has the right, without obtaining a permit to do business in the state, to collect a debt incurred in the transaction of interstate commerce, and, having accepted a promissory note of a third person in part payment of such debt, may sue thereon in the state, although the note of the third person, who had dealings with the purchaser of the corporation's goods, had made the note payable direct to the corporation.—Crisp v. Christian Moerlein Brewing Co., 212 S. W. 531.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSIONERS.**

See Animals, 30.

**COMMON LAW.**

See Estates Tail, 2; Indictment and Information, 112; Municipal Corporations, 706; Principal and Agent, 145.

**COMMUNITY PROPERTY.**

See Husband and Wife, 276.

**COMPROMISE AND SETTLEMENT.**

See Contracts, 129.

2 (Mo.App.) Where defendants claimed they owed plaintiff nothing, a payment to him of a certain amount due his principal, which

was paid to plaintiff as a matter of accommodation, with the consent of the principal, held not a compromise.—Davis v. Greenlee, 212 S. W. 22.

5(2) (Mo.App.) Where there is a dispute as to how much is owing under a conceded contract or agreement, and the debtor offers a certain amount in settlement, which the creditor accepts, the creditor is precluded from further complaint.—Davis v. Greenlee, 212 S. W. 22.

**CONDEMNATION.**

See Eminent Domain.

**CONDITIONAL SALES.**

See Sales, 479.

**CONSTITUTIONAL LAW.**

See Courts, 231; Statutes, 5-121.

For validity of statutes relating to particular subjects, see also the various specific topics.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

38 (Mo.) Acts of the Legislature are not void because they violate public policy unless that policy is embodied in some provision of the state or federal Constitution, and the public policy of the state on any given subject is found in the provisions of the Constitution and acts of the Legislature in harmony therewith relating to that subject.—Rutledge v. First Presbyterian Church of Stockton, 212 S. W. 859.

43(1) (Mo.) Where constitutionality of a statute is denied, the question should be raised on record at first opportunity.—Meredith v. Claycomb, 212 S. W. 861.

Where petition in an automobile collision case pleaded and based its case upon an ordinance, defendant waived right to question constitutionality of ordinance, where he did not raise constitutional question until he excepted to instructions given jury.—Id.

48 (Tex.Civ.App.) If an act is susceptible of two constructions, one which makes it valid and the other invalid, that construction should be adopted which will sustain validity.—White v. Fahring, 212 S. W. 193.

It will not be presumed that the Legislature intended to pass an act in violation of the Constitution, and an act will not be so construed when it is susceptible of a different construction.—Id.

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.****(B) Judicial Powers and Functions.**

70(3) (Tex.Cr.App.) Rev. St. 1911, art. 5229, declares that boys under 17 years of age charged with felonies, who do not claim the privilege of trial as juveniles, may be sent to the penitentiary, where the conviction condemned them for a period greater than 5 years, but if for less penalty the confinement shall be in the juvenile school, but the statutes make no such exemption for girls and the discrimination between the two classes, boys and girls, if wrong, is for the Legislature, and not for the courts to remedy.—Slade v. State, 212 S. W. 661.

80(3) (Ark.) Act No. 55 of Acts 1919, creating road improvement district No. 9 in Crittenden county, by section 8 authorizing district commissioners to determine what roads it was most necessary to improve and to file improvement plans, specifications, and plat with county clerk for approval of county court, does not delegate such authority to commissioners as to invalidate act because interfering with county court's constitutional exclusive ju-



risdiction, over public roads of county.—Rhodes v. Barton, 212 S. W. 333.

### VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§188 (Tex.Civ.App.) Where the Legislature, in passing an act giving an employé of the state railroad permission to sue for injury, provided that limitations should not begin to run until the passage of the act, such act was not under the ban interdicting retroactive statutes.—State v. Elliott, 212 S. W. 695.

§189 (Tex.Com.App.) To construe Rev. St. 1911, art. 2178, providing for allowance of attorney's fees in certain suits to recover for damaged freight, as applying to damage claims arising prior to the act becoming effective, would render it retrospective in its operation, and therefore obnoxious to Const. art. 1, § 16.—Freeman v. W. B. Walker & Sons, 212 S. W. 637.

### IX. EQUAL PROTECTION OF LAWS.

§237 (Tenn.) The requirement of Priv. Laws 1917, c. 648, that dogs be registered and wear collars bearing tags for identification is reasonable, and the enactment that dogs not so identified are a public nuisance when found running at large, while dogs so identified are permitted to run at large, is not an arbitrary and unreasonable discrimination.—Ponder v. State, 212 S. W. 417.

### XI. DUE PROCESS OF LAW.

§278(1) (Tex.Civ.App.) The execution of rental contract and assignment thereof by mortgagor does not constitute the taking of mortgagees' property or an impairment of their security within federal Const. Amend. 14, prohibiting taking of property without due process of law.—Sanger Bros. v. Hunsucker, 212 S. W. 514.

§281 (Ark.) The provisions for an appeal, or for appearance and demand for a jury in Drainage District Acts 1905, p. 143, 1909, p. 829, 1911, p. 193, 1913, p. 738, amply protect the rights of owners whose property is taken for construction of ditches for public drainage districts, and constitutes due process of law.—Dickerson v. Tri-County Drainage Dist., 212 S. W. 334.

§284(1) (Ark.) Where the Arkansas tax commission, in fixing the assessment of a railroad, has considered and included elements of value of private property not owned or used by the road or by any one for it as public carrier, the action amounted to an illegal exaction or the taking of property without due process of law.—State v. Mississippi, A. & W. Ry. Co., 212 S. W. 317.

§290(1) (Tex.Civ.App.) Where a city charter provided that on the day fixed for hearing any person owning or having any interest in the property proposed to be assessed for paving should have the right to be heard, held, that the provision of the charter making the lien of paving superior to that of a mortgage was not invalid as working a deprivation of property without due process of law in violation of Const. Tex. art. 1, § 19, and Const. U. S. Amend. 14, § 1.—Wooten v. Texas Bitulithic Co., 212 S. W. 248.

### CONTINUANCE.

See Appeal and Error, §544, 966; Criminal Law, §596.

§7 (Ark.) The granting or refusing of a continuance is within the sound legal discretion of the trial court.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

§12 (Ark.) Court did not abuse its discretion in refusing to grant a motion for continuance, on account of sickness of chief counsel at the time it was necessary to prepare the case for trial, where the case was thoroughly prepared

for trial by other counsel.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

§20(5) (Tex.Civ.App.) Where an action for breach of contract was filed March 22, 1917, and was called for trial July 23d following, when a postponement was obtained until August 23d, at which time continuance because of the absence of one of defendant's attorneys was refused, the trial court did not abuse its discretion where there was nothing to indicate that defendant was deprived of any defense or that it was not ably and fully represented.—Early-Foster Co. v. El Campo Rice Milling Co., 212 S. W. 964.

§25 (Tex.Civ.App.) Refusal of continuance for absence of witness is not error, where it appears that his testimony was not of a character that would have brought about a different result in the trial court.—Parker v. Harrell, 212 S. W. 542.

§26(11) (Tex.Civ.App.) A motion for continuance, based on absence of nonresident witnesses, was properly overruled, where no effort had been made to take their depositions, and their testimony at a previous trial was read.—Sparkman v. Stout, 212 S. W. 526.

§35 (Ark.) Where a case had been continued for one term of the court and the witnesses embraced in the motion all lived beyond the jurisdiction of the court, so that it would have been necessary to take their deposition, and the motion for a continuance was read as testimony to the jury, and the testimony of the witnesses appeared in it as fully as it could have been taken in deposition, the court did not abuse its discretion in refusing to grant a continuance.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

### CONTRACTS.

See Action, §25, 27; Adoption, §17; Alteration of Instruments, §9; Appeal and Error, §1039, 1052, 1062, 1099; Assignments; Bills and Notes; Carriers, §26, 177, 180, 203, 218; Compromise and Settlement; Continuance, §20; Corporations, §406; Courts, §231; Covenants; Customs and Usages, §10; Damages, §40, 80, 122, 190; Equity, §57; Estoppel, §102; Evidence, §317, 410, 424, 429; Exchange of Property; Executors and Administrators, §96; Frauds, Statute of; Homestead, §118; Husband and Wife, §29, 31, 230; Insurance, §85, 146, 618, 807; Interest, §1; Landlord and Tenant, §18, 226; Master and Servant §23, 341, 417; Mines and Minerals, §75, 78; Municipal Corporations, §331, 341, 446; Partnership, §64; Pledges, §30, 56; Principal and Agent, §143, 145, 147, 163; Railroads, §72, 136; Receivers, §116; Release; Sales; Shipping, §54; Specific Performance; Stipulations; States, §191; Statutes, §21; Telegraphs and Telephones, §54, 66; Trial, §121; Vendor and Purchaser; Wills, §400.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials in General.

§10(1) (Ark.) There must be mutuality in a contract to make it enforceable.—Blanton v. Forrest City Mfg. Co., 212 S. W. 330.

§10(1) (Tex.Civ.App.) S., under whom appellees claimed, having accepted from appellants numerous payments of money under the contract, and appellees having incurred at least some expense in pursuance of the contract, the contract is not unilateral in the sense that it is not binding upon appellees.—Edwards v. Roberts, 212 S. W. 673.

§10(1) (Tex.Civ.App.) A contract is not void because it is terminable at the option of one of the parties if there is a valid consideration for such option.—Merchants' Life Ins. Co. v. Griswold, 212 S. W. 807.



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

§10(2) (Tex.Civ.App.) A contract which bound an insurance company to employ an agent for five years, and bound the agent to work for that period unless the contract should be sooner terminated in one of the methods stipulated, and providing for compensation by a percentage on new and renewal insurance premiums, held not void for want of mutuality. —*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

A contract between an insurance company and its agent was not rendered unilateral by a stipulation under which the agent could terminate the contract at his option by giving 90 days' notice in writing of his intention to do so, nor was the contract made thereby one at will on the part of the agent.—*Id.*

§10(4) (Ark.) Contract under which dealer was given exclusive right to sell manufactured products of manufacturer of motor trucks held lacking in mutuality in view of provision that dealer could not recover for loss of profits due to company's failure to fill orders and unenforceable in so far as it was executory, so that dealer could not recover loss of profits due to company's failure to deliver.—*Weil v. Chicago Pneumatic Tool Co.*, 212 S. W. 313.

#### (B) Parties, Proposals, and Acceptance.

§22(1) (Ark.) An offer without acceptance is not a contract. Gratuitous promises or propositions to pay money upon condition or upon happening of some event or the doing of some act, or incurring some expense, loss, or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition.—*Blanton v. Forrest City Mfg. Co.*, 212 S. W. 330.

§28(2) (Tex.Civ.App.) In an action by owner of building against cement company to recover an alleged agreed rebate, the owner's testimony as to his preference for a steel building over a concrete one, and the effort of cement company to induce him to change to concrete, and of his being so induced by confidential rebate agreement held relevant to the issue as to the amount of agreed rebate.—*Southwestern Portland Cement Co. v. Schwartz*, 212 S. W. 977.

#### (C) Formal Requisites.

§40(2) (Tex.Civ.App.) Damages for loss of profits recoverable for breach of contract must be such profits as appear from the contract itself, and not the inability by reason of such breach to carry out some collateral or speculative venture, and the evidence must furnish some standard by which the amount of the profits which would accrue but for the breach can be estimated with some degree of probability.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

§42 (Tex.Civ.App.) The validity of a contract for the sale of cotton was not affected by the fact that the seller did not obtain a copy thereof, and it was not a condition to the buyer's recovery, as for seller's breach, that seller had obtained such copy; the general rule as to delivery of written instruments not requiring that a copy or duplicate of a mutual agreement be delivered to each of the parties to render the agreement effective.—*Templeman v. Closs*, 212 S. W. 187.

#### (E) Validity of Assent.

§94(5) (Tex.Civ.App.) To avoid a contract for fraud or misrepresentation, it is not necessary that the fraud should have been the sole cause of making the contract, but sufficient if the fraudulent representation was relied on to the extent that it was a material factor in inducing the making of the contract.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

#### (F) Legality of Object and of Consideration.

§108(2) (Ky.) Contract to pay for article incident to conduct of popularity contest,

which dealer was instructed candidates should be nominated by his casting fictitious votes, was invalid as based on fraud and deceit of the public, and therefore against public policy; it being immaterial that the complimentary votes were equalized and the contestants put on the same footing.—*Harrison v. Perry*, 212 S. W. 911.

§129(1) (Mo.App.) In the absence of fraud in its various forms or unlawful consideration, settlements to avoid litigation are not contrary to public policy.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§168 (Tex.) Additions ought not to be made to contracts by implication beyond that which is necessary.—*Grubb v. McAfee*, 212 S. W. 464.

### (B) Parties.

§187(1) (Tex.Com.App.) Where one person for valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action thereon.—*Allen v. Traylor*, 212 S. W. 945.

### (C) Subject-Matter.

§189 (Tex.Civ.App.) Where a debtor executed a bill of sale to his creditor, who thereupon agreed to assume and settle all debts, the debtor is not entitled to reimbursement from such creditor of a sum paid by the debtor as damages for fraud; payment of damages for his torts not being contemplated by the agreement.—*Rouss v. Briscoe*, 212 S. W. 756.

## III. MODIFICATION AND MERGER.

§237(2) (Tex.Civ.App.) Where owner of oil leases assigns shares of stock and his interest in certain oil leases in consideration of assignee's agreement to drill test well, and purchaser from assignee of an interest in the contract assumes obligation of drilling well, but after commencing work refuses to continue, whereupon contract is modified so as to permit owner himself to drill well with equipment furnished by such purchaser the preceding contracts and proceedings constitute a sufficient consideration for modified contract.—*Hinton v. D'Yarmett*, 212 S. W. 518.

## V. PERFORMANCE OR BREACH.

§303(3) (Tex.Civ.App.) Neither an individual nor a corporation has the legal right to breach a contract for the reason that it may be to the financial interest of such party to do so, and either is liable for damages caused by a breach of contract, even though it be occasioned by the act of God.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

## VI. ACTIONS FOR BREACH.

§346(10) (Mo.App.) Where plaintiff pleaded a contract to take out of river 100,000 ties during the year, and established by his evidence a contract to take out during the year "about" 100,000 ties, there was not such a variance between the pleading and the evidence as to be fatal, for "about" means "approximately," and is a common word, having no legal or technical significance, and should be given its common meaning of giving a margin for moderate excess in or diminution of a named amount, negating the idea that exact precision is intended.—*Cavender v. B. Johnson & Son*, 212 S. W. 53.

CONVERSION.  
See Trover and Conversion.

## CORPORATIONS.

See Action, ¶25; Carriers; Commerce, ¶46; Contracts, ¶803; Courts, ¶231, 478; Eminent Domain, ¶209; Evidence, ¶65, 441; Limitation of Actions, ¶28, 39; Master and Servant, ¶351; Municipal Corporations; Partnership, ¶64; Pleading, ¶8; Railroads; Street Railroads; Telegraphs and Telephones.

## IV. CAPITAL, STOCK, AND DIVIDENDS.

## (B) Subscription to Stock.

¶80(1) (Tex.Civ.App.) In an action to recover money paid for stock in oil company on the ground of fraudulent representation as to existence of oil under the land, *held*, that the representations of the defendants to the effect that spirits had revealed through a medium the existence of oil in valuable quantities beneath the land in question must, under the circumstances of the case, be regarded as insufficient to form a basis for relief asked by plaintiff.—*Burchill v. Hermismeyer*, 212 S. W. 767.

¶80(4) (Tex.Civ.App.) Where a subscriber seeks to recover money paid for stock on the ground of fraudulent representation as to existence of oil under company's land, that defendants represented that other oil companies were seeking to purchase their property was immaterial if made long after plaintiff had advanced the sums of money he seeks to recover.—*Burchill v. Hermismeyer*, 212 S. W. 767.

¶80(11) (Tex.Civ.App.) To hold that oral agreement whereby defendants agreed to return to plaintiff money paid for stock in an oil company in case oil was not developed operated as a fraud, plaintiff must prove that defendants at the time they made the agreement did not intend to fulfill it, but to deceive plaintiff and induce him to advance the moneys which he seeks to recover.—*Burchill v. Hermismeyer*, 212 S. W. 767.

¶80(12) (Tex.Civ.App.) In action to recover money paid for stock in oil company, general allegations with reference to fraudulent representations as to existence of oil under the land *held* not to sustain judgment in plaintiff's favor.—*Burchill v. Hermismeyer*, 212 S. W. 767.

## (E) Interest, Dividends, and New Stock.

¶152 (Ky.) In suit by stockholder of corporation to compel declaration of dividends out of alleged surplus, petition not alleging denial of access to company's books, or that he was ignorant of facts disclosed thereby, or that they do not truthfully exhibit the company's affairs, did not authorize a judgment for a disclosure of the financial condition and affairs of the company as demanded in petition.—*Bickel v. Henry Bickel Co.*, 212 S. W. 602.

While court's authority to grant relief to stockholder of corporation by compelling declaration of dividends out of unused surplus is clear, such action is only justified on clear and satisfactory proof of company's ability to pay substantial dividends after making reasonable provision for present obligations and anticipated needs for reasonable time in the future.—*Id.*

Bill to compel declaration of dividends out of unused surplus of corporation must allege a demand on directors and that they have refused the relief complainant seeks in court.—*Id.*

Petition by stockholder of corporation to compel declaration of dividends out of unused surplus *held* insufficient to authorize relief; the only facts pleaded being net earnings and dividends for five years, and pleader's conclusion that company had no need for an accumulated "book value" surplus, and an amount wrongfully charged off to depreciation, especially where petition showed that in prosperous years plaintiff had been paid on his investment 80 per cent. in cash dividends and received a 100 per cent. stock dividend.—*Id.*

## V. MEMBERS AND STOCKHOLDERS.

## (D) Liability for Corporate Debts and Acts.

¶232(1) (Tex.Com.App.) Where original incorporators and subscribers, in their affidavit in application for charter, set forth, as fully paying for stock subscribed by them, payments partly in merchandise and partly in cash, they could not claim, as a defense to their liability for the amounts recited as cash, which were, in fact, not paid, that their valuation in such affidavit of the merchandise turned over by them was too low.—*Park v. Rich*, 212 S. W. 947.

¶244(1) (Tex.Com.App.) Where incorporators and subscribers made affidavit that the stock was fully subscribed and paid, caused the corporation's books to so show, had stock issued to themselves as fully paid and nonassessable, and represented, in sale of the stock, that it was fully paid, purchaser paying full face value therefor, but, although they had paid for the stock the amount of merchandise recited in their affidavits, the cash amounts recited as paid were in fact not paid by them, the question of their good faith in their sale of the stock was immaterial on the question of their liability for amounts unpaid on their stock.—*Park v. Rich*, 212 S. W. 947.

## VI. OFFICERS AND AGENTS.

## (C) Rights, Duties, and Liabilities as to Corporation and Its Members.

¶312(6) (Mo.) Stockholders, who were officers, bondholders, and creditors of a railroad corporation had same right as any creditor or stranger to bid for property of corporation at a foreclosure sale, where corporation had not been under their control for some time, having been in the hands of a receiver, and the stock owned by them was valueless and did not enter into purchase price.—*Seebree v. Cassville & W. R. Co.*, 212 S. W. 11.

## VII. CORPORATE POWERS AND LIABILITIES.

## (B) Representation of Corporation by Officers and Agents.

¶399(2) (Tex.Civ.App.) The term "general manager" imports general authority to perform all reasonable things in conducting the usual and customary business of his principal.—*Hinton v. D'Yarmett*, 212 S. W. 518.

¶399(2) (Tex.Civ.App.) While the directors of a corporation, subject to limitations of charter and by-laws, have as much control of its business affairs as an individual has over his own business, their power is no greater.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

¶406(4) (Tex.Civ.App.) General manager of oil-drilling corporation had authority to modify contract under which the corporation was obligated to drill well for owner of oil lease so as to permit owner to drill well with equipment and casing furnished by the corporation.—*Hinton v. D'Yarmett*, 212 S. W. 518.

¶407(1) (Tex.Civ.App.) A private corporation with limited power of operating, drilling for, and producing oil was not liable for medical services rendered its employé upon request of another employé having no authority to bind the corporation.—*Producers' Oil Co. v. Green*, 212 S. W. 68.

¶429 (Tex.Civ.App.) Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with notice of, but in case of controversy have the burden of showing authority assumed to have been in fact possessed.—*Producers' Oil Co. v. Green*, 212 S. W. 68.

¶432(1) (Tex.Civ.App.) Corporations can be bound by their agents only when acting within the scope of their authority, and those dealing with such agents are not only chargeable with

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notice of but in case of controversy have the burden of showing, authority assumed to have been in fact possessed.—*Producers' Oil Co. v. Green*, 212 S. W. 68.

⚡432(12) (Tex.Civ.App.) In physician's action against corporation for professional services rendered employé of the corporation, evidence held insufficient to sustain finding that employé who had made arrangements for the rendition of such services had authority to bind the corporation.—*Producers' Oil Co. v. Green*, 212 S. W. 68.

#### (D) Contracts and Indebtedness.

⚡482(8) (Mo.) Where a court having jurisdiction over subject-matter of a foreclosure proceeding against a corporation and all persons interested confirms a sale, neither inadequacy of price nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the sale.—*Sebree v. Cassville & W. R. Co.*, 212 S. W. 11.

Where a creditor of a corporation was present at a foreclosure sale and bid on the property, made no protest against sale, filed no exceptions to report of commissioner, interposed no objections to confirmation of report, received his distributive share of the proceeds of the sale, and retained the same, he was estopped from complaining a year later that sale was void by reason of fact that purchasers were stockholders; there being no claim of fraud.—Id.

#### (F) Civil Actions.

⚡503(1) (Mo.App.) Under Rev. St. 1909, § 1754, the "venue" of action on a life policy was either in the county where the cause of action accrued or in any county where defendant insurer had an office or agent.—*Roberts v. American Nat. Assur. Co.*, 212 S. W. 390.

### IX. REINCORPORATION AND RE-ORGANIZATION.

⚡579(2) (Mo.) In contemplation of law, shares of stock in a corporation represent the property thereof, and, where at a judicial sale part of the stock is put in as part of a reorganization consideration, it is equivalent to transfer to new corporation of a part of tangible property of old corporation, in so far as creditors are concerned.—*Sebree v. Cassville & W. R. Co.*, 212 S. W. 11.

#### \*\*\*. FOREIGN CORPORATIONS.

⚡642(6) (Tex.Civ.App.) That a foreign corporation reimbursed a purchaser of its goods for rent paid for premises in which the property bought was stored and for money paid for signs advertising the goods, and furnished a truck for the delivery of goods, retaining the ownership, but requiring the purchaser of the goods to pay the expenses of the upkeep, does not conclusively prove that the corporation was transacting business in the state, being only evidence of such fact.—*Crisp v. Christian Moerlein Brewing Co.*, 212 S. W. 531.

⚡648 (Ky.) The tax commission, in determining the proportion of capital stock employed within the state in ascertaining the amount of license tax which plaintiff, nonresident corporation, should pay under Ky. St. Supp. 1918, § 4189c, properly included (1) total amount of purchase, and (2) amount of purchase in the state in its calculations; the term "business transacted," as used in the statute, meaning not only income, but every kind of business transacted within the state.—*P. Lorillard Co. v. Scott*, 212 S. W. 145.

In determining the amount of annual license tax of nonresident corporation under Ky. St. Supp. 1918, § 4189c, the tax commission may not select from a corporation's business transactions only such items as are favorable to the state, but must include all transactions

disclosed by the corporation's report which it is required to make, as was done in the instant case.—Id.

Where all items furnished by plaintiff nonresident corporation for the purpose were included by tax commission in fixing amount of plaintiff's annual license tax under Ky. St. Supp. 1918, § 4189c, plaintiff cannot complain of omission of items of property which might have been included.—Id.

⚡672(4) (Tex.Civ.App.) A petition by a foreign corporation, which contains no allegation that the transaction involved constituted business done in the state, was not subject to a general demurrer because it contained no allegation that plaintiff had a permit to do business in the state.—*Crisp v. Christian Moerlein Brewing Co.*, 212 S. W. 531.

⚡672(7) (Tex.Civ.App.) There being no allegation in plaintiff's petition or in defendant's answer and no evidence to the effect that plaintiff, a foreign corporation, is transacting business or has established a general or special office in the state, it was not necessary for plaintiff to prove that it had obtained a permit to do business in the state pursuant to Rev. St. 1895, arts. 745, 746.—*Houston Oil Co. of Texas v. W. R. Pickering Lumber Co.*, 212 S. W. 802.

### CORRUPT PRACTICES.

See Elections, ⚡151, 158, 223, 231, 273.

### COSTS.

See Appeal and Error, ⚡58, 781, 1116; Courts, ⚡202; Eminent Domain, ⚡230; Insurance, ⚡598; Sequestration, ⚡20; Taxation, ⚡499, 658; Vendor and Purchaser, ⚡285, 292.

#### V. AMOUNT, RATE, AND ITEMS.

⚡173(1) (Tex.Com.App.) Rev. St. 1911, art. 2178, providing that hereafter any person having a valid bona fide claim against any person or corporation for damaged freight may present the same for payment, and, if not paid within 20 days, may sue thereon, and shall be entitled to attorney's fees, it must be presumed that the Legislature intended by the use of the word "hereafter" that the statute should be prospective, so that attorney's fees could not be had in a suit upon a claim which arose prior to the act becoming effective.—*Freeman v. W. B. Walker & Sons*, 212 S. W. 637.

### VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡262 (Tex.Civ.App.) An appellee's suggestion that the appeal was taken for delay opens the entire record for consideration.—*Southwestern Portland Cement Co. v. Schwartz*, 212 S. W. 977.

### COUNTIES.

See Abatement and Revival, ⚡81; Animals, ⚡4, 34, 36; Counties, ⚡169; Courts, ⚡478; Criminal Law, ⚡322; Drains, ⚡60; Evidence, ⚡65; Insurance, ⚡618; Landlord and Tenant, ⚡226; Partnership, ⚡64; Pleading, ⚡248; Sheriffs and Constables, ⚡65, 157; Statutes, ⚡93; Taxation, ⚡40, 499; Venue, ⚡70.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

⚡169 (Ark.) Sheriff's return reciting in detail proper service of notice calling in county warrants for cancellation and reissuance in the manner provided by statute, under Kirby's Dig. §§ 1176, 4923, was sufficient proof of service, notwithstanding accompanying affidavit of publication by publisher of newspaper, instead of "editor, proprietor, manager or chief accountant," as required by section 4924; such affi-

davit not being sole evidence of publication, and not being inconsistent with sheriff's return.—*Good Roads Machinery Co. v. Cox*, 212 S. W. 87.

## COURTS.

See Appeal and Error, ¶23, 32, 51, 58, 65, 635, 719, 739, 1090, 1097, 1114, 1170; Clerks of Courts; Criminal Law, ¶112; Executors and Administrators, ¶262, 349; Habeas Corpus, ¶3; Judgment, ¶18, 91, 489; Justices of the Peace; Landlord and Tenant, ¶291; Municipal Corporations, ¶63; Prohibition; Taxation, ¶893; Trial, ¶133.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

¶23 (Mo.) Jurisdiction cannot be conferred by consent.—*City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S. W. 887.

¶26 (Tex.Civ.App.) Where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties.—*U. S. Fidelity & Guaranty Co. v. Davis*, 212 S. W. 239.

¶37(1) (Mo.) Jurisdiction cannot be waived.—*City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S. W. 887.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (D) Rules of Decision, Adjudications, Opinions, and Records.

¶92 (Mo.) Where only point in issue was the nature of the estate a mother with six children took under a deed providing that the estate upon her death without issue was to descend to her heirs at law, court's observation that she would have taken a fee if no children had been born to her was mere dictum.—*Gillilan v. Gillilan*, 212 S. W. 348.

¶92 (Mo.) In view of the fact that the duty of the court is to construe the law as it exists in cases brought within its jurisdiction, it is unfair to give permanent and controlling effect to casual statements in opinions outside the scope of the real inquiry.—*Rauch v. Metz*, 212 S. W. 353.

¶93(1) (Ky.) A decision of the Court of Appeals construing a deed of certain lands estopped such court, by the rule of stare decisis, to otherwise hold in another suit concerning the same lands, but did not estop the court from construing differently a similar deed concerning other lands as against one who acquired his interest before the opinion in question was delivered, as his property rights could not have vested upon confidence in the correctness of such opinion.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

¶97(6) (Mo.) In the construction of a Missouri statute, where no federal question arises, Missouri courts are not bound by an opinion of the Supreme Court of the United States.—*Scales v. National Life & Accident Ins. Co.*, 212 S. W. 8.

### V. COURTS OF PROBATE JURISDICTION.

¶200¼ (Mo.App.) While the probate court, under the Constitution and statute, has no equity jurisdiction, yet, as Rev. St. 1909, § 4056, confers jurisdiction on the probate court over all matters pertaining to probate business, that tribunal has jurisdiction in matters pertaining to probate business, where the issue can be settled at law and is simple, and in such a case the probate court may even invoke equitable principles.—*Green v. Strother*, 212 S. W. 319.

A proceeding to classify judgment against an estate, where judgment was actually rendered

against deceased during his lifetime under a wrong name, or an alias name, is not one involving a complicated matter or a proceeding in equity, and the probate court has jurisdiction to determine the matter.—Id.

Rev. St. 1909, § 197, providing that judgment may be obtained against an estate in some court of record in the ordinary course of proceeding, and may thereafter be established in the probate court against the estate, does not prevent a judgment creditor from proceeding directly in the probate court to have allowed and classified against an estate a judgment obtained against deceased under wrong name; the statute not limiting the powers of the probate court, but merely giving a party option to proceed first in the court of record.—Id.

As the verdict, under Rev. St. 1909, § 2119, cures the defect of misnomer, a judgment rendered against deceased, who was served in a wrong name, may be allowed and classified by the probate court, though under sections 1848, 1851, 2119, and 2120 the circuit court alone could correct the misnomer, so that the judgment would import notice to persons buying real estate from the judgment debtor.—Id.

¶200½ (Tex.Com.App.) The county court is without jurisdiction to determine title to the personal property of a decedent on the application of his son to have the administrator deliver the property to him.—*Brown v. Fleming*, 212 S. W. 483.

¶202(5) (Ark.) Failure to file an affidavit for appeal before an appeal was granted by a probate court is waived, where the other party proceeds to the trial in the circuit court without objection on that account.—*Free v. Maxwell*, 212 S. W. 325.

A bond on appeal from probate court to circuit court, required by Acts 1909, p. 956, bound appellant and her sureties for all costs that might accrue, either in the circuit or the Supreme Court of the state, and it was unnecessary to give an additional bond as a prerequisite to granting of an appeal to the Supreme Court.—Id.

### VI. COURTS OF APPELLATE JURISDICTION.

#### (B) Courts of Particular States.

¶231(5) (Mo.) Where materialmen filed petitions against construction company and city asking that balances due them be ordered paid them by city out of amount retained by city under construction contract, and, from judgment ordering such sums paid and adjudging that such payments should be in satisfaction pro tanto of another judgment by the construction company against the city, the construction company alone appealed, the Supreme Court had no jurisdiction of the appeal, the amount involved being insufficient to confer jurisdiction; the city not being a party thereto, and being a party to the cause below solely as stakeholder.—*Hilton v. Universal Const. Co.*, 212 S. W. 867.

¶231(5) (Mo.) Since for the Supreme Court to have appellate jurisdiction on the sole ground that a political subdivision of the state is a party the political subdivision, in its capacity as such, must be a real party in interest, the Supreme Court has no jurisdiction, on such ground, of a suit, against a construction company and its surety, by a city at the relation of a materialman, based on bonds executed by defendants to the city to secure paying contract; the city being but a nominal party, having no control of the proceeding, and incurring no liability, even for costs, under Rev. St. 1909, § 2778.—*City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S. W. 887.

¶231(22) (Mo.) Where constitutional question raised in the trial court was not presented, urged, or briefed in the Supreme Court, held that an appeal will not lie to the Supreme

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

Court on the ground of a constitutional question.—*Kansas City Breweries Co. v. Markowitz*, 212 S. W. 849.

⇒231(23) (Mo.) A constitutional question must be raised at the first opportunity, and the constitutional provision alleged to be violated pointed out; hence mere contention that grading tax bills issued against property were invalid and worked a confiscation of the property, because in excess of its value, raises no constitutional question, which would give the Supreme Court jurisdiction.—*West v. Dyer*, 212 S. W. 880.

⇒231(51) (Mo.) In consolidated suits against construction company and its surety by a city on relation of a materialman, based on bonds executed by defendants to the city to secure paving contract, in which suits judgment was rendered for relator for the aggregate penalties of the bonds, which was \$7,940.83, and execution awarded for the total damages assessed in relator's favor, amounting to \$3,857.56, the Supreme Court had no appellate jurisdiction; the latter amount being the amount in dispute as determinative of jurisdiction of appeal on ground of amount involved.—*City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S. W. 889.

⇒231(52) (Mo.) Where demurrer was sustained to a petition alleging that plaintiff recovered a judgment for about \$1,600 against the predecessor of the defendant corporation, that the judgment debtor conveyed its property to a corporation, which conveyed to defendant, that the conveyances were without consideration and for the purpose of preventing enforcement of the judgment, and praying the appointment of a receiver and dissolution of defendant, the Supreme Court was without jurisdiction upon appeal to review the matter, for the amount in controversy was less than \$7,500, and the prayer should be disregarded; the jurisdiction of the Supreme Court depending on the amount in controversy as shown by the entire petition and not the relief prayed.—*Walker v. Ozark Coopersage & Lumber Co. of New Jersey*, 212 S. W. 881.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (A) Courts of Same State, and Transfer of Causes.

⇒475(2,3) (Tex.Civ.App.) In suit on vendor's lien notes, provision of a consent judgment directing sale of the interest of a decedent's estate through the district court, which had taken jurisdiction of the entire controversy as to all parties having any interest to be affected by the foreclosure was not void merely because administration of the estate was pending in the probate court.—*Wyss v. Bookman*, 212 S. W. 297.

⇒478 (Tex.Civ.App.) Rev. St. 1911, art. 2146, authorizing suits against receivers without first obtaining leave of the court appointing such receivers, does not, in view of article 2137, confer upon one court the right to enforce a judgment out of property in the hands of receiver of another court, or to interfere with the custody and control of such property.—*Mudge v. Hughes*, 212 S. W. 819.

One court has no right to interfere with the possession by another court of property for which it has appointed a receiver.—*Id.*

In view of Rev. St. 1911, arts. 2132 and 2133, the district court of one county has no right to interfere with the management and control of the corporation being administered by a receiver appointed by district court of another county.—*Id.*

District court of one county has no jurisdiction of suit and to compel receiver of irrigation company to supply water upon terms other than those imposed by order of district court of another county appointing receiver, and to

have such terms declared unreasonable, and to enjoin enforcement thereof, since an order granting such relief would constitute an interference with the possession, control, and management of the receivers appointed by another court.—*Id.*

## COVENANTS.

See Appeal and Error, ⇒1033; Principal and Agent, ⇒145.

## II. CONSTRUCTION AND OPERATION.

### (D) Covenants Running with the Land.

⇒84 (Mo.App.) In an action to recover from a defendant, not named in the deed damages for breach of a covenant of warranty, facts held sufficient to show that the grantor was not the beneficial owner of the land, and that the defendant was beneficial owner thereof, holding the record title in grantor's name.—*Donner v. Whitecotton*, 212 S. W. 378.

## IV. ACTIONS FOR BREACH.

⇒114(1) (Mo.App.) Where there was a breach of deed covenant, a petition setting out such facts together with facts showing the defendant to have been an undisclosed principal in the sale, but nowhere alleging what plaintiff paid for the land, nor the value thereof, nor the value per acre of the land lost as compared with the rest, is insufficient for failure to set forth proper allegations as a foundation for application of the proper measure of damages.—*Donner v. Whitecotton*, 212 S. W. 378.

⇒116 (Tex.Com.App.) In suit for breach of warranty of title, allegations in the petition that the price paid for all the land purchased by plaintiff was \$8,000, and that the price paid for the land to which the title failed was \$25 an acre, held sufficient to admit evidence of the price paid for all the land, whether in money or property, and of the proportional part of such price represented by the land lost.—*Northcutt v. Hume*, 212 S. W. 157.

⇒118 (Tex.Com.App.) In an action for breach of warranty of title, the recitals in each of the purchasers' deeds of \$8,000 as consideration being prima facie evidence of the value put upon the property exchanged for the conveyances, the grantor or seller had the right to show that the consideration expressed in the deeds was not the real consideration, but the burden of proof was on him to show the real consideration.—*Northcutt v. Hume*, 212 S. W. 157.

In an action for breach of warranty of title of land conveyed in an exchange of properties, there is no presumption, on the issue of damages, plaintiff offering the deeds to him which recite a consideration for the conveyances of \$8,000, that either party obtained an advantage in the trade.—*Id.*

⇒122 (Tex.Com.App.) In action for breach of warranty of title, the recitals in each of the two deeds to plaintiff that the consideration for the conveyance was \$8,000, though placed therein at his suggestion, were prima facie evidence of the value put upon the property, real and personal, which he gave for the conveyances.—*Northcutt v. Hume*, 212 S. W. 157.

In an action for breach of warranty of title of land conveyed in an exchange of properties, evidence held sufficient to show that the price paid by plaintiff warrantee to the warrantor for all the land conveyed to him was \$8,000.—*Id.*

In an action for breach of warranty of title of lands conveyed in an exchange of properties, evidence held sufficient to show the proportional part of the price paid by plaintiff warrantee represented by the part of the land to which title failed, though there was no direct evidence that the land was all of similar quality or equal value.—*Id.*

⇒130(5) (Mo.App.) In an action for damages for breach of a deed covenant as to part of the

land conveyed, in estimating the average value per acre, it was erroneous to add the \$3,500 deed of trust which plaintiff paid off to the \$7,000 agreed exchange valuation, when the property plaintiff deeded also had a \$3,500 mortgage against it.—*Donner v. Whitecotton*, 212 S. W. 378.

§130(7) (Mo.App.) Where there was a breach of deed covenant in an action therefor against an undisclosed principal, the measure of damages must be the extent to which the defendant was enriched at the expense of the purchaser, who bought from him through his agent.—*Donner v. Whitecotton*, 212 S. W. 378.

§130(7) (Tex.Com.App.) For breach of warranty of title the warrantee is entitled to recover the price paid for the conveyances, and where the price is paid in property, the value of the property is admissible.—*Northcutt v. Hume*, 212 S. W. 157.

In an action for breach of warranty of title of property conveyed in an exchange of properties, evidence as to the value of the property given by either party in exchange for property of the other is admissible to show the true consideration paid by the warrantee.—*Id.*

## CRIMINAL LAW.

See Abduction, §9-16; Animals, §4, 34, 36; Arrest, §68; Bail, §64; Burglary; Commerce, §14; Constitutional Law, §70; Embezzlement; Extradition; False Pretenses; Forgery; Habeas Corpus, §3, 30; Homicide; Indictment and Information; Infants, §68, 69; Injunction, §102, 118; Intoxicating Liquors; Larceny; Parent and Child, §17; Rape, §40; Receiving Stolen Goods; War, §4; Witnesses.

### V. VENUE.

#### (A) Place of Bringing Prosecution.

§112(9) (Ky.) Receiving stolen goods is a distinct offense from larceny of the same goods, and the circuit court of the county where the goods are received has jurisdiction to try the offense; the receiving of the goods constituting the crime.—*Klotz v. Cook*, 212 S. W. 917.

## VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§211(2) (Tex.Cr.App.) In view of Rev. St. 1911, art. 347, giving assistant county attorney the same authority to administer oath as county attorney possesses, complaint was invalid where jurat recited that complaint was sworn to and subscribed before the county attorney by his deputy (following *Arbetter v. State*, 79 Tex. Cr. R. 487, 186 S. W. 769).—*Goodman v. State*, 212 S. W. 171.

§211(2) (Tex.Cr.App.) A complaint reciting: "Sworn to and subscribed by R. A. D. [the affiant], before me, on this 18th day of October, 1918, \_\_\_\_\_, County Attorney of Ellis County, Texas. W. H. F., Assistant County Attorney, Ellis County," etc., sufficiently showed the affidavit was taken by W. H. F., the assistant county attorney.—*Dickerson v. State*, 212 S. W. 497.

§211(4) (Tex.Cr.App.) A complaint which charged that defendant, "an adult male, did unlawfully commit aggravated assault in and upon the person of one Mary Loo D., the said \_\_\_\_\_ then and there being a female," sufficiently charged that the person assaulted was a female.—*Dickerson v. State*, 212 S. W. 497.

§225 (Mo.) The rule that a defendant will be held to have waived preliminary examination where he pleads the general issue of not guilty is based on the fact that the right to a preliminary examination is a matter which goes to the regularity of the previous proceedings, and not to the merits of the trial.—*State v. Ferguson*, 212 S. W. 339.

## X. EVIDENCE.

### (A) Judicial Notice, Presumptions, and Burden of Proof.

§322 (Tex.Cr.App.) That free dipping vats have not been provided by the county does not excuse an owner of cattle from refusing to obey the tick eradication statute; the presumption being that the commission would refuse to order cattle dipped in any vat where exorbitant charges were attempted.—*Emberline v. State*, 212 S. W. 952.

### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§338(4, 5) (Ark.) In homicide prosecution, a letter, reflecting upon character of defendant's daughter, was inadmissible, where no effort was made to prove that deceased had written letter, or that defendant suspected him, prior to the time of the killing, of having any connection with it.—*Walker v. State*, 212 S. W. 319.

§351(3) (Tex.Cr.App.) In a prosecution for the larceny of an automobile, evidence that defendant, while in custody under a charge in the county court for taking the car broke jail and fled, was admissible in the district court; the cases not being separate or distinct, but involving the same act and the same facts.—*Torrence v. State*, 212 S. W. 957.

§363 (Ark.) Res gestæ are the acts talking for themselves, not what people say when talking about the act, and the words must stand in immediate causal relation to the act, unbroken by interposition of voluntary, individual wariness seeking to manufacture evidence for itself.—*Walker v. State*, 212 S. W. 319.

§364(5) (Ark.) In homicide prosecution, testimony that defendant, after having chased deceased across street, stated, upon returning, that he had followed deceased to prevent him from getting a club was not admissible as part of res gestæ.—*Walker v. State*, 212 S. W. 319.

### (C) Other Offenses, and Character of Accused.

§369(2) (Ky.) Where an indictment for unlawfully detaining a woman is based on two distinct offenses, the state electing the one upon which it would rely, evidence as to the other can only be considered as corroborating the proof of defendant's guilt of the offense for which he is being tried.—*Gravitt v. Commonwealth*, 212 S. W. 430.

### (D) Materiality and Competency in General.

§396(1) (Tex.Cr.App.) Where defendant's brother saw the homicide, and defendant testified on cross-examination that he didn't care if his brother was a witness, for, if he told the truth, it would not injure his case, but that the brother was crazy about half the time, such testimony did not warrant the introduction of a written statement by defendant's brother.—*Dunn v. State*, 212 S. W. 511.

§396(2) (Tex.Cr.App.) Where part of a conversation is brought out and the remaining portion of the conversation is necessary to make the preceding part clear or to explain the same, the remainder is admissible.—*Layne v. State*, 212 S. W. 161.

In a prosecution for burglary, an alleged accomplice who testified against defendant, and to the effect that, when his house was searched, he escaped to the residence of defendant in which were present defendant's wife and sister, should not, because asked what they said when told his house was being searched, have been allowed to testify that the women later requested him to run off so that defendant could escape.—*Id.*

### (E) Best and Secondary and Demonstrative Evidence.

§400(3) (Tex.Cr.App.) In a prosecution for violating the tick eradication statute, it was

error to permit the county judge orally to testify as to the fact of the publication of the result of the election for taking up the work of tick eradication in the absence of a showing that such proof was necessary because of the loss or destruction of the certificate provided for by section 7 of the act (Vernon's Ann. Civ. St. Supp. 1918, art. 7314e).—*Emberline v. State*, 212 S. W. 952.

In a prosecution for violating the tick eradication statute, evidence as to what the order by the live stock sanitary commission, directing the defendant to dip his cattle contained, was inadmissible; the order itself being the best evidence.—*Id.*

#### (F) Admissions, Declarations, and Hearsay.

⚡419, 420(2) (Tex.Cr.App.) It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement.—*Dunn v. State*, 212 S. W. 511.

⚡419, 420(8) (Tex.Cr.App.) Evidence of a witness that M., in attendance upon the trial, had told the witness that defendant had admitted to M. that he (defendant) had killed deceased, was hearsay and inadmissible.—*Burkhalter v. State*, 212 S. W. 163.

⚡419, 420(12) (Tex.Cr.App.) It was improper for the state to offer a purported written statement by defendant's brother who saw the homicide for such statement was hearsay.—*Dunn v. State*, 212 S. W. 511.

#### (H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

⚡429(1) (Tex.Cr.App.) In a prosecution for violating tick eradication statute, a supplemental proclamation of the Governor, declaring the county under tick quarantine, was not inadmissible as against the objection that it did not appear that the proclamation had been published in any newspaper.—*Emberline v. State*, 212 S. W. 952.

⚡430 (Tex.Cr.App.) In a prosecution for violating tick eradication statute, a supplemental proclamation of the Governor, declaring the county under tick quarantine, was not inadmissible as against the objection that it did not appear that the proclamation had been published in any newspaper, although it would have been inadmissible on objection that it was not a copy certified by the secretary of state, as prescribed by section 9 (Vernon's Ann. Civ. St. Supp. 1918, art. 7314g) of that statute.—*Emberline v. State*, 212 S. W. 952.

#### (I) Opinion Evidence.

⚡448(12) (Ark.) In homicide prosecution, testimony that witness heard deceased make statement indicating ill feeling toward defendant was inadmissible, being merely an opinion of the witness that such statement indicated ill feeling, which is inadmissible as evidence of the fact.—*Walker v. State*, 212 S. W. 319.

⚡449(1) (Tex.Cr.App.) In a prosecution for murder, where there was some conflict in the testimony as to whether two shots were fired simultaneously, one by deceased and the other by accused, and as to who fired first, a witness may be allowed to testify that an automatic pistol of the caliber of that of deceased, in shooting smokeless powder, would make very little noise.—*Berrian v. State*, 212 S. W. 509.

⚡450 (Ky.) The opinion of a witness in a criminal prosecution as to the facts of the case are not competent for any purpose.—*Gravitt v. Commonwealth*, 212 S. W. 430.

⚡451(3) (Mo.) Testimony as to the accused's appearance immediately after firing the fatal shot, held not objectionable as mere conclusions or opinions, the facts being otherwise incapable of exact description.—*State v. Ferguson*, 212 S. W. 339.

⚡465 (Ark.) Nonexpert witness could testify to mental condition of deceased in making dying statement, after having stated facts upon which his opinion was based.—*Walker v. State*, 212 S. W. 319.

⚡485(1) (Mo.) The state, in putting a hypothetical question to an expert witness, may frame it in accordance with the state's theory of the evidence, and it is not essential that the facts should be stated as they actually exist, nor is the question improper because it includes only a part of the facts in evidence.—*State v. Ferguson*, 212 S. W. 339.

#### (K) Confessions.

⚡517(2) (Tex.Cr.App.) In a prosecution for theft of an automobile subsequently recovered from a third party who claimed to have purchased it, a confession by defendant was admissible where it led to the finding of the stolen property, notwithstanding that the number and means of identification were obtained from the sheriff of another county.—*Torrence v. State*, 212 S. W. 957.

⚡518(2) (Tex.Cr.App.) An alleged oral statement, made by defendant when he was in the presence of two officers who later took him into custody, that he was guilty held not admissible as a confession, and no warning having been given.—*Bonatz v. State*, 212 S. W. 494.

⚡519(3) (Tex.Cr.App.) As it is not necessary to make an arrest in formal words, and the fact of arrest can be shown by surrounding facts and circumstances, a defendant, who objected to the admission of a purported confession made at a time he was in the presence of two officers who would not have allowed him to escape, must be deemed under arrest.—*Bonatz v. State*, 212 S. W. 494.

⚡530 (Tex.Cr.App.) An alleged oral statement, made by defendant when he was in the presence of two officers, who later took him into custody, that he was guilty, not having been reduced to writing, and signed in the presence of two disinterested witnesses, held not admissible as a confession, and no warning having been given.—*Bonatz v. State*, 212 S. W. 494.

⚡530 (Tex.Cr.App.) In a prosecution for the larceny of an automobile, an oral confession by defendant which led to the finding of the stolen property was admissible, notwithstanding a subsequent written confession.—*Torrence v. State*, 212 S. W. 957.

#### (M) Weight and Sufficiency.

⚡561(1) (Tex.Cr.App.) The state must make out its case by competent evidence beyond a reasonable doubt.—*Berrian v. State*, 212 S. W. 509.

### XI. TIME OF TRIAL AND CONTINUANCE.

⚡596(1) (Tex.Cr.App.) The denial of a second motion for continuance filed by defendant, who was accused of murder, on the ground of the absence of a witness to whom deceased made threats, which were communicated by the witness to defendant, was error, and cannot be sustained on the theory that the testimony of such witness was merely cumulative because other witnesses testified to threats; it appearing the absent witness was the only one who had communicated the threats, and that defendant had to rely solely on his testimony as to the communication thereof.—*Dunn v. State*, 212 S. W. 511.

### XII. TRIAL.

#### (B) Course and Conduct of Trial in General.

⚡636(7) (Ark.) It is reversible error for court to communicate with jury, in the absence of defendant, any directions in regard to their verdict.—*Kindrix v. State*, 212 S. W. 84.

⚡655(5) (Ark.) Court's facetious remark, following improper argument by defendant's coun-



sel, that "you can't keep S. (defendant's attorney) from testifying with 40 log chains," was not prejudicial to defendant; the facetious character of the remark being apparent, and the argument to which it had reference having been made by defendant's attorney.—Walker v. State, 212 S. W. 319.

☞656(5) (Tex.Cr.App.) The court should not, in sustaining objection to evidence that sister-in-law of a witness whose character was sought to be impugned had given birth to three illegitimate children, have remarked that evidence was not admissible if woman had 700, meaning 700 illegitimate children; the statutes explicitly prohibiting the court from indicating his view of the evidence, and making the jury the exclusive judge of facts, weight of testimony, and credibility of witnesses.—Burkhalter v. State, 212 S. W. 163.

#### (C) Reception of Evidence.

☞666(3) (Mo.) It is not compulsory on the state to examine all the witnesses subpoenaed, but, to sustain a conviction on account of the sufficiency of the evidence, it is only necessary that those examined give substantial testimony in support of the required material facts.—State v. Ferguson, 212 S. W. 339.

☞666(4) (Tex.Cr.App.) The state is not bound to introduce all or any of the eyewitnesses to a transaction.—Berrian v. State, 212 S. W. 509.

☞673(5) (Ky.) Where an indictment for unlawfully detaining a woman is based on two distinct offenses, the state electing the one upon which it would rely, the court must admonish the jury that evidence as to the other can only be considered as corroborating the proof of defendant's guilt of the offense for which he is being tried.—Gravitt v. Commonwealth, 212 S. W. 430.

☞676 (Ark.) In a prosecution for manufacturing whisky, court did not abuse its discretion in limiting the number of witnesses for the purpose of impeaching testimony of prosecuting witness to five in number, especially where he announced his intention to so do before any of the witnesses were called.—Kindrix v. State, 212 S. W. 84.

☞678(1) (Ky.) Where an indictment for unlawfully detaining a woman was based on two distinct offenses, the state should be required to elect, but, after electing the one upon which it would rely, evidence as to the other can only be considered as corroborating the proof of defendant's guilt of the offense for which he is being tried, and the court must so admonish the jury.—Gravitt v. Commonwealth, 212 S. W. 430.

☞678(4) (Ky.) Where an indictment for unlawfully detaining a woman is based on two distinct offenses, the state electing the one upon which it would rely, evidence as to the other can only be considered as corroborating the proof of defendant's guilt of the offense for which he is being tried.—Gravitt v. Commonwealth, 212 S. W. 430.

#### (D) Objections to Evidence, Motions to Strike Out, and Exceptions.

☞695(6) (Ky.) Where a witness in a criminal prosecution has given evidence the greater part of which is competent, the entire testimony of such witness will not be excluded in the absence of an objection designating that part of the evidence which is incompetent.—Gravitt v. Commonwealth, 212 S. W. 430.

#### (E) Arguments and Conduct of Counsel.

☞699 (Ark.) It is court's duty to prevent counsel from transcending the bounds of legitimate argument and to reprimand or punish counsel who make improper remarks, and to instruct jury not to consider such remarks.—Walker v. State, 212 S. W. 319.

☞703 (Ark.) In a prosecution for selling intoxicating liquor, the prosecuting attorney's opening statement that "prosecuting witness,

after making inquiries and having information as to the defendant's selling whisky," etc., presumably leading up to an outline of the witness' testimony, and not as an attempt to introduce hearsay evidence, and apparently in good faith, must be held not misconduct of counsel; good faith being the general test in passing upon preliminary statements in criminal cases to the jury.—Nelson v. State, 212 S. W. 93.

☞703 (Mo.) In trial for murder, where the state made an opening statement to jury, as required by Rev. St. 1909, § 5231, and defendant then made a statement of facts, it was reversible error to permit prosecuting attorney to make a reply statement defending character of deceased and showing that he had not of his own motion invaded plaintiff's home, and that after he was shot he could not advance toward defendant, as alleged.—State v. Stewart, 212 S. W. 853.

☞706 (Ark.) The trial court has plenary power to compel the attorneys of the parties to observe the well-established rules for the production of evidence.—Walker v. State, 212 S. W. 319.

☞706 (Tex.Cr.App.) It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement, and the impropriety was not cured because the attorney for the prosecution brought out the facts by an inquiry as to whether defendant would consent to the introduction of the statement.—Dunn v. State, 212 S. W. 511.

☞719(1) (Ark.) Statement by defendant's counsel during argument that, when he had asked certain witnesses if deceased or his wife had written letter reflecting upon character of defendant's daughter, deceased's wife nodded her head so that jury could have seen it was improper.—Walker v. State, 212 S. W. 319.

☞721(6) (Tex.Cr.App.) Where defendant was jointly indicted with her husband for murder, and a severance was granted, state attorney's argument asking why defendant, if not guilty of murder, did not call her husband, who was then in court, and as to why she did not call witnesses to prove her innocence, allowed over objection, and without reprimand or instruction to disregard it, violated the statute as being a direct reference to failure of defendant to testify.—Ross v. State, 212 S. W. 167.

☞721½(2) (Tex.Cr.App.) Where defendant was jointly indicted with her husband for murder, and a severance was granted, state attorney's argument asking why defendant, if not guilty of murder, did not call her husband, who was then in court, and as to why she did not call witnesses to prove her innocence, allowed over objection, and without reprimand or instruction to disregard it, violated the statute, as being a direct reference to failure of both defendant and her husband to testify.—Ross v. State, 212 S. W. 167.

☞721½(2) (Tex.Cr.App.) In a prosecution for homicide, where defendant stated that his brother, who was present, was crazy about half the time, and refused the offer of the prosecution to introduce a purported written statement by the brother, argument of the prosecutor that it was a fair inference from the fact the brother did not testify, and that defendant would not agree for his written statement to be introduced, that it was adverse to him, was improper, and aggravated the impropriety of the attempt by the prosecution to get the statement before the jury.—Dunn v. State, 212 S. W. 511.

☞730(7) (Ark.) Where defendant's counsel during argument made improper remark, court's facetious statement, upon prosecutor's objection that he did not want defendant's counsel to testify, that "you can't keep S. (defendant's attorney) from testifying with 40 log chains," was improper; and court, instead



of allowing argument to proceed with facetious remark, should have promptly reprimanded counsel and instructed jury not to consider his remarks.—Walker v. State, 212 S. W. 319.

**(F) Province of Court and Jury in General.**

☞741(6) (Tex.Cr.App.) Direct evidence is not per se better than circumstantial evidence.—Berrian v. State, 212 S. W. 509.

☞755½ (Mo.) The trial court cannot properly comment on the evidence or tell the jury what presumption or conclusion should be drawn from any particular fact, but to aid jury in reaching a correct conclusion it may direct their attention to particular facts in evidence.—State v. Stewart, 212 S. W. 853.

☞759(1) (Mo.) The trial court cannot properly tell the jury what presumption or conclusion should be drawn from any particular fact.—State v. Stewart, 212 S. W. 853.

☞763, 764(5) (Ark.) Instruction containing words "as the proof tends to show" was not objectionable as on weight of evidence, since it was apparent that the word "proof" was not used in its strict legal sense, but in its ordinary sense as a synonym for "evidence."—Walker v. State, 212 S. W. 319.

An instruction, stating that evidence tends to prove a certain fact, and then leaving the jury to ascertain whether that fact was proved, is not objectionable as on weight of evidence.—Id.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

☞792(2) (Tex.Cr.App.) In a prosecution for the theft of an automobile subsequently recovered from a third party who claimed to have purchased it, evidence held to show that defendant assisted in the sale and was a principal, so as to justify the court in charging with reference to the law of principals.—Torrence v. State, 212 S. W. 957.

☞805(3) (Ark.) Proof in a strictly accurate and technical sense is the result or effect of evidence, while evidence is the medium or means by which a fact is proved or disproved, but the words "proof" and "evidence" may be used interchangeably and synonymously in court's charge especially where attention of court is not specifically called to the real difference in meaning (citing Words and Phrases, Evidence; Proof).—Walker v. State, 212 S. W. 319.

☞811(4) (Mo.) An instruction that, even if deceased had been paying improper attentions to defendant's wife, that fact would afford no excuse or justification to defendant for killing deceased was not objectionable as singling out and giving improper prominence to the testimony referred to, where the testimony thereon had been brought out principally by defendant.—State v. Stewart, 212 S. W. 853.

**(H) Requests for Instructions.**

☞829(5) (Tex.Cr.App.) In a prosecution for murder, the court having given the jury an instruction on the law of self-defense without in any way qualifying it, there was no error in refusing to instruct the jury that appellant had a right to arm himself and seek the deceased for an explanation or discussion of the previous difficulty.—Hollman v. State, 212 S. W. 663.

**(J) Custody, Conduct, and Deliberations of Jury.**

☞854(7) (Ark.) Separation of juror from rest of jury for purpose of asking sheriff to inform court that he was sick, where he did not discuss case with sheriff or any other person during separation, was not error.—Kindrix v. State, 212 S. W. 84.

**(K) Verdict.**

☞874 (Ark.) In view of Kirby's Dig. § 2423, inquiry of juror under section 2419, providing

that upon rendition of verdict clerk or judge may, upon instance of either party, ask juror if it is his verdict, need not be limited to receiving the answer "Yes" or "No," but must be limited to ascertainment whether verdict is juror's verdict, without examining juror as to how verdict was arrived at, except as to whether it was arrived at by lot.—Kindrix v. State, 212 S. W. 84.

☞882 (Mo.) In a prosecution for removing and concealing personal property covered by a mortgage, a verdict finding defendant guilty of feloniously, willfully, and unlawfully concealing personal property covered by a chattel mortgage, and assessing punishment at six months' imprisonment, is insufficient, being a special verdict which did not set out all of the elements of the offense, one of which was, under Rev. St. 1909, § 4570, that the act should be done with intent to hinder, delay, or defraud the mortgagee.—State v. Griffin, 212 S. W. 877.

**XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.**

☞915 (Mo.) To render effective objection to failure to comply with Rev. St. 1909, §§ 5057, 5097, requiring the indorsement of the names of the state's witnesses upon an indictment or information, motion to quash must be made or application filed for continuance on account of such omission; and such objection first appearing in motion for new trial is not timely.—State v. Ferguson, 212 S. W. 339.

☞938(1) (Ky.) A new trial will not be granted for newly discovered evidence which is cumulative, merely tending to impeach or discredit opposing witness.—Ray v. Commonwealth, 212 S. W. 908.

☞939(1) (Ky.) A new trial will not be granted to give a litigant an opportunity to use witnesses of whose existence he knew, as well as the facts they would prove, and whom he had negligently failed to offer upon the trial.—Gravitt v. Commonwealth, 212 S. W. 430.

☞940 (Ky.) In a prosecution under Ky. St. § 1158, denouncing the detention of a woman against her will for the purpose of sexual intercourse, a new trial will be granted on the ground of newly discovered evidence showing acts of a lewd and lascivious character on the part of prosecutrix with others shortly before the commission of the alleged offense.—Gravitt v. Commonwealth, 212 S. W. 430.

☞941(1) (Ky.) A new trial will not be granted on account of new evidence which is merely cumulative.—Gravitt v. Commonwealth, 212 S. W. 430.

☞942(1) (Ky.) A new trial will not be granted to allow a litigant to impeach witnesses who have testified upon the trial by proofs touching their character for truth or by showing contradictions.—Gravitt v. Commonwealth, 212 S. W. 430.

☞942(2) (Ky.) A new trial will not be granted to allow a litigant to impeach witnesses who have testified upon the trial by showing contradictions.—Gravitt v. Commonwealth, 212 S. W. 430.

☞945(1) (Ky.) A new trial will not be granted on account of newly discovered evidence unless the proposed new evidence is important and reasonably calculated to have a decisive influence upon another trial.—Gravitt v. Commonwealth, 212 S. W. 430.

☞945(1) (Ky.) To authorize a new trial, the newly discovered evidence should be of such convincing character as to have a decisive influence on and against the evidence to be overthrown by it.—Ray v. Commonwealth, 212 S. W. 908.

**XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.**

☞982 (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865c, 865e, and in view of articles 865d and 865g, as well as Ver-

non's Ann. Pen. Code 1916, art. 2, one convicted of a felony, whose sentence is suspended by the jury, cannot, after the period of suspended sentence has expired, be imprisoned on that sentence because of a later charge of another felony; for that would violate the purpose of the suspended sentence statute.—*Ex parte Coots*, 212 S. W. 173.

## XV. APPEAL AND ERROR, AND CERTIORARI.

### (A) Form of Remedy, Jurisdiction, and Right of Review.

⇨1024(7) (Ky.) Under Cr. Code Prac. § 281, as amended in 1910 (Laws 1910, c. 92), the commonwealth may appeal from an order granting a new trial to one convicted of felony.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

### (B) Presentation and Reservation in Lower Court of Grounds of Review.

⇨1031(3) (Mo.) Where no objections were made or exceptions saved at the time to the manner in which the trial jury was summoned and impaneled, and such objections were first made in motion for new trial, they could not be considered on appeal.—*State v. Ferguson*, 212 S. W. 339.

⇨1036(1) (Ark.) Admission of evidence will not be reviewed on appeal, where no objection was made or exception thereto saved.—*Walker v. State*, 212 S. W. 319.

⇨1037(1) (Ky.) Objection to improper remarks of counsel in argument to the jury, or to any ruling of the court respecting the same, comes too late to warrant review, when made for the first time in the motion and grounds for a new trial.—*Ray v. Commonwealth*, 212 S. W. 908.

⇨1037(2) (Tex.Cr.App.) Where the prosecution by an offer to admit a purported written statement of defendant's brother as to the homicide brought out the fact of the statement, and the attorney for the prosecution argued that the refusal of defendant to allow the same to be introduced warranted an inference that it was unfavorable, such argument was obviously so harmful that it would have been futile to withdraw it, so the fact that defendant, after his objection was overruled, did not request withdrawal of the same by special charge, was not a waiver of objection.—*Dunn v. State*, 212 S. W. 511.

⇨1038(1) (Ky.) Where an indictment for unlawfully detaining a woman was based upon two distinct offenses, and the state elected to proceed as to one offense, defendant could not complain of the court's failure to instruct the jury to disregard evidence as to the other offense in the absence of objection at the time or of a request to instruct.—*Gravitt v. Commonwealth*, 212 S. W. 430.

⇨1043(2) (Ark.) Error cannot be predicated upon court's failure to use the words "proof" and "evidence" in their technical meaning, under a general objection to the instruction.—*Walker v. State*, 212 S. W. 319.

⇨1049 (Mo.) Where no exceptions saved at the time to the manner in which the trial jury was summoned and impaneled, and such objections were first made in motion for new trial, they could not be considered on appeal.—*State v. Ferguson*, 212 S. W. 339.

⇨1054(1) (Ark.) Admission of evidence will not be reviewed on appeal, where court's ruling on objection thereto was not excepted to.—*Walker v. State*, 212 S. W. 319.

Objection to evidence is waived by failure to except to court's ruling thereon.—*Id.*  
⇨1059(1) (Ky.) On appeal by the commonwealth under Cr. Code Prac. §§ 335, 337, from an order granting a new trial to one convicted of grand larceny, only the correctness of the granting of the new trial can be considered, where there was no exception save to that de-

cision.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

⇨1066 (Tex.Cr.App.) Where a motion for a new trial was contested and overruled, where no statement of facts in the record showed such evidence, the matter could not be reviewed.—*Ross v. State*, 212 S. W. 167.

### (D) Record and Proceedings Not in Record.

⇨1086(14) (Ark.) Where the record in a criminal case fails to show that exceptions were saved concerning matters argued for reversal, such matters cannot be considered.—*Nelson v. State*, 212 S. W. 93.

⇨1091(4) (Tex.Cr.App.) Where the evidence set out in a bill of exceptions showed that a confession admitted on behalf of the state was a mere oral statement, not reduced to writing and signed in the presence of two disinterested witnesses, the bill was not defective in failing to suggest or raise the question that the statement was not written.—*Bonatz v. State*, 212 S. W. 494.

⇨1097(6) (Tex.Cr.App.) Where a motion for a new trial was contested and overruled, and appellant reserved no exception setting up facts heard on the contest, and where no statement of facts in the record showed such evidence, the matter could not be reviewed.—*Ross v. State*, 212 S. W. 167.

⇨1098 (Tex.Cr.App.) A statement of facts, on appeal in a criminal case, consisting of questions and answers, is objectionable, and will be stricken.—*Emberline v. State*, 212 S. W. 952.

⇨1110(7) (Tex.Cr.App.) When a statement of facts fails to contain any fact essential to a conviction, a recital in the charge that such fact is admitted will not supply the omission.—*McConnell v. State*, 212 S. W. 498.

⇨1112 (Tex.Cr.App.) *Ex parte* affidavits will not be considered as attacking or assailing the correctness of the statement of facts.—*McConnell v. State*, 212 S. W. 498.

### (G) Review.

⇨1134(4) (Ky.) Since the amendment of 1910 (Acts 1910, c. 92) to Cr. Code Prac. § 281, the decision of the court denying or granting a new trial is subject to exception and to review upon appeal.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

⇨1137(3) (Mo.) Under Rev. St. 1909, § 5115, as to error committed at accused's instance or in his favor, accused cannot complain of an erroneous instruction given at his instance, although it is a literal copy of one for the state formerly condemned by the Supreme Court.—*State v. Ferguson*, 212 S. W. 339.

⇨1144(10) (Ky.) Where the court rebuked the commonwealth's attorney for making remarks, and admonished jury to disregard them, it will not be presumed that the remarks were calculated to influence passion and excite prejudice against defendant on account of his being a negro and deceased a white man.—*Ray v. Commonwealth*, 212 S. W. 908.

⇨1144(18) (Tex.Cr.App.) Where evidence heard upon motion for new trial is not presented by statement of facts or bill of exceptions filed during the term, but it appears the court heard evidence in overruling the motion, the presumption is indulged on appeal that the facts heard justified the conclusion reached.—*Slade v. State*, 212 S. W. 661.

⇨1156(1) (Ky.) A decision of the trial judge granting a new trial, a matter within his discretion, is viewed less critically and more effect is given to it than a decision denying a new trial; for the grant of a new trial places the parties in a position they originally occupied, while a denial of a new trial concludes their rights.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

⇨1156(2) (Ky.) Where a lower court grants a new trial on the ground of the insufficiency

of the evidence to sustain conviction, the appellate court is not justified in reversing the decision unless an abuse of discretion appears.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

⚡1159(1) (Tex.Cr.App.) In prosecution for procuring and delivering intoxicants to persons enlisted in military forces of the United States contrary to Acts 35th Leg. (4th Called Sess.) c. 7, verdict of jury held to solve, in favor of the state, any question of variance as to names of soldiers to whom liquor was given and names charged in indictment.—*Crosby v. State*, 212 S. W. 168.

⚡1159(2) (Ark.) In a prosecution for violation of the law prohibiting the sale of intoxicating liquors, the credibility of the state's witness was a question for the jury, and where he testified to the sale, it cannot be said that there was no substantial evidence to support the verdict.—*Nelson v. State*, 212 S. W. 93.

⚡1159(2) (Mo.) To sustain a conviction on account of the sufficiency of the evidence, it is only necessary that witnesses examined give substantial testimony in support of the required material facts.—*State v. Ferguson*, 212 S. W. 339.

⚡1159(2) (Tex.Cr.App.) The Court of Criminal Appeals will not reverse a judgment of conviction unless there is such manifest lack of evidence as to make it apparent that the verdict was the result of prejudice, or that such verdict is against the weight of the evidence.—*Smith v. State*, 212 S. W. 660.

⚡1159(4) (Ark.) In a prosecution for violation of the law prohibiting the sale of intoxicating liquors, the credibility of the state's witness was a question for the jury.—*Nelson v. State*, 212 S. W. 93.

⚡1170½(3) (Mo.) The mere inquiry by prosecuting attorney on cross-examination of accused, whether accused had not made a contradictory statement in regard to a certain matter, held not prejudicial, being excluded and not answered.—*State v. Ferguson*, 212 S. W. 239.

⚡1171(1) (Ark.) Improper remarks by counsel during argument constitutes reversible error, where it is likely that prejudice has resulted therefrom.—*Walker v. State*, 212 S. W. 319.

⚡1171(1) (Tex.Cr.App.) It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement, and the impropriety was not cured because the attorney for the prosecution brought out the facts by an inquiry as to whether defendant would consent to the introduction of the statement.—*Dunn v. State*, 212 S. W. 511.

#### (H) Determination and Disposition of Cause.

⚡1182 (Ky.) Where the instructions which are not criticized properly gave the law necessary for the guidance of the jury, the evidence was sufficient to support the verdict, and no prejudicial error appears in any ruling of the trial court, the judgment will be affirmed.—*Ray v. Commonwealth*, 212 S. W. 908.

⚡1182 (Tex.Cr.App.) Where appeal from a conviction under Acts 35th Leg. (4th called Sess.) c. 8, creating offense of disloyalty came up without any bills of exceptions or statement of facts in the record, and motion for new trial only questioned the sufficiency of the evidence to support verdict, and court, on examination, finds that indictment appears to follow language of statute, and that language imputed to defendant, if uttered, violated the law, the conviction would be affirmed.—*Meyer v. State*, 212 S. W. 504.

⚡1187 (Mo.) Where the record upon appeal is such as to make it reasonably apparent that evidence sufficient to sustain a conviction cannot be produced upon retrial, it is proper to order the defendant discharged; otherwise the

cause should be remanded.—*State v. Griffin*, 212 S. W. 877.

⚡1189 (Mo.) In a prosecution for removing and concealing personal property covered by chattel mortgage, held that the record did not make it reasonably apparent that evidence to sustain a conviction could not be produced upon retrial, and hence the case should, on reversal of a conviction, be remanded.—*State v. Griffin*, 212 S. W. 877.

## CROPS.

See Chattel Mortgages, ⚡12; Customs and Usages, ⚡10; Damages, ⚡108, 112; Evidence, ⚡113; Landlord and Tenant, ⚡18, 180; Mortgages, ⚡197; Railroads, ⚡72; Sales, ⚡12; Vendor and Purchaser, ⚡36; Waters and Water Courses, ⚡179.

## CURTESY.

See Mines and Minerals, ⚡79.

⚡12½ (Ky.) Surviving husband's possession of deceased wife's realty as a tenant by the curtesy was insufficient to give him title thereto by adverse possession; his possession being that of a life tenant, which is not adverse to remaindermen.—*Fish v. Fish*, 212 S. W. 586.

⚡12(1) (Ky.) Where coal mines were opened and operated during the lifetime of and under lease from a wife, the owner, her husband after her death as life tenant by curtesy by law was entitled to the whole of the royalties due from the operation.—*Caudil v. Wagoner*, 212 S. W. 422.

## CUSTOMS AND USAGES.

See Master and Servant, ⚡105, 285, 289.

⚡10 (Tex.Civ.App.) In the absence of specific agreement with respect to the kind of crops that would be planted upon rented land, and the amount of rentals to be paid, the usual custom of the country determines such questions.—*Rupert v. Swindle*, 212 S. W. 671.

## DAMAGES.

See Appeal and Error, ⚡53, 719, 1068, 1140, 1171; Attachment, ⚡331, 375; Carriers, ⚡32, 177, 180, 185, 186, 228; Constitutional Law, ⚡189; Contracts, ⚡40, 189, 303; Covenants, ⚡114, 118, 130; Drains, ⚡32; Eminent Domain, ⚡145, 205, 209; Evidence, ⚡113, 462; Exchange of Property, ⚡8; Fraud, ⚡59, 65; Insurance, ⚡85, 802; Interest, ⚡1; Landlord and Tenant, ⚡180; Libel and Slander, ⚡88, 116, 120; Master and Servant, ⚡23, 341; Municipal Corporations, ⚡741; Negligence, ⚡101; Pleading, ⚡11, 110; Pledges, ⚡30; Principal and Agent, ⚡103, 169; Railroads, ⚡72, 260; Sales, ⚡418; Sequestration, ⚡20; Specific Performance, ⚡58; Telegraphs and Telephones, ⚡54; Torts, ⚡12; Trespass, ⚡40, 52; Trial, ⚡63, 191, 207, 256, 352; Waters and Water Courses, ⚡178, 179.

## III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚡24 (Tex.Civ.App.) The rule that damages which are uncertain and contingent cannot be recovered does not apply where the uncertainty is only as to the amount of loss suffered by breach of a contract, but where it is uncertain as to whether any damages resulted therefrom.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

⚡40(2) (Tex.Civ.App.) In a proper case contemplated profits may be recovered as damages for breach of contract.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

In an action by an insurance agent against

the company for breach of an employment contract, such profits as it reasonably appeared were a loss to the agent by reason of the company's breach of the contract were proper elements of damages.—*Id.*

☞40(4) (Mo.App.) In an action under Rev. St. 1909, § 3150, against a railroad company flooding farm land by an embankment, it was proper to prove plaintiff's loss by showing that he had taken stock to pasture at a fixed price per head, and that, owing to the flooding, the pasture soured, so that he was unable to pasture the stock, and lost such income.—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

#### IV. LIQUIDATED DAMAGES AND PENALTIES.

☞80(1) (Tex.Com.App.) Where it cannot be ascertained from the face of the contract that the damages stipulated to be paid in case of a breach are excessive, and it cannot be determined from evidence whether the stipulated amount reasonably approximates the actual damages, the provision cannot be construed as a penalty.—*Walsh v. Methodist Episcopal Church, South, of Paducah, Tex.*, 212 S. W. 950.

☞85 (Tex.Civ.App.) Where a contract between plaintiff and one of defendants provided that a \$200 check deposited therewith was placed as a forfeit on the land deal, defendant had the absolute right arbitrarily to refuse to carry out the sale and lose such amount, and plaintiff had no cause of action against such defendant; the deposit not being earnest or escrow money but liquidated damages or forfeit.—*Richardson v. Terry*, 212 S. W. 523.

#### V. EXEMPLARY DAMAGES.

☞87(1) (Tex.Civ.App.) "Exemplary damages" are awarded as matter of sound public policy in punishment of the guilty one for malicious acts, and not as compensation.—*Evans v. McKay*, 212 S. W. 680.

☞91(1) (Tex.Civ.App.) In the law relating to exemplary damages, any unlawful act done willfully and purposely to the injury to another is in a legal sense, as against that person, "malicious."—*Evans v. McKay*, 212 S. W. 680.

#### VI. MEASURE OF DAMAGES.

##### (A) Injuries to the Person.

☞96 (Ky.) The amount of damages to be awarded for personal injuries is necessarily left largely to the sound discretion of the jury.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

☞98 (Ky.) That plaintiff in personal injury case who has suffered a permanent injury is a mere youth will not be allowed as an element to reduce his damages, but would tend to increase rather than diminish them.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

☞99 (Tex.Civ.App.) The wife's services are not to be computed as those of a servant, and a verdict based upon the circumstances and conditions of the wife and guided by the sound judgment of the jury should not be disregarded, unless upon evidence of abuse of such discretion.—*City of Ft. Worth v. Weisler*, 212 S. W. 280.

From a detailed statement of the position of the wife, her family, her ordinary duties and labor, the jury can ascertain the value of her services in the performance of household duties, as well as any witness.—*Id.*

##### (B) Injuries to Property.

☞108 (Tex.Civ.App.) The measure of damages to land caused by overflow is the difference in the value of the land immediately before and immediately after such overflow.—*Ft. Worth & D. C. Ry. Co. v. Speer*, 212 S. W. 762.

If the overflow of land be caused by defendants' wrongful act and plaintiff by reason there-

of is unable to plant and cultivate his crop during the crop season, he is entitled only to the reasonable rental value of the land for said term, and not the probable value of crops, less cultivation cost.—*Id.*

☞112 (Tex.Civ.App.) Where crops have been planted and are growing or have matured and are yet on the land, plaintiff is entitled to recover for their destruction from overflow caused by defendant's wrongful act the reasonable value of such crops at the time and place of destruction.—*Ft. Worth & D. C. Ry. Co. v. Speer*, 212 S. W. 762.

##### (C) Breach of Contract.

☞122 (Tex.Com.App.) Church's measure of damages for contractor's failure to complete construction of church building within stipulated time is the value of the use of the building during the time it should have been used after date provided for completion.—*Walsh v. Methodist Episcopal Church, South, of Paducah, Tex.*, 212 S. W. 950.

#### VII. INADEQUATE AND EXCESSIVE DAMAGES.

☞132(1) (Mo.) Verdict of \$25,000 for severe burns, reduced by remittitur in trial court to \$15,000, *held* still excessive by \$7,500.—*Rigg v. Chicago, B. & Q. R. Co.*, 212 S. W. 878.

☞132(1) (Mo.App.) \$2,500 damages were not excessive for injuries causing badly broken shoulder blade, care by physician for eight or nine months, inability to work for four months, and some permanent effects from injury.—*Natt v. Aiken*, 212 S. W. 58.

☞132(7) (Mo.App.) Where plaintiff, previously a reasonably strong, healthy man, suffered an injury to his back and a compound comminuted fracture of both bones of a leg between knee and ankle, was required to use crutches more than a year thereafter, was forced to have operation to remove splintered bones, and had a plaster cast taken off five times to rebreak and reset the leg, which was left two inches shorter than the other, and the wound was discharging blood, pus, and bone at the time of the trial, and he was forced to bear much expense, a judgment for \$7,500 was not excessive.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

☞132(8) (Mo.App.) A verdict for \$5,000 was not excessive, where plaintiff's left shoulder and arm were permanently impaired, lungs and left ear permanently injured, so that from a strong vigorous man he was reduced to one greatly hampered in his movements, unable to do an ordinary man's work, and coughing up blood at intervals.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

☞132(9) (Ky.) Verdict of \$9,500 for loss of leg, it being amputated between knee and hip, *held* not excessive.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

#### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

##### (A) Pleading.

☞158(1) (Mo.App.) In an action for personal injuries, where petition pleaded injury to the lungs, and that all the injuries were permanent, evidence that plaintiff coughed up blood was admissible.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

☞159(4) (Tex.Civ.App.) In an action by the purchasers of a thrasher for damages from misrepresentations inducing the purchase, testimony as to loss of profits *held* admissible in view of the allegations of the petition, against which general demurrer alone was filed.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

☞159(8) (Tex.Civ.App.) In the purchasers' action for damages for misrepresentations in-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

ducing the sale of a thrasher, testimony as to the value of items of expense alleged to have been paid by the purchasers *held* inadmissible in the absence of allegation that the amount paid was the reasonable value.—Hart-Parr Co. v. Krizan & Muler, 212 S. W. 835.

#### (B) Evidence.

⚡185(1) (Tex.Civ.App.) In an action for personal injuries, evidence *held* to show damages.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

⚡186 (Tex.Civ.App.) It is not essential to the right of recovery for wife's impaired capacity to perform her household duties that the pecuniary value of the same be shown with any mathematical accuracy or in dollars and cents.—City of Ft. Worth v. Weisler, 212 S. W. 280.

⚡190 (Tex.Civ.App.) In an action by insurance agent for breach of an employment contract where he had the exclusive right to represent the company in 42 wealthy and populous counties, evidence of profits the agent had made *held* a sufficiently accurate standard to enable the jury to estimate the amount of profit the agent would have received under the contract had employer not breached it.—Merchants' Life Ins. Co. v. Griswold, 212 S. W. 807.

#### (C) Proceedings for Assessment.

⚡208(2) (Mo.) In action against a city for death from pneumonia of plaintiff's wife, injured when she fell in the pavilion in a park, whether the injury suffered in the fall was the proximate cause of the pneumonia *held* for the jury.—Kuensel v. City of St. Louis, 212 S. W. 876.

⚡208(4) (Tex.Civ.App.) In suit by husband and wife for injuries to the latter due to cover of manhole in street of defendant city tilting, causing her foot and leg to fall into hole, evidence of pecuniary value of wife's services *held* to warrant submission, as an element of damages, of loss of ability of wife to perform her household duties.—City of Ft. Worth v. Weisler, 212 S. W. 280.

⚡208(8) (Ky.) Punitive damages are not recoverable as a matter of right, but their allowance rests entirely in the discretion of the jury.—Hurst v. Southern Ry. Co. in Kentucky, 212 S. W. 461.

⚡216(8) (Mo.App.) In a personal injury action giving an instruction as to the measure of damages for plaintiff's loss of earnings was error, where, although there was evidence that plaintiff was working at the time of injury, there was no evidence as to his earnings or earning capacity.—Woods v. Kansas City Light & Power Co., 212 S. W. 899.

## DEATH.

See Appeal and Error, ⚡1048, 1060; Carriers, ⚡228; Damages, ⚡208; Evidence, ⚡553; Insurance, ⚡488, 514, 598, 602, 624, 665, 668, 669, 675; Master and Servant, ⚡92, 286; Municipal Corporations, ⚡133; Negligence, ⚡101; Railroads, ⚡346, 348, 350; Street Railroads, ⚡114; Trial, ⚡199; Venue, ⚡8.

## II. ACTIONS FOR CAUSING DEATH.

#### (B) Jurisdiction, Venue, and Limitations.

⚡39 (Ky.) Administrator's cause of action for death of his intestate under Ky. St. § 6, is barred by limitations under section 2516, requiring action to be commenced "within one year next after the cause of action accrued," in one year from death of intestate, and does not run until one year from qualification of administrator, in view of legislative history of latter statute.—Faulkner's Adm'r v. Louisville & N. R. Co., 212 S. W. 130.

212 S.W.—65

## DEDICATION.

See Telegraphs and Telephones, ⚡10.

### I. NATURE AND REQUISITES.

⚡14 (Tex.) The dedication of streets and alleys to the use of the public in a town site is not rendered invalid by want of acceptance by the municipality, there not being sufficient number of inhabitants to organize a municipal government, so as to make inapplicable Rev. St. 1911, art. 1231, authorizing a telephone company to maintain lines on public roads or streets.—Roaring Springs Town-site Co. v. Paducah Telephone Co., 212 S. W. 147.

### II. OPERATION AND EFFECT.

⚡55 (Tex.) The general rule that a dedicatory may impose such restrictions as he may see fit on making a dedication of his property to a public use is subject to the limitation that the restriction be not repugnant to the dedication or against public policy.—Roaring Springs Town-site Co. v. Paducah Telephone Co., 212 S. W. 147.

## DEEDS.

See Adverse Possession, ⚡100; Appeal and Error, ⚡1060, 1060; Courts, ⚡92, 93; Covenants, ⚡84, 114, 116, 118, 122, 130; Depositors, ⚡79; Escrows, ⚡12; Estoppel, ⚡32, 38; Evidence, ⚡271, 318, 353, 383, 444, 460; Executors and Administrators, ⚡145; Frauds, Statute of, ⚡117, 129; Husband and Wife, ⚡198; Injunction, ⚡194; Judgment, ⚡255; Life Estates, ⚡28; Logs and Logging, ⚡3; Mines and Minerals, ⚡55; Mortgages; Principal and Agent, ⚡145; Railroads, ⚡69, 72; Taxation, ⚡734, 750; Tenancy in Common, ⚡15, 45; Trespass to Try Title, ⚡11; Trial, ⚡53, 214; Vendor and Purchaser, ⚡230, 343.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances in General.

⚡8 (Ky.) Where, after death of life tenant of lands under a will, the lands were divided, and a portion allotted to each of his children, remaindermen in fee, and thereafter A., one of such children, died, and her heirs conveyed her allotted lands, and by the same deed conveyed all the interests which should thereafter come to them under the will in the lands held by the life tenant during his lifetime on account of the death of any other of the remaindermen without children or issue then living, nothing passed by such deed except the lands allotted to A.—Spacey v. Close, 212 S. W. 127.

A grantor must have a vested or contingent interest in the subject-matter of the conveyance.—Id.

A mere expectation by certain persons that in the event another died childless and intestate and the owner of certain land they would inherit an interest in it is a mere expectancy which is not a subject of sale or conveyance.—Id.

#### (B) Form and Contents of Instruments.

⚡26 (Tex.Civ.App.) Instrument, whereby landowners authorized agent to sign their names to contract with third person in disposal of their land, owners agreeing in consideration of agent's services and moneys expended in negotiating the transaction to accept a number of acres out of certain public school lands for their equity in the land disposed of, did not pass any legal or equitable title to the agent or agents in the public school lands conveyed by the third person to the owners.—Vauter v. Greenwood, 212 S. W. 269.

⚡28 (Ky.) A deed reciting that grantors "have sold and hereby convey, with clause of general warranty, unto K. T. B., wife of J. D. B. and her heirs forever," followed by a description of the property, is sufficient to convey title of the grantors, although the usual habendum and tenendum clauses are lacking.—*Meisberg v. Bryant*, 212 S. W. 600.

⚡38(1) (Ky.) To make a conveyance of lands by deed valid, deed must describe them so certainly that property can be located, and in this sense that is certain and locatable which can be made certain and locatable.—*Prewitt v. Wilborn*, 212 S. W. 442.

#### (C) Execution.

⚡53 (Tex.Civ.App.) In trespass to try title by realty brokers to recover certain lands as commission, whether there was such intention to convey that a deed from defendants to plaintiff broker conveyed title as a contract for conveyance of land under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1116*, held for the jury under the evidence, though defendants admitted they signed the instruments.—*Vauter v. Greenwood*, 212 S. W. 269.

#### (E) Validity.

⚡68(1½) (Mo.) Mere peculiarities or eccentricities of the grantor do not make a deed invalid if he had sufficient capacity to understand the nature and effect of the transaction; the legal test of capacity being the power of the grantor to understand the matter in hand and the effect of the transaction.—*Messer v. Helfer*, 212 S. W. 806.

⚡76 (Ky.) A deed void ab initio conveys no title whatever on the grantee.—*Miller v. Powers*, 212 S. W. 453.

## II. RECORDING AND REGISTRATION.

⚡82 (Tex.Com.App.) The recordation of a deed is not essential to its validity.—*McBride v. Loomis*, 212 S. W. 480.

## III. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

⚡90 (Tex.Com.App.) Where language of deed is so ambiguous as to be susceptible of different constructions, that interpretation will be adopted which is most favorable to grantee.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

⚡93 (Tex.Com.App.) A deed should be so interpreted as to give effect to the intention of the parties.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

⚡95 (Tex.Com.App.) Every part of the deed must be given effect if it can be done.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

To warrant a departure from the general rules of construction and to give deeds a meaning not fairly deducible from the language employed, the circumstances should be such as to impel the conclusion that the parties intended other than their expressed language would ordinarily imply.—*Id.*

⚡97 (Tex.Com.App.) If any of the terms used in a deed seem to contradict the manifest intention clearly indicated by the deed as a whole, the intention must govern.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

⚡100 (Tex.Com.App.) The court in construing language of deed susceptible of different constructions will consider the circumstances attending the transaction, the particular situation of the parties, the state of the thing granted, for purpose of ascertaining the true intent.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

In determining the character of the estate granted, the court will consider, not merely the

uses for which the property was designated in the conveyance, but the relation of the grantor to those uses.—*Id.*

⚡109 (Ky.) When the term "heirs" is used in a deed, it will be presumed that the grantor knew and understood the legal meaning of the term, and intended it in that sense, unless the deed shows the contrary.—*Meisberg v. Bryant*, 212 S. W. 600.

#### (B) Property Conveyed.

⚡111 (Ky.) If there is ambiguity in description of property intended to be conveyed or excepted from conveyance, its identity may be gathered from intention of parties and accompanying circumstances; but intention must be gathered from deed itself.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡118 (Ky.) Deed containing description, "Beginning at a big rock at B's mill seat, running up Wooten's creek so as to hold all the land owned by said W. on the side of the creek that said R. holds," was insufficient, in absence of evidence identifying any "big rock" or place where B's mill site was, or on which side of the creek R. held, or what land, if any, W. had on either side of creek.—*Hendrix v. Lewis*, 212 S. W. 569.

#### (C) Estates and Interests Created.

⚡120 (Tex.Com.App.) The largest estate that the terms of a deed with all its parts harmonized will permit of will be conferred upon grantee.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

⚡123 (Ky.) The word "heir" carrying in its legal meaning the idea of a person upon whom the descent is cast according to the laws of inheritance when the ancestor dies intestate, the use of the term in a deed as to a certain person "and his heirs" imports that the title conveyed is a fee simple.—*Meisberg v. Bryant*, 212 S. W. 600.

Although the term "heirs," or "heirs of the body," is generally held to be a term of limitation, where it appears from the instrument, construed in the light of all facts properly shown, that the grantor used the term in the sense of "children," it will be construed to mean "children," and not "heirs," and hence a term of purchase; but, if the intent appears to be otherwise, it will be treated as a word of limitation.—*Id.*

⚡124(1) (Ky.) Where a husband, who had purchased land, caused a conveyance of it by others to be made to his wife and her "heirs forever," there was nothing in the deed to indicate that the term "her heirs forever" was used in the sense of "children," or otherwise than the legal meaning, and hence she took a fee simple, and not a life estate merely, with remainder to her children, and a conveyance by the wife to another conveyed a fee simple.—*Meisberg v. Bryant*, 212 S. W. 600.

⚡124(2) (Ky.) The use of the term "heirs" in a deed, as to a certain person "and his heirs," imports that the title conveyed is a fee simple.—*Meisberg v. Bryant*, 212 S. W. 600.

⚡128 (Mo.) The rule in *Shelley's Case* does not exist either in deeds or wills in Missouri.—*Gillilan v. Gillilan*, 212 S. W. 348.

⚡129(1) (Ky.) Where granting clause was unto W., her heirs and the heirs of J., their heirs and assigns, and the language of the habendum clause was to W., her heirs and the heirs of J., their heirs forever, W. did not take the entire fee but a life estate, with remainder to her children and the children of J.; the words "her heirs and the heirs of J." being words of purchase, not limitation, and used in the sense of "children."—*Phillips v. Williamson*, 212 S. W. 121.

⚡129(1) (Ky.) A deed held to convey, not an estate in fee, but only a life estate.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

#### (D) Exceptions and Reservations.

§138 (Ky.) An "exception" in a deed, as distinguished from a reservation, is some part of the boundary described in the deed to which the grantor retains title, not conveying it by the deed.—Prewitt v. Wilborn, 212 S. W. 442.  
 §139 (Ky.) The certainty necessary in a description of lands excepted in a deed, to make the exception valid, is the same certainty necessary to make the conveyance of lands by the deed valid.—Prewitt v. Wilborn, 212 S. W. 442.

#### (E) Conditions and Restrictions.

§144(1) (Tex. Com. App.) When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when the use is for the benefit of a special class of persons or the public at large.—Stevens v. Galveston, H. & S. A. Ry. Co., 212 S. W. 639.  
 §145 (Tex. Com. App.) The mere use of technical terms which ordinarily denote a limitation or a condition subsequent is an unsafe test of the true nature of the estate granted; the word "proviso" or "provided" itself being sometimes taken as a condition, sometimes as a limitation, and sometimes as a covenant.—Stevens v. Galveston, H. & S. A. Ry. Co., 212 S. W. 639.

Language ordinarily importing a limitation or condition subsequent will be construed most strictly against grantor on the ground that law does not favor forfeitures.—Id.

§155 (Tex. Com. App.) Where there is a doubt from the language of the entire instrument whether its fair construction imports a limitation which would absolutely determine the estate or a condition subsequent determining the estate only upon some act of the grantor tantamount to re-entry, the deed must be construed to import the latter as being in a sense less onerous upon the grantee.—Stevens v. Galveston, H. & S. A. Ry. Co., 212 S. W. 639.

#### (F) Loss or Relinquishment of Rights.

§179 (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1103, requiring conveyance of realty to be in writing and signed by grantor, where the purchaser of land and his wife had received title by reason of the seller's deed to them, mere delivery of the deed back to the seller did not divest them of title, and revest the seller, to effect which a conveyance in writing back to the seller was necessary.—Cooper v. Hinman, 212 S. W. 972.

### DEPOSITIONS.

See Appeal and Error, §242; Appearance, §23; Continuance, §26, 35; Witnesses, §178.

§79 (Ky.) In action involving title to lands, where depositions of party in chain of title and his grantee were given in action to which defendant and privies of plaintiff were parties, as both deponents were dead, such part of their depositions should have been permitted to be read as tended to prove execution and contents of writing between them, and location of lands, embraced by exception in controversy in present suit, to which writing referred, also any other portions of the depositions containing competent evidence on the issues, if the depositions were filed in action before trial.—Prewitt v. Wilborn, 212 S. W. 442.

### DEPOSITS IN COURT.

See Clerks of Courts, §70, 75.

### DESCENT AND DISTRIBUTION.

See Adoption, §21; Cancellation of Instruments, §59; Deeds, §8, 109, 123, 124; Estoppel, §38; Executors and Administrators,

§494, 276; Taxation, §859, 867, 893; Trespass to Try Title, §11; Trial, §53; Trusts, §153; Wills; Witnesses, §76.

### I. NATURE AND COURSE IN GENERAL.

§6 (Mo.) Rev. St. 1909, § 382, governing the course of descent and distribution of real estate, is not unconstitutional or void as against public policy as allowing property to descend to persons not of the blood of the ancestor, in preference to those of his blood.—Rutledge v. First Presbyterian Church of Stockton, 212 S. W. 859.

### DETACHMENT.

See Bills and Notes, §378.

### DIPPING.

See Animals, §30, 84, 86; Criminal Law, §322, 400.

### DISEASE.

See Health, §24.

### DISLOYALTY.

See Criminal Law, §1182; Habeas Corpus, §30; Indictment and Information, §125; War, §4.

### DISMISSAL AND NONSUIT.

See Appeal and Error, §395, 635, 781, 1114, 1203; Attachment, §360; Attorney and Client, §190; Carriers, §186; Judgment, §840.

### DISORDERLY HOUSE.

See Health, §21; Witnesses, §344.

### DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, §211, 703, 721, 721½, 1037, 1144; Homicide, §170; Taxation, §589; Witnesses, §349, 350.

### DIVIDENDS.

See Corporations, §152.

### DIVORCE.

See Army and Navy, §84; Exemptions, §16; Habeas Corpus, §85, 99.

### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

#### (C) Pleading.

§88 (Tex. Civ. App.) Accurate pleading should be demanded before the marriage relation is dissolved.—Rowden v. Rowden, 212 S. W. 302.  
 §99 (Tex. Civ. App.) Cross-action in divorce suit alleging "cruel, harsh, and inhuman treatment," though in words of statute, does not state cause of action for divorce; it being necessary to state the facts and circumstances constituting the cruel, harsh, and inhuman treatment.—Rowden v. Rowden, 212 S. W. 302.

#### (D) Evidence.

§124 (Tex. Civ. App.) Accurate pleading and clear and convincing proof should be demanded before the marriage relation is dissolved.—Rowden v. Rowden, 212 S. W. 302.

**V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.**  
 §254 (Mo.) The jurisdiction of courts to award alimony is statutory, its judgment to the wife specific personal property as alimony and cutting off her



dower, is void and subject to collateral attack.—*Eceton v. Tomlinson*, 212 S. W. 865.

Judgment in divorce, so far as it attempted to vest title in the wife to specific personal property and to cut off her dower, being beyond scope of pleadings and relief prayed, was void and open to collateral attack.—*Id.*

The wife acquiescing in the void part of a divorce decree awarding to her, in lieu of dower rights, personal property of her husband which she had taken, is estopped to claim dower.—*Id.*

## DOGS.

See Animals, ¶4; Constitutional Law, ¶237; Statutes, ¶93, 121; Taxation, ¶42.

## DOMICILE.

See Insurance, ¶618; Landlord and Tenant, ¶226; Venue, ¶8.

## DOORS.

See Carriers, ¶315.

## DOWER.

See Divorce, ¶254; Husband and Wife, ¶29.

## DRAINS.

See Constitutional Law, ¶281; Eminent Domain, ¶31, 71, 209; Municipal Corporations, ¶331, 341, 445; Railroads, ¶72; Statutes, ¶64; Trial, ¶214.

### I. ESTABLISHMENT AND MAIN TENANCE.

¶15 (Ky.) In view of Ky. St. § 2380, subsec. 49, a drainage district may be organized within the limits of an established drainage district to meet the peculiar needs of a portion of the district, notwithstanding subsection 30, providing that owners may construct lateral drains from their own lands to main drain; such subsection merely giving owner right to connect lateral drains with main drain and to condemn land for that purpose.—*Horn v. Adams*, 212 S. W. 108.

¶32 (Ark.) The provision of Acts 1911, p. 193, relating to drainage districts and the taking of private lands for ditch construction, that where the commissioners make no return of damages to a particular tract "it shall be deemed a finding by them that no damage will be sustained," merely relates to the form of the report and is entirely proper, since no finding need be reported where no damages are found or those found are exceeded by the benefits.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

¶36(2) (Ark.) The whole proceeding to obtain privately owned land for ditches for drainage districts is one in rem, and when the statutory notices are properly given, all owners of property thereby become parties to the proceeding, and have the right of appeal whether they actually appear at the hearing or not.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

¶60 (Ark.) Under Acts 1911, p. 193, § 1, there is no liability against a county for the expenses of the preliminary survey where a projected drainage district has not been formed; the petitioners for the district being liable on their bond for the cost of the survey where the district is not created.—*Gibson v. Hempstead County*, 212 S. W. 99.

### II. ASSESSMENTS AND SPECIAL TAXES.

¶85 (Mo.) Under Laws 1913, p. 238, § 11, providing that a tax imposed by a drainage district to pay organization and preliminary expenses shall be due and payable as soon as as-

essed, such tax, when assessed in September, became delinquent by December 31st of that year.—*Elsberry Drainage Dist. v. Winkelmeyer*, 212 S. W. 893.

In view of previous legislation regarding assessments for drainage districts, as well as Rev. St. 1909, § 8057, prescribing rules for construction of statutes, *held*, that an annual assessment imposed by a drainage district under Laws 1913, p. 243, § 19, providing that the board of supervisors shall each year thereafter determine, order and levy the amount of the annual assessment, such assessment, which follows that for cost of construction, when levied in September, cannot be deemed, in view of sections 18 and 23, to become delinquent on December 31st of that year.—*Id.*

## DRAMSHOPS.

See Intoxicating Liquors.

## DUE PROCESS OF LAW.

See Constitutional Law, ¶278-290.

## DUST.

See Insurance, ¶787.

## EASEMENTS.

See Railroads, ¶69, 72; Trial, ¶214.

### I. CREATION, EXISTENCE, AND TERMINATION.

¶7(6) (Ky.) If plaintiff's predecessor in title held and used passway over defendant's land for as much as the statutory period, his right to passway was fully established, and was not lost by any attempted interruption not amounting to an adverse holding for the statutory period, 15 years.—*Daniel v. Shaver*, 212 S. W. 913.

¶18(3) (Ky.) The mere fact that there was another passway from the pike to the small tract of land purchased by plaintiff's predecessor, after the establishment and use of the passway in controversy, would not militate against the right of plaintiff's predecessor and his successors in title to claim and use the passway in question.—*Daniel v. Shaver*, 212 S. W. 913.

¶36(1) (Ky.) Where a passway has been used for a long term of years and the statutory period has elapsed, the presumption is that the use was by grant and as a matter of right, and if the owner of the servient estate asserts use was by permission, the burden is upon him to establish the fact.—*Daniel v. Shaver*, 212 S. W. 913.

Plaintiff having established the use of the passway in question over defendant's land by himself and his predecessor in title for 54 years before the commencement of the present action, the burden is upon defendant, the owner of the servient estate, to show that the use of the passway was by permission, and not by claim of right.—*Id.*

In action by plaintiff, claiming prescriptive right to a passway over lands of defendant, to require defendant to remove an obstruction which he had placed across passway, evidence for defendant *held* insufficient to overcome presumption that use was as a matter of right.—*Id.*

¶36(3) (Ky.) In action by plaintiff, claiming prescriptive right to passway over lands of defendant, to require defendant to remove an obstruction which he had placed across passway, chancellor's finding that the use of the passway by plaintiff and his predecessors in title was as a matter of right and not by permission *held* not against the weight of the evidence.—*Daniel v. Shaver*, 212 S. W. 913.



**EJECTMENT.**

See Injunction, **136**.

**I. RIGHT OF ACTION AND DEFENSES.**

**9(3)** (Ky.) Where both parties in an ejectment suit claimed under a common source, it was not incumbent upon plaintiffs to win upon the strength of their own title, regardless of the weakness of the title of defendants.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

**15(1)** (Ky.) Where both parties in action of ejectment claimed under common source, it was not incumbent upon plaintiffs to win upon the strength of their own title, regardless of the weakness of the title of defendants, and defendants will not be permitted to deny the title of their predecessors in the chain, or interpose the defense that lands in controversy were covered by a patent issued previous to the patent which was the source of their title.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

In an action of ejectment, where defendants claimed by adverse possession, they could not deny the validity of a patent which was the original source of their title.—*Id.*

**ELECTION OF REMEDIES.**

See Action, **27**; Appeal and Error, **1039**; Sales, **429**.

**ELECTIONS.**

See Animals, **38**; Criminal Law, **400**; Estoppel, **68**; Officers, **55**; Schools and School Districts, **38**; Waters and Water Courses, **216**.

**VI. NOMINATIONS AND PRIMARY ELECTIONS.**

**151** (Ky.) Acts 1916, c. 13, § 4, relating to contest of nominations and declaring that the same shall be declared void for violation of the act, relates to the nomination, and not to the final election, and in view of Ky. St. § 1530, subsecs. 27, 28, providing for the time of instituting contest and their disposal, if advantage is not taken of the violation of the Corrupt Practices Act in the time prescribed for impeachment of the nomination, there is no machinery of law by which it can be done thereafter.—*Hardin v. Horn*, 212 S. W. 573.

**156** (Ky.) The board of election commissioners must give a certificate of nomination to the candidate at a primary election who received a majority or plurality of the votes cast as appears from the tabulated returns when the candidate shall have filed a post election statement of his expenditures as provided by Acts 1916, c. 13, § 4, and if the board should refuse to grant such certificate, its members may be required by mandatory injunction to do so; the board having no discretion.—*Hardin v. Horn*, 212 S. W. 573.

**158** (Ky.) The statute providing for declaring a nomination void on account of violations of the Corrupt Practices Act means violations of the act in securing the nomination.—*Hardin v. Horn*, 212 S. W. 573.

**VII. BALLOTS.**

**172** (Ky.) When a nomination certificate has been seasonably filed with the clerk of the county court or other officer, it is the duty of such officer, which he may be compelled by mandatory injunction to perform, to cause the nominee's name as it appears from the certificate to be printed for the election, and neither commissioners nor clerk can refuse to so act except in obedience to a court judgment in an election contest declaring the certificate invalid or the nomination void.—*Hardin v. Horn*, 212 S. W. 573.

The name of one who holds a certificate of nomination which has not been adjudged invalid is not illegally printed upon the ballot when it is done by officers of the law in performance of their statutory duties, who have no discretion in the matter, and may be compelled by injunction to act.—*Id.*

**179** (Ky.) When a nomination certificate has been seasonably filed with the clerk of the county court or other officer, it is the duty of such officer, which he may be compelled by mandatory injunction to perform, to cause the nominee's name as it appears from the certificate to be printed for the election.—*Hardin v. Horn*, 212 S. W. 573.

**VIII. CONDUCT OF ELECTION.**

**228** (Ky.) The statute providing for declaring a nomination void on account of violations of the Corrupt Practices Act means violations of the act in securing the nomination, and the authority it confers to adjudge an election void therefor means violation of the act in securing the election, and not infractions of the law committed in securing the nomination.—*Hardin v. Horn*, 212 S. W. 573.

**230** (Ky.) Prior to Corrupt Practices Act there was no warrant for adjudging an election void for failure of candidates elected to file statements of expenditures or on account of illegal use of money in election, unless there was such bribery in the conduct of the election that neither party could be adjudged to have been fairly elected in view of Ky. St. § 1596a, subsec. 12.—*Hardin v. Horn*, 212 S. W. 573.

**231** (Ky.) Prior to Corrupt Practices Act there was no warrant for adjudging an election void for failure of candidates elected to file statements of expenditures or on account of illegal use of money in election, unless there was such bribery in the conduct of the election that neither party could be adjudged to have been fairly elected in view of Ky. St. § 1596a, subsec. 12.—*Hardin v. Horn*, 212 S. W. 573.

The use of money either directly or indirectly by a candidate in the promotion of his elections, except for legitimate purposes, would forfeit his election under the Corrupt Practices Act, but to have that effect its use must have been by the candidate or in his behalf and with his knowledge.—*Id.*

That defendant in an election contest previous to the election had promised a deputyship to a voter is not a ground for adjudging his election void under the Corrupt Practices Act.—*Id.*

**X. CONTESTS.**

**270** (Ky.) Acts 1916, c. 13, § 11, providing that in contest over nomination or election of an officer, where the nomination or election shall be declared void, the candidate who has received the next highest number of votes and who has not violated the provisions of the act shall be declared nominated or elected, is in contravention of the Constitution and void.—*Hardin v. Horn*, 212 S. W. 573.

**273** (Ky.) Although contestants are not entitled to the offices they seek through an election contest, they are entitled to contest the election of defendants on the ground of violation of the Corrupt Practices Act.—*Hardin v. Horn*, 212 S. W. 573.

**287** (Ky.) Where the allegations in petitions for contest of nominations and elections set forth the grounds of contest too generally and indefinitely, and contestants moved for more specific declarations thereof, which motions were never passed upon, and contestees did not seek the judgment of the court thereon, the ground of the motion was waived.—*Hardin v. Horn*, 212 S. W. 573.

**295(1)** (Ky.) In a contest of a nomination and election to public office, evasiveness and want of candor on part of a witness held to create a strong suspicion that the contestees

or one of them furnished money to the witness, and that it was used on his behalf or at least with his knowledge for corrupt purposes in violation of election laws, but was insufficient in the absence of affirmative evidence.—*Hardin v. Horn*, 212 S. W. 573.

§305(6) (Ky.) Upon an appeal of an election contest case, where appellants are not entitled to the offices in controversy, in any event, it is unnecessary to consider various grounds of counter contest presented against them.—*Hardin v. Horn*, 212 S. W. 573.

## ELECTRICITY.

See Eminent Domain, §318; Master and Servant, §105, 217.

## EMBEZZLEMENT.

See Appeal and Error, §1060; Insurance, §2, 624; Larceny, §15.

§10 (Tex. Cr. App.) Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft and not embezzlement.—*Bonatz v. State*, 212 S. W. 494.

## EMINENT DOMAIN.

See Constitutional Law, §284; Drains, §15; Evidence, §142, 474, 488; Trial, §252.

### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§2(2) (Tenn.) Priv. Laws 1917, c. 648, as to registering dogs, does not violate Const. art. 1, § 21, in that it takes property without just compensation being made therefor.—*Ponder v. State*, 212 S. W. 417.

§31 (Ark.) Taking private property for use of drainage districts for construction of ditches falls within the state's right of eminent domain.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

### II. COMPENSATION.

#### (A) Necessity and Sufficiency in General.

§70 (Ark.) Const. art. 2, § 22, declaring that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor," relates entirely to the right of the owner to have compensation, and has nothing to do with the owner's remedy, which is left to the Legislature.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

§71 (Ark.) Where the Legislature provides a method for the ascertainment of compensation to be allowed owners for land taken under eminent domain for construction of ditches in drainage districts, all constitutional guaranties are complied with, and the right to exact compensation is made effectual.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

#### (B) Taking or Injuring Property as Ground for Compensation.

§103 (Tex. Civ. App.) Where construction of a road necessitated additional fencing and the establishment of an additional watering place to restore abutting land to former usefulness and value, for grazing purposes, the district court on appeal from award of jury of view erred in finding that there was no evidence of depreciated value of land not taken.—*Currie v. Glasscock County*, 212 S. W. 533.

#### (C) Measure and Amount.

§145(4) (Tex. Civ. App.) In proceeding to determine the amount of damages to land due to construction of a road by appellee county, increased and better road facilities could be taken into consideration as offsetting damages to land not taken.—*Currie v. Glasscock County*, 212 S. W. 533.

### III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§203(1) (Tex. Civ. App.) In proceeding to determine the amount of damages due to construction of a road, evidence of the cost of additional fencing, establishing watering places, and other items of like nature necessitated by the laying of the road is admissible and entitled to be accorded its proper probative force in determining whether tract of land as a whole has been damaged.—*Currie v. Glasscock County*, 212 S. W. 533.

§205 (Tex. Civ. App.) In proceeding to determine the amount of damages due to construction of a road, failure of court to recognize evidence of value to tract as a whole, and evidence of decrease in value due to road, as of any probative force upon issue of damage to land not actually appropriated, was reversible error.—*Currie v. Glasscock County*, 212 S. W. 533.

§209 (Ark.) Const. art. 12, § 9, guaranteeing jury trial in condemnation proceedings, relates only to condemnations by private corporations, and there is no express constitutional provision requiring assessments of damages by a jury where private owners' lands are taken by a drainage district for construction of a ditch.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

§280 (Mo.) Under St. Louis City Charter, art. 21, § 9, relating to costs in condemnation proceedings, the matter of extending time for commissioners to file their report and the number of days the statutory per diem is to be allowed them is within the discretion of the court.—*City of St. Louis v. Schuttenberg*, 212 S. W. 864.

Where commissioners appointed in condemnation proceeding orally requested an extension of time, stating that additional time was necessary, that statement was sufficient to justify the court in allowing an extension, and the burden thereafter was on the city, which was required to pay compensation, to show clearly that in granting such extension the court abused its discretion.—*Id.*

Where a city asserted that the action of the court in extending the time for commissioners appointed in eminent domain proceedings to report and the allowance of the statutory per diem for the full time was an abuse of discretion, the showing made held insufficient to establish such abuse of discretion.—*Id.*

§238(4) (Tex. Civ. App.) The road in question being laid out under Rev. St. arts. 6863, 6864, appeal to district court from award of jury of view is governed by article 6866, which does not require bond to be filed in ten days after approval of award by commissioners' court, and not by article 6882.—*Currie v. Glasscock County*, 212 S. W. 533.

### IV. REMEDIES OF OWNERS OF PROPERTY.

§262(5) (Tex. Civ. App.) In a railroad's condemnation proceedings, where the jury found that the land was not increased in value by the taking of the part condemned, failure to require it to state the amount of any increase in the value of the rest of the owners' land was harmless.—*Gulf & Interstate Ry. Co. of Texas v. Stephenson*, 212 S. W. 215.

### V. TITLE OR RIGHTS ACQUIRED.

§318 (Tex. Civ. App.) In a proceeding to condemn land for the use of electric power lines, under Vernon's Sayles' Ann. Civ. St. 1914, arts. 1283c and 1283d, the provision of the latter article that lines shall be constructed upon suitable "poles" means either wood or metal poles, and in view of the land being subject to overflow, and the necessary carrying of numerous wires and the distance between poles, the statute must be construed to include towers as well

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

as "poles."—Stemmons v. Dallas Power & Light Co., 212 S. W. 222.

## EMPLOYERS' LIABILITY ACTS.

See Master and Servant, 168, 173, 204, 259; Negligence, 101.

## EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, 237.

## EQUITY.

See Appeal and Error, 242, 917, 1000; Cancellation of Instruments; Corporations, 482; Courts, 200½; Easements, 38; Estoppel, 58, 106; Executors and Administrators, 219; Injunction; Partition; Partnership, 53; Quieting Title; Sequestration; Specific Performance; Subrogation; Trusts.

## I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(C) Principles and Maxims of Equity.

57 (Tex.Civ.App.) Where an oil prospector agreed to accept an oil lease in terms fully set forth as a part of the contract within 5 days after releases were procured from one who held prior oil leases on the land, and such releases were obtained, the contract became executed under the maxim that, Equity regards as done that which ought to be done, though the new lease was not formally executed.—Haynie v. Stovall, 212 S. W. 792.

## ERROR, WRIT OF.

See Appeal and Error.

## ESCAPE.

See Criminal Law, 351, 396; Witnesses, 349.

## ESCROWS.

See Damages, 85; Evidence, 462; Frauds, Statute of, 117; Specific Performance, 58.

12 (Tex.Civ.App.) A deed placed in escrow to be delivered on compliance with specified conditions becomes effective on the fulfillment of the conditions, though there is no actual delivery.—Sykes v. Fischl, 212 S. W. 217.

13 (Tex.Civ.App.) Where delivery is to a third person in escrow for delivery to grantee upon compliance with specified conditions, a delivery as directed relates back so as to divest the title of the grantor from the first delivery.—Sykes v. Fischl, 212 S. W. 217.

## ESTATES.

See Courts, 92; Curtesy; Deeds, 100, 120, 124, 129, 155; Descent and Distribution; Estates Tail; Executors and Administrators; Life Estates; Perpetuities; Railroads, 69, 72; Remainders; Tenancy in Common; Wills.

## ESTATES TAIL.

2 (Mo.) The common-law doctrine of primogeniture was not adopted by R. S. 1909, § 2872, abolishing entails and providing that remainder upon death of first devisee in tail shall pass "according to the course of the common law"; that doctrine being "repugnant to federal Constitution and state laws" within section 8047.—Gillilan v. Gillilan, 212 S. W. 348.

Under R. S. 1909, § 2872, general and special estates in fee tail do not exist in Missouri.—Id.

## ESTOPPEL.

See Carriers, 26, 223; Corporations, 482; Courts, 93; Divorce, 254;

Ejectment, 15; Frauds, Statute of, 144; Husband and Wife, 62, 198; Judgment, 584, 634, 713; Landlord and Tenant, 63, 64; Mortgages, 275; Partnership, 34; Pleading, 404, 428; Remainders, 5; Tenancy in Common, 45.

## II. BY DEED.

(A) Creation and Operation in General.

32(1) (Ky.) Acceptance of a deed by plaintiff does not estop him from asserting title to the lands excepted from its operation, if he had title to such lands otherwise.—Prewitt v. Wilborn, 212 S. W. 442.

(B) Estates and Rights Subsequently Acquired.

38 (Ky.) The rule of estoppel as to grantor conveying with a warranty and that an after-acquired interest inures to the benefit of his grantee is subject to exception in the case of an heir making the sale and conveyance of an estate which he expects to inherit from an owner then living, the thing attempted to be sold having no potential existence and the conveyance being a fraud upon the owner and against public policy.—Spacey v. Close, 212 S. W. 127.

## III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

58 (Ky.) Prejudice to adverse party is an essential element of estoppel.—Milliken v. Haner, 212 S. W. 605.

58 (Tex.Com.App.) One of the necessary elements of an equitable estoppel is that the person claiming it must have been induced to alter his position in such manner that he will be injured if the estoppel is not declared.—Llano Granite & Marble Co. v. Hollinger, 212 S. W. 151.

(B) Grounds of Estoppel.

68(2) (Mo.App.) Plaintiffs, who with other citizens sought to prohibit issue of bonds legally voted and the building of a high school on a site legally selected, and who took legal steps with that object in view, or were financial contributors in injunction suits prohibiting the issuance of the bonds, all of which prevented delivery of the bonds, are not in a position to maintain suit to enjoin collection of certain school levies and delivery of the bonds on the ground that levies were illegal because bonds had never been delivered.—Wadlow v. Consolidated School Dist. No. 3, Tp. 30, R. 23, Greene County, 212 S. W. 904.

75 (Tex.Civ.App.) Where plaintiff drew a bill of sale of a car from H. to B. without reference to a company, except that its name appeared thereon above H.'s signature, and plaintiff took a mortgage upon the car from B., plaintiff may not claim that the company is estopped by the bill of sale, or that he is an innocent purchaser as against the company.—Rowe v. Guderian, 212 S. W. 960.

A company owning an automobile described in a bill of sale as the property of H., and therein transferred to B. and mortgaged to plaintiff, but showing no connection of the company with the bill of sale, except its name appearing above H.'s signature, is not estopped to claim ownership on the ground that company placed H. in possession of automobile.—Id.

76 (Tex.Com.App.) Where bank held assignment of balance due plaintiff as subcontractor for materials as a mere pledge to secure certain indebtedness due it by plaintiff, defendant debtor could not claim that plaintiff was estopped to deny the bank's authority to accept less than the amount due in full satisfaction of defendant's liability; defendant having paid only admitted liability and protected his rights under contract.—Llano Granite & Marble Co. v. Hollinger, 212 S. W. 151.

(C) Persons Affected.

⚡97 (Tex.Com.App.) In trespass to try title, defendants not being parties to a suit of plaintiffs against purchaser, plaintiffs are in no manner estopped to assert another and contrary theory, from that upon which they recovered from the purchaser, upon which to base a recovery against defendants.—*Heard v. Vineyard*, 212 S. W. 489.

(D) Matters Precluded.

⚡102 (Ky.) One cannot estop himself to deny the validity of a void contract.—*Milliken v. Haner*, 212 S. W. 605.

Where assignee of life policies was allowed to collect all that he had paid under the assignments, with interest, the beneficiary, by consenting to assignment, was not estopped from denying the validity of the assignment upon the ground that assignee had no insurable interest in life of insured, since such assignment was void as against public policy and assignee had not acted thereon to his prejudice.—*Id.*

⚡106 (Mo.App.) The defense of estoppel in pais may be made at law, though it is properly a doctrine of equity originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights.—*Hamburger v. Hirsch*, 212 S. W. 49.

## EVIDENCE.

See Constitutional Law, ⚡48; Costs, ⚡173; Criminal Law, ⚡322-561; Depositions; Judgment, ⚡251, 315; New Trial, ⚡72, 99, 105; Pleading, ⚡11, 428; Statutes, ⚡64, 267; Trial ⚡252; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚡666-678; Trial, ⚡53-85.

### I. JUDICIAL NOTICE.

⚡5(2) (Tex.Civ.App.) It is a matter of common knowledge that the telephone is a means of communication of almost universal use.—*Western Union Telegraph Co. v. Campbell*, 212 S. W. 720.

⚡13 (Tex.Civ.App.) It is well known that tetanus, or lockjaw, usually, if not invariably, arises from wounds inflicted under certain peculiar circumstances.—*Ft. Worth & R. G. Ry. Co. v. Fleming*, 212 S. W. 233.

⚡20(2) (Tex.Civ.App.) Court will not judicially know that a connecting carrier in handling through shipment acts as the agent and employé of carrier from whom it receives shipment, and not as an independent carrier.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

⚡31 (Tex.Civ.App.) Courts will take judicial notice of the provisions of a city charter granted by the state Legislature.—*Cawthon v. City of Houston*, 212 S. W. 796.

⚡43(2) (Tex.Civ.App.) Where application for writ of garnishment is filed at the same time as the main suit, or prior to final judgment, it is ancillary to and part of the main suit, and the court will take judicial knowledge of the proceedings in the main suit and consider them together; but where the original suit is terminated at the time of the institution of the garnishment proceedings, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment without proof of a valid, subsisting, and unsatisfied judgment.—*Tripplett v. Hendricks*, 212 S. W. 754.

### II. PRESUMPTIONS.

⚡65 (Ky.) A corporation, obtaining a transfer of an oil and gas lease on land in A. county

from a partnership, must be presumed familiar with Ky. St. § 199b, requiring a registration of members of such a partnership in such county, to render the partnership's contracts enforceable.—*Warren Oil & Gas Co. v. Gardner*, 212 S. W. 456.

⚡69 (Mo.App.) There is a presumption in favor of correct dealing and against forgery.—*Produce Exch. Bank v. North Kansas City Development Co.*, 212 S. W. 898.

⚡83(1) (Mo.) The court may indulge the presumption that the facts contained in an enumeration made as required by the state census law of 1865 were obtained in the usual manner, and that the information contained in them is prima facie correct. Per *Blair, Woodson, and Williams, JJ.*—*Rauch v. Metz*, 212 S. W. 357.

⚡83(1) (Tex.Civ.App.) It will not be presumed that defendants, board of directors of irrigation district in question, will ever attempt to violate any of the provisions of the Constitution limiting the taxing powers of the district in the amount of indebtedness it may incur.—*White v. Fahring*, 212 S. W. 193.

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### (A) Facts in Issue and Relevant to Issues.

⚡113(7) (Mo.App.) In an action against a railroad company for the flooding of land caused by defendant's negligent construction and maintenance of embankments, in determining the value of wheat destroyed it was proper to admit in evidence the price of wheat after the harvest of that year in estimating the damages.—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

### (B) Res Gestæ.

⚡118 (Tex.Civ.App.) The tendency of the courts is to extend rather than narrow the scope of the rule admitting otherwise hearsay matter as res gestæ.—*Evans v. McKay*, 212 S. W. 680.

⚡121(1) (Tex.Civ.App.) Declarations or exclamations uttered by parties to a transaction contemporaneous with and accompanying it are admissible as res gestæ.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

⚡121(2) (Tex.Civ.App.) In an action by an employé for damages for discharge occasioned by defendant falsely and maliciously notifying the employer that plaintiff owed her a debt, and that she had an assignment of his wages, plaintiff could testify that the employer's agents notified him at the time of his discharge that he was discharged because a loan company had given notice that it held an assignment of his wages, being a part of the res gestæ incidental to and explanatory of plaintiff's claim that the railroad company discharged him because of the giving of the false notice.—*Evans v. McKay*, 212 S. W. 680.

⚡123(1) (Tex.Civ.App.) Not only are declarations or exclamations uttered by parties to a transaction contemporaneous with and accompanying it admissible as res gestæ, but also such as are made under such circumstances as will raise a reasonable presumption that they were the spontaneous utterances of thoughts created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption of premeditation or design.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

⚡123(12) (Tex.Civ.App.) In an action for damages arising from a collision of automobiles, a declaration relative to the accident made 15 minutes thereafter by employé who was driving defendant's automobile was not admissible as a part of the res gestæ.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

⚡126(2) (Tex.) In suits on an accident policy, testimony as to statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the

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cause of insured's injury and death, *held* inadmissible as hearsay, while the statements were self-serving and no part of the res gestæ.—*International Travelers' Ass'n v. Branum*, 212 S. W. 630.

(C) Similar Facts and Transactions.

⇒142(2) (Tex.Civ.App.) In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify to sales of land four or five miles from his own, against objection that there was no showing whether the sales were for cash or credit, or whether there were any improvements on the lands sold, where the owner stated that there were no improvements on one tract sold, except a small box house, etc.—*Gulf & Interstate Ry. Co. of Texas v. Stephenson*, 212 S. W. 215.

(E) Competency.

⇒148 (Tex.Civ.App.) In an action against a telegraph company for delay in delivering a death message, testimony of plaintiff's son, who sent the message, detailing the statements of the party at the other end of the wire when he phoned the message to an agent of the telegraph company for transmission, *held* not inadmissible as hearsay, irrelevant, immaterial, and prejudicial.—*Western Union Telegraph Co. v. Campbell*, 212 S. W. 720.

## VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⇒208(1) (Tex.Civ.App.) An admission or statement made under one allegation in a pleading is not admissible in evidence as an admission where inconsistent defenses are pleaded.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

⇒208(6) (Tex.Civ.App.) An admission made by a party against his interest is admissible in evidence whether made in court or out, and whether by the pleading on which he goes to trial or an abandoned pleading.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

In the purchasers' action for damages from misrepresentations inducing the sale of a thrasher, the original answer of the purchasers in the seller's suit to recover on the notes given it, *held* not admissible as tending to show the purchasers were not entitled to recover for certain items.—*Id.*

(B) By Parties or Others Interested in Event.

⇒222(1) (Tex.Civ.App.) An admission made by a party against his interest is admissible in evidence whether made in court or out.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

(E) Proof and Effect.

⇒258(1) (Tex.Civ.App.) In an action for damages to an automobile in a collision, statement of defendant's secretary that he would settle for the damages to plaintiff's automobile and would put it in as good shape as it was before the accident should not have been admitted, in the absence of evidence as to secretary's authority to make such a statement or promise.—*Wall & Stabe Co. v. Berger*, 212 S. W. 975.

## VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒271(1) (Tex.Civ.App.) In suit against operator of jitney and surety on his bond for injuries sustained by plaintiff while a passenger, when jitney collided with a street car, *held* that court did not err in refusing to strike out testimony of plaintiff's daughter that her father was complaining on the ground that it was self-serving.—*Parker v. Harrell*, 212 S. W. 542.

⇒271(16) (Tex.) In suit on an accident policy, statements of insured to his wife, the ben-

eficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, *held* self-serving.—*International Travelers' Ass'n v. Branum*, 212 S. W. 630.

⇒271(18) (Tex.Civ.App.) In trespass to try title, where there was an issue whether plaintiff's grantor had been married, admitting recitals in deeds given by her that she was widow and wife of a certain person is erroneous; they being self-serving.—*Clark v. Scott*, 212 S. W. 728.

(C) As to Pedigree, Birth, and Relationship.

⇒291 (Mo.) In the construction of a will involving the issue as to whether defendant was the adopted daughter of a deceased sister of testator, through whom she claimed, evidence that defendant's father had stated that he had given her away "by the law" was admissible as pedigree or family history, regardless of the character of the litigation. Per Blair, Woodson, and Williams, JJ.—*Rauch v. Metz*, 212 S. W. 357.

## IX. HEARSAY.

⇒317(3) (Tex.Civ.App.) In suit against operator of jitney and surety on his bond for injuries sustained by plaintiff while a passenger, when jitney collided with a street car, *held* that court did not err in refusing to strike out testimony of plaintiff's daughter that her father was complaining, on the ground that it was hearsay and self-serving, and not admissible for any purpose.—*Parker v. Harrell*, 212 S. W. 542.

⇒317(4) (Tex.Civ.App.) In trespass to try title by the buyer of land against a tenant of the seller, since the tenant's claim of right of possession was predicated in part on his prior rental contract with the seller, of which the buyer had notice before he purchased, testimony to prove the fact was admissible over the buyer's objection that he was not present when the contract was made, so that the testimony was hearsay as to him.—*Rupert v. Swindle*, 212 S. W. 671.

⇒317(8) (Tex.) In suit on an accident policy, testimony as to statements of insured to his wife, the beneficiary, and to his trained nurse, about having seen a man burned up across the street, and about having fallen, all two or three days previously, as showing the cause of insured's injury and death, *held* inadmissible as hearsay.—*International Travelers' Ass'n v. Branum*, 212 S. W. 630.

⇒318(1) (Tex.Civ.App.) Despite provision of deeds of trust that any recitals of certain character in any deeds made by any trustee should be prima facie evidence, recitals of deeds executed by substitute trustee that beneficiary or holder of notes secured had requested trustee to sell the land, which request was necessary to authorize the trustee to sell, *held* unauthorized by the deeds, and no evidence of the fact of request, being mere hearsay as to the beneficiaries.—*Bowman v. Oakley*, 212 S. W. 549.

⇒320 (Tex.Civ.App.) In action for delay in delivery of cattle shipment, testimony predicated upon correctness of records of sales of the cattle kept by person making sales and records of weight by person doing weighing was not objectionable as hearsay.—*Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

## X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

⇒353(3) (Tex.Civ.App.) Ordinarily recitals in deeds are evidence only against privies, and do not affect strangers.—*Clark v. Scott*, 212 S. W. 728.

⇒353(4) (Ky.) In an action involving title to land, a deed accepted by plaintiff is competent evidence against him, if, under the other facts of the case, it would tend to prove an admission

on his part of the existence of any fact adverse to his claim of title.—Prewitt v. Wilborn, 212 S. W. 442.

**(D) Production, Authentication, and Effect.**

¶383(7) (Tex.Civ.App.) Despite provision of deeds of trust that any recitals of certain character in any deeds made by any trustee should be prima facie evidence, recitals of deeds executed by substitute trustee that beneficiary or holder of notes secured had requested trustee to sell the land, which request was necessary to authorize the trustee to sell, *held* unauthorized by the deeds.—Bowman v. Oakley, 212 S. W. 549.

Where the recitals of deeds executed by a trustee under deeds of trust by a provision of the deeds of trust constituted merely prima facie evidence, the power of the courts to ascertain the real truth, when necessary to determination of rights in litigation, was not taken away.—*Id.*

**XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**

**(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

¶410 (Tex.Civ.App.) In an action for loss of barges while in defendant's possession, testimony of a plaintiff as to the agreement between the parties *held* not inadmissible as varying the terms of any written contract; a letter not having been considered by the parties as constituting the contract.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, 212 S. W. 287.

¶424 (Mo.App.) The rule that in the absence of fraud, accident, or mistake, parol evidence is inadmissible to vary the terms of a written contract, cannot be invoked by a stranger to the contract.—Slinkard v. Lamb Const. Co., 212 S. W. 61.

**(B) Invalidating Written Instrument.**

¶429 (Tex.Civ.App.) Where plaintiff at time of execution of written instruments knew that oral contract was not embodied in the writing, he would, to bring himself within the exception to general rule that parol testimony cannot be received to vary valid written instrument, be required to allege and prove that omission was due to accident, mistake, or fraud of defendants; a mere charge that omission was fraudulent being insufficient.—Burchill v. Hermismeyer, 212 S. W. 767.

**(C) Separate or Subsequent Oral Agreement.**

¶441(9) (Tex.Civ.App.) In suit to recover money paid for stock in an oil company upon the ground that at the time the subscription contract, which was in writing, was entered into, the individual defendants orally agreed to return to plaintiff said money in the event oil was not developed, *held* that, aside from the allegations of fraud, evidence of the oral contract alleged was in violation of the rule that parol testimony cannot be received to vary, add to, or subtract from a valid written instrument.—Burchill v. Hermismeyer, 212 S. W. 767.

¶444(4) (Tex.Civ.App.) It may be shown by parol testimony that an ordinary written instrument was executed under agreement that it should not become effective except on certain conditions, but the principle is not applicable to a deed delivered to the grantees and not to a third person.—Cooper v. Hinman, 212 S. W. 972.

**(D) Construction or Application of Language of Written Instrument.**

¶460(5) (Ky.) In action involving title to land, where question of whether lands affected by exception in deed involved could be located, so as to make property referred to a matter of reasonable certainty, was dependent on the evi-

dence, the trial court erred in rejecting proof of the contents and execution of a writing between a party in the chain of title and his grantee.—Prewitt v. Wilborn, 212 S. W. 442.

¶460(7) (Ky.) Parol evidence may be resorted to, to designate property contained in exception from deed, where terms of exception so identify property that parol proof can be applied to language and make it certain.—Prewitt v. Wilborn, 212 S. W. 442.

¶462 (Tex.Civ.App.) A written contract for sale of land providing for a deposit "placed as a forfeit" cannot have its terms varied by parol evidence to show that the money was deposited as earnest or escrow money and not as liquidated damages or forfeit.—Richardson v. Terry, 212 S. W. 523.

**XII. OPINION EVIDENCE.**

**(A) Conclusions and Opinions of Witnesses in General.**

¶471(14) (Tex.Civ.App.) In contest of probate of a will of deceased wife of proponent involving issue of undue influence exerted by proponent, testimony of daughter that her father dominated her mother was a conclusion, and inadmissible.—Jennings v. Jennings, 212 S. W. 772.

¶472(1) (Mo.App.) In action by plaintiff brokers for commission, question asked by defendant of his bookkeeper and stenographer by whom she considered one of plaintiffs employed *held* clearly inadmissible, because calling for a conclusion upon a difficult matter which was the sole issue in the case.—Davis v. Geiger, 212 S. W. 384.

In suit for commission for procuring a tenant for defendant's property, the sole issue being whether plaintiffs were employed by defendant or the lessee, it was permissible to show that, when a discussion was had relative to the deal, one of the plaintiffs spoke in behalf of defendant, and question as to who argued on the side of the lessee was not subject to objection that it called for witness' conclusion as to whether said plaintiff was employed to act for defendant.—*Id.*

¶472(4) (Tex.Civ.App.) In an action for loss of barges, testimony of a witness, who had been in charge of another party's barge at the time of the flood which caused the loss, that he considered it reasonable care and ordinary prudence on his part to have five men on his barge to protect it from the flood, *held* inadmissible as opinion involving a mixed question of law and fact.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, 212 S. W. 287.

¶474(18) (Tex.Civ.App.) In a railroad's condemnation proceedings, the owner of the land was properly permitted to testify in his own behalf that the fair market value of the land taken prior to its taking was \$100 an acre.—Gulf, & Interstate Ry. Co. of Texas v. Stephenson, 212 S. W. 215.

¶474½ (Mo.App.) Facts of common observation or concerning matters within the common experience and observation of men are in general the matters about which a nonexpert witness is allowed under proper conditions to give his opinion or conclusion.—Davis v. Geiger, 212 S. W. 384.

¶477(2) (Tex.Civ.App.) In suit against operator of jitney for injuries sustained by plaintiff passenger in jitney when jitney collided with a street car, defense being that plaintiff's injuries were the result of prior accident, there was no error in permitting plaintiff's wife to testify that her husband had recovered from a former accident some two years before the accident in question.—Parker v. Harrell, 212 S. W. 542.

¶488 (Tex.Civ.App.) In a railroad's condemnation proceedings, an owner of the land, who had lived in the neighborhood for 31 years, and on his then farm for 25 years, having been deputy tax assessor in the neighborhood for

several years, and well informed as to the nature of lands in the vicinity, *held* qualified to testify as to market value.—*Gulf & Interstate Ry. Co. of Texas v. Stephenson*, 212 S. W. 215.

**(B) Subjects of Expert Testimony.**

⚡514(3) (Ky.) The distance within which an engine may be stopped is a proper subject for expert testimony.—*Hurst v. Southern Ry. Co. in Kentucky*, 212 S. W. 461.

**(C) Competency of Experts.**

⚡535 (Tex. Civ. App.) In an action by mine employé for personal injuries, based on ground that mine was not properly lighted, testimony of witness that the mine was "poorly lighted" at that point of accident should not be admitted, unless the witness qualifies as an expert.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡539½(2) (Ky.) The distance within which an engine may be stopped is a proper subject for expert testimony, but it is necessary that the witness should have a special knowledge of the subject as applied to the facts and conditions.—*Hurst v. Southern Ry. Co. in Kentucky*, 212 S. W. 461.

In action for injuries in collision between street car and train, expert testimony as to distance within which an engine may be stopped was properly excluded, where the witness had not been upon an engine for 15 years, and disqualified himself by showing that he was not acquainted with the equipment in use at the time of the accident.—*Id.*

⚡539½(2) (Mo. App.) An expert motorman, though he had never operated a car of the type which caused the accident, may testify as to the distance within which it could be stopped, where he had ridden with motormen who were at the time operating such cars, and saw how they were operated, etc.—*Buzan v. Kansas City Rys. Co.*, 212 S. W. 906.

⚡542 (Ark.) A witness, who testified that he had handled apples for over 27 years, qualified as an expert, and could give his opinion as to when certain apples had been frozen, and that it takes the decay in apples some time to show after they have been frozen.—*C. H. Robinson Co. v. Hudgins Produce Co.*, 212 S. W. 305.

⚡543(4) (Tex. Civ. App.) In an action against a railroad for the destruction by fire of cotton in transit, a member of plaintiff firm, long experienced in handling, buying, and selling cotton, *held* qualified to give an opinion as to quality of the cotton.—*Sugarland Ry. Co. v. Dew Bros.*, 212 S. W. 190.

**(D) Examination of Experts.**

⚡553(2) (Mo. App.) In an action for the death of a woman struck by a street car, an hypothetical question as to the distance in which a car could be stopped *held* not erroneous because not including the weight of the car, the kind of motors, etc., where the witness testified he was familiar with that type of car.—*Buzan v. Kansas City Rys. Co.*, 212 S. W. 905.

⚡553(4) (Mo.) In an action for death from pneumonia of plaintiff's wife, injured by a fall in park pavilion maintained by defendant city, the trial court's refusal to permit the city to put a hypothetical question as to whether, on the facts assumed, the death could have been caused by lobar pneumonia *held* not error; the evidence tending to show that death resulted from bronchial pneumonia.—*Kuenzel v. City of St. Louis*, 212 S. W. 876.

**XIV. WEIGHT AND SUFFICIENCY.**

⚡598(1) (Ky.) In personal injury action, where three witnesses testified to plaintiff's theory and four to that of plaintiff, it cannot be said that a verdict adopting the testimony of the three witnesses for plaintiff, rather than the facts testified to by defendant's four

witnesses, is flagrantly against the evidence, or that the verdict is not sustained by it.—*Cumberland R. Co. v. Girdner*, 212 S. W. 105.

**EXCEPTIONS, BILL OF.**

See Appeal and Error, ⚡2, 511, 516, 544, 604, 635, 690, 907; Criminal Law, ⚡1091, 1144, 1182.

**EXCHANGE OF PROPERTY.**

See Covenants, ⚡118, 122; Frauds, Statute of, ⚡70; Injunction, ⚡194; Pleading, ⚡248.

⚡8(5) (Tex. Com. App.) Where a purchaser of land conveyed in part payment a farm, and thereafter discovered that the land conveyed to him contained 84 acres, instead of 100, as estimated by the vendor's agent, his measure of damages was the difference between the value of the property given in exchange and that received by him.—*Cox v. Barton*, 212 S. W. 652.

**EXECUTION.**

See Appeal and Error, ⚡1068; Attachment, ⚡331; Chattel Mortgages, ⚡197; Courts, ⚡231; Fraudulent Conveyances, ⚡132, 309; Master and Servant, ⚡411.

**V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.**

⚡172(2) (Tex. Com. App.) A judgment debtor who had been garnished in an action against his creditor is entitled to restrain execution on the judgment under Vernon's Sayles' Ann. Civ. St. 1914, art. 4647, though he fails to tender the excess of the amount of the judgment over the claim of plaintiff in garnishment, in view of article 279, which prevents garnishees from paying any debt to the defendant in garnishment after service of writ.—*O'Brien v. Barcus*, 212 S. W. 941.

**EXECUTIVE POWER.**

See Constitutional Law, ⚡80.

**EXECUTORS AND ADMINISTRATORS.**

See Adoption, ⚡17; Cancellation of Instruments, ⚡59; Courts, ⚡200½, 200¾, 475; Death, ⚡39; Descent and Distribution; Guardian and Ward, ⚡10; Husband and Wife, ⚡207, 208, 276; Judgment, ⚡712; Master and Servant, ⚡92; Process, ⚡149; Trespass to Try Title, ⚡11; Trusts, ⚡227, 316; Wills; Witnesses, ⚡126, 158, 178.

**II. APPOINTMENT, QUALIFICATION, AND TENURE.**

⚡14 (Ky.) A will bequeathing testator's entire estate to a daughter, and asking the court to appoint his brother "administrator" and guardian without bond, with power of attorney to sell and handle the property, manifested testator's intention to nominate his brother as executor, so that his appointment by the court as executor was proper.—*Sauer v. Taylor's Ex'r*, 212 S. W. 533.

**III. ASSETS, APPRAISAL, AND INVENTORY.**

⚡70 (Tex. Com. App.) Where an administrator, while inventorying the personality of the estate, appraised the county court that it was claimed by decedent's son, who applied to have the property turned over to him, an application which the court granted, and the administrator turned the property over, the effect of the order was to eliminate the property from the inventory, at least until some action was taken in a court of competent jurisdiction to recover it.—*Brown v. Fleming*, 212 S. W. 483.

⚡72 (Tex. Com. App.) Neither the original nor the corrected inventory of the personality of



a decedent is conclusive for or against the administrator under Rev. St. 1911, arts. 3337-3348.—*Brown v. Fleming*, 212 S. W. 483.

The inventory of a decedent's estate required by Rev. St. 1911, arts. 3330-3349, to be filed by the administrator, should be at least prima facie a guide for the county court in respect of what property belongs to the estate and comes under the jurisdiction of the court.—*Id.*

Where, when district court entered order denying administrator's application for sale of realty to pay debts, certain personalty was not in his hands as administrator, and was not even a part of his inventory, having been turned over to decedent's son, who claimed it, pursuant to the order of the county court, and no objection was made to the inventory, which did not refer to the personalty, decedent's creditor cannot, by way of contest of the application for sale by the administrator, inject the issue of the correctness of the inventory.—*Id.*

#### IV. COLLECTION AND MANAGEMENT OF ESTATE.

##### (A) In General.

⚡96 (Ark.) Executrix cannot create a new liability where none existed before, by binding estate on a contract which had come to an end by testator's death.—*Blanton v. Forrest City Mfg. Co.*, 212 S. W. 330.

⚡97 (Tex.) In necessary cases the probate court may, under the statute, sanction an administrator's employment of a broker to make a sale advantageous to the estate, and allow a reasonable broker's commission as a legitimate expense of administration, although the power should be sparingly exercised.—*Jones v. Gilliam*, 212 S. W. 930.

The probate court, not the administrator, must be the judge as to the necessity of employing a broker to make a sale for the estate, as well as of the amount of the broker's compensation; the administrator being but an agency of the court.—*Id.*

An independent executor has the same authority as the probate court possesses in ordinary administrations to employ agents to sell the lands of the estate and to make the estate liable for reasonable commissions earned under such employment.—*Id.*

⚡121(2) (Ky.) Under Ky. St. § 3892, clothing an administrator with the will annexed with the powers of an executor, he may sell and convey real estate, if so authorized by the terms of the will.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

##### (B) Real Property and Interests Therein.

⚡129(1) (Ky.) An administrator cannot sell, and has no duty to control, the real estate of an intestate.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

⚡138(1) (Ky.) Where a will bequeathed testator's entire estate to a daughter, and asked the court to appoint his brother administrator and guardian without bond, and to give him power of attorney to sell and handle the property, and named administrator was appointed executor, he was authorized by will to sell and convey real estate.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

⚡145 (Tex.Com.App.) An administrator's deed to land is but an assertion that the title remained in decedent to the date of his death, and is not evidence of such ownership.—*McBride v. Loomis*, 212 S. W. 480.

#### VI. ALLOWANCE AND PAYMENT OF CLAIMS.

##### (A) Liabilities of Estate.

⚡219 (Ark.) Kirby's Dig. § 109, providing for a special proceeding by which the probate court may allow any claim in favor of an administrator against the estate of intestate, is broad enough to include equitable demands.—*Free v. Maxwell*, 212 S. W. 325.

⚡221(6) (Ark.) In a proceeding by a widow to establish a claim against her husband's estate, evidence held sufficient to warrant a finding that he borrowed money from her.—*Free v. Maxwell*, 212 S. W. 325.

##### (D) Priorities and Payment.

⚡262 (Mo.App.) A proceeding in the probate court to classify judgment against the estate of a decedent is not a mere ministerial or clerical act, and may involve a trial of fact, as where a judgment is against the deceased in the wrong name.—*Green v. Strother*, 212 S. W. 309.

Under Rev. St. 1909, §§ 197 and 206, it is unnecessary in a proceeding before the court of probate to obtain the allowance and classification against an estate of a judgment rendered against the deceased in a wrong name to file any formal pleadings.—*Id.*

Where a judgment was rendered against deceased in a wrong name, the probate court, in proceeding to have the same allowed and classified against the estate, cannot render a money judgment against the estate, and a judgment for a fixed amount is void.—*Id.*

⚡272 (Tex.Com.App.) Personal property is the primary fund for the payment of the debts of a decedent.—*Brown v. Fleming*, 212 S. W. 483.

#### VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

##### (A) When Authorized.

⚡325 (Tex.Com.App.) If the personal property belonging to the estate of a decedent had been lost by the wrongful act of a former administrator, decedent's land could nevertheless be sold to pay his debts before exhaustion by the creditors of their remedy against the administrator.—*Brown v. Fleming*, 212 S. W. 483.

Under Rev. St. 1911, art. 3235, though the personal estate of a decedent is the primary fund for the payment of his debts, the personalty need not be exhausted in the sense that before the administrator can resort to the realty all of the personal assets should be reduced to possession by him.—*Id.*

##### (B) Application and Order.

⚡334 (Tex.Com.App.) Where the question whether an administrator had committed a devastavit could be determined only by suit, a creditor of the estate was not required to postpone collection of its debt and sale of realty of the estate to satisfy the debt, until litigation over the question of devastavit should be determined by the court of last resort.—*Brown v. Fleming*, 212 S. W. 483.

⚡349(2) (Tex.Com.App.) The county court, so far as the administration of estates of decedents is concerned, is a court of general jurisdiction, having jurisdiction to sell property for the payment of debts, and its judgment, in such regard, where jurisdiction over an estate is once acquired, is as binding as that of any other court, and not subject to collateral attack.—*Brown v. Fleming*, 212 S. W. 483.

⚡349(2) (Tex.Com.App.) In a collateral proceeding, no presumption can be indulged against the validity of an order of the probate court directing a sale of lands.—*Henrd v. Vineyard*, 212 S. W. 489.

An order of sale of land to pay a claim, made by the county court on an application under Rev. St. 1911, arts. 3489, 3490, is not void and subject to collateral attack because the claim was not then established, where the record shows subsequent establishment, classification, and payment, and therefore its existence.—*Id.*

⚡358(1) (Tex.Com.App.) The district court, on appeal in proceedings for the sale of land of a decedent to pay debts, has no greater



power than the county court had originally.—*Brown v. Fleming*, 212 S. W. 483.

## X. ACTIONS.

§439 (Tex.Civ.App.) In trespass to try title to deceased's homestead, it is not necessary to join administrator, especially where a previous suit had determined creditors and administrator had no interest in the property.—*Clark v. Scott*, 212 S. W. 728.

## XI. ACCOUNTING AND SETTLEMENT.

(E) *Stating, Settling, Opening, and Review.*

§514 (Tex.) Approval of statutory administrator's annual exhibit does not prevent, on the final settlement, re-examination of the charges made by him.—*Jones v. Gilliam*, 212 S. W. 930.

## EXEMPTIONS.

See Carriers, §113; Constitutional Law, §70; Homestead; Insurance, §129, 392, 438; Mandamus, §118.

### I. NATURE AND EXTENT.

(B) *Persons Entitled.*

§16 (Tex.Civ.App.) In view of Const. art. 16, §§ 49-51, a divorced father, who had not been legally deprived of the custody of his son or daughter, with whom the son was living, except for temporary absences, and who contributed to the daughter's support, though she was living with her mother, was the "head of the family," within Rev. St. 1911, art. 3785, subd. 10, entitling him to exemption of his automobile, from forced sale.—*John E. Morrison & Co. v. Murff*, 212 S. W. 212.

(C) *Property and Rights Exempt.*

§81 (Ark.) A debtor is entitled to claim his chattel exemptions in partnership property when his interest therein has been ascertained and segregated, but the right of exemption does not exist so long as the property claimed exempt continues to be partnership property.—*Swift & Co. v. Cox*, 212 S. W. 83.

## IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§123 (Ark.) Upon an appeal from justice to circuit court, an amendment of defendant judgment debtor's schedule, permitted by the circuit court, so as to exclude from property claimed as exempt certain partnership property bought by judgment debtor and another, the title to which had been reserved by vendor, and certain other articles on which they had executed a mortgage, was proper where, omitting such articles, the remainder did not equal \$500 in value.—*Swift & Co. v. Cox*, 212 S. W. 83.

## EXPLOSIVES.

See Negligence, §136.

## EXPOSITIONS.

See Statutes, §64.

## EXTRADITION.

See Habeas Corpus, §85.

## II. INTERSTATE.

§32 (Tex.Cr.App.) In extradition cases the test is the sufficiency in the demanding state of the affidavit filed with requisition.—*Ex parte Nix*, 212 S. W. 507.

## FACTORS.

See Brokers.

## FAIRS.

See Statutes, §64.

## FALSE IMPRISONMENT.

See Arrest, §70.

§39 (Ky.) Whether defendant, in action for false imprisonment, who arrested plaintiff without a warrant on receiving a telegram from another state charging plaintiff with the crime of receiving stolen goods, had reasonable grounds to believe the plaintiff had committed a felony, held a question for the jury.—*Klotz v. Cook*, 212 S. W. 917.

## FALSE PRETENSES.

See Habeas Corpus, §85.

§4 (Tex.Cr.App.) To sustain a conviction, under Vernon's Ann. Pen. Code, 1916, art. 690, providing that any agent or solicitor, who knowingly procures, by fraudulent representations, payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, there must be in existence at the time the fraudulent representations are made a complete binding obligation to pay an insurance premium.—*Griffin v. State*, 212 S. W. 499.

§7(5) (Tex.Cr.App.) Under Vernon's Ann. Pen. Code 1916, art. 690, providing that any agent or solicitor who knowingly procures by fraudulent representations payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, the representations must not be mere false promises or professions as to future happenings or events, but must relate to something present or past.—*Griffin v. State*, 212 S. W. 499.

§49(1) (Tex.Cr.App.) Facts held not to show the existence of an obligation, the payment of which was induced by fraudulent representations knowingly made by defendant, within Vernon's Ann. Pen. Code 1916, art. 690, providing that any agent or solicitor who knowingly procures by fraudulent representations payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor.—*Griffin v. State*, 212 S. W. 499.

## FEDERAL EMPLOYERS' LIABILITY ACT.

See Negligence, §101.

## FELLOW SERVANTS.

See Master and Servant, §168-173.

## FENCES.

See Eminent Domain, §103, 203; Master and Servant, 105, 217; Railroads, §275.

## FINDING LOST GOODS.

See Larceny, §3, 10, 16, 17, 44, 68.

## FIRES.

See Appeal and Error, §1053; Carriers, §113, 134, 136; Evidence, §543; Insurance, §635; Railroads, §480, 485; Sales, §172.

## FOOD.

See Evidence, §542; Sales, §179, 418, 420.

## FOOD ADMINISTRATION.

See Sales, §179, 418.

## FORCIBLE ENTRY AND DETAINER.

See Justices of the Peace, §191; Landlord and Tenant, §288, 291; Time, §10.

## FOREIGN CORPORATIONS.

See Corporation, §402-472.

## FORFEITURES.

See Adverse Possession, ¶109; Appeal and Error, ¶173; Damages, ¶85; Deeds, ¶145; Elections, ¶231; Evidence, ¶462; Insurance, ¶146, 392; Intoxicating Liquors, ¶45, 88; Landlord and Tenant, ¶112; Mines and Minerals, ¶78, 79; Officers, ¶56; Specific Performance, ¶58; Waters and Water Courses, ¶225.

## FORGERY.

See Banks and Banking, ¶227; Evidence, ¶69; Husband and Wife, ¶198; Judgment, ¶255.

¶19 (Tex.Cr.App.) One who presents a false check to a paying teller, and disappears when the teller steps into another part of the bank, without accepting the check or paying the money thereon, and calls an officer, is guilty of attempting to pass a forged instrument.—*McConnell v. State*, 212 S. W. 498.

¶44(½) (Tex.Cr.App.) In prosecution for passing a forged check, state's failure to introduce the alleged forged check in evidence constitutes reversible error.—*McConnell v. State*, 212 S. W. 498.

## FRANCHISES.

See Taxation, ¶117.

## FRAUD.

See Action, ¶25; Appeal and Error, ¶172, 1039; Army and Navy, ¶34; Bills and Notes, ¶106, 497; Contracts, ¶94, 108, 129, 189; Corporations, ¶80, 482; Damages, ¶159; Estoppel, ¶38; Evidence, ¶208, 429, 441; False Pretenses, ¶4, 7, 49; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, ¶29, 198; Injunction, ¶186; Insurance, ¶198; Judgment, ¶443; Limitation of Actions, ¶28, 39, 100; Mortgages, ¶235; Release, ¶24, 57; Sales, ¶38; Taxation, ¶446; Telegraphs and Telephones, ¶54; Vendor and Purchaser, ¶352; Wills, ¶165.

### I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

¶11(2) (Ky.) Where vendor accepts assignment of notes in part consideration for land, "without recourse" and waives vendor's lien upon purchaser's representations that bonds securing the notes were worth par, such representations were statements of facts and not merely expressions of opinion, where the purchaser claimed to have knowledge of value, and the vendor had no opportunity to ascertain the actual value.—*Larue v. Barbee*, 212 S. W. 142.

¶12 (Tex.Civ.App.) The general rule is that a false representation, in order to authorize relief on that ground, must be of an existing fact, and not a promise of something to be done in the future.—*Burchill v. Hermismeyer*, 212 S. W. 767.

¶20 (Tex.Civ.App.) If the purchasers of a threshing machine signed the contract on information which they, or either of them, gained by an independent investigation, judgment should have been rendered for the seller in the purchasers' action for damages on account of misrepresentation.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

## II. ACTIONS.

### (B) Parties and Pleading.

¶41 (Tex.Civ.App.) Fraud is never presumed, but must always be proven, and the facts and circumstances relied on must be set out, so that in construing a petition it may be determined whether the facts and circumstances alleged amount to fraud.—*Burchill v. Hermismeyer*, 212 S. W. 767.

### (C) Evidence.

¶50 (Tex.Civ.App.) Fraud is never presumed, but must always be proven.—*Burchill v. Hermismeyer*, 212 S. W. 767.

¶52 (Tex.Civ.App.) In an action by the purchasers for misrepresentations inducing a sale to them of a threshing machine, testimony of a purchaser that, immediately after rejecting the threshing machine, he signed a written order for another containing the same stipulations, which he read and understood, held properly excluded in the trial court's discretion, as being a collateral matter.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

### (D) Damages.

¶59(1) (Ky.) In vendor's action against purchaser for misrepresenting the value of bonds securing notes assigned to vendor in part consideration for land, where the uncontradicted evidence shows that the notes at the time of assignment were worthless, the vendor's measure of damages is the full face value of the notes and interest.—*Larue v. Barbee*, 212 S. W. 142.

¶59(2) (Ky.) Where purchaser induces vendor to accept assignment of notes in part consideration for land upon misrepresentation as to the value of the notes, the vendor's measure of damages is the difference between the value of the notes at the time of assignment and what their value would have been if the bonds by which they were secured had been worth par as represented by purchaser.—*Larue v. Barbee*, 212 S. W. 142.

### (E) Trial, Judgment, and Review.

¶65(1) (Ky.) In vendor's action against purchaser for fraud in misrepresenting the value of bonds securing notes assigned by purchaser to vendor in part consideration for land, where only evidence as to worthlessness of the notes was a statement that the makers were insolvent, the court's failure to give instruction on measure of damages was error, since mere proof of insolvency of the makers was not proof of worthlessness of the notes.—*Larue v. Barbee*, 212 S. W. 142.

## FRAUDS, STATUTE OF.

See Principal and Agent, ¶145; Torts, ¶12; Vendor and Purchaser, ¶105.

### III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISARRIAGE OF ANOTHER.

¶14 (Tex.Civ.App.) In an action upon an open account for goods sold to an alleged partnership, where one defendant denied the relation, alleged that the other defendant was primarily liable, and pleaded the statute of frauds, held, that, where the debt was a partnership one the statute of frauds had no application.—*Pennington v. Fleming*, 212 S. W. 303.

### VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

¶70 (Ky.) An agreement upon a division line which was in effect the mere exchange of lands owned by the different parties was in contravention of the statute of frauds; there being no uncertainty as to where the true boundary line ran nor any bona fide dispute as to its location.—*Standifer v. Combs*, 212 S. W. 921.

### VIII. REQUISITES AND SUFFICIENCY OF WRITING.

¶117 (Tex.Civ.App.) A deed deposited in escrow, reciting full payment of consideration for the sale of land, held not such a memorandum of an oral agreement for the transfer of the land, in consideration of an automobile, cash paid, and deferred payments, as to satisfy the statute of frauds. *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3965.—*Simpson v. Green*, 212 S. W. 263.

**IX. OPERATION AND EFFECT OF STATUTE.**

↪129(4) (Mo.App.) Where lessor performed lease by putting lessee in possession, lessee, after remaining in possession for part of term, cannot defeat liability for the remainder of term on ground that description in lease was insufficient to satisfy statute of frauds.—Gentry v. Fitzgerald, 212 S. W. 39.

↪129(5) (Mo.App.) Although contract for sale of land was oral, if deed was delivered and accepted and part payment made by purchaser in accordance with the contract, the statute of frauds would not be involved.—Davis v. Greenlee, 212 S. W. 22.

↪129(10) (Ark.) The question whether authority of the owners' agent to lease plantation to plaintiff for a longer period than one year could be conferred in parol was immaterial, where plaintiff complied with the terms of his five-year lease by paying county, state, and a large part of levee taxes, and placing improvements on the plantation to the value of about \$8,500.—Grant v. Burrows, 212 S. W. 95.

↪144 (Mo.App.) Where lease gave lessees option of terminating lease at certain date by giving lessors notice within certain time, and lessors, upon request, gave lessees a parol extension of time within which to give notice, and lessees, relying upon such extension, did not give the notice until after the date prescribed by the lease, lessors were estopped from asserting that parol agreement to extend time was unenforceable under statute of frauds (Rev. St. 1909, § 2783).—Hamburger v. Hirsch, 212 S. W. 49.

**X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

↪152(1) (Mo.App.) Where answer sets up contract and reply takes issue therewith as to such contract, the statute of frauds, though not specially pleaded, is available to plaintiff.—Hamburger v. Hirsch, 212 S. W. 49.

↪158(2) (Tex.Civ.App.) In action to recover interest in land, in which plaintiff relied on agreement between stepmother and his father that property, title of which was in mother, would become common property of both, evidence held insufficient to sustain such parol transfer of property.—Bauss v. Bauss, 212 S. W. 965.

**FRAUDULENT CONVEYANCES.**

See Trial, ↪296.

**I. TRANSFERS AND TRANSACTIONS INVALID.****(A) Grounds of Invalidity in General.**

↪15 (Mo.App.) That stock of goods and fixtures were worth enough to meet seller's debts, but were sold in bulk for a grossly inadequate price, making seller insolvent, to buyer's knowledge was a badge of fraud.—Ward v. Stutzman, 212 S. W. 65.

↪16 (Mo.App.) Transfers of property constituting badges of fraud do not in themselves constitute fraud, but are signs or evidence from which its existence may be inferred, and are more or less strong or weak, according to their nature and the number occurring in the same case.—Ward v. Stutzman, 212 S. W. 65.

**(C) Property and Rights Transferred.**

↪47 (Tex.Civ.App.) Under Rev. St. 1911, art. 3971, relating to sales in bulk, a dealer in monuments, having on hand marble, granite, etc., was a "merchant" or "trader" within the act, though at time he sold his entire stock of goods without complying with act he was not engaged in that business, but was engaged in other lines of employment.—Teich v. McAuley, 212 S. W. 979.

**(E) Consideration.**

↪74(2) (Mo.App.) Gross inadequacy of consideration is one of the indicia of fraud.—Ward v. Stutzman, 212 S. W. 65.

Mere inadequacy of price, unattended by other circumstances giving color and form to the transaction, is not usually sufficient to establish fraud.—Id.

**(I) Retention of Possession or Apparent Title by Grantor.**

↪132(3) (Mo.App.) Under Rev. St. 1909, § 2887, sale was fraudulent and void as against the seller's creditors where there was no change of possession, despite any notice to or knowledge of the void sale to a purchaser on execution against the seller.—Miller v. Tallent, 212 S. W. 73.

**III. REMEDIES OF CREDITORS AND PURCHASERS.****(G) Evidence.**

↪282 (Mo.App.) Actual knowledge, on part of buyer, of seller's fraudulent intent, must be proved, and not presumed.—Ward v. Stutzman, 212 S. W. 65.

↪301(1) (Mo.App.) Actual knowledge by buyer of seller's fraudulent intent may be proved by circumstantial evidence.—Ward v. Stutzman, 212 S. W. 65.

**(I) Trial.**

↪308(1) (Mo.App.) Evidence held sufficient to warrant submission to jury of question of whether sale of stock of jewelry was fraudulent as to seller's creditors.—Ward v. Stutzman, 212 S. W. 65.

↪309(4) (Mo.App.) On buyer's claim to ownership of property levied on under execution issued on judgment recovered against seller, where seller's judgment creditor claimed sale to have been void under Rev. St. 1909, § 2881, invalidating sale made with "intent to hinder, delay or defraud creditors," instruction that sale was valid, unless made with "intent of defrauding and delaying his creditors," was reversible error, since sale was fraudulent, if intent was either to defraud or delay.—Ward v. Stutzman, 212 S. W. 65.

**FREEZING.**

See Evidence, ↪542.

**FUNDAMENTAL ERROR.**

See Appeal and Error, ↪285, 719.

**GARNISHMENT.**

See Evidence, ↪43; Execution, ↪172; Judgment, ↪504.

**I. NATURE AND GROUNDS.**

↪7 (Tex.Civ.App.) A dormant judgment—one not kept alive by issuance of execution—will support a writ of garnishment.—Tripplett v. Hendricks, 212 S. W. 754.

**II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.**

↪62 (Tex.Civ.App.) Community funds in name of wife may be impounded by garnishment in aid of judgment against husband.—Szanto v. First State Bank of Mt. Calm, 212 S. W. 971.

**III. PROCEEDINGS TO PROCURE.**

↪87 (Tex.Civ.App.) Where all the statutory requirements of an affidavit for garnishment have been met, that affidavit contains other allegations is immaterial.—Szanto v. First State Bank of Mt. Calm, 212 S. W. 971.

↪88 (Tex.Civ.App.) A special exception to part of an application for a writ of garnishment, alleging that "said judgment is still in force and satisfied," should have been sustained

upon the ground that the allegations were contradictory.—*Tripplett v. Hendricks*, 212 S. W. 754.

⚡89 (Tex.Civ.App.) Garnishment proceedings may be maintained after judgment obtained, without giving bond.—*Szanto v. First State Bank of Mt. Calm*, 212 S. W. 971.

### V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

⚡108 (Tex.Com.App.) The assignee of a judgment occupies no better position than the judgment creditor, and, if he took the assignment after service of garnishment on the judgment debtor, he took it subject thereto, and, if he has failed to require his assignor to file the replevy bond under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 279, or to take other steps to protect himself, he cannot complain of delay in collection of his judgment by reason of the garnishment proceeding.—*O'Brien v. Barcus*, 212 S. W. 941.

### VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

⚡162 (Tex.Civ.App.) Where application for garnishment is filed at the same time as the main suit, or prior to final judgment, it is ancillary to and part of the main suit; but where the original suit is terminated at the time of the institution of garnishment, and by the petition the judgment is set up as the basis for a valid writ, and defendant joins issue by denying the existence of a judgment, the court is not authorized to enter judgment without proof of a valid, subsisting, and unsatisfied judgment.—*Tripplett v. Hendricks*, 212 S. W. 754.

### GAS.

See Evidence, ⚡65; Injunction, ⚡137, 163; Mines and Minerals, ⚡6, 58, 78, 79; Partnership, ⚡64.

### GIFTS.

See Husband and Wife, ⚡49½; Witnesses, ⚡78.

### GRAND JURY.

See Indictment and Information, ⚡4.

### GUARANTY.

See Sales, ⚡89.

### GUARDIAN AND WARD.

See Executors and Administrators, ⚡14, 138; Infants, ⚡29; Insane Persons, ⚡62; Mortgages, ⚡86.

### II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

⚡10 (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4078, subd. 5, disqualifying as guardians parties to lawsuits affecting the minor, does not disqualify administrator of minor's deceased parents.—*Sparkman v. Stout*, 212 S. W. 526.

A minor's grandfather has preference right to appointment as guardian, although court may think some other person better qualified.—*Id.*  
⚡13(7) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4083, subd. 4, providing that orders appointing guardian shall specify amount of bond and direct clerk to issue letters of guardianship, order omitting these requirements is defective.—*Sparkman v. Stout*, 212 S. W. 526.

⚡13(8) (Tex.Civ.App.) Upon appeal from a probate court order appointing guardian of a minor's person and estate, a district court order appointing guardian for minor's person only is erroneous, since it did not dispose of entire case.—*Sparkman v. Stout*, 212 S. W. 526.

### III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

⚡29 (Tex.Civ.App.) Possession of a minor cannot properly be awarded in proceedings to appoint a guardian for him.—*Sparkman v. Stout*, 212 S. W. 526.

In proceeding to appoint a guardian for minor's personal property, appealed to district court from county court, a district court order awarding custody of child is void.—*Id.*

### HABEAS CORPUS.

See Trial, ⚡255.

#### I. NATURE AND GROUNDS OF REMEDY.

⚡3 (Tex.Cr.App.) Where relator, after being acquitted of one charge of murder, was indicted on another, he cannot by habeas corpus raise the issue of *autrefois acquit*; the appropriate remedy being by special plea entered in the court in which the second indictment was pending.—*Ex parte Spanell*, 212 S. W. 172.

⚡3 (Tex.Cr.App.) Original writ of habeas corpus cannot be granted to secure release of woman committed to city farm because afflicted with syphilis on showing that both positive and negative results have come from various tests, since application for writ of habeas corpus to local courts would furnish the remedy.—*Ex parte Brooks*, 212 S. W. 956.

⚡30(2) (Tex.Cr.App.) In habeas corpus proceedings for discharge of prisoner charged with violation of Disloyalty Act 35th Leg. (4th Called Sess.) c. 8, § 1, court will not discharge prisoner, though complaint does not set out the language used, or show wherein it was calculated to provoke a breach of the peace, and does not allege that it was used in the presence and hearing of a United States citizen, since under Code Cr. Proc. 1911, art. 206, the prisoner will not be discharged where there is probable cause to believe an offense has been committed.—*Ex parte Acker*, 212 S. W. 500.

#### II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡85(1) (Tex.Civ.App.) In father's habeas corpus proceedings to secure custody of children, whom he has never supported, and to whom he has been cruel, it will not be presumed that the best interests of the children will be subserved by placing them in father's custody.—*State v. Jackson*, 212 S. W. 718.

In father's habeas corpus proceeding to procure custody of children from maternal grandparents, in whose care children had been placed upon mother's death, following her divorce from father, evidence of the adoption of the children by the grandparents was admissible.—*Id.*

⚡85(2) (Tex.Cr.App.) Where warrant recited that Governor of demanding state had made known to Governor of this state that relator is charged "with the crime of false pretenses committed in said state," the production of the warrant made a *prima facie* case for respondent in habeas corpus proceeding, in view of rule that offense may be designated by name in general terms, and the trial court did not err in holding that warrant was not fatally defective in that it charged relator with "false pretenses," not denominated an offense in demanding state.—*Ex parte Nix*, 212 S. W. 507.

The certificate of the Governor of this state, to the fact that the Governor of the demanding state had made it known to him that relator was charged by complaint, and that the demand for his surrender was "accompanied by a copy of the complaint duly certified as authentic by the Governor" of the demanding state, was sufficient to put upon relator the burden of proving that demand was not accompanied by a copy of complaint duly certified by Governor of demanding state, and it was not necessary that Governor's warrant be ac-

complicated by complaint charging the offense.  
—Id.

Where the Governor did not attach to the warrant issued by him in extradition proceeding the various papers which he recites therein as furnished to him as the basis for the issuance of the warrant, it devolved upon relator in habeas corpus proceeding to show that the papers before the Governor were insufficient to authorize the issuance of the warrant.—Id.  
§99(1) (Tex.Civ.App.) The fact that defendant had cared for plaintiff's infant daughter for 14 years, was much attached to her, and is of good moral character, and that such child for some unknown reason is estranged from her father, stepmother, and half-sisters, does not justify giving defendant custody of such child when her father is a suitable person and able to care for her.—Dunn v. Jackson, 212 S. W. 959.

§99(3) (Tex.Civ.App.) The welfare and happiness of infant children is the controlling factor in determining their custody.—State v. Jackson, 212 S. W. 718.

Law and best interests of society demand that natural rights of father to custody of his children be made subservient to interest and welfare of children.—Id.

§99(4) (Tex.Civ.App.) Father, who had no home, was thriftless and improvident, whose income was small and uncertain, who had been cruel to infant daughters and mother, and who had no one to care for daughters, was not entitled to their custody following death of mother, to whom the daughters had been awarded by divorce decree, as against maternal grandparents, who had supported them practically all their lives, had adopted them, had a good home, and were well able to support them.—State v. Jackson, 212 S. W. 718.

§99(6) (Tex.Civ.App.) The fact that defendant had cared for plaintiff's infant daughter for 14 years, was much attached to her, and is of good moral character, and that such child for some unknown reason is estranged from her father, stepmother, and half-sisters, does not justify giving defendant custody of such child when her father is a suitable person and able to care for her.—Dunn v. Jackson, 212 S. W. 959.

## HARMLESS ERROR.

See Appeal and Error, §1032-1068; Criminal Law, §1170½-1171.

## HEALTH.

See Habeas Corpus, §3.

## II. REGULATIONS AND OFFENSES.

§21 (Tex.Cr.App.) Legislature has power to declare that prostitution is a source of communicable diseases, and that its suppression is a public health measure, and to direct, as is done by Acts 35th Leg. (Fourth Called Sess.) c. 85, that health officers hold such persons in quarantine, and such act is not violative of provisions of Constitution, or discriminatory, arbitrary, or unreasonable.—Ex parte Brooks, 212 S. W. 956.

§24 (Tex.Cr.App.) Order of city health officer for commitment of woman to city farm because afflicted with disease is not void because authorizing delivery to quarantine officer who has, since remand to him, ceased to hold office, as any officer having charge of farm would have legal custody of her.—Ex parte Brooks, 212 S. W. 956.

There is nothing in Acts 35th Leg. (Fourth Called Sess.) c. 85, authorizing health officer to quarantine prostitutes afflicted with communicable disease, which prohibits treatment by private physicians while in quarantine.  
212 S.W.—66

## HIGHWAYS.

See Constitutional Law, §80; Dedication, §14; Eminent Domain, §145, 205, 238; Telegraphs and Telephones, §10.

## I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(C) Alteration, Vacation, or Abandonment.

§77(5) (Ky.) In proceeding to close public road, where closing of the road is excepted to by owners, claiming the need thereof for ingress and egress to their premises, the burden of proof, under Civ. Code Prac. § 526, was on the owners.—Wolfe v. Bailey, 212 S. W. 579.

§77(7) (Ky.) The failure of owners, excepting to closing of public road, to allege a prescriptive right to use of the road as a private passway will not preclude court, in closing of road, from giving owners the right to use as much of the road as a private passway as is necessary to ingress and egress to their premises.—Wolfe v. Bailey, 212 S. W. 579.

§77(9) (Ky.) Under Ky. St. 1909, § 4303, an appeal from county to circuit court may be taken from order closing public road, notwithstanding that no such right of appeal is given by Laws 1914, c. 80.—Wolfe v. Bailey, 212 S. W. 579.

An appeal from order of county court closing public road may be taken to the circuit court within 60 days, under Ky. St. 1909, § 4303; the requirement that appeal be taken within 30 days having reference to private passways.—Id.

## HOMESTEAD.

See Cancellation of Instruments, §59; Executors and Administrators, §439; Mortgages, §407; Specific Performance, §65; Subrogation, §23; Trespass to Try Title, §32.

## I. NATURE, ACQUISITION, AND EXTENT.

(C) Acquisition and Establishment.

§31 (Tex.Civ.App.) Where owners of rural homestead purchased adjoining land with intention of making it part of homestead, and where the two tracts comprised less than 200 acres, the land so purchased became a part of the homestead at time of purchase, though owners at such time were not living upon homestead.—Barbee v. Lundy, 212 S. W. 257.

§57(3) (Tex.Civ.App.) Evidence held not to support finding that owners of rural homestead who purchased adjoining land did not intend to make purchased land a part of the homestead.—Barbee v. Lundy, 212 S. W. 257.

(E) Liabilities Enforceable Against Homestead.

§96 (Tex.Com.App.) Where time of payment of purchase money for homestead was extended by execution of deed in trust of homestead to secure note to third party who took over purchase-money notes from vendor, a sale under the deed in trust was valid, notwithstanding that note to third party was in excess of the amount of indebtedness secured by vendor's lien.—W. C. Belcher Land Mortgage Co. v. Taylor, 212 S. W. 647.

## II. TRANSFER OR INCUMBRANCE.

§118(5) (Tex.Civ.App.) Under Rev. St. arts. 1103, 1114, 1115, a contract to execute an oil lease on homestead property, in which contract the wife of the owner has not joined, is void.—Haynie v. Stovall, 212 S. W. 792.

### III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§146 (Tex.Com.App.) Surviving wife, tenant in common of homestead with her children to save it from threatened foreclosure of vendor's lien, had the right to extend time of payment of purchase-money note by making new note to third party who took over purchase-money notes from vendor, and to execute deed in trust binding her interest and that of the children in the homestead to secure such note.—*W. C. Belcher Land Mortgage Co. v. Taylor*, 212 S. W. 647.

Surviving wife had the right to bind her interest in homestead by deed of trust for purpose of extending time for payment of purchase price, under Rev. St. 1879, art. 2854, in force at such time, though she had remarried at time of execution of deed in trust; the transaction being to preserve her separate estate and being merely a change in the form of the indebtedness, and not the creation of a debt.—*Id.*

### HOMICIDE.

See Carriers, §180; Criminal Law, §338, 364, 396, 419, 420, 448, 449, 451, 596, 703, 706, 721, 721½, 811, 829, 1037, 1171; Habeas Corpus, §3; Indictment and Information, §110, 112; Witnesses, §240, 266.

#### I. THE HOMICIDE.

§2 (Tenn.) If one owes to another a plain particular and personal duty imposed by law or contract, an omission resulting in the death of the party to whom such duty was owing usually renders the delinquent party guilty of homicide; so, where an infant child died by reason of her father's failure to provide proper medical attention, the father is guilty of homicide.—*State v. Barnes*, 212 S. W. 100.

### III. MANSLAUGHTER.

§42 (Mo.) The reasonable provocation adequate to reduce the offense from murder to manslaughter does not exclude malice, but only removes the presumption thereof which the law raises without proof, so that, if a defendant deliberately intended to kill deceased, the provocation must be disregarded, unless it has been shown that such purpose was abandoned before the killing.—*State v. Stewart*, 212 S. W. 853.

§43 (Mo.) A state of facts which is calculated to excite the passions beyond control, and, in the mind of the average just and reasonable man, stir up resentment likely to cause violence and danger to life, which would naturally tend to disturb and obscure the reason and lead to action from passion rather than judgment, is a reasonable provocation adequate to reduce the offense from murder to manslaughter.—*State v. Stewart*, 212 S. W. 853.

§75 (Tenn.) As to whether a father, who suffered his child to die for want of proper medical attention, is guilty of murder or manslaughter, depends upon the circumstances; it being probable that, if the neglect was not malicious or willful, he would be guilty only of manslaughter.—*State v. Barnes*, 212 S. W. 100.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§116(2) (Tex.Cr.App.) The law of self-defense requires that the jury should view the matter of apparent danger from the standpoint of the accused.—*Standifer v. State*, 212 S. W. 954.

§122 (Mo.) An instruction in a homicide case that, even if deceased has been paying improper attentions to defendant's wife, that fact would afford no excuse or justification for the killing of the deceased, was correct.—*State v. Stewart*, 212 S. W. 853.

### VII. EVIDENCE.

#### (A) Presumptions and Burden of Proof.

§146 (Mo.) That a weapon is deadly may be inferred from the fact that it produces death, although there is no evidence of its quality or dimensions.—*State v. Stewart*, 212 S. W. 853.

The ordinary result of the use of a deadly weapon raises a presumption of malice and shifts the burden of proof to repel the presumption to the accused, unless the evidence proving the killing shows its absence.—*Id.*

The reasonable provocation adequate to reduce the offense from murder to manslaughter does not exclude malice, but only removes the presumption thereof which the law raises without proof.—*Id.*

Where a reasonable provocation adequate to reduce the offense from murder to manslaughter intervenes between the manifestation of malice and the killing, the presumption is that the crime found its moving impulse in malice, and not in the passion produced by the provocation.—*Id.*

#### (B) Admissibility in General.

§163(1) (Tex.Cr.App.) Though defendant had put his reputation in evidence as a law-abiding citizen, objection to evidence of the state that 15 or 20 years before the homicide defendant was given to fighting and was regarded "as a holy terror" should have been sustained; the interregnum between defendant's fighting capacity as a youngster and the time of the killing being too remote.—*Burkhalter v. State*, 212 S. W. 163.

§163(2) (Ky.) While it would have been proper to have permitted proof that deceased was by reputation or even by habit a person of violent temper and quarrelsome disposition, evidence that on one occasion prior to the homicide deceased drew a pistol on the witness was incompetent.—*Ray v. Commonwealth*, 212 S. W. 908.

§166(2) (Ark.) In homicide prosecution, a letter, reflecting upon character of defendant's daughter, was inadmissible, where no effort was made to prove that deceased had written letter, or that defendant suspected him, prior to the time of the killing, of having any connection with it; the letter therefore throwing no light upon the question of motive.—*Walker v. State*, 212 S. W. 319.

In homicide prosecution, evidence that defendant had suspected others than deceased of having written letter reflecting upon virtue of defendant's daughter was inadmissible to prove that defendant harbored no ill will toward deceased, being evidence as to collateral matters.—*Id.*

§166(8) (Mo.) In prosecution for homicide committed after defendant had obtained deceased's promise to stop improper attentions to defendant's wife and when he had again found deceased speaking to her, testimony that deceased had visited defendant's wife in defendant's absence from home to show motive, reason, and animus as affording a mitigating circumstance was properly excluded, where the criminal relation, if any, was past, and was known to defendant several days before homicide.—*State v. Stewart*, 212 S. W. 853.

§170 (Tex.Cr.App.) Testimony of county attorney that tracks near the scene of the killing had been made by a shoe about No. 8 or 9 in size, and that in his judgment defendant's boots made the tracks on the ground, held inadmissible in absence of something more definite in the witness' testimony showing proximity of tracks to body of victim.—*Burkhalter v. State*, 212 S. W. 163.

§181 (Mo.) Evidence of an adulterous relation of deceased with defendant's wife is only admissible when the discovery thereof by defendant is so near the homicide as to afford no time for the passion thus inflamed to cool.—*State v. Stewart*, 212 S. W. 853.

§194 (Tex.Cr.App.) Where defendant prosecuted for murder pleaded self-defense and claimed that deceased had come to the place in question to carry out a threat to kill defendant before sundown, testimony of the wife of deceased, explaining her husband's presence by detailing his intention, undisclosed to defendant, to meet witness at that place for the purpose of accompanying her home, was inadmissible.—Standifer v. State, 212 S. W. 954.

(C) Dying Declarations.

§204 (Mo.) Where deceased on December 27th, in response to his brother's question as to whether he would have a dying statement taken, said that he had to die, and died on December 29th, it was admissible as a dying declaration. (Per Williams and Faris, JJ.)—State v. Stewart, 212 S. W. 853.

(E) Weight and Sufficiency.

§233 (Ark.) Proof of motive is not essential to a conviction, but where established tends to strengthen the case for the prosecution, while absence thereof is a circumstance favorable to accused.—Walker v. State, 212 S. W. 319.

VIII. TRIAL.

(B) Questions for Jury.

§268 (Tex.Cr.App.) A stick, described as a black jack limb about two or three feet long and about as big as witness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact, notwithstanding death resulted from the blow struck with it; and it was error for the court, after having its attention called thereto, not to charge the substance of Pen. Code 1911, art. 1147, providing that "if the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."—Hollman v. State, 212 S. W. 663.

(C) Instructions.

§286(1) (Tex.Cr.App.) A stick, described as a black jack limb about two or three feet long and about as big as witness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact.—Hollman v. State, 212 S. W. 663.

§300(8) (Tex.Cr.App.) In a prosecution for murder, where there was evidence that deceased had his knife in his hand, but no evidence describing the knife upon which the jury could predicate a finding that it was a deadly weapon, the failure of the court to instruct the jury on the presumption of intent to kill by the deceased, arising from his use of deadly weapon, was not error.—Hollman v. State, 212 S. W. 663.

§309(3) (Mo.) Where defendant obtained deceased's promise to desist from clandestine attentions to defendant's wife, and on the following day observed his wife speaking to deceased and went deliberately toward them and began to upbraid deceased, who attempted to assault him, and then immediately shot deceased and walked away, the failure to instruct for manslaughter in the fourth degree was not error, in view of Rev. St. 1909, § 4468, defining that degree.—State v. Stewart, 212 S. W. 853.

Where all the attendant facts show a higher grade of homicide or unqualified self-defense, an instruction on manslaughter in the fourth degree need not be given.—Id.

§309(6) (Tex.Cr.App.) In a homicide prosecution, where defendant, after having been severely beaten in a general fight, fled from house, and in the face of a threat to shoot fired a shot which killed a child in the house, it was error in an instruction on manslaughter to limit the provocation to the acts of the

son defendant intended to kill.—Rodgers v. State, 212 S. W. 166.

X. APPEAL AND ERROR.

§325 (Mo.) Alleged error in an instruction as to one inviting a combat and as to what would constitute a right of self-defense, attempted to be reserved by a general allegation in the motion for a new trial "that the court gave illegal and improper instructions," is not such a preservation of the error as to entitle it to a consideration on appeal. (Per Williams and Faris, JJ.)—State v. Stewart, 212 S. W. 853.

Admission of dying declarations are subject to the same regulations applicable to other testimony, and if the appellate court finds that objections thereto have not been properly made or preserved so as to present a proper record thereof, they will not be entitled to consideration. (Per Williams and Faris, JJ.)—Id.

A motion for a new trial alleging error in admitting a dying declaration of the deceased and in thereby permitting improper and illegal evidence to go to jury, although general in its terms, must be limited to the specific objections made in the record itself. (Per Williams and Faris, JJ.)—Id.

§339 (Ark.) In homicide prosecution, exclusion of testimony as to whether witness had heard deceased make statements indicating hatred toward defendant was harmless, where witness had prior thereto testified that he had never heard deceased make any threats that he was going to fight or injure defendant.—Walker v. State, 212 S. W. 319.

In homicide prosecution, exclusion of testimony that prior to time of killing defendant had not suspected deceased of having written letter reflecting upon daughter's character, but had suspected others of being the authors thereof, if error, was harmless, being favorable to defendant.—Id.

HUSBAND AND WIFE.

See Appeal and Error, §1060; Criminal Law, §719; Courtesy, §99; Damages, §99, 186, 208; Deeds, §124, 179; Divorce; Evidence, §471, 477, 553; Executors and Administrators, §221; Garnishment, §62; Homestead, §118, 146; Homicide, §122, 166, 194, 309; Judgment, §255; Mines and Minerals, §79; Mortgages, §497; Municipal Corporations, §819, 822; Remainders, §14; Wills, §163, 164, 165, 166; Witnesses, §55, 76, 158.

II. MARRIAGE SETTLEMENTS.

§29(6) (Ky.) Antenuptial agreement between 64 year old husband, who owed certain obligations to his children by his first wife, with 22 year old wife, giving wife upon husband's death dower upon one-third of the home place, and a child's share in the rest of the property, in the event that a child should be born to them, but in case no child shall be born merely a child's share in the property instead of dower therein, was not inequitable or unjust.—Fish v. Fish, 212 S. W. 586.

§29(9) (Ky.) In action involving question of whether antenuptial agreement was invalid because of husband's misrepresentations as to extent of his property as claimed by wife, evidence of fraud held not sufficient to authorize an annulment of the agreement.—Fish v. Fish, 212 S. W. 586.

§31(4) (Ky.) Antenuptial agreement of 64 year old husband with 22 year old wife, providing that wife shall be "endowed with one-third of the home place" of husband, and as to other property shall take a child's part, together with husband's children by his first wife, gave wife merely a life estate in one-third of the home place, and not an absolute estate therein; the word "endowed" having been used in its technical sense.—Fish v. Fish, 212 S. W. 586.



### III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

⚡49¾(1) (Ark.) Deceased wife's heirs cannot recover from surviving husband money given husband by wife during her lifetime, notwithstanding Const. art. 9, § 7, and Kirby's Dig. §§ 5207, 5227.—*Evans v. Wells*, 212 S. W. 328.

⚡49¾(6) (Ark.) In deceased wife's heirs' action against surviving husband to recover wife's money, or have trust declared in their favor upon land purchased therewith by husband, finding that wife had given money to husband held not clearly against preponderance of the evidence.—*Evans v. Wells*, 212 S. W. 328.

### IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

#### (A) In General.

⚡62 (Mo.) A married woman is estopped in equity from interposing coverture as a defense in cases where she is attempting to enforce a right inconsistent with her previous conduct, upon which the other party has relied. Per Blair, Woodson, and Williams, JJ.—*Rauch v. Metz*, 212 S. W. 357.

#### (B) Property and Conveyances.

⚡69½ (Ky.) Refusal of wife to pay rent or surrender possession on demand of landlady's agent, together with denial of right of landlady to possession and assertion of ownership, amounted to a disseisin sufficient to start the statute of limitation running, where, before refusal, the tenant, wife's husband, had deserted her, and she was in sole possession.—*Holton v. Jackson*, 212 S. W. 587.

### V. WIFE'S SEPARATE ESTATE.

#### (C) Liabilities and Charges.

⚡171(1) (Tex.Civ.App.) A married woman may mortgage or pledge her separate property to secure a debt incurred by her husband; her power in that regard not being impaired by the Married Woman's Act of 1913 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624).—*Bird v. Bird*, 212 S. W. 253, 257.

#### (D) Conveyances and Contracts to Convey.

⚡198 (Ky.) Where husband conveying wife's property forged her signature to deed, wife's negligence in not ascertaining that deed was forged and in not promptly asserting a claim to the property, notwithstanding knowledge that purchaser's son was in possession, was not such fraud as to estop her from claiming the property.—*Venters v. Potter*, 212 S. W. 117.

### VI. ACTIONS.

⚡207 (Ark.) Under Laws 1915, p. 684, § 1, providing that a married woman may sue and be sued as a feme sole, a widow may sue her deceased husband's estate in a court of law.—*Free v. Maxwell*, 212 S. W. 325.

⚡208 (Ark.) Under Acts 1915, p. 684, § 1, providing that a married woman may sue and be sued as a feme sole a widow may sue her husband's estate for money advanced by her before the passage of the act, such statute being one of procedure only.—*Free v. Maxwell*, 212 S. W. 325.

⚡230 (Mo.) The disability of a married woman to make a personal contract, such as a contract of adoption, is personal to herself, and will be taken as waived, unless she elects to interpose it as a defense in some proceeding against herself or her property, and no one else can interpose such defense for her or compel her to interpose it. Per Blair, Woodson, and Williams, JJ.—*Rauch v. Metz*, 212 S. W. 357.

### VII. COMMUNITY PROPERTY.

⚡276(6) (Tex.Com.App.) Where a wife died prior to her husband and their estates were combined, persons claiming under sale by the executor or administrator of the husband's estate, in order to establish title to the interest of the heirs of wife, must prove the existence of the community debts at date of the sale.—*Heard v. Vineyard*, 212 S. W. 489.

Where plaintiffs proved the existence of community debts established by suit, classified in the estate of deceased husband and one-half thereof paid out of the consolidated estates of the deceased husband and deceased wife, the lands being sold prior to the opening of administration on the wife's estate and not inventoried as a part thereof, and the proceeds of the sale formed assets of the consolidated estates and entered into the amount distributed to the heirs of both, held, in view of the record, that the sale by the executor of the estate of deceased husband was valid, vesting purchaser with title of both of the estates.—*Id.*

### IMPROVEMENTS.

See Cancellation of Instruments, ⚡59; Frauds, Statute of, ⚡129; Levees, ⚡25; Municipal Corporations, ⚡294-522; Partition, ⚡85; Railroads, ⚡272.

### INDEMNITY.

See Appeal and Error, ⚡1060; Insurance, ⚡2, 514, 598, 602, 624, 665, 668, 675; Trial, ⚡127, 199.

### INDIANS.

⚡35 (Mo.) Under Rev. St. U. S. § 2140 (U. S. Comp. St. § 4141), an officer of the United States had no right to destroy at a point in Kansas intoxicating liquors which had been seized from custody of railroad, on ground they were to be shipped into adjacent Indian territory, without a valid order of court authorizing him so to do, but his seizure, if he had reason to suspect or was informed the liquor was about to be introduced into Indian territory, may have been valid, despite its subsequent illegal destruction.—*Danciger v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 5.

### INDICTMENT AND INFORMATION.

See Animals, ⚡4; Criminal Law, ⚡211, 673, 678, 915, 1038, 1159, 1182; Indictment and Information, ⚡110; Infants, ⚡68; Intoxicating Liquors, ⚡223; Larceny, ⚡32, 40.

### I. NECESSITY OF INDICTMENT OR PRESENTMENT.

⚡4 (Mo.) Since under Const. art. 2, § 12, and Rev. St. 1909, §§ 5055, 5077, the remedies of prosecution by indictment and information are concurrent, where accused had been held without bail after preliminary examination before a justice to await the action of the grand jury, the prosecuting attorney was not precluded from filing an information; the requirement of section 5055, that the mode of procedure, whether indictment or information, which is first instituted, shall be pursued to the exclusion of the other, applying only to proceedings instituted in courts having jurisdiction to hear and determine the guilt or innocence of accused, and not to informations filed before a justice merely to commit accused to jail or to bind him over to await the action of the grand jury.—*State v. Ferguson*, 212 S. W. 339.

### IV. FILING AND FORMAL REQUIREMENTS OF INFORMATION OR COMPLAINT.

⚡41(6) (Mo.) The right to a preliminary examination as a condition precedent to the filing



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

of an information is not jurisdictional, and a failure to accord this right can only be taken advantage of by calling the trial court's attention to same by an appropriate motion and offering proof to establish such failure.—State v. Ferguson, 212 S. W. 339.

⚡47 (Mo.) The criminal court of Greene county having exclusive jurisdiction of all criminal cases in that county, under Rev. St. 1909, § 4200, its consideration of an information filed by the prosecuting attorney is within its general jurisdiction, and not such a special or exceptional exercise of it as to require that there be shown on the face of the information all preliminary steps leading up to such filing, such as the reduction to writing of testimony at the preliminary examination, signed by the witnesses, certified by the magistrate, etc., as required by sections 5033, 5042.—State v. Ferguson, 212 S. W. 339.

⚡51(1) (Mo.) It is not a valid objection to an information that there is not appended to the signature of the prosecuting attorney the name of the county.—State v. Ferguson, 212 S. W. 339.

## V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⚡110(3) (Ky.) The crime denounced by Ky. St. § 1158, prohibiting the taking or detaining of a woman against her will, being statutory, it is sufficient if the indictment, following the language of the statute, charges that accused unlawfully committed the acts constituting the crime, and word "feloniously" not being required, and, if such word be included, it is mere surplusage.—Gravitt v. Commonwealth, 212 S. W. 430.

⚡110(17) (Mo.) The requirement of Const. art. 2, § 22, that accused shall be apprised of the nature and cause of the accusation, not infringed by omitting the word "willfully" from the body of the charge in information for murder, although such word is included in the statutory definition of murder in the first and second degrees (Rev. St. 1909, §§ 4448, 4450).—State v. Ferguson, 212 S. W. 339.

⚡112 (Mo.) An indictment for murder under Missouri statutes means just what it did at common law.—State v. Ferguson, 212 S. W. 339.

⚡119 (Ky.) The crime denounced by Ky. St. § 1158, prohibiting the taking or detaining of a woman against her will, being statutory, if the indictment, following the language of the statute, charges that accused unlawfully committed the acts constituting the crime, the word "feloniously," if included, is mere surplusage.—Gravitt v. Commonwealth, 212 S. W. 430.

## VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

⚡125(20) (Tex.Cr.App.) The word "or" in Disloyalty Act, § 1, forbidding the use of language in the presence and hearing of another person of and concerning the United States of America, etc., which language is disloyal to the United States of America, etc., or is of such nature as to be reasonably calculated to provoke a breach of the peace, etc., was intended to be and should be read "and," and each element of the offense must be charged conjunctively.—Fromme v. State, 212 S. W. 501.

⚡125(31) (Tex.Cr.App.) Allegation that defendant "did then and there unlawfully and knowingly, directly and indirectly, purchase for and procure for, and did then and there give and deliver and did then and there cause to be given and delivered," is in the terms of Acts 35th Leg. (4th Called Sess.) c. 7, as to procuring and delivering intoxicants to persons enlisted in military forces of the United States, and contention that indictment is duplicitous because of such allegation cannot be sustained.—Crosby v. State, 212 S. W. 168.

## INFANTS.

See Constitutional Law, ⚡70; Damages, ⚡98; Guardian and Ward; Habeas Corpus, ⚡99; Parent and Child; Statutes, ⚡225½.

## VI. CRIMES.

⚡68 (Tex.Cr.App.) Under the provisions of Acts 35th Leg. (4th Called Sess.) c. 26, amending Code Cr. Proc. 1911, art. 1197, a female juvenile under 18 years of age charged with felony had the right to file a statement in court advising the judge of her claim that she was a juvenile, or to exercise her option to be tried under the indictment.—Slade v. State, 212 S. W. 681.

⚡69 (Tex.Cr.App.) The contention that the Juvenile Acts disclose the legislative policy to exempt delinquent children from confinement in the state penitentiary, and even though there is a failure to follow the procedure named and bring to the court's attention the claim of one accused of a felony to be tried as a juvenile, that the legislative policy should nevertheless be given effect by refusing to send such accused person to the penitentiary is untenable.—Slade v. State, 212 S. W. 681.

## INJUNCTION.

See Appeal and Error, ⚡781, 856, 954; Carriers, ⚡12, 18; Courts, ⚡478; Elections, ⚡156, 172, 179; Estoppel, ⚡68; Execution, ⚡172; Intoxicating Liquors, ⚡261; Judgment, ⚡243; Municipal Corporations, ⚡513; Pleading, ⚡8, 129; Railroads, ⚡9; Remainders, ⚡17; Schools and School Districts, ⚡111; Specific Performance, ⚡113; Taxation, ⚡608; Trial, ⚡352; Vendor and Purchaser, ⚡228.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (B) Property, Conveyances, and Incumbrances.

⚡34 (Tex.Civ.App.) In granting injunction under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, the court is not confined to the general rules of equity practice on the subject, and will give relief where applicant has a substantial right cognizable in law that is or is about to be invaded, where injunction is necessary to restrain some act prejudicial to him.—Hinton v. D'Yarmett, 212 S. W. 518.

⚡36(1) (Tex.Civ.App.) An injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property.—Hodges v. Christmas, 212 S. W. 825.

### (C) Contracts.

⚡59(1) (Tex.Civ.App.) Owner of oil leases, who has transferred stock and assigned certain oil leases in consideration of use of drilling equipment and casing in drilling test well, and who has sold oil leases conditioned upon the drilling of the well to certain depth, and who has insufficient funds wherewith to himself supply equipment and casing, is entitled to injunction restraining the removal of equipment and casing from premises where drilling of well has commenced, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, as to scope of remedy by injunction.—Hinton v. D'Yarmett, 212 S. W. 518.

### (H) Criminal Acts, Conspiracies, and Prosecutions.

⚡102 (Tex.Civ.App.) An injunction will not issue to restrain the operation of a moving picture show on Sunday, where such operation constitutes a misdemeanor, punishable under Pen. Code 1911, art. 302, and no property rights of complainant are involved.—Barry v. State, 212 S. W. 304.

## III. ACTIONS FOR INJUNCTIONS.

⚡118(1) (Tex.Civ.App.) In suit by the state to enjoin the operation of a moving picture show

on Sunday as in violation of Penal Code, art. 302, a petition failing to allege facts showing that defendant was actually conducting such a show in violation of the statute held insufficient.—*Barry v. State*, 212 S. W. 304.

—§118(1) (Tex.Civ.App.) Petition held to state cause of action for injunction to restrain removal of oil drilling equipment and casing delivered to plaintiff under an executed contract.—*Hinton v. D'Yarmett*, 212 S. W. 518.

—§119 (Tex.Civ.App.) In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

#### IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

##### (A) Grounds and Proceedings to Procure.

—§135 (Tex.Civ.App.) The granting or refusing of a temporary injunction is largely within the sound discretion of the trial court.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

—§136(2) (Tex.Civ.App.) In trespass to try title, where plaintiffs have been ejected from actual possession of land by defendants, possession will be restored and the original status of the property preserved by temporary injunction pending decision of the issue of title.—*Hodges v. Christmas*, 212 S. W. 825.

It is not the function of a preliminary injunction to transfer possession of land from one person to another, pending an adjudication of title, except in cases in which the possession of another has been forcibly or fraudulently obtained by defendants, and the equities are such as to require that the previous possession be restored and original status of property preserved pending decision of issue of title.—*Id.*

—§137(4) (Tex.Civ.App.) In a suit by the lessee of an oil and gas lease against the purchaser of a part of the land omitted by mutual mistake from the lease, to restrain him from drilling for oil, a temporary writ of injunction was not appropriate, it appearing that the rival claimants were acting in good faith, that their ultimate rights were uncertain, and that the interest of the public at large, arising from an early development of the region for oil, was at stake.—*Texas Pacific Coal & Oil Co. v. Howard*, 212 S. W. 735.

—§144 (Tex.Civ.App.) A bill asking for temporary injunction, contrary to the rule in ordinary actions, will be taken most strongly against the applicant, and must negative any reasonable inference from the facts stated that he may not be entitled to the recovery sought.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

—§146 (Tex.Civ.App.) On motion for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true, and if in such answer, under oath, the facts constituting the claim of the plaintiff for the interposition of the court are controverted by defendant, the court will not generally interfere, but will deny the injunction.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

—§157 (Mo.App.) In action to enjoin issuance of special tax bills for street improvements by owner of abutting property, such owner is not entitled to have temporary injunction apply to bills against property in which he has no interest.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

##### (B) Continuing, Modifying, Vacating, or Dissolving.

—§163(1) (Mo.App.) Sufficiency of petition for injunction may be attacked by motion to dissolve a temporary injunction in the same manner as general demurrer.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

—§163(2) (Tex.Civ.App.) In a suit by the lessee of an oil and gas lease to restrain the purchaser of a part of the land omitted from the lease by mutual mistake from drilling an oil well, it was not an abuse of discretion to dissolve a temporary injunction, where litigation as to the title of the omitted land was pending on conflicting evidence, and irreparable injury might result to defendant by wells drilled on adjacent land by petitioner.—*Texas Pacific Coal & Oil Co. v. Howard*, 212 S. W. 735.

—§171 (Mo.App.) Court, in acting on motion to dissolve temporary injunction, is not compelled to have evidence thereon if the facts upon which the court acts appear on the face of the pleading on which injunction was issued.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

In action to enjoin issuance of special tax bills, motion to dissolve temporary injunction which does not attack sufficiency of petition to state cause of action does not raise the issue of the sufficiency thereof, though facts are alleged tending to show tax bills to be void, where such defects do not render petition wholly insufficient to state any cause of action whatever.—*Id.*

—§176 (Mo.App.) In owner's action to enjoin issuance of special tax bills for paving construction, where temporary injunction prohibited issuance of all tax bills on abutting property in which plaintiff had no interest as appeared from petition, court, upon motion to dissolve temporary injunction, could modify it so as to make it apply merely to tax bills against plaintiff's property, without the taking of evidence, notwithstanding Rev. St. 1909, §§ 2529, 2531.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

—§178 (Mo.App.) Where plaintiff, given temporary injunction, failed to give bond as required by Rev. St. 1909, § 2522, court, in ruling upon motion for dissolution of temporary injunction, could upon its own motion require that such bond be given.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

#### V. PERMANENT INJUNCTION AND OTHER RELIEF.

—§194 (Tex.Civ.App.) In suit to restrain defendant from interfering with plaintiff's use and possession of property received from defendants in exchange for her own, where defendants disputed plaintiff's title and sought to recover it for themselves, it was not improper for the court to render judgment against defendants for title and possession.—*Sykes v. Fischl*, 212 S. W. 217.

Where defendants threatened to forcibly re-enter and take possession of property deeded to plaintiff in exchange for plaintiff's property, and rescind trade for sole reason that they were unsatisfied with their bargain, after having lived upon plaintiff's property for 11 months, it was a proper exercise of the court's power in suit to restrain such acts to enjoin the institution of further suits by defendants.—*Id.*

#### INSANE PERSONS.

See Deeds, —§68; Insurance, —§455, 646; Mortgages, —§86; Partition, —§9; Wills, —§50, 55.

#### V. PROPERTY AND CONVEYANCES.

—§62 (Mo.App.) A judgment in rem rendered against the estate of an insane person while he was under guardianship cannot, in suit against him after he has been adjudged sane and his guardian has been discharged, be made the basis for a judgment in personam.—*Fogle v. Kaster*, 212 S. W. 565.

#### INSOLVENCY.

See Fraud, —§65; Insurance, —§514.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## INSPECTION.

See Carriers, ¶113; Sales, ¶420.

## INSTRUCTIONS.

See Criminal Law, 755½-829; Trial, ¶191-240.

## INSURANCE.

See Appeal and Error, ¶1060, 1062; Appearance, ¶23; Contracts, ¶10; Corporations, ¶503; Damages, ¶40, 190; Estoppel, ¶102; Evidence, ¶126, 317; False Pretenses, ¶4, 7, 49; Interest, ¶53; Master and Servant, ¶351; Pleading, ¶104; Trial, ¶127, 199.

### I. CONTROL AND REGULATION IN GENERAL.

¶2 (Tex.Civ.App.) Fidelity bonds issued by a surety company to a bank, in consideration of premiums paid, indemnifying the bank against defalcation of its cashier, are insurance contracts, though such bonds recite that the cashier is principal and the surety company surety, the bonds containing an express obligation running from the cashier to the surety company to reimburse the latter for any loss suffered.—*Southern Surety Co. v. Citizens' State Bank of Hempstead*, 212 S. W. 556.

### III. INSURANCE AGENTS AND BROKERS.

#### (A) Agency for Insurer.

¶73 (Tex.Civ.App.) The time and money expended by a life insurance agent in establishing agencies, being contemplated by the parties, constitutes a sufficient consideration for the agent's option to terminate the employment contract upon 90 days' notice.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

¶85 (Tex.Civ.App.) Where the agent for life insurance company bound himself to engage in no other business during the life of his contract, traveled over his territory and spent both time and money in establishing agencies, which both parties contemplated would be done, and company did not quit doing business as provided in contract, but voluntarily amended its charter so that it could not thereafter continue the business under the contract of writing insurance on the assessment plan, and there could be no renewals or commissions thereon, it terminated the agency, and the company was liable for damages for breach.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

In an action against an insurance company for breach of an agency contract to write insurance on the assessment plan, by ceasing to write such insurance an offer to the agent of a contract to write on the level premium plan, is material only in so far as it tends to reduce the amount of recovery by showing what he could have earned during the life of his contract and after its breach.—*Id.*

Where an insurance agent was under contract to sell insurance on the assessment plan, and the contract was breached by the company ceasing to sell such insurance and adopting the level premium plan, the agent was under no obligation to accept employment of an inferior quality under the latter plan until he had tried to obtain other satisfactory employment.—*Id.*

In an action by an agent against insurance company for breach of an employment contract, whether the employe agreed to work for employer as agent under its new plan of insurance with inferior contract, and the company annulled the contract on account of agent's bad faith in going to work for another company, was an issue of fact for the jury, under the pleadings and evidence, which was sufficient to sustain a finding upon the issue for plaintiff.—*Id.*

Where an insurance company breached its contract with its agent by ceasing to write the

kind of insurance embraced in the employment agreement, it became liable to him for all damages reasonably resulting from such breach.—*Id.*

Where an insurance company breached its contract with an agent both as to commissions on assessment policies that might have been written, and as to renewals thereof which would otherwise have accrued, the agent's suit for damages was properly brought for the breach, although before the stipulated termination of the contract, and it was not error to submit that the company was indebted to the agent on renewal contracts.—*Id.*

In an action by an insurance agent against the company for breach of an employment contract, where the amount of damages depended largely upon the number of policies written and which would have been written, and which would not have lapsed during the period of his contract, which amount in no case could have been reduced to a certainty, and which might have been most satisfactorily shown by experts, evidence held such that the jury's verdict for plaintiff cannot be said to be unsupported.—*Id.*

### IV. INSURABLE INTEREST.

¶121 (Ky.) Assignment of life policy to assignee having no insurable interest in life of insured is void, being against public policy.—*Milliken v. Haner*, 212 S. W. 603.

### V. THE CONTRACT IN GENERAL.

#### (A) Nature, Requisites, and Validity.

¶129 (Ark.) The county agent of a life insurer, without authority to issue policies or to alter or interpret their terms, had no apparent authority to bind the insurer by a statement as to his interpretation of a clause of the policy exempting the insurer from liability for death in military service in time of war.—*Miller v. Illinois Bankers' Life Ass'n*, 212 S. W. 310.

#### (B) Construction and Operation.

¶146(1) (Ky.) The different provisions of a contract of insurance must be so construed, if it can be reasonably done, as to give effect to each.—*Prudential Ins. Co. of America v. Ragen*, 212 S. W. 123.

Where policy contains inconsistent or contradictory provisions, force must be given to those that sustain rather than those which would forfeit the contract, because forfeitures are not favored by the law.—*Id.*

¶146(3) (Ky.) Where two interpretations equally fair may be made, that which allows a greater indemnity will prevail.—*Prudential Ins. Co. of America v. Ragen*, 212 S. W. 123.

Where terms of policy render its meaning doubtful, a construction must be given which is favorable to the party insured.—*Id.*

Where a policy of insurance contains terms more advantageous to the insured than is required by statute, the provisions of the statute will be treated as a minimum of value, and the policy and statute will be considered together, and that construction given which is more favorable to insured and will sustain the contract.—*Id.*

¶151(2) (Tex.Civ.App.) Under Rev. St. art. 4951, requiring insurance policies to be accompanied by copies of the application and a copy of all questions asked, a written agreement and representations not complying with these requirements, made by the president of a bank contemporaneously with the issue of a fidelity bond to the bank by a surety company, is not a good defense in an action for breach of the bond.—*Southern Surety Co. v. Citizens' State Bank of Hempstead*, 212 S. W. 556.

¶152(3) (Ky.) The statutes of a state relating to insurance in force at time a policy is issued must be regarded as entering into and forming a part of the policy to the same effect

as if embodied therein.—Prudential Ins. Co. of America v. Ragen, 212 S. W. 123.

## VI. PREMIUMS, DUES, AND ASSESSMENTS.

☞198(4) (Tex.Civ.App.) Though agent represented to plaintiff that premium would be \$270 and plaintiff did not know that policy provided for an annual premium of over \$337, where no concealment or fraud was used when application was made and the policy followed the terms of the application, plaintiff, who could read, but who kept the policy and application for about a year before examining them, cannot recover from the company the amount paid; he having actually received protection under the policy.—Union Cent. Life Ins. Co. v. Short, 212 S. W. 225.

In such case, the rule is that fraudulent representations of the agent, to be available to insured, must take place at the time of the delivery of the policy, at which time the contract is consummated, and a preliminary representation of insurer's agent that the premium would be a certain amount, when in fact the premium on the policy as delivered was more, was not fraud.—Id.

## X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

### (B) Nonpayment of Premiums or Assessments.

☞368(1) (Ky.) In ascertaining term of lapsed policy providing for paid-up term policy for amount of policy, less indebtedness for such term as cash surrender value less indebtedness would carry modified amount at single premium term relates, court was not required to follow either method prescribed by Ky. St. § 659, or method provided for by contract, but could take a combination of the two most favorable to insured.—Prudential Ins. Co. of America v. Ragen, 212 S. W. 123.

## XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

☞390 (Tex.Civ.App.) A surety company, upon being sued by a bank for breach of a fidelity bond, cannot, in view of Rev. St. art. 4948, interpose as a defense representations by the bank's president that the books of the cashier had been found correct, where it was not shown that the company ever notified the bank of refusal to be bound because thereof or set them up in defense at all until the filing of its amended answer, more than one year after commencement of suit.—Southern Surety Co. v. Citizens' State Bank of Hempstead, 212 S. W. 556.

☞392(1) (Ark.) A life insurer by policy exempting it from liability for death in the military service in time of war, by accepting premiums with knowledge that insured was serving in the army, did not waive the exemption provision of the policy, which did not call for a forfeiture, such as would be waived by the acceptance of premiums.—Miller v. Illinois Bankers' Life Ass'n, 212 S. W. 310.

## XII. RISKS AND CAUSES OF LOSS.

### (D) Life Insurance.

☞438 (Ark.) Provision of a life insurance policy exempting the insurer from liability for death in the military or naval service in time of war, or merely while in the service of the army and navy of any government, held not void as against public policy.—Miller v. Illinois Bankers' Life Ass'n, 212 S. W. 310.

The death of insured from pneumonia while at a camp in the United States, in the military service of the United States, during the war with Germany, was "in the service in the army

or navy of the government in time of war," within his life policy, exempting the insurer from liability for such death.—Id.

### (E) Accident and Health Insurance.

☞455 (Mo.) Death by suicide of an insane person is death by "accident."—Scales v. National Life & Accident Ins. Co., 212 S. W. 8. Intentional self-destruction by a sane person is not an accident.—Id.

Under Rev. St. 1909, § 6945, which takes away the defense to a policy of suicide, the insurer is not liable under a policy insuring against death by accident, in case of death of insured by suicide while sane.—Id.

## XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

### (C) Guaranty and Indemnity Insurance.

☞514 (Mo.App.) Where a company holding a policy indemnifying it against loss through damages for death of, or injuries to, a servant, after a servant was injured and recovered judgment, on the advice of the attorney for the indemnity insurer transferred its business and assets to one of its stockholders, but thereafter borrowed money to pay the servant's judgment, it sustained a "loss" within the meaning of its indemnity policy, whether it was solvent or insolvent, and could recover from the insurer, which cannot urge the payment was voluntary.—Hoagland Wagon Co. v. London Guarantee & Accident Co., 212 S. W. 393.

The matter of good faith of a company in paying the judgment of its injured servant, raised by the company's casualty insurer when sued for the loss, goes only to the question whether the judgment was actually paid by the company, or whether a form of payment was gone through amounting to a mere sham or colorable transaction and not actual payment.—Id.

## XIV. NOTICE AND PROOF OF LOSS.

☞550 (Tex.) Though by-laws provide that, if a member files claim before his disability ceased, he waives all right to future benefit, insurer cannot reduce its true liability by means of a mere unaccepted offer on the part of insured to receive in satisfaction of his demand less than amount to which he is entitled under Rev. Stat. art. 4807.—International Travelers' Ass'n v. Powell, 212 S. W. 931.

## XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

☞598 (Mo.App.) In view of the indemnity limits of its policy, indemnity insurer of company against loss through damages from death of, or injury to, a servant, held liable for interest on the amount of the original judgment in favor of the servant against the company, and, after demand on it for payment of the judgment, interest, and costs, for statutory interest of 6 per cent. on the whole sum due.—Hoagland Wagon Co. v. London Guarantee & Accident Co., 212 S. W. 393.

☞602 (Mo.App.) A company, which was the real party in interest to sue on its indemnity policy against loss through damages from death of or injuries to its servant, had a right to recover statutory damages and attorney's fees of the insurer for its vexatious refusal to pay, though the policy was pledged to secure a note given by the company for money borrowed to pay the injured servant's judgment against it.—Hoagland Wagon Co. v. London Guarantee & Accident Co., 212 S. W. 393.

## XVIII. ACTIONS ON POLICIES.

☞618 (Mo.App.) A cause of action on a life insurance policy, for the purpose of determining venue, accrues at the place where the insured dies.—Roberts v. American Nat. Assur. Co., 212 S. W. 390.

⚡618 (Tex.) Stipulations between an accident insurer and its policy holder for exclusive venue in the county of the insurer's residence do not control, under Rev. St. 1911, art. 1830, §§ 24, 29, and cannot be enforced.—*International Travelers' Ass'n v. Branum*, 212 S. W. 630.

⚡618 (Tex.) An insurance company cannot enforce a provision of its policy and by-laws prohibiting the maintenance of suits on its policies elsewhere than in the county of its domicile; such contract stipulation being contrary to public policy.—*International Travelers' Ass'n v. Powell*, 212 S. W. 931.

⚡624(1) (Mo.App.) A company was the real party in interest to sue on its indemnity policy against loss through damages from death of or injuries to a servant, though the policy had been pledged to secure payment of a note given by the company for money borrowed to pay the servant's judgment; the written pledge not giving the lender any right to file suit against the indemnity insurer until the company failed to do so.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

⚡624(2) (Tex.Civ.App.) A bank may maintain a suit against a surety company to recover upon fidelity bonds the amount of its cashier's defalcations, although the directors have already refunded the money to the bank, the bank still retaining legal title to the bonds, and the surety company claiming no defense under the bonds as against the directors, who are not complaining.—*Southern Surety Co. v. Citizens' State Bank of Hempstead*, 212 S. W. 556.

⚡646(6) (Tex.Com.App.) In suit on accident policy containing exception clauses, such as a clause providing that the policy shall not cover accidents resulting from trying to enter a moving conveyance using steam as motive power plaintiff has the burden of establishing that the accident on which suit is based does not fall within the exceptions; the exception clauses being construed as taking something out of the general portion of the contract so that the promise is to perform only what remains after the part excepted is taken away.—*Travelers' Ins. Co. v. Harris*, 212 S. W. 933.

⚡646(7) (Mo.) Insured, committing suicide, is presumed to have been sane at the time of suicide.—*Scales v. National Life & Accident Ins. Co.*, 212 S. W. 8.

⚡665(4) (Mo.App.) Evidence held to show that money was actually loaned by a third person to a company, holder of an indemnity policy against loss through death of or injuries to its servant, which money was used by the company in paying an injured servant's judgment against it, so that it sustained a loss within the meaning of its indemnity policy rendering the insurer liable.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

⚡665(4) (Tex.Civ.App.) In action on fire policy on goods and fixtures in a store for partial loss by fire which covered an area of six feet square and did not burn through the floor, evidence held sufficient to support findings as to loss and damages sustained.—*Barnett v. Prussian Nat. Ins. Co.*, 212 S. W. 839.

⚡668(1) (Mo.App.) Whether an indemnity insurer against loss through damages from death of, or injury to, employés, had been guilty of vexatious refusal to pay a loss, held for the jury.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

⚡669(12) (Mo.App.) In an action against a casualty insurer by a company which held a policy against loss from injuries to or death of a servant, instruction held proper as submitting the only issue of fact in the case, whether there had been a payment in good faith by the company of an injured servant's judgment against it.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

⚡675 (Mo.App.) A company, which was real party in interest to sue on its indemnity policy against loss through damages from death

of or injuries to its servant, had a right to recover attorney's fees of the insurer for its vexatious refusal to pay, though the policy was pledged to secure a note given by the company for money borrowed to pay the injured servant's judgment against it.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

## XX. MUTUAL BENEFIT INSURANCE.

### (E) Beneficiaries and Benefits.

⚡787 (Tex.Civ.App.) Where plaintiff was injured by dust blowing in his eyes while driving his wagon around a street corner on a spring day, during a high wind, prevalent in West Texas at such times, the cause of his injury was an "accident," being "an unusual effect of a known cause," and he was entitled to recover upon a benefit certificate carrying an accident clause.—*Independent Order of Puritans v. Lockhart*, 212 S. W. 559.

### (F) Actions for Benefits.

⚡807 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, enacted in 1907, providing that stipulations limiting the time for giving notice of claim for damages to less than 90 days are void, and, like article 5713, as to agreements shortening the time for suit, being applicable to all contracts, applies to fraternal benefit associations, Vernon's Ann. Civ. St. 1914, art. 4830, enacted in 1913, providing that no insurance law thereafter enacted shall apply to them, being inapplicable as article 5714 is a prior existing statute and not an insurance law.—*Independent Order of Puritans v. Lockhart*, 212 S. W. 559.

## INSURRECTION.

See Criminal Law, ⚡1182; Habeas Corpus, ⚡30; Indictment and Information, ⚡125; War, ⚡4.

## INTEREST.

See Appeal and Error, ⚡58; Clerks of Courts, ⚡70, 75; Estoppel, ⚡102; Insurance, ⚡598; Mortgages, ⚡235; Sales, ⚡479; Taxation, ⚡658; Trusts, ⚡153; Vendor and Purchaser, ⚡172, 265, 294.

### I. RIGHTS AND LIABILITIES IN GENERAL.

⚡1 (Tex.Civ.App.) Interest, as such, cannot be recovered upon fixed amount due under express parol contract, but is recoverable only as damages.—*Walker v. Alexander*, 212 S. W. 713.

⚡18(2) (Tex.Civ.App.) Suit to recover real estate sale commissions is not one upon an "open account," within Vernon's Sayles' Ann. Civ. St. 1914, art. 4978, allowing interest on such accounts.—*Walker v. Alexander*, 212 S. W. 713.

### III. TIME AND COMPUTATION.

⚡53 (Ky.) In action between the beneficiary and the assignee of life policy, where judgment was rendered for beneficiary, and for assignee for amount paid under assignment, with interest, and both parties appealed therefrom, assignee was not entitled to interest for the time following rendition of judgment.—*Milliken v. Haner*, 212 S. W. 605.

## INTOXICATING LIQUORS.

See Commerce, ⚡14; Criminal Law, ⚡676, 703, 1159; Indians, ⚡35; Indictment and Information, ⚡125; Mandamus, ⚡118; Statutes, ⚡5, 47; Taxation, ⚡117; Writings, ⚡349, 350.

### II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

⚡17 (Tex.Civ.App.) Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for

any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not in conflict with any existing law.—*Gulf, C. & S. F. Ry. Co. v. State*, 212 S. W. 845.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not in contravention of Const. art. 16, § 20, giving the right to voters within certain prescribed limits to determine from time to time whether intoxicants shall be sold in such prescribed limits.—*Id.*

#### IV. LICENSES AND TAXES.

—45 (Tex.Civ.App.) Since the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond is penal in its nature, the right of plaintiff, an independent school district, to sue for such forfeiture must be made very clear.—*Devine Independent School Dist. v. Koehler*, 212 S. W. 238.

—88(2) (Tex.Civ.App.) An independent school district is not a "person" within the meaning of the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond.—*Devine Independent School Dist. v. Koehler*, 212 S. W. 238.

#### VI. OFFENSES.

—132 (Tex.Civ.App.) Any law which might be in conflict with Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, as to transportation or receipt of intoxicants, would be repealed thereby by implication, notwithstanding other sections of the chapter provide that all other laws prohibiting or regulating sale of intoxicants shall remain in full force and effect.—*Gulf, C. & S. F. Ry. Co. v. State*, 212 S. W. 845.

—158 (Tex.Cr.App.) If certain bottles in defendant's possession contained wine which would intoxicate, and defendant left a bottle where his brother-in-law, a marine in the military forces of the United States, could get it by arrangement, defendant violated Acts 35th Leg. (4th Called Sess.) c. 7, punishing the procuring or furnishing of intoxicating liquors for or to any person in the military service of the United States.—*Gardner v. State*, 212 S. W. 169.

#### VIII. CRIMINAL PROSECUTIONS.

—223(5) (Tex.Cr.App.) The evidence must show that defendant's illegal sale of intoxicating malt liquor occurred prior to the filing of the indictment therefor.—*Wales v. State*, 212 S. W. 503.

—236(1) (Ark.) Evidence held sufficient to sustain conviction for an illegal disposition of whisky, in that defendant and one acting with him gave it to persons for assistance in piloting his (defendant's) automobile, loaded with whisky.—*Webb v. State*, 212 S. W. 567.

—236(1) (Tex.Cr.App.) Evidence held to sustain conviction of procuring and delivering intoxicants to persons enlisted in military forces of the United States, contrary to Acts 35th Leg. (4th Called Sess.) c. 7.—*Crosby v. State*, 212 S. W. 168.

—236(1) (Tex.Cr.App.) In a prosecution for violating Acts 35th Leg. (4th Called Sess.) c. 7, prohibiting the procuring or furnishing intoxicants to any person in the military forces of the United States, evidence held insufficient to sustain defendant's conviction of having supplied intoxicating wine to his brother-in-law, a marine.—*Gardner v. State*, 212 S. W. 169.

—236(1) (Tex.Cr.App.) In a prosecution for the selling of malt intoxicating liquor without license, a showing only by witness' belief that defendant did not have a license is insufficient to sustain a conviction; the statute requiring a license for the selling of malt drinks, both intoxicating and nonintoxicating.—*Wales v. State*, 212 S. W. 503.

—236(13) (Tex.Cr.App.) In a prosecution for the selling of intoxicating malt liquor without license, where the witnesses testified they did not know whether the liquor was intoxicating or not, the evidence is insufficient to sustain a conviction.—*Wales v. State*, 212 S. W. 503.

—238(1) (Ark.) In a prosecution for violation of the law against selling intoxicating liquors, where defendant was introduced as a witness and denied that he sold whisky and contradicted state's witnesses, it was for the jury to determine whether or not defendant was beyond a reasonable doubt guilty of the offense charged.—*Nelson v. State*, 212 S. W. 93.

#### X. ABATEMENT AND INJUNCTION.

—261 (Tex.Civ.App.) Under Act 35th Leg. (Fourth Called Sess.) c. 24, known as the "State-Wide Prohibition Law," injunction will lie to restrain a railroad from using its transportation facilities in the state for receiving, transporting, or delivering intoxicants except for medicinal, scientific, mechanical, or sacramental purposes.—*Gulf, C. & S. F. Ry. Co. v. State*, 212 S. W. 845.

#### IRRIGATION.

See Waters and Water Courses, —216-249.

#### JITNEYS.

See Carriers, —18; Evidence, —271, 317, 477.

#### JOINT TENANCY.

See Tenancy in Common.

#### JUDGES.

See Criminal Law, —400, 655, 656, 730; Judgment, —826; Justices of the Peace.

#### JUDGMENT.

See Courts, —200 $\frac{1}{4}$ , 231, 475, 478; Execution; Subrogation, —31, 41; Time, —10.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

#### I. NATURE AND ESSENTIALS IN GENERAL.

—18(2) (Ark.) Probate court's judgment ordering specific performance of deceased's land contract under Kirby's Dig. § 213, was void, where it appeared upon the face of the judgment reciting the contract that the contract lacked mutuality, and was therefore unenforceable.—*Blanton v. Forrest City Mfg. Co.*, 212 S. W. 330.

—21 (Tex.Civ.App.) In action on notes and to foreclose vendor's lien against the vendee and others who had purchased part of the land from vendee, a judgment against the vendee for the amount due upon the notes and against all of the defendants foreclosing the lien, the decree foreclosing the lien and ordering the sale of the land in directing the officers making the sale, in event the lands should sell for more than sufficient to satisfy the judgment, to pay the excess to the "defendants," was not indefinite nor uncertain, so as to require that it be reversed or reformed.—*Clark v. Taylor*, 212 S. W. 231.

#### III. ON CONSENT, OFFER, OR ADMISION.

—91 (Tex.Civ.App.) In suit on vendor's lien notes, the judgment entered by agreement held binding on the appealing defendants, as made in open court and entered of record in full compliance with rule 47 for the district and county courts (142 S. W. xxi), in the absence of objection even to the form of the decree, except in two particulars; one respecting a remedy not available to appellants, the other matter

otherwise provided for.—Wyss v. Bookman, 212 S. W. 297.

A consent judgment in a suit on vendor's lien notes, which recited that all defendants had been duly and legally cited, were properly before the court, and that the rights and interests of all were determined, held to have disposed of the rights of a defendant whose name was not specially mentioned.—Id.

#### IV. BY DEFAULT.

##### (B) Opening or Setting Aside Default.

⇒443(10) (Ky.) Where counsel's neglect was induced by his misunderstanding his client's statement that he "settled that case," meaning another case, the court abused its discretion under Civ. Code Prac. § 340, in refusing to set aside the default.—Rosen v. Galizio, 212 S. W. 104.

#### VI. ON TRIAL OF ISSUES.

##### (A) Rendition, Form, and Requisites in General.

⇒206 (Mo.) Under Rev. St. 1909, § 2333, where defendant in an action for slander appeared by applying for a change of venue, the trial court was allowed to enter a general judgment on trial on the merits, and it would have been error to enter a special judgment only against the attached property.—State ex rel. and to Use of Fenn v. Conran, 212 S. W. 869.

##### (B) Parties.

⇒243 (Ky.) In suit by plaintiffs to enjoin waste and have themselves adjudged owners of certain interest in remainder, court properly refused to pass on question whether certain remaindermen, who were not parties, should be barred of a recovery to the extent of advancements received as provided by Ky. St. § 2352.—Phillips v. Williamson, 212 S. W. 121.

##### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⇒251(2) (Tex.Civ.App.) In a suit to foreclose vendor's lien against the vendee and others who had purchased part of the land from the vendee, in the absence of any pleading of equities by either defendant, or any pleading or proof as to the amount he was entitled to receive of the excess proceeds of a sale of the lands, the court could not do otherwise than direct that such excess proceeds be paid to the defendants jointly.—Clark v. Taylor, 212 S. W. 231.

⇒255 (Ky.) Wife, having accepted commissioner's deed of partition conveying land allotted to her in partition proceedings, jointly to wife and husband, and having offered such deed in proof of her title in her action to cancel a deed to the land to which husband had forged her signature, cannot in such action recover any greater interest in the land than was conveyed by such commissioner's deed.—Venters v. Potter, 212 S. W. 117.

#### VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

⇒315 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 2015, does not require the existence on the court's records of some written memorandum or evidence showing the judgment actually rendered, in order to correct judgment entry to make it speak the truth.—Smith v. Moore, 212 S. W. 988.

⇒326 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2015, providing that the judge may on notice correct a judgment according to the truth and justice of the case, the court may correct a judgment nunc pro tunc so as to make it show that the cause was determined as to all parties joined issue.—Smith v. Moore, 212 S. W. 988.

#### X. EQUITABLE RELIEF.

##### (A) Nature of Remedy and Grounds.

⇒443(3) (Ky.) Petition alleging that plaintiff herein, as transferee of a coal-mining lease, was sued, with others, by defendants herein, to cancel lease, etc., that on the fraudulent representation of defendants herein that, if plaintiff would not answer or appear and would allow judgment to be taken, defendants would execute a new lease, plaintiff in reliance allowed a default judgment, though having a good defense, and that defendants refused to execute a lease, stated a cause of action to vacate the judgment for fraud, within Civ. Code Prac. § 518, subsec. 4.—Krypton Coal Co. v. Eversole, 212 S. W. 421.

#### XI. COLLATERAL ATTACK.

##### (B) Grounds.

⇒486(1) (Tex.Civ.App.) A void judgment may be collaterally attacked.—Evans v. McKay, 212 S. W. 680.

⇒486(1) (Tex.Com.App.) While a judgment binds only the parties thereto and those in privity with them, it is not subject to collateral attack by a stranger unless he shows that he has rights, claims, or interests which would be prejudiced or injuriously affected by its enforcement.—Heard v. Vineyard, 212 S. W. 489.

⇒489 (Ark.) In determining the validity of a judgment on collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and the subject-matter and those quasi jurisdictional facts without allegation of which the court cannot properly proceed and without proof of which decree should not be made; the absence of the former rendering judgment void upon collateral attack.—Blanton v. Forrest City Mfg. Co., 212 S. W. 330.

⇒501 (Tex.Civ.App.) Where a court of general jurisdiction, in the exercise of its ordinary judicial function, renders a judgment in a cause in which it has jurisdiction over the person of the defendant and the subject matter of the controversy, such judgment is never void, no matter how erroneous it may appear to be from the face of the record or otherwise.—Evans v. McKay, 212 S. W. 680.

⇒501 (Tex.Com.App.) A judgment based upon an erroneous view of the law is not for that reason void and subject to collateral attack.—Heard v. Vineyard, 212 S. W. 489.

⇒504(3) (Tex.Civ.App.) The question of whether a judgment should have been for the amount of a replevin bond or for the value of the property replevied cannot be raised on collateral attack by surety, on application by plaintiff after judgment for a writ of garnishment.—Tripplett v. Hendricks, 212 S. W. 754.

#### XII. CONSTRUCTION AND OPERATION IN GENERAL.

⇒524 (Tex.Com.App.) When the language of a decree is susceptible of two constructions, from one of which it follows that the law has been correctly applied to the facts, and from the other that the law has been incorrectly applied, that construction should be adopted which correctly applies the law.—Gough v. Jones, 212 S. W. 943.

#### XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

##### (A) Judgments Operative as Bar.

⇒540 (Tex.Civ.App.) In order for a second suit upon the same cause of action to be barred under the doctrine of res judicata, there must be identity in the thing sued for in the cause of action, in the persons and parties, and in the quality in the persons for or against whom the claim is made.—Evans v. McKay, 212 S. W. 680.

⇒576(1) (Tex.Civ.App.) An erroneous judgment is not void, and, unless appealed from.



remains in force, and any error or irregularity therein does not lessen its effect as a bar to further suits upon the same cause of action.—*Evans v. McKay*, 212 S. W. 680.

**(B) Causes of Action and Defenses Merged, Barred, or Concluded.**

⚡584 (Tex.Civ.App.) There is a difference between the effect of a judgment as a bar against the prosecution of a second suit on the same claim or demand and its effect as a bar in another action between the same parties upon a different claim or demand; as in the former case the judgment constitutes an absolute bar to a subsequent action, while in an action between the same parties upon a different claim or demand the judgment in the former action operates only as an estoppel as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.—*Evans v. McKay*, 212 S. W. 680.

**XIV. CONCLUSIVENESS OF ADJUDICATION.**

**(A) Judgments Conclusive in General.**

⚡634 (Tex.Civ.App.) There is a difference between the effect of a judgment as a bar against the prosecution of a second suit on the same claim or demand and its effect as a bar in another action between the same parties upon a different claim or demand; as in the former case the judgment constitutes an absolute bar to a subsequent action, while in an action between the same parties upon a different claim or demand the judgment in the former action operates only as an estoppel as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.—*Evans v. McKay*, 212 S. W. 680.

**(B) Persons Concluded.**

⚡666 (Ky.) A former judgment, which is not binding on defendants, is not a bar to the assertion of any right by plaintiff.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡684 (Ky.) Judgment in action against tenants, to which lessors were not parties on record, was not binding on lessors, if adverse to them, unless they assisted or directed defense, which they could have lawfully done for their tenants.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡712 (Tex.Civ.App.) In trespass to try title, a previous judgment recovering land involved against others than defendant held admissible to establish plaintiff's title.—*Clark v. Scott*, 212 S. W. 728.

⚡712 (Tex.Com.App.) In an action of trespass to try title, a judgment in another proceeding vesting in one of plaintiffs an undivided interest in the land in controversy, was admissible as a link in plaintiff's chain of title, notwithstanding defendants were not parties to that suit, and such judgment, in connection with the decree of partition and sale by an executor, held to establish title in plaintiffs.—*Heard v. Vineyard*, 212 S. W. 489.

**(C) Matters Concluded.**

⚡713(1) (Ky.) A final judgment rendered on the merits, by a court having jurisdiction of the subject-matter and parties, is conclusive on the rights of the parties and their privies in another suit on the points and matters in issue on the first suit.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡713(1) (Tex.Civ.App.) Res judicata is but the assertion in a pending suit that some legal or equitable issue there presented has been decided by some other court of competent jurisdiction and is as a consequence a bar to again litigate.—*Evans v. McKay*, 212 S. W. 680.

⚡713(2) (Ky.) In second suit between same parties on same cause of action, judgment in former suit is complete bar, not only as to everything used in former action to sustain or

defeat demand, but everything which parties could have used properly; but where second suit is between same parties or their privies upon different cause of action, judgment in former action is an estoppel only to a relitigation of questions actually litigated or determined in first action.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡725(6) (Tex.Civ.App.) In an action against plaintiff's employer and defendant for wages and cancellation of an assignment of wages to defendant, it being alleged that the debt to defendant was paid prior to notice to the employer of the assignment, a judgment for plaintiff for wages and a cancellation of the assignment necessarily included a finding that the debt had been paid to defendant, and the assignment canceled prior to the date notice was given the employer, and the judgment was admissible in another action by plaintiff against the defendant to show such fact.—*Evans v. McKay*, 212 S. W. 680.

⚡731 (Tex.Civ.App.) Where the pleadings upon which trial was had put in issue plaintiff's right to recover upon two causes of action, and judgment awarded him a recovery upon one and was silent as to the other, such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause of action.—*Evans v. McKay*, 212 S. W. 680.

⚡736 (Ky.) Judgment in action for reformation of deed on ground of mistake, the real question decided being whether mistake had occurred, was not res judicata in an action for trespass on lands, involving issue as to title not adjudicated in first suit, since same evidence would not sustain or defeat action in both cases.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡736 (Tex.Civ.App.) In an action on notes and to foreclose a vendor's lien against the vendee and others who had purchased part of the land from the vendee, a judgment against the vendee for the amount due on the notes and against all the defendants foreclosing the lien, directing that any excess proceeds be paid to the "defendants," in the absence of any pleading or proof as to the amounts each was entitled to receive of the excess proceeds of a sale, will not preclude either of the defendants from having their equities in any such excess proceeds thereafter adjudicated.—*Clark v. Taylor*, 212 S. W. 231.

⚡739 (Ky.) Plaintiff's claim of title, acquired since rendition of a former judgment, would not be barred by such former judgment.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡741 (Tex.Civ.App.) In action to recover usurious interest paid and exacted and to cancel an assignment of wages on the ground that the debt had been paid, a judgment only canceling the assignment was prima facie an adjudication that plaintiff was not entitled to recover the alleged usurious interest.—*Evans v. McKay*, 212 S. W. 680.

⚡743(2) (Ky.) In action involving title to land, it was duty of a party to bring forward all titles and claims to titles he possessed, and he could not rest his action on one claim of title alone, and, being defeated on that, put forward another claim, and thus require court to adjudicate his rights piecemeal.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡744 (Tex.Civ.App.) In an action by an employe discharged from his employment by reason of a false and malicious notice by defendant to his employer that plaintiff owed defendant a debt and that she had an assignment of plaintiff's wages, a judgment, in a prior action by the plaintiff against the employer and defendant for his wages and to cancel the assignment of wages, adjudging that the debt had been paid before notice of the assignment to the employer was given, was admissible in evidence to prove such fact.—*Evans v. McKay*, 212 S. W. 680.

A judgment in an action by plaintiff against a railroad and defendant to recover wages and to cancel an assignment of the wages to the



individual defendant, adjudging that the debt to defendant had been paid prior to notice to the railroad of the assignment of the wages, was res judicata in an action by plaintiff against defendant for damages on account of his discharge from employment, occasioned by defendant falsely and maliciously notifying the railroad that plaintiff owed defendant a debt, and that defendant had an assignment of plaintiff's wages.—Id.

### **XVIII. ASSIGNMENT.**

⚡840 (Mo.App.) Whether or not attestation by clerk to assignments of judgments is mandatory under Rev. St. 1909, § 2156, an assignment of a judgment, without such attestation, to attorney for the judgment creditor having a lien thereon will at least give the attorney the right to have the sufficiency of the judgment determined on an appeal, especially where the judgment debtor joined in the submission thereof after the judgment creditor had stipulated to dismiss his cause of action.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

⚡841 (Mo.App.) Under Rev. St. 1909, §§ 964, 965, the lien of an attorney upon the plaintiff's cause of action which attaches to the judgment is a property right in the attorney, and is a good consideration for an assignment of the judgment.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

A judgment debtor cannot question the validity of an assignment of the judgment, unless the assignment was taken for his benefit or paid for with funds advanced by him for that purpose.—Id.

⚡844 (Mo.App.) An assignment of a judgment carries with it all incidental rights, remedies, and advantages existing at the time of the assignment, and then available to the judgment creditor, being, of course, subject to reversal on appeal; the assignor being divested of all interest and control over the action or original liability.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

### **XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.**

⚡883(11) (Mo.) A general judgment creditor had the right to appear in the court where the judgment debtor's judgment against him was entered, and to file a motion to have the same satisfied by offsetting it with the unpaid balance of his own general judgment, and the order and judgment of the court allowing such satisfaction became final when no appeal was taken.—*State ex rel. and to Use of Fenn v. Conran*, 212 S. W. 869.

### **XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.**

⚡948(1) (Mo.) Res adjudicata being an affirmative defense to be pleaded, where the claim to which such defense is urged is made by intervening petition not showing former adjudication on its face, and the answers to such petition are simple general denials, the question of res judicata is not presented.—*Kilpatrick v. Robert*, 212 S. W. 884.

⚡951(1) (Ky.) In an action involving title to land, the burden is on defendants to show they participated in the defense of a prior action for their tenants, so that the former judgment is a bar to the assertion of any right by plaintiff, in that it is binding on defendants.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡958(2) (Ky.) In an action involving title to land, whether defendants participated in the defense of a prior action for their tenants a question of fact for the jury.—*Prewitt v. Wilborn*, 212 S. W. 442.

### **JUDICIAL POWERS.**

See Constitutional Law, ⚡70.

### **JUDICIAL SALES.**

See Appeal and Error, ⚡781, 1068; Attachment, ⚡831; Cancellation of Instruments, ⚡59; Chattel Mortgages, ⚡197; Corporations, ⚡312, 482, 579; Courts, 475; Executors and Administrators, ⚡72, 325, 334, 349, 358; Fraudulent Conveyances, ⚡132; Husband and Wife, ⚡276; Judgment, ⚡21; Mortgages, ⚡372; Taxation, ⚡624, 733, 760; Vendor and Purchaser, ⚡285, 292.

### **JURY.**

See Adverse Possession, ⚡115; Appeal and Error, ⚡230; Constitutional Law, ⚡281; Criminal Law, ⚡636, 864, 874, 1081; Eminent Domain, ⚡209.

### **V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.**

⚡97(4) (Tex.Civ.App.) In a personal injury suit that juror was engaged in preparing for injured persons their suits against railroads was not ground for challenge for cause when he stated that he had no interest in instant case and could decide case impartially, record not showing that he was interested in any suit against defendant.—*St. Louis, S. F. & T. Ry. Co. v. Whatley*, 212 S. W. 968.

⚡132 (Tex.Civ.App.) Testimony of a juror who had been accepted and sat as a juror held to show that he was qualified.—*St. Louis, B. & M. Ry. Co. v. Broughton*, 212 S. W. 664.

### **JUSTICES OF THE PEACE.**

See Appeal and Error, ⚡65, 1114; Exemptions, ⚡123; Landlord and Tenant, ⚡291; Time, ⚡10.

### **IV. PROCEDURE IN CIVIL CASES.**

⚡86(11) (Ark.) The question whether a bond given in the justice court by defendant to secure possession of attached property was made under Kirby's Dig. § 362, or section 372, is unimportant, as liability on a bond executed under either section was discharged by the dissolution of the attachment.—*Swift & Co. v. Cox*, 212 S. W. 83.

### **V. REVIEW OF PROCEEDINGS.**

#### **(A) Appeal and Error.**

⚡174(6) (Ark.) Upon appeal from the justice to the circuit court, it was not abuse of discretion to permit filing in circuit court of affidavit controverting grounds of plaintiff's attachment, such action not offending against Kirby's Dig. § 4682, providing that the same cause of action shall be tried in the circuit court upon appeal, since the circuit court may allow amendments of pleadings and new issues, keeping clear of new causes of actions and set-offs not presented below.—*Swift & Co. v. Cox*, 212 S. W. 83.

⚡191(1) (Mo.App.) Where appeal in unlawful detainer case was not taken within the time required by Rev. St. 1909, § 7705, the appeal bond therein was void, and did not bind the sureties thereon, although they signed it voluntarily.—*Downing v. La Shot*, 212 S. W. 30.

### **LANDLORD AND TENANT.**

See Alteration of Instruments, ⚡12; Appeal and Error, ⚡1050; Brokers, ⚡40, 41; Chattel Mortgages, ⚡12; Constitutional Law, ⚡278; Contracts, ⚡237; Corporations, ⚡642; Curtesy, ⚡12; Customs and Usages, ⚡10; Equity, ⚡57; Evidence, ⚡65, 317, 472; Frauds, Statute of, ⚡129, 144; Homestead, ⚡118; Husband and Wife, ⚡69½; Injunction, ⚡59, 137, 1013; Judgment, ⚡443, 684, 951, 958; Justices of the Peace, ⚡191; Mines and Minerals, ⚡55, 58, 74, 75, 77, 78, 79; Mortgages, ⚡197, 312; Partnership, ⚡64; Principal

and Agent, §100; Public Lands, §173; Remainders, §14; Sales, §12; Schools and School Districts, §70; Statutes, §47, 48; Time, §10.

### I. CREATION AND EXISTENCE OF THE RELATION.

§18(3) (Tex.Civ.App.) Although there was no evidence of specific agreement relating to kind of crops and amount of rental, evidence held sufficient to sustain finding of contract, where the buyer of land inquired of the tenant what rentals he had been paying to the seller for the previous year, and, on receiving the desired information, immediately told the tenant he might have the farm for another year, thus implying his assent to the rental on the same terms.—Rupert v. Swindle, 212 S. W. 671.

### II. LEASES AND AGREEMENTS IN GENERAL.

#### (A) Requisites and Validity.

§27(6) (Mo.App.) Evidence held to show that description was omitted on one or both of duplicate leases by inadvertence or oversight on part of lessor.—Gentry v. Fitzgerald, 212 S. W. 39.

### III. LANDLORD'S TITLE AND REVERSION.

#### (B) Estoppel of Tenant.

§63(1) (Ky.) Possession of tenant is presumed to be amicable, and in harmony with the title of the landlord, until the contrary is shown by clear and convincing evidence.—Holton v. Jackson, 212 S. W. 587.

§63(3) (Ky.) The possession of the tenant is the possession of the landlord, and the tenant is estopped to deny title in the landlord until the expiration of the term, or until vacating the premises and surrendering them to the landlord.—Holton v. Jackson, 212 S. W. 587.

§63(6) (Ky.) The duration of estoppel of tenant to deny title of landlord is not limited to the expiration of the lease.—Holton v. Jackson, 212 S. W. 587.

§64 (Ky.) One who enters under a tenant must be regarded as subservient, and not adverse to the landlord, to the same extent as the tenant.—Holton v. Jackson, 212 S. W. 587.

The presumption is that the husband is the head of the household, and that he obtains and holds premises, not only for his own use, but for the use and benefit of his wife and family, and her possession must be considered as amicable to the landlord, so long as she remains a member of the household of the husband and tenant.—Id.

Wife, who entered premises with her husband by reason of the marriage relation, was during the time she held possession with her husband, estopped to deny the landlord's title, or to claim or hold otherwise than in subserviency to the leasehold.—Id.

Refusal of wife to pay rent or surrender premises did not amount to a disseisin or assertion of paramount title, where after refusal wife continued on the premises as the wife of her husband, who at all times acknowledged himself to be tenant of his mother.—Id.

§66(2) (Ky.) A disseisin can be worked by a tenant against his landlord only by bringing his disclaimer and hostile holding to the knowledge of the landlord.—Holton v. Jackson, 212 S. W. 587.

### IV. TERMS FOR YEARS.

#### (D) Termination.

§112(2) (Ky.) Acceptance of rent for the defaulted period, or any part of it, in a lease, is a waiver of the right to declare a forfeiture.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., 212 S. W. 110.

### V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§115(2) (Mo.App.) Where description was inadvertently omitted from a lease signed by lessee, and under which lessee took possession, the lease was not of the character contemplated by Rev. St. 1909, § 7883, converting parol tenancies of city property into a renting from month to month.—Gentry v. Fitzgerald, 212 S. W. 39.

### VII. PREMISES AND ENJOYMENT AND USE THEREOF.

#### (E) Injuries from Dangerous or Defective Condition.

§166(9) (Ky.) Where upper tenant negligently causes water to flow into premises of tenant below, he, and not the landlord, is liable for the resulting damages, especially so where the plumbing in the upper apartment was in the upper tenant's exclusive control.—Nunan v. Bennett, 212 S. W. 570.

Where landlord and tenant of ground floor, in part of basement of which the cut-off of the main water pipe was located, agreed that landlord might turn off water at night, and where that was done and tenant of apartment above, on finding water turned off, left faucets open, and when landlord had water turned on in morning it leaked through ceiling of first floor and damaged lower tenant's goods, the landlord's acts were not proximate cause of damage.—Id.

#### (F) Eviction.

§180(3) (Tex.Civ.App.) In trespass to try title by buyer of land against seller's tenant, latter bringing cross-action for wrongful ouster, evidence that tenant, besides himself and wife, had one son and daughter, both of age, all working on the farm, also two teams and farm implements, held to warrant a finding he could have grown a crop on the farm with practically no outlay of money.—Rupert v. Swindle, 212 S. W. 671.

§180(4) (Tex.Civ.App.) In trespass to try title by buyer of land to recover it from seller's tenant, latter, on his cross-action for wrongful ouster, was entitled to recover as damages reasonable market value of his part of the crops which it was reasonably probable he would have raised during the year, less expense of raising and harvesting them, and such sums as he and the dependent members of his family could have earned by engaging in other business.—Rupert v. Swindle, 212 S. W. 671.

### VIII. RENT AND ADVANCES.

#### (B) Actions.

§226 (Tex.Civ.App.) Where the court found that the defendant was at no time a resident of the county of venue, and that the contract between plaintiff and defendant was a pasturage contract only, and that defendant did not rent plaintiff's land, Rev. St. 1911, art. 3208, § 5, providing that suits for recovery of rent may be brought in the county in which the rented premises or part thereof are situated, did not authorize plaintiff to sue in such county (citing Words and Phrases, First and Second Series, Rent).—McClintic v. Brown, 212 S. W. 540.

### IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§288 (Mo.App.) The law governing forcible entry and detainer is a code unto itself, and its mandatory requirements must be strictly observed.—Downing v. La Shot, 212 S. W. 30.

§291(6½) (Mo.App.) An unlawful detainer case must originate in the justice court, and the circuit court has only appellate jurisdiction.—Downing v. La Shot, 212 S. W. 30.

§291(18) (Mo.App.) Under Rev. St. 1909, § 7705, as to appeal in unlawful detainer, a judgment, rendered during a temporary adjournment or recess of the circuit court from De-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

ember 8th to January 10th, following, was rendered "during the term" of the circuit court, and not "in vacation," and therefore appeal therein was returnable within six days after judgment rendered in justice court.—*Downing v. La Shot*, 212 S. W. 30.

Where in unlawful detainer case appeal bond was not filed in time, the mere fact that the justice recited in his docket that the appeal was granted did not make it an appeal; his authority being limited by the statute which did not authorize appeal, except where bond is filed in time.—*Id.*

Where plaintiff's appeal bond in unlawful detainer case was not filed in time, the fact that defendant appeared and tried out the pretended appeal in the circuit court made no difference, because an appearance under such circumstances will not confer jurisdiction.—*Id.*

## LARCENY.

See Bills and Notes, *§*382; Criminal Law, 112, 351, 517, 530, 792, 1059; Embezzlement, *§*10; False Imprisonment, *§*39; Receiving Stolen Goods.

### I. OFFENSES AND RESPONSIBILITY THEREFOR.

*§*3(4) (Ky.) Lost property may be the subject of larceny, although it must be taken from the possession of some one, and there must be an asportation or carrying away so as to oust the constructive possession of the owner, at least for a distinct time, but one who takes lost property into his possession does not commit larceny unless he takes it with the intention to appropriate to his own use and permanently deprive the owner.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

*§*10 (Ky.) Lost property may be the subject of larceny.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

*§*15(3) (Tex.Cr.App.) Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft, and not embezzlement.—*Bonatz v. State*, 212 S. W. 434.

*§*16 (Ky.) Lost property, to be the subject of larceny, must be taken from the possession of some one, but one who takes lost property into his possession does not commit larceny unless he takes it with the intention to appropriate to his own use and permanently deprive the owner.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

To make the necessary asportation to constitute larceny of lost property, there must be a severance of the property from the possession of the owner for a distinct time, and any removal of the property from the place it was found with a felonious intention is a sufficient asportation; yet the finder of lost property is not guilty of larceny when he takes possession and converts it to his own use, where he has no clue to the ownership, although he will be guilty if he has a clue and the taking is felonious.—*Id.*

*§*17 (Ky.) Lost property may be the subject of larceny, although it must be taken from the possession of some one, and there must be an asportation or carrying away so as to oust the constructive possession of the owner, at least for a distinct time.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

To make the necessary asportation to constitute larceny of lost property, there must be a severance of the property from the possession of the owner for a distinct time, and any removal of the property from the place it was found with a felonious intention is a sufficient asportation.—*Id.*

*§*27 (Tex.Cr.App.) To hold defendant guilty as principal in prosecution for theft of mules, it must appear that he was one of the individuals who took the mules or at the time of

taking was doing something in aid of those who did the taking.—*Benavides v. State*, 212 S. W. 658.

That defendant previous to taking advised theft and gave information touching preparation for the offense would tend to show that he was not a principal, but an "accomplice," defined by Pen. Code 1911, art. 79, as one not present at the commission of the offense.—*Id.*

### II. PROSECUTION AND PUNISHMENT.

#### (A) Indictment and Information.

*§*32(1) (Tex.Cr.App.) Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom, under Rev. St. art. 5664, rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance, and the indictment should have alleged ownership in T. or real ownership in S. and special ownership in T.—*Rabe v. State*, 212 S. W. 502.

*§*32(1) (Tex.Cr.App.) Where the owner of an automobile sold it and received a check in payment but was to keep the car until the purchaser could call and get it and it was stolen while in the possession of the original owner, the ownership, so far as the prosecution for larceny was concerned was properly alleged to be in the original owner; he having the control, care and management of the property.—*Torrence v. State*, 212 S. W. 957.

In larceny prosecutions, while ownership may be generally alleged to be in the general or special owner, under the statute ownership must be alleged to be in the party who has the actual control, care, and management of the property, and it is not sufficient to allege ownership only in the real owner, although an allegation that possession is in the real owner does not detract from the indictment.—*Id.*

*§*40(9) (Tex.Cr.App.) Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom, under Rev. St. art. 5664, rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance.—*Rabe v. State*, 212 S. W. 502.

#### (B) Evidence.

*§*44 (Ky.) In a prosecution for larceny of a lost \$20 bill, the fact that defendant, who knew of the loss by the prosecuting witness, learned after the finding that another had found a \$20 bill, is not competent as shedding any light on his motives at the time he found and took possession of the same, but does shed light upon his failure thereafter to return the money or tell the prosecuting witness about finding it.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

#### (C) Trial and Review.

*§*68(1) (Ky.) In a prosecution for larceny of a lost \$20 bill, the question of the sufficiency of the evidence to support the conviction held for the jury.—*Commonwealth v. Metcalfe*, 212 S. W. 434.

## LEASE.

See Landlord and Tenant; Mines and Minerals, *§*58, 78, 79.

## LETTER HEADS.

See Partnership, *§*49.

## LEVEES.

See Frands, Statute of, *§*129; Pleading, *§*8; Principal and Agent, *§*103; Statutes, *§*141.

*§*2 (Ark.) Notwithstanding Acts 1919, No. 166, authorizing a designated levee district to

issue bonds for funds to strengthen and repair levees, indicates a mistake of fact as to an indebtedness incurred because of a previous overflow, the statute must be given effect; the reference to such overflow being surplusage.—*Skillem v. White River Levee Dist.*, 212 S. W. 90.

§25 (Ark.) Since the Legislature may act directly in assessing benefits to accrue from local improvements which it has authorized, which determination is conclusive unless arbitrary, unjust, or unreasonable, it is within the power of the Legislature to increase the benefit of a levee district at the rate of 6 per cent. per annum, to be cumulative and continuous until the entire indebtedness is paid.—*Skillem v. White River Levee Dist.*, 212 S. W. 90.

Where the Legislature has power primarily to determine the value of the benefit of a local improvement, it may increase such benefit assessments either directly or by a board of assessors of the improvement to which the power has been delegated.—*Id.*

Acts 1919, No. 168, providing for aid to a designated levee district and increasing the assessments of benefits, held not void as imposing any burden on the property in excess of the value of the benefits to the lands.—*Id.*

## LEWDNESS.

See Criminal Law, §940; Rape, §40.

## LIBEL AND SLANDER.

See Attachment, §331; Judgment, §206.

### I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§4 (Tex.Civ.App.) In actions for libel, there are two kinds of malice, "malice in law" and "malice in fact," or "express malice," malice in law arising in cases where the words uttered are presumed in law to be malicious.—*Evans v. McKay*, 212 S. W. 680.

Where words uttered are not actionable per se or presumptively libelous, it becomes necessary to prove express malice or that the alleged libelous matter was published in reckless disregard of plaintiff's rights and in a spirit of indifference concerning the injury which it might inflict.—*Id.*

§5 (Tex.Civ.App.) In cases founded on libelous publication, the jury may infer the existence of malice from absence of probable cause for making the publication, or from evidence of express malice.—*Evans v. McKay*, 212 S. W. 680.

Malice in law arises in cases where the words uttered are presumed in law to be malicious.—*Id.*

§10(6) (Tex.Civ.App.) It is not libelous for one who is the owner of the assignment of another's wages to give notice of that fact to the master, but, if at the time notice is given the debt which the assignment secures had been paid, and it is maliciously claimed that it has not, the one giving notice is liable for such damages as proximately result from the unlawful act.—*Evans v. McKay*, 212 S. W. 680.

### IV. ACTIONS.

#### (B) Parties, Preliminary Proceedings, and Pleading.

§81 (Tex.Civ.App.) In an action against one who had caused the discharge of plaintiff from his employment by falsely and maliciously giving notice to the employer that she had an assignment of plaintiff's wages, allegations that defendant was engaged in conducting a usury business in the name of the M. Co., of which defendant was sole owner, but which defendant, in order to avoid the law and its penalties, falsely claimed was owned by a nonresident, were proper and material where defendant was sought to be held liable for acts done by the loan company as her agent.—*Evans v. McKay*, 212 S. W. 680.

§85 (Tex.Civ.App.) A libel suit being based on language or its equivalent, a complaint should put the court in possession of the libelous matter published, so as to enable court to determine whether words are actionable, and that defendant may be advised concerning exact charges he will be called upon to meet.—*Evans v. McKay*, 212 S. W. 680.

Allegation in complaint that defendant published and delivered to plaintiff's employer a statement in writing wherein defendant alleged and stated that she "had an assignment of wages and power of attorney on him, the plaintiff, to the extent of \$12, providing for an attorney's fee of \$10 additional," sufficiently disclosed a libel under *Vernon's Sayles' Ann. Civ. St. 1914, art. 5595*; the rule as to pleading being satisfied with any allegation that discloses the very language used, whether purporting to be quoted from the writings or not.—*Id.*

§88 (Tex.Civ.App.) In an action for damages on account of discharge occasioned by defendant falsely and maliciously sending written notice to plaintiff's employer that defendant had an assignment of plaintiff's wages, allegations that defendant was engaged in making short-time wage loans upon which she collected in violation of law from 20 to 30 per cent. interest per month and was assisted in that respect by various agents for whose acts she was responsible, and that one of her means for extorting usurious interest was to notify employers, particularly the employer of plaintiff, that she had an assignment of the wages of the employe, were proper and material as tending to show the degree and deliberateness of the act; the petition containing a prayer for exemplary damages.—*Evans v. McKay*, 212 S. W. 680.

In an action for damages in that plaintiff was discharged from his employment by reason of a notice sent by defendant to his employer falsely claiming he was indebted to defendant, allegations that as a result of such discharge he was exposed to public hatred, contempt, and ridicule, and his reputation for honesty and integrity impaired, and he was for many years prevented from securing other employment, which was of special value to him at that time because of his wife's illness, and that as a result of such libelous statement to his employer and his subsequent discharge and the bringing into question his reputation for honesty and integrity and the fact that he would be confronted with and forced to disclose such facts when seeking employment in the future, he suffered much chagrin, humiliation, distress of mind, mental pain, and agony, were a sufficient basis for the recovery of damages.—*Id.*

In the law of libel, general damages are those which naturally, proximately, and necessarily result from publishing the libel, and are recoverable under a general averment.—*Id.*

#### (D) Damages.

§116 (Tex.Civ.App.) In the law of libel, general damages are those which naturally proximately and necessarily result from publishing the libel, and are recoverable under a general averment; the elements of such damages being injury to character, or reputation, feelings, mental suffering and anguish, and other like wrongs or injuries incapable of money valuation.—*Evans v. McKay*, 212 S. W. 680.

§120(2) (Tex.Civ.App.) An employe who was discharged from his employment by reason of defendant falsely and maliciously notifying the employer that the employe owed her a debt and that she had an assignment of his wages was properly allowed exemplary damages.—*Evans v. McKay*, 212 S. W. 680.

## LICENSES.

See Animals, §4; Constitutional Law, §237; Corporations, §648; Eminent Domain, §2; Intoxicating Liquors, §236;

Mandamus, **118**; Railroads, **275, 276, 282**; Statutes, **93, 121**; Taxation, **42, 117**.

## I. FOR OCCUPATIONS AND PRIVILEGES.

**7(2)** (Tenn.) Priv. Laws 1917, c. 648, as to registering dogs, does not violate Const. art. 2, § 28, providing that no one species of taxable property shall be taxed higher than any other species of property of the same value.—Ponder v. State, 212 S. W. 417.

## LIENS.

See Appeal and Error, **707, 1116**; Attorney and Client, **190**; Chattel Mortgages, **157**; Constitutional Law, **290**; Courts, **475**; Fraud, **11**; Homestead, **96, 146**; Judgment, **21, 91, 251, 736, 840, 841**; Larceny, **32, 40**; Mortgages, **137, 277**; Municipal Corporations, **407**; Quietting Title, **7**; Subrogation, **23**; Taxation, **658, 733**; Vendor and Purchaser, **265-294, 285, 292**.

## LIFE ESTATES.

See Curtesy, **12**; Deeds, **8, 129**; Husband and Wife, **31**; Limitation of Actions, **70**; Mines and Minerals, **79**; Remainders, **5, 14, 17**; Tenancy in Common, **15**; Wills, **645, 598, 614, 616, 634**.

**7** (Ky.) One who took title to a life estate will be presumed, in the absence of a contrary showing, to have also taken possession under the conveyance and claimed under it.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

**8** (Ky.) The possession of a tenant for life, or the possession of a grantee of a tenant for life, during the life of the life tenant, cannot be adverse to remaindermen.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

**18** (Ky.) A life tenant is bound to preserve the property and to keep it up so long as the particular estate continues, including the payment of taxes.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

**23** (Ky.) The deed of one having only a life estate, though attempting and purporting to convey the fee, is effective to convey a life estate only, and does not affect the interests of remaindermen.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

## LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, **1039**; Constitutional Law, **188**; Death, **39**; Easements, **7, 36**; Husband and Wife, **69½**; Public Lands, **173**; Remainders, **17**; Sales, **193**; Tenancy in Common, **15**.

## I. STATUTES OF LIMITATION.

### (B) Limitations Applicable to Particular Actions.

**28(1)** (Ark.) The three-year statute (Kirby's Dig. § 5064) applies to a right of action by one surety on a note against another for contribution; the contract for contribution being an implied one.—Cooper v. Rush, 212 S. W. 94.

**28(1)** (Tex.Civ.App.) An action for the rescission of a contract to purchase corporate stock on the ground of fraud is governed by the four-year statute, but an action for damages by reason of fraud in the sale of corporate stock is governed by the two-year statute.—Texas Co-op. Inv. Co. v. Clark, 212 S. W. 245.

**39(7)** (Tex.Civ.App.) An action for the rescission of a contract to purchase corporate

212 S.W.—67

stock on the ground of fraud is governed by the four-year statute.—Texas Co-op. Inv. Co. v. Clark, 212 S. W. 245.

**39(12)** (Tex.Com.App.) The statute of limitations of four years, or any other period, unaccompanied by adverse possession, is without application in trespass to try title.—McBride v. Loomis, 212 S. W. 480.

## II. COMPUTATION OF PERIOD OF LIMITATION.

### (A) Accrual of Right of Action or Defense.

**45** (Tex.Civ.App.) Where plaintiff lent sawmill machinery to defendant, limitations did not begin to run in defendant's favor until he repudiated plaintiff's title and notice of the repudiation was brought home to plaintiff.—Williams v. Davenport, 212 S. W. 675.

Where plaintiff lent sawmill machinery to defendant, the mere fact that defendant gave a chattel mortgage on all of his sawmill machinery, which included that lent, was not notice to plaintiff of defendant's repudiation of his title so as to start the running of limitations, though the mortgage was filed for record, for plaintiff was not bound to make periodic searches of the records to discover whether defendant had repudiated.—Id.

**49(6)** (Ark.) Right of action for contribution accrues when one surety pays more than his share of the common liability.—Cooper v. Rush, 212 S. W. 94.

**55(7)** (Tex.Civ.App.) Where the defendant railroad company's construction of a bridge as built was not unlawful and plaintiff's rights were not invaded by its building, but the bridge was as an impediment to the stream, causing or increasing an overflow of plaintiff's land during heavy rains, the statute limiting actions therefor ran from the date of the flood.—Ft. Worth & D. C. Ry. Co. v. Spear, 212 S. W. 762.

Where a nuisance is permanent, and continuing resulting damages should all be litigated in one suit, but when not permanent and dependent upon accidents or contingencies successive actions may be brought for injury as it occurs, and an action for such injury would not be barred by the statute of limitations, unless the full period of the statute had run against the special injury before suit was brought.—Id.

### (B) Performance of Condition, Demand, and Notice.

**69** (Tex.Civ.App.) As a state cannot be sued without permission, limitations against an action by employé on a state railroad, who was injured by those having the management of the road, do not begin to run until permission to sue is granted.—State v. Elliott, 212 S. W. 695.

### (C) Personal Disabilities and Privileges.

**70(2)** (Ky.) The 15-year statute of limitations begins to run against all remaindermen in favor of a grantee of the life tenant claiming adversely immediately upon the death of the life tenant, where some of the remaindermen were sui juris, although some of them were under disability; but where all the codefendants to whom the right of action descends are under disability at the time the right of action accrues, the statute does not commence to run until the disability is removed from all, even the youngest.—May v. Chesapeake & O. Ry. Co., 212 S. W. 131.

### (F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

**100(5)** (Tex.Civ.App.) A cause of action for deceit accrues at the time that the defrauded party discovers facts which would put a reasonable man on notice of the fraud.—Texas Co-op. Inv. Co. v. Clark, 212 S. W. 245.

**(H) Commencement of Action or Other Proceeding.**

⚡118(2) (Ky.) Even though one claiming title by adverse possession brings his action prematurely, yet, if the holder of the legal title delays the filing of his answer and counterclaim until after the lapse of 15 years from the entry of the adverse claimant, the answer and counterclaim will be treated as the commencement of the action for recovery of property from the adverse claimant, and a plea of limitations will prevail.—*Holton v. Jackson*, 212 S. W. 587.

⚡127(8) (Tex.Civ.App.) Where petition for loss of barges, filed within two years of the loss, alleged that defendant was in their possession "without hire," an allegation contradicted by the specific facts recite another amended petition filed more than two years after the loss, and eliminating the improper allegation that the barges were in defendant's possession without hire, did not change the cause of action, and was not barred by the two-year statute of limitations.—*Freeport Town-Site Co. v. S. H. Hudgins & Sons*, 212 S. W. 287.

⚡131 (Tex.Civ.App.) Where an employé on a state railroad was injured, and his petition to the Legislature for privilege of entering the courts with his cause of action, of which, under Const. art. 3, § 57, he was required to give advance notice of 30 days, was presented within two years after injury, the running of limitations against an action for such injuries was tolled.—*State v. Elliott*, 212 S. W. 695.

**IV. OPERATION AND EFFECT OF BAR BY LIMITATION.**

⚡175 (Tex.Civ.App.) As there is no constitutional provision requiring the state to plead limitations in an action against it, the Legislature, on passing an act allowing an employé of a state railroad who was injured to sue, may waive limitations, and provide that limitations should not begin to run until the passage of the act.—*State v. Elliott*, 212 S. W. 695.

**LIQUOR SELLING.**

See Intoxicating Liquors.

**LIVE STOCK SANITARY COMMISSION.**

See Animals, ⚡30.

**LOCK JAW.**

See Carriers, ⚡228; Evidence, ⚡13.

**LOGGING TRAIN.**

See Railroads, ⚡276.

**LOGS AND LOGGING.**

See Adverse Possession, ⚡23; Pleading, ⚡11; Public Lands, ⚡173; Railroads, ⚡276, 282; Taxation, ⚡317; Trespass, ⚡40, 52.

⚡3(7) (Tex.Com.App.) Deeds of conveyance of standing timber, like other contracts, should be construed in such manner as to carry out the real intention of the parties.—*Brooks v. Moss*, 212 S. W. 153.

⚡3(11) (Tex.Com.App.) A deed of standing timber which gave the grantee the right to cut and remove the timber within a specified time, and an additional term or so much thereof as might be required, on payment of a specified sum, gave the grantee title only to such timber as was cut and removed within the period fixed.—*Brooks v. Moss*, 212 S. W. 153.

**LOST INSTRUMENTS.**

See Appeal and Error, ⚡1052.

**LUNATICS.**

See Insane Persons.

**MANDAMUS.**

See Pleading, ⚡129.

**II. SUBJECTS AND PURPOSES OF RELIEF.**

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

⚡118 (Ky.) Plaintiff, a manufacturer of double stamp spirits, but exempt from license tax provided by Ky. St. §§ 4189a, 4189c, having paid the tax, made without any assessment by the tax commission, under the mistaken belief that it was liable therefor, and having made application for its return within the time provided by law, may maintain mandamus, under Ky. St. § 162, to compel auditor to draw warrant upon the treasurer for amount of tax paid, in view of section 162.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

**III. JURISDICTION, PROCEEDINGS, AND RELIEF.**

⚡151(2) (Tex.Civ.App.) Where a railroad, with permission of the authorities, the Railroad Commission and the Attorney General, abandoned a portion of its track, and sold its right of way to a company, which sold to residents of the city, who built thereon, a company aggrieved by the abandonment cannot secure mandamus to compel replacement without making the city and present holders of the title to the abandoned right of way parties to the suit.—*Jeff Bland Lumber & Building Co. v. Galveston, H. & S. A. R. Co.*, 212 S. W. 750.

⚡164(3) (Tex.Civ.App.) In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

**MANSLAUGHTER.**

See Homicide.

**MANUFACTURES.**

See Contracts, ⚡10; Criminal Law, ⚡676; Mandamus, ⚡118; Sales, ⚡54; Vendor and Purchaser, ⚡16.

**MARRIAGE.**

See Divorce; Evidence, ⚡271; Husband and Wife.

**MASTER AND SERVANT.**

See Action, ⚡27; Appeal and Error, ⚡51, 1060, 1062, 1064; Army and Navy, ⚡24; Assignments, ⚡12, 13; Constitutional Law, ⚡188; Corporations, ⚡407, 432; Damages, ⚡40, 190; Embezzlement, ⚡10; Evidence, ⚡121, 123, 535; Insurance, ⚡2, 85, 151, 390, 514, 598, 602, 624, 665, 668, 669, 675; Judgment, ⚡725, 741, 744; Larceny, ⚡15; Libel and Slander, ⚡10, 81, 85, 88, 120; Limitation of Actions, ⚡69, 131, 175; Municipal Corporations, ⚡705, 706; Negligence, ⚡101; Parent and Child, ⚡7; Principal and Agent, ⚡169; Railroads, ⚡260, 275, 278, 282; Release, ⚡12, 24, 27; Statutes, ⚡267; Trial, ⚡121, 191, 199, 251, 352; Venue, ⚡7.

**I. THE RELATION.**

(B) Statutory Regulation.

⚡16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⚡ number sections 346-420, at the end of this topic,

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where the matter in this and future index-digests will be found.

(C) Termination and Discharge.

⇒23 (Tex.Civ.App.) If one by retiring from business breaks a contract of employment, he is liable to employé for damages.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

### III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

⇒85 (Tex.Com.App.) Where there is reason to anticipate some injury may result to the servant, the master must exercise such care as will prevent the injury, and a failure to do so is actionable negligence, if injury follows the breach of duty.—*Collins v. Pecos & N. T. Ry. Co.*, 212 S. W. 477.

⇒87½. Owing to the great increase of matter heretofore classified in this section, we have made a new subdivision, consisting of ⇒number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

⇒88(1) (Tex.Civ.App.) Where the state owned and operated a railroad under Laws 30th Leg. c. 74; Laws 31st Leg. (2d Ex. Sess.) c. 24; Laws 33d Leg. c. 139 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 6745a-6745f), and employed labor, *held* that the state occupies to such employé the relations of an ordinary employer; and, where an employé was injured through the negligence of agents having supervision and management of the road, the state is liable, though it cannot be sued without permission.—*State v. Elliott*, 212 S. W. 695.

⇒92(1) (Ark.) Employer having duty of furnishing employé with medical attention, or undertaking to discharge that duty, is not liable for physician's negligence or lack of skill, but only for failure to exercise ordinary care to select a physician with requisite skill and learning who will give employé the treatment and attention which the case requires.—*Smith v. Buckeye Cotton Oil Co.*, 212 S. W. 88.

⇒92(1) (Mo.) In an administrator's suit for damages on account of failure of decedent's employer to furnish prompt first aid and proper medical attendance to decedent when injured, instructions *held* to be correct statement of the law and consistent.—*Hunlike v. Meramec Quarry Co.*, 212 S. W. 345.

(B) Tools, Machinery, Appliances, and Places for Work.

⇒101, 102(1) (Mo.App.) In a servant's action for injury caused by cement sacks falling upon him, a requested instruction that defendants had a right to conduct business in their own way, and had a right to pile cement as high as they chose, *held* properly refused.—*Natt v. Aikin*, 212 S. W. 58.

⇒101, 102(1) (Tex.Civ.App.) The state, as an employer operating state's railroad, is bound to furnish employé with a safe place in which to work.—*State v. Elliott*, 212 S. W. 695.

⇒101, 102(2) (Tex.Com.App.) Master is not an insurer of servant's safety, but is required to exercise that degree of care which an ordinarily prudent person engaged in like business would have exercised under similar circumstances.—*Taylor v. White*, 212 S. W. 656.

⇒101, 102(2) (Tex.Civ.App.) Where a servant alleged negligence on the part of the master in furnishing a defective pipe wrench, a charge that it is the duty of an employer to furnish reasonably safe tools, and that a failure to do so is negligence, was erroneous as making such duty absolute.—*Texas & Pacific Coal Co. v. Ervin*, 212 S. W. 234.

⇒101, 102(4) (Tex.Com.App.) Before master can be held liable for failure to perform a promise to remove a specific danger, it is necessary to show that the existing conditions were of such a nature that their maintenance implied culpability.—*Taylor v. White*, 212 S. W. 656.

⇒101, 102(8) (Tex.Com.App.) Master is required to exercise ordinary care to provide servant with safe place to work and with reasonably safe and suitable machinery and appliances.—*Taylor v. White*, 212 S. W. 656.

⇒105(1) (Tex.Com.App.) The custom of others engaged in like business is not the absolute test of negligence in failing to provide safe working place appliances, but where master was conducting his business in accordance with the uniform custom of others, it devolves upon servant to show that custom is negligent; the presumption being that persons in like business are reasonably prudent.—*Taylor v. White*, 212 S. W. 656.

⇒105(2) (Tex.Com.App.) An employer operating an electric power plant is not negligent in failing to fence an exciter, which is covered with shield leaving no exposure except openings for adjusting and cleaning machine, where other employers in same line of business did not fence in exciters by guard rails, and employé who came in contact with machine was experienced and familiar with the surroundings.—*Taylor v. White*, 212 S. W. 656.

⇒113(1) (Mo.App.) A railroad company is required to use ordinary care to provide a reasonably safe place for its trainmen, and is liable for injuries resulting from its failure to use such care by permitting bluffs so near tracks that trainmen on the outside of moving cars or engines in performing their duties are struck by them.—*Brown v. Missouri, K. & T. Ry. Co.*, 212 S. W. 26.

⇒125(1) (Ky.) To render an employer liable for injuries to employé resulting from lever of jack flying back and striking him, employé must show that jack was defective, and that defect was known to employer, or could have been known by exercise of ordinary care.—*Howard v. Stearns Coal & Lumber Co.*, 212 S. W. 463.

(E) Fellow Servants.

⇒168(3) (Tex.Civ.App.) In an action by a servant for personal injuries against an employer amenable to the provisions of Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzz), but not having qualified, recovery could be had, under article 5246h, subd. 4, for negligence of the employer in hiring an inexperienced and incompetent employé.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⇒173 (Tex.Civ.App.) In an action by a servant for injuries against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzz), but not having qualified, it is necessary, in order to recover on the ground of negligence of the employer in hiring inexperienced and incompetent servants, to allege and prove that the employer knew of the inexperience and incompetency of the servant, or should have known it.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

(F) Risks Assumed by Servant.

⇒204(1) (Tex.Civ.App.) In an action against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzz), but not having qualified, assumption of risk is not a defense.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⇒210(1) (Mo.App.) A locomotive engineer does not assume the risk of injury from the negligent failure of the railroad company to use ordinary care to furnish him a safe place to work.—*Brown v. Missouri, K. & T. Ry. Co.*, 212 S. W. 26.

⇒216(1) (Tex.Com.App.) Servant assumes risks caused by negligence of fellow servant.—*Taylor v. White*, 212 S. W. 656.

⇒217(18) (Tex.Com.App.) An experienced employé familiar with an unfenced exciter in an electric power plant and fully appreciating danger of injury from contact with it while in op-



eration assumes the risk.—*Taylor v. White*, 212 S. W. 656.

⚡221(5) (Tex.Com.App.) A servant is not relieved of the assumption of risks of a known defect by reason of a promise to remedy unless he continues in the service in reliance on such promise and has reasonable grounds to expect its fulfillment.—*Taylor v. White*, 212 S. W. 656.

#### (G) Contributory Negligence of Servant.

⚡227(1) (Tex.Civ.App.) In an action by a servant for injuries ordinarily intoxication is simply a fact for the jury to consider in connection with all the facts and attendant circumstances in determining whether an act done by him while under such influence was negligence.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

#### (H) Actions.

⚡250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⚡ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

⚡258(15) (Tex.Civ.App.) In an action by a servant for injuries, an allegation "that it was the duty of defendant to properly light said mine, and that it failed to perform said duty, that, if it had been properly lighted, plaintiff might have discovered that the switch was turned wrong, and might have avoided injury," was not subject to general demurrer.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡259(2) (Tex.Civ.App.) In an action by a servant against an employer amenable to the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), but who has not qualified, allegation that "the defendant, its agents and servants, negligently," etc., "turned the switch," is sufficient upon general demurrer under article 5246h, subd. 4, although a special exception pointing out that no particular servant was named, and that there was no allegation that the person or employé was acting within the scope of his employment, would be sustained.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡264(7) (Tex.Civ.App.) In an action by a servant for personal injuries, it was error to admit evidence of incompetency of another who caused the injury, in the absence of an allegation that the employer knew of such incompetency.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡265(9) (Tex.Com.App.) The custom of others engaged in like business is not the absolute test of negligence in failing to provide safe working place appliances, but, where master was conducting his business in accordance with the uniform custom of others it devolves upon servant to show that custom is negligent; the presumption being that persons in like business are reasonably prudent.—*Taylor v. White*, 212 S. W. 656.

⚡271(1) (Tex.Civ.App.) In an action by an injured servant based on negligence of the master in hiring inexperienced and incompetent trapper boy, testimony that witness had not seen him trap before and testimony of the boy that he had not trapped before is proper and admissible.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡271(3) (Tex.Civ.App.) In an action by an injured servant based on negligence in hiring an inexperienced and incompetent servant, declaration made by plaintiff to one occupying the position of vice principal regarding such servant that "he would get somebody killed by putting that boy on the trap," was admissible to show that employer had notice of the incompetency.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

⚡276(2) (Tex.Com.App.) Evidence held to show that permanent injury to a section foreman, poisoned by handling creosote ties, was

the proximate result of negligence in failing to warn him of the danger.—*Collins v. Pecos & N. T. Ry. Co.*, 212 S. W. 477.

⚡276(2) (Tex.Com.App.) A master's negligence and the proximate cause of injury to a servant may be established by circumstantial evidence.—*Bock v. Fellman Dry Goods Co.*, 212 S. W. 635.

⚡278(1) (Tex.Com.App.) Plaintiff, in an action for injuries to a servant, is required to convince the jury by fair preponderance of the evidence that the accident resulted from defendant's negligence.—*Bock v. Fellman Dry Goods Co.*, 212 S. W. 635.

A master's negligence may be established by circumstantial evidence.—*Id.*

⚡278(14) (Ky.) In action for injuries to employé struck by lever of jack when it flew back, evidence held insufficient to show that defendant had knowledge of defect in jack or that it was defective.—*Howard v. Stearns Coal & Lumber Co.*, 212 S. W. 463.

⚡285(5) (Mo.App.) In servant's personal injury action, where there was evidence that cement sacks were carefully piled in the usual way under a foreman's direction, except that the height was unusual, held, that the question as to whether the unusual height, combined with the sagging of the floor on which the sacks were piled, caused them to fall was for the jury.—*Natt v. Aiken*, 212 S. W. 58.

⚡285(5) (Tex.Com.App.) In an action for death of an employé from falling into an elevator shaft in a poorly lighted room, with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the gate, evidence held sufficient to require the submission of the issues of defendant's negligence and the proximate cause of the accident.—*Bock v. Fellman Dry Goods Co.*, 212 S. W. 635.

⚡285(12) (Tex.Com.App.) In action by section foreman for injury to his hands and face from handling ties wet with a poisonous mixture known as creosote, whether the permanent injuries suffered were the natural and proximate result of defendant's negligence in not warning him of danger, held, on the evidence, a question for the jury.—*Collins v. Pecos & N. T. Ry. Co.*, 212 S. W. 477.

⚡286(15) (Mo.App.) Whether or not railroad company was negligent in leaving bluff along its right of way with a clearance of only 20 to 24 inches between the engine tank and the bluff, which struck engineer inspecting a hot box, was a question for the jury.—*Brown v. Missouri, K. & T. Ry. Co.*, 212 S. W. 26.

In an action for the death of a locomotive engineer struck by a bluff near the track, evidence of defendant's rule notifying trainmen of danger from structures near the track, does not warrant a peremptory instruction for defendant, particularly where the rule does not mention bluffs.—*Id.*

⚡286(18) (Tex.Com.App.) In an action for death of an employé from falling into an elevator shaft in a poorly lighted room, with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the gate, evidence held sufficient to require the submission of the issues of defendant's negligence and the proximate cause of the accident.—*Bock v. Fellman Dry Goods Co.*, 212 S. W. 635.

⚡288(16) (Mo.App.) Evidence that plaintiff piled cement sacks to an unusual height on his foreman's orders, etc., held not to establish, as a matter of law, that he assumed risk of sacks falling upon him.—*Natt v. Aiken*, 212 S. W. 58.

⚡289(32) (Mo.App.) Where a locomotive engineer assumed the customary position for an engineer examining a hot box, when he was injured by a bluff near the track, the question of his contributory negligence was for the jury.—*Brown v. Missouri, K. & T. Ry. Co.*, 212 S. W. 26.

⚡289(37) (Mo.App.) Evidence that plaintiff was injured by cement sacks falling upon him, which he had piled to an unusual height at his



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foreman's orders, *held* not to establish his contributory negligence as a matter of law.—*Natt v. Aiken*, 212 S. W. 58.

☞291(13) (Tex.Civ.App.) In a servant's action for injuries by the slipping of a defective pipe wrench, causing him to be caught in exposed cogwheels, instructions *held* erroneous in failing to instruct the jury to find whether the defective wrench or the exposed cogwheels, or both, was the proximate cause of the injuries.—*Texas & Pacific Coal Co. v. Ervin*, 212 S. W. 234.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (A) Acts or Omissions of Servant.

☞302(6) (Tex.Civ.App.) Where local manager of company started on trip to post office in company's automobile with another employé to mail report to company, a duty of his employment, and, after making a stop on the other employé's personal business, started to go on, and negligently injured a pedestrian, the company was liable, though, after mailing the report, he intended to journey on to his home, and though the use of the automobile was after business hours.—*Pierce-Fordice Oil Ass'n v. Brading*, 212 S. W. 707.

☞305 (Tex.Civ.App.) If a servant's deviation from his instructions amounts to an entire abandonment of the service, the master is not liable for injuries by the servant during such deviation; but if the deviation is a mere incident to a duty of the service, and after termination of it authorized service is resumed, the master is liable.—*Pierce-Fordice Oil Ass'n v. Brading*, 212 S. W. 707.

#### V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

##### (A) Civil Liability.

☞341 (Tex.Civ.App.) Where one knowingly induces a master to break his contract with his servant, the servant has a right of action against the one so causing the breach for any damages resulting.—*Evans v. McKay*, 212 S. W. 680.

The fact that an employé's contract is from month to month does not preclude recovery of damages from one who wrongfully procured his discharge.—*Id.*

#### VI. WORKMEN'S COMPENSATION ACTS.

##### (A) Nature and Grounds of Master's Liability.

☞351 (Tex.Civ.App.) Corporation was not liable for medical services rendered an employé in absence of special authority from board of directors, where corporation had provided method of caring for injuries to employes by means of insurance it had taken out for their benefit under the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz).—*Producers' Oil Co. v. Green*, 212 S. W. 68.

##### (B) Compensation.

☞385(5) (Tex.Civ.App.) Where an injured servant had worked in the employment in which he was engaged when injured for several years before injury, under Workmen's Compensation Act, pt. 4, § 1, subsec. 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-82), his average weekly wages, and not the average weekly wages of other persons similarly engaged, were the proper basis for determining the amount of compensation.—*U. S. Fidelity & Guaranty Co. v. Davis*, 212 S. W. 239.

☞388 (Tex.Civ.App.) The brothers of a deceased servant were "beneficiaries" within the meaning of Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246kk).—*American Indemnity Co. v. Zyloni*, 212 S. W. 183.

☞391½ [New, vol. 7A Key-No. Series]

(Tex.Civ.App.) An injured servant could not, under Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-44), repudiate and abrogate the ruling of the Industrial Accident Board awarding compensation, and at the same time treat it as effective and binding on the employer, and seek under section 5a to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with the mandates of the board.—*U. S. Fidelity & Guaranty Co. v. Davis*, 212 S. W. 239.

##### (C) Proceedings.

☞398 (Tex.Civ.App.) Brothers of deceased servant, his beneficiaries, through the attorney for the elder, *held* to have given the notice of injury and made the claim for compensation required by Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp), though the first letter of the attorneys in relation to the matter was sent to the employer, and they were referred to the insurer, to which they wrote inclosing a copy of their first communication.—*American Indemnity Co. v. Zyloni*, 212 S. W. 183.

☞408 (Tex.Civ.App.) In view of Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-44), a court trying a workmen's compensation case by implying a workmen's compensation case by implying a power given the Industrial Accident Board by part 1, § 15 (article 5246-33), to approve any agreed lump sum settlement, and the power given it by section 12d (article 5246-25) to review, terminate, diminish, or increase an award for compensation made.—*U. S. Fidelity & Guaranty Co. v. Davis*, 212 S. W. 239.

☞411 (Tex.Civ.App.) In a workmen's compensation case, the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they matured, since clerk cannot be made the judge to determine what character of process he shall issue.—*U. S. Fidelity & Guaranty Co. v. Davis*, 212 S. W. 239.

In a workmen's compensation case, the form of judgment proposed by the servant, embodying the right and power of the court to review it, and diminish, increase, or terminate the liability of the insurer in accordance with part 1, § 12d, of the Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-25), with the right in the insurer at any time to redeem its entire liability by payment of a lump sum on agreement with the servant, with the approval of the Industrial Accident Board, in accordance with part 1, § 15 (article 5246-33), *held* proper, with modification of provisions as to executions and the approval of the trial court of any lump sum settlement.—*Id.*

☞417(3%) (Tex.Civ.App.) A workmen's compensation insurer which voluntarily contested the claim of the deceased servant's brothers before the Industrial Accident Board was not bound by the board's final award, and has an appeal therefrom where the board did not direct payment of the award to the brothers or find them in fact beneficiaries, but merely fixed the amount due, and ordered payment to the "legal beneficiaries," and where there was no express agreement the parties should be bound by action of the board.—*American Indemnity Co. v. Zyloni*, 212 S. W. 183.

#### MECHANICS' LIENS.

See Taxation, ☞117.

#### MILITARY LAW.

See Army and Navy.

#### MILITARY SERVICE.

See Insurance, ☞129.

## MINES AND MINERALS.

See Contracts, ¶237; Corporations, ¶80, 406, 407; Curtesy, ¶12; Equity, 57; Evidence, ¶85, 441, 535; Homestead, ¶118; Injunction, ¶59, 118, 137, 163, Judgment, ¶443; Partition, ¶85; Partnership, ¶64; Remainders, ¶14; Specific Performance, ¶113; Tenancy in Common, ¶37.

### I. PUBLIC MINERAL LANDS.

#### (A) Reservation and Disposal in General.

¶6 (Tex.) Under Acts 33d Leg. c. 173, as to permits to prospect for oil and gas upon public lands, where a certain area had been lawfully surveyed in virtue of an application made under the act, but upon which no permit issued, the field notes being approved by the commissioner and filed in the land office, the commissioner was authorized to treat the area, as respects a later application, as "surveyed land" within the meaning of the act.—Sibley v. Robison, 212 S. W. 932.

### II. TITLE, CONVEYANCES, AND CONTRACTS.

#### (A) Rights and Remedies of Owners.

¶48 (Tex.Civ.App.) Oil produced from wells is a "mineral" substance.—Texas Pacific Coal & Oil Co. v. Howard, 212 S. W. 735.

#### (B) Conveyances in General.

¶55(3) (Tex.Civ.App.) Instrument executed by the owner of supposed oil land and designated as an oil lease held a conveyance of the mineral rights in the land subject to defeasance for failure to pay the rentals as stipulated, and subject to the further contingency of termination after the expiration of a five-year period by failure to discover the minerals mentioned in paying quantities, and failure to exercise ordinary diligence after discovery to mine same.—Key v. Big Sandy Oil & Gas Development Co., 212 S. W. 300.

#### (C) Leases, Licenses, and Contracts.

¶58 (Ky.) Oil and gas leases for 5 and 10 years, or as long as oil or gas was produced, requiring commencement of operations within one year or payment to extend the lease within the year, entitling lessor to certain royalties, are not unilateral, and void for want of mutuality.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., 212 S. W. 110.

¶74 (Tex.Civ.App.) The agreement by the lessor of supposed oil land that the well drilled by the lessee company to a depth of 2,000 feet was a complete well within the meaning of the lease was binding upon her and upon the buyer from her, who bought the land with full notice of the construction of the lease, and also upon the buyer's lessee, who took his lease with notice of the same fact.—Key v. Big Sandy Oil & Gas Development Co., 212 S. W. 300.

¶75 (Tex.Civ.App.) The \$500 paid by the lessee of supposed oil land in addition to a full performance by his assignee of the drilling contract stipulated in the lease held a full payment of the consideration required for continuation of the lease for the five-year period stipulated in it.—Key v. Big Sandy Oil & Gas Development Co., 212 S. W. 300.

¶77 (Tex.) Lessee of oil lands for 20 years held to have abandoned his rights under the lease in having drilled as required by the lease and struck oil and then having removed his machinery when the well ceased to flow without expectation of resumption of operations.—Grubb v. McAfee, 212 S. W. 464.

¶78(1) (Ky.) The purpose of gas and oil leases is the development of the property and the collection of royalties, and the lessee will not be permitted to postpone the land's development for an unreasonable length of time, or extend the lease indefinitely by paying nominal

rent.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., 212 S. W. 110.

¶78(1) (Tex.) The lessee of oil lands after oil was encountered in the first well sunk held under obligation implied by law to exercise reasonable diligence to continue drilling and mining operations on the land.—Grubb v. McAfee, 212 S. W. 464.

¶78(1) (Tex.Civ.App.) The contractual consideration of a five-year oil lease having been fully performed by the lessee by drilling a well, the lessee was under no obligation to drill another well in order to hold the lease for the five-year period.—Key v. Big Sandy Oil & Gas Development Co., 212 S. W. 300.

¶78(2) (Tex.) The lessee of oil lands after oil was encountered in the first well sunk held under obligation implied by law to exercise reasonable diligence to continue drilling and mining operations on the land, but the contract, which specified as the sole cause of forfeiture of the lessee's right a failure to drill a first well within time, did not make the obligation a condition subsequent, and did not authorize forfeiture of the lease for noncompliance.—Grubb v. McAfee, 212 S. W. 464.

¶78(3) (Ky.) While an agreed royalty and development of the property was provided for in a gas and oil lease, lessor could not forfeit lease for nondevelopment without notifying lessee that he would no longer accept the annual rentals, but would demand commencement of operations within a reasonable time.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., 212 S. W. 110.

¶79(1) (Ky.) The fact that a coal mining company pays to a husband, life tenant by curtesy of his wife's coal lands leased by her to another company, which sold to the first, a stipulated annual rent for use of certain buildings on the land, and for the right to haul over it coal from other lands, does not preclude the life tenant husband from recovering from the company his part of the royalties due from the operation of mines on the land.—Caudil v. Wagoner, 212 S. W. 422.

¶79(6) (Ky.) Under oil and gas lease providing for annual rental of \$12.50, where the payment thereof at the end of the first year was delayed for three days, and the rental was then deposited as provided in the lease, such deposit was sufficient to avoid forfeiture for failure to pay rent.—Ohio Valley Oil & Gas Co. v. Irvin Development Co., 212 S. W. 110.

## MINORS.

See Infants.

## MORTGAGES.

See Acknowledgment, ¶20; Appeal and Error, ¶172, 931, 1060; Chattel Mortgages; Constitutional Law, ¶278, 290; Corporations, ¶106; Covenants, ¶130; Evidence, ¶318, 383; Homestead, ¶96, 146; Husband and Wife, ¶171; Municipal Corporations, ¶294, 407, 443; Partnership, ¶131; Taxation, ¶535; Vendor and Purchaser, ¶265.

### I. REQUISITES AND VALIDITY.

#### (D) Validity.

¶86(3) (Mo.) In a suit by a person of unsound mind by her guardian to set aside a deed of trust executed by such insane person, evidence held insufficient to establish mental incapacity of such person at or prior to date of the execution of the trust deed.—Messer v. Helfer, 212 S. W. 896.

### III. CONSTRUCTION AND OPERATION.

#### (C) Property Mortgaged, and Estates of Parties Therein.

¶137 (Tex.Civ.App.) Mortgagee of lands is but a lienholder; the legal title remaining in

the owner of the mortgaged premises.—Sanger Bros. v. Hunsucker, 212 S. W. 514.

#### IV. RIGHTS AND LIABILITIES OF PARTIES.

⌚197 (Tex.Civ.App.) Mortgagee of lands is but a lienholder, the legal title remaining in the owner of the mortgaged premises, with an unimpaired right to lease and obtain the emblements in the way of growing crops.—Sanger Bros. v. Hunsucker, 212 S. W. 514.

#### V. ASSIGNMENT OF MORTGAGE OR DEBT.

⌚235 (Mo.App.) Where lender on security of deed of trust, she having purchased from her agent a note for principal and notes for interest secured by such deed, was the owner of the note first negotiated, another principal note and interest notes being subsequently negotiated by plaintiff's fraudulent agent to a second lender on the security, plaintiff's note will be considered the real note, entitled to priority, as to the security of the deed of trust, over those held by the second lender though plaintiff's note, by the fraud of the agent, was never recorded.—Foege v. Woestendiek, 212 S. W. 411.

#### VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

⌚275 (Tex.Civ.App.) Ordinarily purchaser of mortgaged property who assumes, or purchases subject to, the mortgage is estopped to deny its validity.—Clark v. Scott, 212 S. W. 728.

Grantee of mortgaged premises who has not assumed mortgage, and has purchased without reduction on account thereof, may dispute its validity.—Id.

⌚277 (Tex.Civ.App.) One purchasing property incumbered with a mortgage is not personally bound to pay debt unless he assumes it, but mortgage remains a lien against the land.—Clark v. Scott, 212 S. W. 728.

#### VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

⌚305 (Tex.Com.App.) A mere change in the form of indebtedness will not discharge the mortgage or deed in trust, the mortgage continuing so long as the debt it is given to secure subsists, since it secures the debt, and not the note or other evidence of the debt.—W. C. Belcher Land Mortgage Co. v. Taylor, 212 S. W. 647.

#### IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

⌚333 (Tex.Civ.App.) Where a trustee under deeds of trust or his substitute was authorized by the deeds to sell the property only at the request of the beneficiary or other holder of the notes secured, the request provided for was essential to passing of title by the substitute trustee.—Bowman v. Oakley, 212 S. W. 549.

⌚335 (Tex.Com.App.) A sale made under a deed of trust for a sum larger than the amount with which the property is properly chargeable is not void, and a power of sale in such deed can be exercised if any part of the debt is due and owing.—W. C. Belcher Land Mortgage Co. v. Taylor, 212 S. W. 647.

⌚350 (Tex.Com.App.) Under Act of March 21, 1889 (Rev. St. 1911, art. 3759), a sale of property under deed of trust executed prior to enactment of such act was not required to be made in county in which property was situated, although time for payment had been extended after act had taken effect; the mortgage continuing notwithstanding extension agreements.—W. C. Belcher Land Mortgage Co. v. Taylor, 212 S. W. 647.

⌚372(1) (Tex.Civ.App.) Where the purchasers of land from a substitute trustee under deed of trust by his deed were not relieved from nec-

cessity of inquiring into and ascertaining whether the trustee had been empowered to sell by having been requested so to do by the beneficiary or holder of the notes secured, having made no inquiry, the purchasers assumed the trustee had power at their peril, and where he was without power his sale was void.—Bowman v. Oakley, 212 S. W. 549.

Where the substitute trustee under deeds of trust sold the land without authority because not on request of the beneficiary or holder of the notes secured, the purchasers are not protected as bona fide purchasers of the legal title, for the rule of bona fide purchasers applies only to cases of purchase from a holder of the legal title who has power to convey.—Id.

⌚372(4) (Tex.Civ.App.) Purchaser, at trustee sale, under deed of trust, was not entitled to crops growing and unmaturing at time of sale as against assignees of crop-sharing rental contract.—Sanger Bros. v. Hunsucker, 212 S. W. 514.

Where land is rented under crop-sharing rental contract, and, while crops are growing, is sold under deed of trust, and, after sale, a portion of the land is replanted by tenant under agreement with purchaser, assignees of rental contract are entitled to the rent crop share of the replanted crops as against purchaser.—Id.

Rental contract, entered into by purchaser under deed of trust with tenant in possession, with knowledge of tenant's rental contract with former owner, and assignment of rents thereunder, is of no effect as against assignees.—Id.

#### X. FORECLOSURE BY ACTION.

(I) Judgment or Decree and Execution.

⌚497(2) (Tex.Civ.App.) Judgment foreclosing mortgage, in action against husband mortgagor, is not res adjudicata against wife who was not made a party to the suit, and in no way affects her right to assert her homestead claim to the land.—Barbee v. Lundy, 212 S. W. 257.

#### MOTOR CAR.

See Railroads, ⌚275.

#### MOTOR CYCLE.

See Municipal Corporations, ⌚705, 706; Trial, ⌚199.

#### MOVING PICTURES.

See Injunction, ⌚102, 118.

#### MUNICIPAL CORPORATIONS.

See Appeal and Error, ⌚260; Carriers, ⌚12, 18; Constitutional Law, ⌚43, 290; Counties; Courts, ⌚231; Damages, ⌚208; Dedication, ⌚14; Injunction, ⌚157, 171, 176; Eminent Domain, ⌚230; Evidence, ⌚31, 553; Habeas Corpus, ⌚3; Health, ⌚24; Mandamus, ⌚151; Pleading, ⌚8; Railroads, ⌚69; Schools and School Districts; Street Railroads; Telegraphs and Telephones, ⌚10; Trial, ⌚194, 253; Vendor and Purchaser, ⌚16.

#### I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

⌚8 (Tex.Civ.App.) Provisions of city charter specially granted to city by Legislature have the same force and effect as any other positive statutory law of the state.—Cawthon v. City of Houston, 212 S. W. 796.

#### II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

⌚63(1) (Tex.Civ.App.) A city council, when acting upon subjects over which it has the power to legislate, is an entirely independent lawmaking body, and cannot be interfered with

or subjected to inquiry by the courts as to its motives, reasons, or purposes in enacting ordinances.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

## IX. PUBLIC IMPROVEMENTS.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

☞294(5) (Tex.Civ.App.) Though no notice of the proposed paving of a street was given a mortgagee, *held*, that publication in a newspaper of notice of the proposed pavement was sufficient to bind the mortgagee; the city charter, which provided for notice, declaring that service of notice by advertisement should be conclusive.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

### (C) Contracts.

☞331 (Mo.App.) Insertion of notices for bids for sewer contract in only one newspaper, with second notice appearing only 12 days before day set for letting of bids, and with both notices appearing on page of paper devoted exclusively to news of another town, did not comply with ordinance requiring notices to appear "in proper and appropriate newspapers by at least two insertions to appear at least 15 days prior to opening of bids."—*City of Webster Groves to Use of McMahon v. Reber*, 212 S. W. 38.

☞341 (Mo.App.) Sewer contract entered into by city of the fourth class pursuant to special ordinance under authority conferred by Rev. St. 1909, §§ 9384 and 9385, after insufficient compliance with requirements of ordinance as to publication of notice for bids, was not legally authorized, though such statutes did not require solicitation of bids or letting of contract to lowest bidder.—*City of Webster Groves to Use of McMahon v. Reber*, 212 S. W. 38.

### (E) Assessments for Benefits, and Special Taxes.

☞407(1) (Tex.Civ.App.) Where a city charter provided that on the day fixed for hearing any person owning or having any interest in the property proposed to be assessed for paving should have the right to be heard, *held*, that the provision of the charter making the lien of paving superior to that of a mortgage was not invalid.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

☞443 (Tex.Civ.App.) Where an assessment for street paving was invalid ab initio because the board of commissioners of the city attempted to act under their general authority without following the provisions applicable because property owners had petitioned for the improvement, the fact that act of the board did not prejudice one holding a mortgage on abutting property *held* not to validate the assessment.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

☞445 (Mo.App.) Tax bills issued for work done under a sewer contract not legally authorized are void.—*City of Webster Groves to Use of McMahon v. Reber*, 212 S. W. 38.

☞446 (Tex.Civ.App.) Though the contract for paving a street called for pavement to the south line of an intersecting street, and the pavement constructed extended only to the north line, *held* that, as the contract made the charter and ordinances of the city a part thereof, and all of the proceedings by the board of commissioners, etc., showed that the pavement was to extend only to the north line of the intersecting street, the assessment for such paving was not open to attack on that ground.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

☞485(5) (Mo.App.) In action on tax bills, contractor established prima facie case by introducing in evidence the tax bills described in the petition.—*City of Webster Groves to Use of McMahon v. Reber*, 212 S. W. 38.

☞513(6) (Mo.App.) In owner's action to enjoin issuance of special tax bills for construc-

tion of pavement and delivery thereof to contractor, the contractor is the real party interested and a necessary party to the suit.—*Wengenka v. City of St. Joseph*, 212 S. W. 71.

☞516 (Tex.Civ.App.) Though a city charter provided that any person interested in property assessed for street improvements should not institute suit to contest the validity of the assessment after a time fixed, the assessment can be collaterally attacked where the board of commissioners of the city did not acquire jurisdiction under the charter to levy the assessment.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

☞522 (Tex.Civ.App.) Where a city charter made it the duty of the board of commissioners to order a street paved whenever the owners of 60 per cent. of the property abutting thereon should present a written petition therefor, and provided that assessment should be paid in five installments, and a petition for paving signed by the owners of more than 60 per cent. was filed, the board of commissioners cannot disregard it, and, acting under their general authority, order improvement and provide for payment of the assessment within 30 days after acceptance of the work.—*Wooten v. Texas Bitulithic Co.*, 212 S. W. 248.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

☞705(1) (Mo.App.) In an action for personal injuries received in collision at street crossing, the warning that defendant's servant was required to give of the approach of his motorcycle was a reasonably sufficient warning and in time to permit pedestrians to avoid injury, and a warning given by the noise of the exhaust, which grew less as the speed slowed, was insufficient and tended to confuse.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

☞706(5) (Mo.App.) In an action for damages for personal injuries, evidence *held* sufficient to sustain the allegation of the negligence of the defendant's servant in passing over the intersection of city streets at a negligent and dangerous rate of speed without having his motorcycle under reasonable control.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

In an action for personal injuries received at a street crossing, evidence *held* sufficient to sustain the allegation that defendant's servant was negligent in not sounding a reasonably sufficient warning of the approach of the motorcycle he was riding to the street intersection and failing to keep a reasonably sufficient lookout ahead.—*Id.*

In an action for personal injuries resulting from being struck by a motorcycle at a street intersection, evidence *held* to show that defendant's servant operating the motorcycle could have seen plaintiff at a greater distance had he not been negligent in keeping a lookout ahead.—*Id.*

☞706(6) (Mo.App.) In an action for personal injuries resulting from being struck by a motorcycle at a street crossing, where the rate of speed pleaded and submitted was neither ordinance nor statutory, but common-law, speed, it was for the jury to determine whether or not it was reasonable under the circumstances.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

☞706(8) (Mo.App.) In an action for personal injuries received in collision at street intersection, an instruction that, if the jury found that the operator "was driving the motorcycle referred to in evidence north on Troost avenue," etc., *held* not erroneous as broadening the instruction, for the reason that the petition alleged the motorcycle was being operated on the wrong side of the street, since plaintiff was not required to submit all his various al-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

legations of negligence to the jury.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 889.

In an action for personal injuries resulting from a pedestrian being struck by a motorcycle at a street intersection, plaintiff was not required to submit an alleged violation of a city ordinance, where the case was submitted to the jury on common-law negligence, and followed the allegation of the petition referring thereto.—*Id.*

In an action for personal injuries received by plaintiff when struck by a motorcycle at a street intersection, a tendered instruction which sought to tell the jury that plaintiff stepped in the way of an approaching motorcycle when the evidence was that the motorcycle ran him down was misleading, and tended to prejudice plaintiff's case, and was properly refused.—*Id.*

## XII. TORTS.

### (A) Exercise of Governmental and Corporate Powers in General.

☞723½ (Tex.Com.App.) City of Dallas Charter, art. 14, § 11, requiring written notice of injury as a condition precedent to a suit against a city for such injury, is valid.—*City of Dallas v. Shows*, 212 S. W. 633.

☞733(1) (Mo.) In providing in its public park a pavilion furnished with a rest room and ladies toilet room, a city did not act in its governmental capacity to exempt it from liability for injuries or death by its negligence in maintaining the premises.—*Kuenzel v. City of St. Louis*, 212 S. W. 876.

☞741(1) (Tex.Com.App.) A written notice to a city of an injury required by City of Dallas Charter, art. 14, § 11, is a condition precedent to an action for such injury, though the injury was the result of an act of the city itself.—*City of Dallas v. Shows*, 212 S. W. 633.

The requirement of notice of injury as a condition precedent to an action under City of Dallas Charter, art. 14, § 11, is in derogation of common right, and will be construed with reasonable strictness, and not extended by implication beyond its own terms or held to apply to such damages as are not within its clear intent.—*Id.*

City of Dallas Charter, art. 14, § 11, requiring actual knowledge or written notice to city of defect in public street, highway, or grounds or public works of city causing damage to "person or property" at least 24 hours prior to injury, and requiring "person injured" to give notice of injury before city shall be liable for "damages of any kind," construed to require notice of injury only in case of personal injury, and not in case of injury to property.—*Id.*

☞741(1) (Tex.Civ.App.) That plaintiff's injury was due to negligence of street and bridge commissioner of city, and that the commissioner had actual knowledge of the injury, did not dispense with written notice, under Houston City Charter, § 11, to mayor and city council, stating how injuries occurred, apparent extent thereof, amount of damages sustained, amount for which claimant will settle, present and past residence of claimant, and names and addresses of witnesses; the purpose of notice being not merely to notify city of the fact of the injury, but to give city the information required to be conveyed by the notice.—*Cawthon v. City of Houston*, 212 S. W. 796.

That injured party was invited to present claim for damages to city council, but failed to do so because of inability to get council together, does not constitute waiver of written notice of injury to mayor and city council required by Houston City Charter, § 11.—*Id.*

☞741(3) (Tex.Civ.App.) Notice of injury to mayor and city council by Houston City Charter, § 11, cannot be waived by street and bridge commissioner, or by any commissioner or number of commissioners or member of city council, but, if subject to waiver, can be waived only

by the city council and the mayor jointly.—*Cawthon v. City of Houston*, 212 S. W. 796.

☞742(4) (Tex.Com.App.) In action against city for personal injuries and for damages to property, the giving of notice of claim of damages required by City of Dallas Charter, art. 14, § 11, must be affirmatively alleged by plaintiff, being a condition precedent to the right of action.—*City of Dallas v. Shows*, 212 S. W. 633.

### (C) Defects or Obstructions in Streets and Other Public Ways.

☞755(1) (Ky.) A municipality is not responsible for injury to one falling upon a pavement, unless the pavement was inherently dangerous, or was constructed and maintained according to a plan which was not reasonably safe, and which a reasonably prudent person would not have adopted or maintained.—*Schmidt v. City of Newport*, 212 S. W. 113.

☞763(1) (Ky.) While a city is not an insurer of the safety of persons traveling upon its streets, it has the duty of exercising ordinary care to keep and maintain its streets and pavements in a reasonably safe condition for use by the public, once it has undertaken to do so.—*Schmidt v. City of Newport*, 212 S. W. 113.

☞768(1) (Mo.App.) A city was liable for maintaining its brick paved street at a crossing in so smooth and slippery a condition that a pedestrian fell.—*Berry v. City of Sedalia*, 212 S. W. 34.

☞768(2) (Ky.) The mere fact that a pavement is constructed of smooth tile is not sufficient in itself to render it so dangerous and unsafe as to fix liability upon municipality for injuries to persons falling thereon, or even to raise a presumption that such walk is inherently dangerous, but it is in a glazed, highly polished condition, rendering it slick and slippery, which makes it so inherently dangerous as to render the city liable.—*Schmidt v. City of Newport*, 212 S. W. 113.

☞768(2) (Mo.App.) If injury results to a pedestrian on a crosswalk from a danger inherent in the adopted plan, the city is not liable, but it is if the danger has arisen from negligent construction or maintenance of the plan.—*Berry v. City of Sedalia*, 212 S. W. 34.

☞768(4) (Mo.App.) A city was not liable for planning its streets so as to have a proper slope from the crown to the gutters, yet, having constructed a pavement on such slope, in maintaining it the city was under duty, in view of the slope, to see that the surface did not become so smooth and slippery as to render it dangerous to pedestrians.—*Berry v. City of Sedalia*, 212 S. W. 34.

☞768(2) (Ky.) The liability of the city for injuries from defective street does not arise until the city, through its authorized officers, has received or has had reasonable opportunity to obtain knowledge of such defective condition; but the municipality will be charged with notice of such defects as it could by the exercise of reasonable care have discovered, and where it authorized the use of a sidewalk by property owner for advertising purposes, and injury resulted directly or proximately therefrom, the city is liable.—*Schmidt v. City of Newport*, 212 S. W. 113.

☞808(8) (Ky.) Where a city allowed a sidewalk to be used for the special benefit of a theater and its business, by reconstructing a part of it with smooth tiling for advertisement purposes, this constituted an extra burden or servitude, and if it was in such an unsafe condition as to render the city liable for injuries sustained by a pedestrian falling thereon, the theater company was also liable, and was properly joined with the city in the action.—*Schmidt v. City of Newport*, 212 S. W. 113.

☞814 (Ky.) If a theater by permission of the city constructed and maintained a dangerous tiled sidewalk, and injury resulted to a pedestrian, the city and owner were properly joined

in an action for damages.—*Schmidt v. City of Newport*, 212 S. W. 113.

⚡816(1) (Ky.) A petition in an action for personal injuries, received by a pedestrian when she slipped and fell on a sidewalk which was used for advertising purposes by an amusement company, *held* sufficient to present a cause of action against both the city and the amusement company.—*Schmidt v. City of Newport*, 212 S. W. 113.

⚡816(1) (Mo.App.) In a pedestrian's action for injuries against a city, allegations in the petition *held* not to make the slope of the street, for which the city was not liable, a part of its alleged negligent acts, which were its permitting the brick pavement to become by wear so slick and slippery as to be apt to cause a fall.—*Berry v. City of Sedalia*, 212 S. W. 34.

⚡819(1) (Mo.) In a suit by a pedestrian, who stepped on the cover of a coal hole, which tipped, causing her to fall and sustain injuries, evidence *held* to show that defendants, the abutting owners, were in control and possession of the opening.—*Loundin v. Apple*, 212 S. W. 891.

⚡819(4) (Mo.App.) In a pedestrian's action against a city for injuries in slipping on a street pavement, evidence *held* not to show that plaintiff was injured by reason of the plan in providing the slope in the street from crown to gutters.—*Berry v. City of Sedalia*, 212 S. W. 34.

⚡819(6) (Mo.) In an action by plaintiff, who stepped on the cover of a coal hole, which tipped, causing her to fall and receive injuries, evidence *held* sufficient to establish defendant's negligence, showing that they must have had knowledge of the defect in the cover.—*Loundin v. Apple*, 212 S. W. 891.

⚡819(6) (Tex.Civ.App.) Evidence *held* sufficient to show that defendant city had notice, or in the exercise of ordinary care should have had notice, of defective condition of manhole into which plaintiff pedestrian fell.—*City of Ft. Worth v. Weisler*, 212 S. W. 280.

⚡819(7) (Tex.Civ.App.) In suit by husband and wife for injuries to the latter, due to cover of manhole in street of defendant city tilting, causing her foot and leg to fall into hole, *held* that jury was justified in concluding that plaintiff was not negligent, and was not acting in violation of the spirit of an ordinance forbidding use of street by pedestrians.—*City of Ft. Worth v. Weisler*, 212 S. W. 280.

⚡822(2) (Mo.App.) In an action against a city for injuries to a pedestrian when she slipped on a slick street pavement at a crossing, instruction *held* not erroneous as submitting the slope of the street from crown to gutter as part of the city's negligence.—*Berry v. City of Sedalia*, 212 S. W. 34.

In such action instruction that greater diligence on the city's part is required in looking after the condition of a street or crossing where much traveled than where little used *held* proper, especially in connection with another instruction that all the city was bound to do was to exercise the care of an ordinarily prudent person.—*Id.*

In such action the city's requested instruction *held* properly refused as offered, and properly modified to limit plaintiff's right to recover, on account of smoothness and slickness of the pavement, to smoothness and slickness brought about or suffered to continue as defined in another instruction.—*Id.*

⚡822(5) (Mo.App.) In an action against a city for injuries to a pedestrian when she slipped on a brick-paved street constructed with a dangerously smooth and slippery surface, which also became such by wear thereafter, instruction *held* not erroneous as submitting disjunctively the matters of original construction of the pavement and subsequent wear, which were alleged conjunctively by the petition.—*Berry v. City of Sedalia*, 212 S. W. 34.

⚡822(5) (Tex.Civ.App.) In suit by husband and wife for injuries to the latter, due to cover of manhole in street of defendant city tilting,

causing her foot and leg to fall into hole, instructing that burden of showing contributory negligence was on defendant, and that in determining the issue the jury should consider all the facts and circumstances in evidence, *held* not erroneous, though plaintiff's evidence tended to show such negligence.—*City of Ft. Worth v. Weisler*, 212 S. W. 280.

## MURDER.

See Homicide.

## MUTUAL BENEFIT INSURANCE.

See Insurance.

## NAMES.

See Banks and Banking, ⚡227; Criminal Law, ⚡1159; Covenants, ⚡84; Courts, ⚡200½; Elections, ⚡172, 179; Executors and Administrators, ⚡262; Judgment, ⚡81; Partnership, ⚡84; Principal and Agent, ⚡145; Process, ⚡147, 148, 149, 166; Wills, ⚡515.

⚡14 (Ky.) Identity of name is *prima facie* evidence of identity of person.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

⚡18 (Mo.App.) There is a presumption of law that identity of name is evidence of identity of person.—*Produce Exch. Bank v. North Kansas City Development Co.*, 212 S. W. 898.

## NATURAL GAS.

See Evidence, ⚡65.

## NAVIGABLE WATERS.

See Boundaries, ⚡14, 36; Evidence, ⚡472; Trespass to Try Title, ⚡41.

## II. LANDS UNDER WATER.

⚡36(2) (Tex.Civ.App.) The expression, "thence down the river," as used in field notes of a surveyor of a patent, is construed to mean with the meanders of the river, unless there is positive evidence that the meander line as written was where the surveyor in fact ran it; for such lines are to show the general course of the stream and to be used in estimating acreage, and not necessarily boundary lines (citing Words and Phrases, First and Second Series, Down).—*Burkett v. Chestnutt*, 212 S. W. 271.

## NEGLIGENCE.

See Appeal and Error, ⚡231, 742, 754, 1050, 1052, 1062, 1064; Carriers; Damages, ⚡132, 183; Evidence, ⚡123, 258; Homicide, ⚡75, 198; Judgment, ⚡143; Landlord and Tenant, ⚡166; Master and Servant, ⚡85-278; Municipal Corporations, ⚡705, 706, 723½-822; Pleading, ⚡8; Railroads, ⚡260-485; Shipping, ⚡54, 58; Street Railroads, ⚡81-118; Telegraphs and Telephones, ⚡86; Trial, ⚡191, 194, 199, 207, 252, 253, 260, 350; Vendor and Purchaser, ⚡350; Venue, ⚡8; Waters and Water Courses, ⚡178, 179.

## I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

### (A) Personal Conduct in General.

⚡1 (Tex.Com.App.) Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation, but to render negligence actionable it must be incorporated into some injury.—*Collins v. Pecos & N. T. Ry. Co.*, 212 S. W. 477.

## II. PROXIMATE CAUSE OF INJURY.

⚡56(1) (Ky.) Proximity in point of time or space is not an element of proximate cause of an injury.—*Nunan v. Bennett*, 212 S. W. 570.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

§59 (Ky.) To warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of attending circumstances.—Nunan v. Bennett, 212 S. W. 570.

To fix liability for remote negligence, the injury must be one that under all the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence to flow from or be the natural and probable consequence of the first negligent act.—Id.

§59 (Tex.Com.App.) "Proximate cause" incorporates in it such anticipation of result as ought, from the circumstances, to have been foreseen as natural consequences of a negligent act; and if a negligent act produces an injury, and more serious injury naturally flows from the negligence, without any intervening independent cause, those consequences are probable and ought to be foreseen, and are chargeable to the negligence.—Collins v. Pecos & N. T. Ry. Co., 212 S. W. 477.

§61(1) (Ky.) One will not be excused on the ground of the remoteness of injury if his negligent act, combined with an intervening act for which he was not responsible, produced the injury, where such intervening act alone would not have sufficed to produce the injury.—Nunan v. Bennett, 212 S. W. 570.

### III. CONTRIBUTORY NEGLIGENCE.

#### (C) Imputed Negligence.

§93(1) (Tex.Civ.App.) Negligence of a driver of an automobile will not be imputed to one riding as a passenger.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

#### (D) Comparative Negligence.

§101 (Mo.App.) Contributory negligence is not a bar to recovery for the wrongful death of a locomotive engineer, under Employers' Liability Act Cong. April 22, 1908 (U. S. Comp. St. §§ 8657-8663), but only diminishes the damages.—Brown v. Missouri, K. & T. Ry. Co., 212 S. W. 26.

### IV. ACTIONS.

#### (B) Evidence.

§121(2) (Tex.Civ.App.) Negligence will not be presumed from the mere fact of accident or injury.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

§122(1) (Tex.Civ.App.) Contributory negligence will not be presumed from the mere fact of accident or injury.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

#### (C) Trial, Judgment, and Review.

§136(26) (Mo.App.) In an action for personal injuries sustained while endeavoring to control a team frightened by a blast in a quarry, evidence held to warrant the court in submitting to the jury the question of plaintiff's contributory negligence.—Slinkard v. Lamb Const. Co., 212 S. W. 61.

§138(2) (Tex.Civ.App.) Unless the evidence shows a case without proof tending to show negligence, it is not error to refuse to charge that negligence cannot be presumed from the mere fact of accident or injury, but is a fact that must be proven as any other fact in issue.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

§141(2) (Mo.App.) Where no charge of contributory negligence was pleaded or appeared in plaintiff's evidence, it was not necessary to refer to it in the instructions.—Argeropoulos v. Kansas City Rys. Co., 212 S. W. 369.

### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

### NEWSPAPERS.

See Criminal Law, §429, 430; Counties, §169; Municipal Corporations, §294, 331.

### NEW TRIAL.

See Appeal and Error, §231, 282, 285, 302, 719, 722, 759, 1171, 1203; Criminal Law, §915-945, 1031, 1037, 1059, 1066, 1097, 1144, 1182; Homicide, §325; Public Lands, §178.

### II. GROUNDS.

#### (F) Verdict or Findings Contrary to Law or Evidence.

§72 (Tex.Civ.App.) Verdict, to authorize trial or Appellate Court to set it aside, must be against the preponderance of the evidence to a degree showing that manifest injustice has been done, at least it must be affirmatively wrong.—Nations v. Miller, 212 S. W. 742.

§77(2) (Ky.) In personal injury case, it is only when verdict for plaintiff is excessive to an extent as to cause the mind at first blush to conclude it was returned under the influence of passion or prejudice on the part of the jury that the court is authorized to set it aside for that reason.—Cumberland R. Co. v. Girdner, 212 S. W. 105.

#### (H) Newly Discovered Evidence.

§99 (Tex.Civ.App.) The grant or refusal of new trial on the ground of newly discovered evidence is largely in the discretion of the trial judge.—Nations v. Miller, 212 S. W. 742.

§105 (Tex.Civ.App.) Newly discovered evidence, when its object is to impeach the credit of the witness, is not a ground for grant of new trial.—Nations v. Miller, 212 S. W. 742.

### NOTES.

See Bills and Notes.

### NOTICE.

See Appearance, §23; Attachment, §375; Bills and Notes, §525; Contracts, §10; Corporations, §429, 432; Counties, §169; Courts, §2004; Drains, §36; Evidence, §121, 317; Frauds, Statute of, §144; Fraudulent Conveyances, §132; Insurance, §73, 807; Judgment, §326, 725, 744; Libel and Slander, §10, 81, 88; Limitation of Actions, §45, 100, 131; Master and Servant, §271, 398; Mines and Minerals, §74, 78; Municipal Corporations, §294, 331, 341, 7234, 741, 742, 788, 819; Partnership, §84; Pledges, §56; Principal and Agent, §143, 169; Replevin, §125; Sales, §193; Schools and School Districts, §50; Taxation, §588, 658, 750; Tenancy in Common, §15; Trial, §352; Trusts, §356; Vendor and Purchaser, §105, 228, 229, 230, 231, 232.

### NUISANCE.

See Animals, §4; Constitutional Law, §237; Limitation of Actions, §55; Statutes, §93, 121.

### OATH.

See Criminal Law, §211; Injunction, §146.

§2 (Tex.Cr.App.) While the general rule is that a deputy may do what his principal officer might, the deputy cannot verify in the name of his principal where a duty such as taking oaths pertains to the deputy individually.—Goodman v. State, 212 S. W. 171.

### OFFICERS.

See Arrest, §63; Clerks of the Courts; Constitutional Law, §80, 284; Corporations, §312, 399; Elections, §156, 172, 179,



270; Indians, ¶35; Justices of the Peace; Mandamus, ¶118; Municipal Corporations, ¶741; Oath, ¶2; Receivers; Sheriffs and Constables; Statutes, ¶64; Taxation, ¶40, 317, 446, 535, 608, 734; Waters and Water Courses, ¶216.

## I. APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Holding Over.

¶55(1) (Ky.) When an election for an office results in the selection of one who is ineligible or who by failure to comply with the election laws had forfeited his right to qualify to hold the office, the result is a vacancy.—Hardin v. Horn, 212 S. W. 573.

## OIL.

See Contracts, ¶237; Corporations, ¶80, 406, 407; Equity, ¶57; Evidence, ¶65, 441; Homestead, ¶118; Injunction, ¶59, 118, 137, 163; Mines and Minerals, ¶6, 48, 55, 58, 74, 75, 77, 78, 79; Partnership, ¶64; Specific Performance, ¶113; Tenancy in Common, ¶37.

## PARENT AND CHILD.

See Adoption; Courts, ¶92; Criminal Law, ¶338; Executors and Administrators, ¶14, 138; Exemptions, ¶16; Guardian and Ward; Habeas Corpus, ¶85, 99; Homestead, ¶146; Homicide, ¶2, 166; Infants; Railroads, ¶346, 350; Remainders, ¶14; Trial, ¶255; Witnesses, ¶159, 177.

¶3(1) (Tenn.) It is the legal duty of a father to provide proper care, treatment, and medical attention for his infant child.—State v. Barnes, 212 S. W. 100.

¶7(13) (Tex.Com.App.) Where the evening before plaintiff's minor son was injured in defendant's employment he advised his mother that he was employed by defendant to work in his gin and to run the gin stand, and such minor had previously been employed around gins, the question whether the mother consented to the employment was for the jury.—Urban v. Cook, 212 S. W. 160.

¶17(1) (Tenn.) Where a father failed to provide for his infant child under 16 according to his means, but suffered the child to sicken and die without medical attention, he cannot be punished under Acts 1915, c. 120, making it a misdemeanor for a father to willfully fail to provide for his child under 16, but providing that, upon complaint, the father shall be required to execute a bond to secure the child's support, etc., and in event of his failure to comply with the undertaking he may be imprisoned for misdemeanor, as a delinquent parent cannot be imprisoned as an original proposition under the statute, but only for repudiation or breach of the undertaking required by the statute.—State v. Barnes, 212 S. W. 100.

## PARTIES.

See Courts, ¶231; Estoppel, ¶97; Judgment, ¶91, 486.

For parties, on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also the various specific topics.

## III. NEW PARTIES AND CHANGE OF PARTIES.

¶40(2) (Mo.App.) The real party in interest may be made a party defendant on his own application whenever such interest is made to appear to the court.—Wegenka v. City of St. Joseph, 212 S. W. 71.

## PARTITION.

See Appeal and Error, ¶69; Judgment, ¶256, 712.

### I. BY ACT OF PARTIES.

¶9(1) (Tex.Com.App.) Where certain tenants in common conveyed a specific portion of common property and one of the nonjoining tenants was non compos mentis, a private partition of the unsold portion of the common property among all the tenants equally was not binding upon the incompetent tenant, since he should have received an equal share of the entire tract, and not merely of the unsold portion.—Lasater v. Ramirez, 212 S. W. 935.

### II. ACTIONS FOR PARTITION.

#### (A) Right of Action and Defenses.

¶12(3) (Tex.Civ.App.) Where in partition suit the evidence establishes that the actual uses made of land claimed as a homestead were contrary to an abandonment or intention to abandon and residence on other tract of land consistent with right to claim homestead of tract in suit, the land was not subject to partition under direct provisions of Rev. St. art. 3424.—Eason v. Eason, 212 S. W. 972.

#### (B) Proceedings and Relief.

¶85 (Ky.) Where joint owners sue for partition and an accounting of rents and royalties arising from oil produced and marketed from the premises, the land being ordered sold, the fair value of necessary and proper permanent and lasting improvements placed on lands by defendants to develop it for minerals must be ascertained and allowed to those making outlay from funds arising from royalties of the whole property.—Miller v. Powers, 212 S. W. 453.

## PARTNERSHIP.

See Carriers, ¶177, 180; Evidence, ¶65; Exemptions, ¶61, 123; Frauds, Statute of, ¶14.

### I. THE RELATION.

#### (B) As to Third Persons.

¶34 (Mo.App.) Where defendants held themselves out as partners with another, and plaintiff dealt with them on the strength of such holding out, they are estopped to deny that they were partners.—Ennis-Hanly-Blackburn Coffee Co. v. Olin, 212 S. W. 561.

#### (C) Evidence.

¶49 (Mo.App.) Billheads and letter heads of a partnership, where used so extensively and for so long a time by one who had ceased to be a member that defendant members must have known thereof, were admissible in suit involving question whether defendants held themselves out as partners with the one who had been Coffee Co. v. Olin, 212 S. W. 561.

¶53 (Ky.) In an action to settle an alleged partnership and to recover one-half of the profits, the chancellor's finding that no partnership existed held warranted by the evidence.—Alexander v. Lewis, 212 S. W. 440.

¶55 (Mo.App.) Evidence held sufficient to warrant jury finding that defendants held themselves out as partners with the other defendant, and that plaintiff dealt with them on the strength of such holding out.—Ennis-Hanly-Blackburn Coffee Co. v. Olin, 212 S. W. 561.

### II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

¶64 (Ky.) A corporation, obtaining a transfer of an oil and gas lease on land in A. county from a partnership, was chargeable with knowledge that such firm was a partnership and was operating under a fictitious name, and must be presumed familiar with Ky. St. § 199b,



For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

requiring a registration of members of such a partnership in such county, to render the partnership's contracts enforceable, and had constructive notice of the partnership from the records of W. county where recorded, and from the records of A. county where the lease was obtained, that such certificate of fictitious name was not there recorded, and obtained no better title to the lease than the partnership had.—Warren Oil & Gas Co. v. Gardner, 212 S. W. 456.

Where a partnership, acting under a fictitious name, was not registered in the county as required by Ky. St. § 189b, neither the partnership nor its assigns could enforce as lessee an oil lease on land therein, although the contract was valid and enforceable as to lessor who was not in fault; the contract being voidable but not void.—Id.

It is not enough that the partnership certificate of fictitious name required by Ky. St. § 199b, is filed with the clerk of the county where the partnership is formed and where the partners reside, but it must be filed in such county or counties in which such persons conduct or transact or intend to conduct or transact such business.—Id.

#### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

##### (A) Representation of Firm by Partner.

§131 (Tex.Civ.App.) A general manager of a partnership is without authority to execute a mortgage on the property of his principal to secure a debt of a third person, where the principal is not liable for such debt, nor can he authorize another to so do.—Rowe v. Guderian, 212 S. W. 980.

##### (D) Actions by or Against Firms or Partners.

§217(3) (Tex.Civ.App.) In an action against two defendants as partners, where the record disclosed an admitted partnership and the evidence supports a finding of partnership debt, and that the various undisputed items of the account were personally obtained by one of defendants and charged to the partnership account, the evidence is sufficient to support findings for plaintiff.—Pennington v. Fleming, 212 S. W. 303.

§219(1) (Tex.Civ.App.) Where judgment was entered against two partners, it must be presumed that the court found the debt to be a partnership one as alleged, and one partner could not obtain judgment over against another without going into a settlement of the partnership accounts, which would not be proper in such an action.—Pennington v. Fleming, 212 S. W. 303.

#### PATENTS.

See Ejectment, §15.

#### PAYMENT.

See Adverse Possession, §94; Appeal and Error, §931, 1116; Army and Navy, §24; Bills and Notes, §147; Brokers, §56, 86; Carriers, §26, 158; Chattel Mortgages, §34; Commerce, §46; Compromise and Settlement, §2; Contracts, §10, 108, 189; Corporations, §80, 232, 244, 642; Costs, §173; Courts, §231; Covenants, §122, 130; Estoppel, §102; Evidence, §441; Executors and Administrators, §72, 272, 325, 334, 349, 358; False Pretenses, §4, 7, 49; Frauds, Statute of, §117, 129; Homestead, §96, 146; Husband and Wife, §276; Insurance, §514, 598, 602, 624, 665, 668, 669, 675; Judgment, §725, 741, 744; Larceny, §32; Libel and Slander, §10; Logs and Logging, Mandamus, §118; Master and Servant, §411, 417; Mines and Minerals, 75; Mortgages, §350; Municipal Corporations, §522; Sales, §199; Sheriffs and Stables, §65, 157; Statutes, §21;

rogation; Taxation, §117, 535, 538, 539, 859, 893; Trespass to Try Title, §10; Vendor and Purchaser, §105, 285; Waters and Water Courses, §216.

#### V. RECOVERY OF PAYMENTS.

§82(1) (Ky.) Money paid under a mistake of law or fact may be recovered if the money was not due and payable, and in good conscience ought to be returned.—Greene v. E. H. Taylor, Jr., & Sons, 212 S. W. 925.

#### PENALTIES.

See Carriers, §26; Damages, §80; Intoxicating Liquors, §45; Master and Servant, §391½; Taxation, §658; Telegraphs and Telephones, §54.

#### PERPETUITIES.

See Homestead, §146.

§4(1) (Tex.Com.App.) A perpetuity is a limitation of property taking the subject thereof out of commerce for a longer period than a life or lives in being and 21 years thereafter (citing Words and Phrases, Perpetuity).—West Texas Bank & Trust Co. v. Matlock, 212 S. W. 937.

§4(15) (Tex.Civ.App.) Will bequeathing property to named trustees to have full management, control, and sale, with directions to turn proceeds of all property over to certain church when in judgment of trustees the church shall be in need of new church building, did not contravene constitutional inhibition against perpetuities, the property vesting in trustees immediately upon testator's death, in trust for church, and discretionary power given trustees to decide as to time for construction of church building not destroying right of church officers to take proceeds upon need for or propriety of building.—Meadors v. Sherrill, 212 S. W. 546.

§7(1) (Tex.Com.App.) Where a vendor of land which was divided into many lots and farms agreed to pay \$50,000 bonus to the first railroad that should come through the land, and to deposit the bonus with trustees, held that when the funds were delivered to trustees it was proper for the vendor to insist that the trustees' bond should provide for return of the money within a reasonable time if no railroad was constructed, for if such provision were not incorporated in the agreement, the trust would be invalid under Const. art. 1, § 28, as creating a perpetuity.—West Texas Bank & Trust Co. v. Matlock, 212 S. W. 937.

#### PHYSICAL EXAMINATION.

See Trial, §63.

#### PHYSICIANS AND SURGEONS.

See Corporations, §432; Health, §24; Master and Servant, §92, 351.

#### PLEADING.

See Constitutional Law, §43; Courts, §231; Evidence, §43, 208, 429; Judgment, §251, 731; Limitation of Actions, §127, 175; Trial, §251, 352.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

#### I. FORM AND ALLEGATIONS IN GENERAL.

§8(2) (Ark.) In a suit to restrain a levee district from increasing assessments and from issuing bonds, an allegation in the complaint that the indebtedness of the district will be thereby increased to greatly exceed the benefits assessed, allegations of fact showing such to be the case, is insufficient.—Skillern v. White River Levee Dist., 212 S. W. 90.

⚡8(3) (Ky.) In suit by stockholder of corporation to compel declaration of dividends out of surplus, allegation of petition that stated amount was wrongfully charged off to depreciation is a mere conclusion of the pleader.—*Bickel v. Henry Bickel Co.*, 212 S. W. 602.

⚡8(17) (Ky.) In an action against a city for personal injuries resulting from a fall on a sidewalk allegations that the sidewalk was maintained in a "slippery, smooth, glazed, and glossy" condition, which rendered "the walk unfit and unreasonably unsafe and dangerous to public travel by pedestrians," and that it was negligently constructed on a dangerous grade, *held* sufficient, since an averment of negligence is not the statement of a mere legal conclusion.—*Schmidt v. City of Newport*, 212 S. W. 113.

⚡11 (Mo.App.) In action for damages for destruction of shade and ornamental tree, the pleading of the location of the tree with reference to the premises and the beauty and ornament of such tree would be pleading the evidence.—*McKinsey v. Guthrie*, 212 S. W. 563.

## II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

⚡72 (Tex.Civ.App.) A prayer for "general relief" is just as comprehensive in its scope as the prayer for "such other and further relief, judgments and decrees, legal and equitable, such as he may be entitled to under the facts in this case," etc.—*Texas Co-op. Inv. Co. v. Clark*, 212 S. W. 245.

## III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

### (B) Dilatory Pleas and Matter in Abatement.

⚡104(1) (Mo.App.) Where the fact that the cause of action on a life insurance policy did not accrue in the county of suit was not disclosed by the petition, and absence of jurisdiction on account of improper venue did not appear from or in the sheriff's return, the only way to question the court's lack of jurisdiction was by plea to the jurisdiction in the answer.—*Roberts v. American Nat. Assur. Co.*, 212 S. W. 390.

⚡104(2) (Tex.) In suit on accident policy, where company's plea of privilege did not negative exceptions contained in subdivisions 24 and 29 of Rev. St. art. 1830, as to venue, it was properly overruled in view of article 1903, as to sufficiency of plea of privilege.—*International Travelers' Ass'n v. Powell*, 212 S. W. 931.

⚡110 (Tex.Civ.App.) If defendant's pleading as a whole conclusively shows he does not intend to waive his plea of special privilege for change of venue, no waiver should be held because he did not specifically state that his plea to the merits was subject to such plea of privilege being overruled; but where he alleges a duty, a subsequent breach thereof on plaintiff's part, loss suffered thereby, specifies the nature and amount of damages, and asks affirmative relief, he waives his plea of special privilege.—*McClinic v. Brown*, 212 S. W. 540.

Where defendant, following his allegations of a duty and breach thereof on plaintiff's part, and consequent damage to defendant, prayed for affirmative relief, and the pleading was sufficient to have sustained the judgment on defendant's plea in reconvention, he must be held to have asked affirmative relief in a manner to waive his plea of privilege or change of venue.—*Id.*

### (C) Traverses or Denials and Admissions.

⚡123(1) (Tex.Civ.App.) In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true.—*Houston Electric Co. v. City of Houston*, 212 S. W. 198.

## V. DEMURRER OR EXCEPTION.

⚡223 (Tex.Com.App.) The trial court having sustained general demurrer to petition special exceptions thereto should not have been considered.—*City of Dallas v. Shows*, 212 S. W. 633.

⚡228 (Tex.Civ.App.) If plaintiff's pleading was defective for want of particularity, defendant should have excepted on such ground, following up the general rule that an exception touching the legal sufficiency, formally or substantially, of a pleading, should be made before a trial on the issues of fact.—*Cooper v. Hinman*, 212 S. W. 972.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚡248(3) (Tex.Civ.App.) Where original petition was amended only to the extent of changes due to a different stage having been reached in the progress of negotiations for exchange of properties, *held*, that different causes were not stated, and court did not err in overruling defendants' plea asking a transfer of cause to the county to which they had moved between the time of filing of original and amended petitions.—*Sykes v. Fischl*, 212 S. W. 217.

## XII. ISSUES, PROOF, AND VARIANCE.

⚡387 (Tex.Civ.App.) The allegata and probata must correspond.—*Allen v. Vineyard*, 212 S. W. 286.

## XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡404 (Tex.Civ.App.) The rule that failure to except to pleadings setting up supposed immaterial issues constitutes a waiver or an estoppel in regard to the defect is applicable only when the issue pleaded could be saved by amending the pleading.—*Cooper v. Hinman*, 212 S. W. 972.

⚡428(7) (Tex.Civ.App.) Though it is the better practice to present exceptions to pleadings setting up supposed immaterial issues, failure so to do does not necessarily constitute a waiver or an estoppel, and prevent objection to supporting proof when offered.—*Cooper v. Hinman*, 212 S. W. 972.

## PLEDGES.

See Estoppel, ⚡76; Husband and Wife, ⚡171; Insurance, ⚡602, 624, 675; Telegraphs and Telephones, ⚡68.

⚡30(2) (Tex.Com.App.) Where assignment from plaintiff of balance due plaintiff as subcontractor for materials was held by bank as a mere pledge or collateral to secure payment of certain indebtedness due it by plaintiff, the cashing by the bank of a check for less than the amount claimed by plaintiff, which check had been sent the bank by the contractor and recited that it was in full, when there was a dispute as to whether the contractor should pay liquidated damages for delay, did not constitute an accord and satisfaction.—*Llano Granite & Marble Co. v. Hollinger*, 212 S. W. 151.

⚡56(4) (Tex.Civ.App.) Unless otherwise expressly authorized by the contract of bailment, a sale by a pledgee of property pledged to secure an indebtedness, to be valid, must be public after due advertisement and reasonable notice to the pledgor of the time and place of sale.—*Western Union Telegraph Co. v. Haynes*, 212 S. W. 260.

## POISONS.

See Evidence, ⚡271; Master and Servant, ⚡276, 285.

## POPULARITY CONTEST.

See Bills and Notes, ⚡106, 497; Contracts, ⚡108.

## POWERS.

See Executors and Administrators, ¶14, 138;  
Mortgages, ¶335.

## PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

## PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

## PRIMOGENITURE.

See Estates Tail, ¶2.

## PRINCIPAL AND AGENT.

See Acknowledgment, ¶20; Appeal and Error, ¶172, 1062, 1068; Attorney and Client; Brokers; Carriers, ¶26, 134, 139, 219, 280; Contracts, ¶10; Corporations, ¶106, 399, 429, 432; Covenants, ¶114, 130; Damages, ¶40, 190; Deeds, ¶26; Evidence, ¶20, 121, 148; False Pretenses, ¶4, 7, 49; Frauds, Statute of, ¶129; Insurance, ¶73, 85, 129, 198; Libel and Slander, ¶81, 88; Master and Servant, ¶88; Mortgages, ¶235; Railroads, ¶226; Sales, ¶85, 89, 199; Telegraphs and Telephones, ¶66; Trial, ¶352; Vendor and Purchaser, ¶350, 352; Venue, ¶8.

## III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (A) Powers of Agent.

¶99 (Ark.) General authority cannot be inferred from authority given to perform a particular act.—Grant v. Burrows, 212 S. W. 95.  
¶100(2) (Ark.) Facts held to show a general agency for the owners of a plantation to rent it for a five-year term.—Grant v. Burrows, 212 S. W. 95.

¶103(7) (Ark.) Authority conferred upon agent by owners of a plantation to represent them in the organization and construction of a levee built across the plantation, in the matter of granting a right of way and agreeing to and receiving damages therefor, did not carry the inference of general authority to sell the plantation; the special agency having reference to but the single transaction.—Grant v. Burrows, 212 S. W. 95.

It cannot be inferred that, because an agent had general control and management of a plantation for rental purposes, he likewise had authority to execute an option contract for the sale and purchase thereof at a future date.—Id.

That owners of a plantation confirmed and acquiesced in a sale by their agent of a part thereof does not warrant an inference that they made him their general agent to sell the plantation without consulting them.—Id.

¶124(2) (Tex.Civ.App.) In an action by plaintiff, claiming under a mortgage against defendants, for conversion of the mortgaged automobile, where there was testimony tending to show that one of the defendants, claiming to be owners, authorized the mortgagor to execute the mortgage in question, it was error for the court to refuse to give requested instruction requiring the jury to find whether or not such defendant authorized the mortgagor to execute such mortgage.—Rowe v. Guderian, 212 S. W. 960.

¶124(3) (Ky.) In action by seller to recover for purchase price of an engine, in which the buyer counterclaimed for breach of special warranty executed by the seller's local agent, whether such agent had authority to execute the special warranty held for the local agent.—Nichols & Shepard Co. v. Dudderar, 212 S. W. 923.

### (B) Undisclosed Agency.

¶143(5) (Ark.) Where an undisclosed principal sues on a contract made by his agent

agent's name with the defendant, who had no knowledge of the agency, the suit is subject to any defense which the defendant had against agent before notice of the principal's rights.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

¶145(2) (Mo.App.) Generally as to simple contracts, even such as the statute of frauds requires to be in writing, an undisclosed principal may be charged with liability on obligations made by the agent in his own name, but for his principal's benefit and by his authority.—Donner v. Whitecotton, 212 S. W. 378.

The general rule as to liability of undisclosed principal does not apply to negotiable instruments; for one who takes a negotiable instrument contracts only with the parties who upon the face of the instrument are bound for its payment, and is presumed to look only to those parties, and not elsewhere.—Id.

At common law an undisclosed principal cannot be held liable upon a contract under seal executed by his agent.—Id.

¶145(3) (Mo.App.) At common law, under the rule that an undisclosed principal is not liable upon a sealed contract executed by the agent in his own name, such principal could not be held liable for breach of covenant of warranty contained in a deed executed by agent in his own name.—Donner v. Whitecotton, 212 S. W. 378.

Even though the distinction between sealed and unsealed instruments be wholly abolished by Rev. St. 1909, § 2773, an action for breach of warranty cannot be maintained against an undisclosed principal, based solely on a deed covenant of warranty, since the principal does not appear on the face of the covenant as a party thereto, although a recovery may be had on the theory of his having obtained through his agent money to which he was not entitled and for which he gave nothing.—Id.

### (C) Unauthorized and Wrongful Acts.

¶147(3) (Ark.) One dealing with a special agent whose authority is confined to a single transaction or a particular act must ascertain the extent of his authority and contract accordingly before the contract will be binding upon the principal.—Grant v. Burrows, 212 S. W. 95.

¶148(1) (Ky.) Provision in the original contract between the seller of an engine and the buyer that, after delivery, all subsequent contracts relating to a warranty therein or the return of machinery must be in writing and be signed by the seller's president, applies only where there has been a delivery under the original contract, and not where the original contract was repudiated by the buyer before acceptance.—Nichols & Shepard Co. v. Dudderar, 212 S. W. 923.

### (D) Ratification.

¶163(1) (Tex.Civ.App.) "Ratification" is the election by one to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract in his behalf.—Evans v. McKay, 212 S. W. 680.

¶169(2) (Tex.Civ.App.) Where one sued his employer for wages, and employer set up defense that wages had been assigned to defendant, and defendant, who was also sued for alleged usurious interest and to cancel the assignment, appeared and filed the assignment, she thereby ratified the unauthorized act of another in giving notice of such assignment to the employer, and was bound thereby in an action by plaintiff for damages for discharge from employment by reason of such notice of assignment.—Evans v. McKay, 212 S. W. 680.

¶175(1) (Tex.Civ.App.) Where one ratifies the unauthorized act of another in his behalf, the legal consequences of the act follow as a matter of course.—Evans v. McKay, 212 S. W. 680.

Principal in the matter of course.

**PRINCIPAL AND SURETY.**

See Attachment, ¶331; Clerks of Courts, ¶75; Courts, ¶202, 231; Evidence, ¶317; Insurance, ¶2, 151, 390, 624; Judgment, ¶504; Justices of the Peace, ¶191; Limitation of Actions, ¶28; Perpetuities, ¶7; Replevin, ¶125; Sequestration, ¶16, 20; Subrogation, ¶31, 41.

**PRISONS.**

See Constitutional Law, ¶70; Infants, ¶69; Sheriffs and Constables, ¶65, 157.

**PRIVATE ROADS.**

See Highways, ¶77.

**PROCESS.**

See Appearance, ¶23; Attachment, ¶331; Counties, ¶169; Master and Servant, ¶411; Pleading, ¶104.

**II. SERVICE.****(E) Return and Proof of Service.**

¶147 (Mo.App.) It is proper to permit the introduction of parol evidence to identify the particular individual upon whom a writ was served, though the name of the individual served and the name in the writ are not idem sonans.—Green v. Strother, 212 S. W. 399.

¶148 (Ark.) The recitals of sheriff's return on process made pursuant to Kirby's Dig. § 6381, may be contradicted by other evidence which accompanies it.—Good Roads Machinery Co. v. Cox, 212 S. W. 87.

¶148 (Mo.App.) It is proper to permit the introduction of parol evidence to identify the particular individual upon whom a writ was served, though the name of the individual served and the name in the writ are not idem sonans, and to do so does not tend to contradict or impeach the return of the officer serving the writ.—Green v. Strother, 212 S. W. 399.

¶149 (Mo.App.) In proceeding in the probate court to have allowed and classified against an estate a judgment rendered against the deceased in a wrong name, evidence held to establish that deceased was the person served, although he was served under a wrong name.—Green v. Strother, 212 S. W. 399.

**III. DEFECTS, OBJECTIONS, AND AMENDMENT.**

¶166 (Mo.App.) A name is a mere means of identity, and if one served with process in the wrong name desired to take advantage of the situation, he must appear and raise the question in the court where suit is brought before judgment is rendered, and, unless he does so, his right to object for misnomer is waived.—Green v. Strother, 212 S. W. 399.

**PROHIBITION.****I. NATURE AND GROUNDS.**

¶4 (Mo.App.) Discretion of the court as to issue of a writ of prohibition should be applied with judicial circumspection, and applied to the facts as presented by each individual case, and prohibition should not be granted, unless a usurpation of jurisdiction by the inferior tribunal is clear.—State ex rel. Clark v. Klene, 212 S. W. 55.

¶5(1) (Mo.App.) The judicial exercise of discretion by an inferior court having jurisdiction will not be interfered with by a writ of prohibition.—State ex rel. Clark v. Klene, 212 S. W. 55.

**PROMISSORY NOTES.**

See Bills and Notes.

**PROPERTY.**

¶4 (Tex.Civ.App.) Water in canals for irrigation purposes is real estate and land owner's right to the use of a portion thereof is a servitude upon such real estate.—Mudge v. Hughes, 212 S. W. 819.

¶9 (Tex.Civ.App.) Possession of land is prima facie proof of ownership.—Allen v. Vineyard, 212 S. W. 266.

**PROSTITUTION.**

See Health, ¶21, 24.

**PUBLIC IMPROVEMENTS.**

See Municipal Corporations, ¶294-522.

**PUBLIC LANDS.**

See Appeal and Error, ¶173; Deeds, ¶26; Mines and Minerals, ¶6.

**III. DISPOSAL OF LANDS OF THE STATES.**

¶173(5) (Tex.) Under Acts 27th Leg. (1901) c. 125, an award of the timber on public lands carried with it the right of purchase of the land within five years if the timber was not sooner removed on condition of actual settlement. In 1907 the requirement as to actual settlement was abrogated. Held, that plaintiff, to whom the timber was awarded under said act, and who within the five-year period, but after 1907, was awarded the land without the condition of actual settlement, was entitled to the same as against a previous purchaser of other public lands whose conveyance, made in 1906, erroneously included the lands acquired by plaintiff.—Kirby v. Conn, 212 S. W. 469.

¶173(18) (Tex.Civ.App.) Evidence in trespass to try title held sufficient to sustain findings that defendant purchaser did not actually settle free school land within 90 days after its award to him, as required, and did not reside thereon continuously for three years after actual settlement.—Nations v. Miller, 212 S. W. 742.

¶173(19) (Tex.Civ.App.) In trespass to try title to recover land, originally public free school lands, from the purchaser thereof and his lessee, remarks of the trial court in overruling motion for new trial, and the ground on which he based his ruling, the ground being that the purchaser did not settle on the land for a home, but settled on it as employé of his subsequent lessee, held not reversible error.—Nations v. Miller, 212 S. W. 742.

¶173(21) (Tex.Civ.App.) The fact of forfeiture of public free school lands by an applicant to purchase is material to the right of the purchaser on forfeiture to prosecute trespass to try title to recover the lands from the original purchaser and his lessee only as relieving him from being barred within a year by Rev. St. 1911, arts. 5458, 5459.—Nations v. Miller, 212 S. W. 742.

**PUBLIC POLICY.**

See Constitutional Law, ¶38.

**PUBLIC SERVICE COMMISSIONS.**

See Mandamus, ¶151; Railroads, ¶9, 225, 226; Trial, ¶352.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

**QUARANTINE.**

See Health, ¶21, 24.

## QUIETING TITLE.

### I. RIGHT OF ACTION AND DEFENSES.

⚡7(5) (Mo.App.) Where defects rendering special tax bills absolutely void appear on the face of the tax proceedings, there is no lien upon the property under the tax bills and no cloud upon the title of such property entitling owner to maintain a suit in equity.—*Wegenka v. City of St. Joseph*, 212 S. W. 71.

## QUO WARRANTO.

See Action, ⚡62.

## RAILROADS.

See Appeal and Error, ⚡51, 1050; Carriers, ⚡340; Constitutional Law, ⚡188, 284; Corporations, ⚡312; Damages, ⚡40; Embezzlement, ⚡10; Eminent Domain, ⚡262; Evidence, ⚡113, 121, 142, 474, 488, 514, 539½; Indians, ⚡35; Judgment, ⚡744; Jury, ⚡97; Larceny, ⚡15; Limitation of Actions, ⚡55, 69, 131, 175; Mandamus, ⚡151; Master and Servant; Negligence, ⚡101; Perpetuities, ⚡7; Street Railroads; Taxation, ⚡317, 603; Trial, ⚡132, 133, 194, 214, 252, 350, 352; Trusts, ⚡81, 153, 227; Waters and Water Courses, ⚡179.

### I. CONTROL AND REGULATION IN GENERAL.

⚡9(2) (Tex.Civ.App.) In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, the only question as to the unjustness and unreasonableness of the order, in view of Rev. St. 1911, art. 6693, is whether sum required to be expended is reasonable.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

The reasonableness and justness of Railroad Commission's order requiring construction of depot building and sidings and spur tracks, whether made pursuant to Rev. St. 1911, art. 6552 or article 8715, depends upon the facts of the particular case.—*Id.*

In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building, spur tracks, and sidings, special issue as to reasonableness of order was properly applied to both building and sidings, since it will not be assumed that sidings and spur tracks are indispensable to all stations.—*Id.*

Evidence held to support verdict finding Railroad Commission's order directing construction of depot building, sidings, and spur tracks at expense of from \$250 to \$500 to be unfair and unreasonable to railroad.—*Id.*

In passing upon reasonableness of Railroad Commission's order requiring construction of depot building at certain place, court will contrast expense of complying with order with inconvenience and hardships imposed on the public by reason of absence of facilities ordered.—*Id.*

Evidence as to extent of shipment made by persons living in certain vicinity is admissible upon question of reasonableness of Railroad Commission's order that depot building and spur tracks and sidings be constructed at such point.—*Id.*

In action involving reasonableness of Railroad Commission's order requiring construction of depot building, sidings, and spur tracks at certain place, evidence as to gross shipments to and from station 3½ miles distant therefrom during past four years, though remote, is of aid to jury on issue of reasonableness, tending to show increase of business in that section.—*Id.*

212 S.W.—68

⚡9(2) (Tex.Civ.App.) Under Rev. St. art. 6654, subd. 12, and article 6693, the burden rests upon a railroad company, assailing an order of the Railroad Commission requiring it to maintain a depot at a certain station, to show the unreasonableness of the exercise of the power vested in commission by statute.—*Angelina & N. R. Co. v. Railroad Commission of Texas*, 212 S. W. 703.

### IV. LOCATION OF ROAD. TERMINI, AND STATIONS.

⚡57 (Tex.Civ.App.) The Legislature, by Acts 35th Leg. (Fourth Called Sess.) c. 27, § 4, could ratify effectually an abandonment and relocation by a railroad of a portion of its main line tracks.—*Jeff Bland Lumber & Bldg. Co. v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 750.

⚡58 (Tex.Civ.App.) Under the statutes a place may become a "station" either by designation by the railroad, or by designation by statute, or by being established as a siding or stopping place to receive and discharge passengers and freight.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

Rev. St. 1911, art. 6552, if construed so as to require railroads to construct sidings and spur tracks at stations, requires construction thereof only where necessary for accommodations for transportation of passengers and freight.—*Id.*

### V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

⚡69 (Tex.Com.App.) A railroad company has the right to acquire real estate without limitation or restriction in use, and when so acquired its title is as absolute as that of a private individual, at least in so far as concerns immunity from attack by any one except the state.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

Deeds to a railroad of property in corporate limits of town to be used for depot ground and railroad purposes in consideration of the expected enhancement in value of grantors' adjoining property, held to convey a fee and not merely an easement.—*Id.*

⚡72(7) (Tex.Com.App.) Deeds by trustees to a railroad on condition that premises shall be used exclusively for railroad purposes, and that after they shall cease to be used for such purposes they shall revert to grantors or their "successors," naming a small consideration, the real consideration being expected enhancement in value of grantors' adjoining property, held to convey a fee upon condition subsequent, and not upon limitation, and railroad took an indefeasible title after grantors' sale of adjoining land.—*Stevens v. Galveston, H. & S. A. Ry. Co.*, 212 S. W. 639.

⚡72(8) (Ky.) In an action by the grantor in a right of way deed for damages to crops resulting from railroad company's breach of contract to construct ditches, instructions placing upon the company the obligation to construct ditches so as to carry off the rainfall in "vicinity" held erroneous as placing upon the company not only liability for its failure to perform the contract, but also for the consequences of grantor's failure to lead tiles into the ditches as he had a right to do under the contract.—*Chicago, M. & G. R. Co. v. Stahr*, 212 S. W. 115.

⚡72(9) (Ky.) For breach of a contract by a railroad company to construct drainage ditches specified in deed of right of way, the measure of damages as to the land in cultivation is the difference between what was raised and what could have been produced, and the measure of damages as to such land as the grantor was prevented from cultivating is its rental value.—*Chicago, M. & G. R. Co. v. Stahr*, 212 S. W. 115.

# **VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.**

☞114(2) (Mo.App.) In action under Rev. St. 1909, § 3150, against a railroad company for flooding lands due to construction of an embankment without sufficient openings, evidence of floods in other years having broken through the embankment was admissible to show that the embankment was an obstruction.—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

# **VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.**

☞136 (Tex.Civ.App.) Railroad companies may make contracts in their private character for the use of road, as distinguished from their public character of common carrier.—*Hicks v. Gulf C. & S. F. Ry. Co.*, 212 S. W. 840.

## **X. OPERATION.**

### **(B) Statutory, Municipal, and Official Regulations.**

☞225 (Tex.Civ.App.) Rev. St. art. 6589, requiring every railroad to erect at every station established by it for the reception and delivery of freight suitable buildings to protect such freight, is mandatory, and to secure compliance therewith it is the duty of the Railroad Commission to order a railroad company which maintains only a shed at a town containing several stores, mills, etc., to erect a depot there sufficient to handle the freight and passenger traffic.—*Angelina & N. R. R. Co. v. Railroad Commission of Texas*, 212 S. W. 703.

☞226 (Tex.Civ.App.) A railroad company cannot evade the statutory duty imposed upon it to erect and maintain suitable depots at each of its stations and entirely ignore public convenience and accommodation, because of increased expense to the company.—*Angelina & N. R. R. Co. v. Railroad Commission of Texas*, 212 S. W. 703.

The duty imposed upon a railroad by Rev. St. § 6693, to provide and maintain adequate depots at every station for accommodation of passengers and to keep them well lighted and warmed carries with it by necessary implication the furnishing of agents at such stations, and the Railroad Commission has power to secure compliance therewith.—*Id.*

An order of the Railroad Commission to compel compliance with a mandatory statute requiring the erection of suitable depot buildings at stations is not subject to a test of reasonableness; the only question of reasonableness possible being as to the kind of buildings required to be built.—*Id.*

### **(C) Companies and Persons Liable for Injuries.**

☞260 (Tex.Civ.App.) A servant employed upon a train making trips over another company's road is entitled to presume that such company performed its duty to keep the track in a safe condition, and is entitled to damages for injuries received by reason of its failure in such respect.—*Hicks v. Gulf C. & S. F. Ry. Co.*, 212 S. W. 840.

☞272 (Tex.Civ.App.) Evidence held to show that improvements were made upon railway properties by receiver out of earnings while in his hands in excess of amount sued for by one injured by the negligence of the receiver's servants.—*St. Louis, B. & M. Ry. Co. v. Broughton*, 212 S. W. 664.

### **(D) Injuries to Licensees or Trespassers in General.**

☞275(1) (Tex.Civ.App.) A railroad company owes to a mere licensee, riding on a motorcar operated over its track, no affirmative duty in regard to fencing its right of way so as to keep stock off of the track, or the condition of the track, the licensee assuming all the risks incident to the operation of the car.—*Hicks v. Gulf C. & S. F. Ry. Co.*, 212 S. W. 840.

☞275(2) (Tex.Civ.App.) Where a railroad gave a lumber company written permission to use its tracks, receiving no consideration therefor, lumber company not being a common carrier, a servant of the lumber company, while riding on one of the lumber company's motorcars, was a mere licensee (quoting Words and Phrases, First and Second Series, Licensee).—*Hicks v. Gulf C. & S. F. Ry. Co.*, 212 S. W. 840.

☞276(2) (Tex.Civ.App.) A lumber company owes a licensee on its log train no duty with respect to the condition of its track, cars, or other instrumentalities; its sole duty being to exercise ordinary care in the operation of the train.—*Kirby Lumber Co. v. Davis*, 212 S. W. 831.

Where a logging company permitting a licensee to ride on its logging train creates a new danger after he is on the train, if by making up its train in a manner not before used by it, it must assume with reference to such new hazard the responsibility of exercising due care to protect him from injury resulting by reason thereof.—*Id.*

☞278(2) (Ark.) Where consignee's employé unloading lumber from a freight car discovered that an endgate was unfastened and could not be latched, but, upon observing certain cleats and concluding that these prevented the gate from falling, continued unloading until injured by the gate falling, the danger was not so obvious that he must be deemed to have accepted the risk.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

☞282(5) (Ark.) In suit for injuries to a consignee's employé by the falling of a freight car endgate, evidence that gate could not be latched because it was sprung, and that defendant railroad company had nailed cleats on the inside to support it, held sufficient to show that it was out of repair, and that defendant knew or had ample time to discover the defect.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

☞282(5) (Tex.Civ.App.) In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, conflicting evidence held sufficient to support verdict for plaintiff.—*St. Louis, S. F. & T. Ry. Co. v. Whatley*, 212 S. W. 968.

☞282(9) (Ark.) In suit by a consignee's employé for injuries by the falling of a freight car door while he was unloading lumber after he had discovered that the door was defective and that cleats were nailed on the inside to prevent it from falling, whether he was guilty of contributory negligence was a question for the jury.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

☞282(13) (Tex.Civ.App.) In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, an instruction on contributory negligence, making it the duty of plaintiff to exercise ordinary care, held to sufficiently cover the issue as raised by the evidence.—*St. Louis, S. F. & T. Ry. Co. v. Whatley*, 212 S. W. 968.

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, an instruction on proximate cause held not misleading.—*Id.*

☞282(14) (Ark.) In suit by a consignee's employé for injuries by the falling of a freight car endgate, defendant's requested instruction that it would not be liable unless it knew that the gate was unfastened held properly refused, where the negligence charged and proved was that of permitting the gate to get out of repair so that it could not be fastened.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

☞282(16) (Tex.Civ.App.) A finding that defendant's logging train, on which plaintiff was permitted to ride, was negligently operated, considering the condition of track, the manner

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

of coupling, and the speed, *held* to warrant judgment in plaintiff's favor, though the jury had answered that the speed of the train was not excessive.—*Kirby Lumber Co. v. Davis*, 212 S. W. 881.

(F) Accidents at Crossings.

↪346(5) (Tex.Com.App.) In an action against a railroad for death of plaintiff's son struck in an automobile at a crossing, the burden rested on the railroad to establish the son's contributory negligence excusatory of its own negligence.—*Moye v. Beaumont, S. L. & W. Ry. Co.*, 212 S. W. 471.

↪348(1) (Tex.Civ.App.) In an action for death of driver of automobile truck struck by a train at a crossing, evidence *held* sufficient to sustain jury finding of negligence proximately causing the injury.—*Schaff v. Merchant*, 212 S. W. 970.

↪348(6) (Tex.Civ.App.) In an action for death of driver of automobile truck struck by a train at a crossing, evidence *held* insufficient to show that driver was guilty of contributory negligence.—*Schaff v. Merchant*, 212 S. W. 970.

↪350(13) (Tex.Com.App.) In an action against a railroad for death of plaintiff's son while driving an automobile at a crossing, question of the son's contributory negligence *held* for the jury.—*Moye v. Beaumont, S. L. & W. Ry. Co.*, 212 S. W. 471.

(G) Injuries to Persons on or near Tracks.

↪397(1) (Tex.Civ.App.) In action for negligence in driving cars against standing cars with such force as to cause standing cars to strike one crossing track located on an avenue, testimony as to use of avenue by public was relevant and admissible; but conveyances evidencing defendant's right to operate a railroad along the avenue *held* irrelevant and immaterial.—*St. Louis, B. & M. Ry. Co. v. Broughton*, 212 S. W. 664.

(I) Fires.

↪456 (Ky.) A railroad is liable for burning a house by fire communicated to weeds, high grass, etc., on its right of way by an otherwise harmless spark emitted by a locomotive through a proper spark arrester; the statute requiring that railroads' rights of way be kept free from combustible material.—*Terhune v. Louisville & N. R. Co.*, 212 S. W. 915.

↪480(2) (Tex.Com.App.) Where plaintiff has met the burden of proving that fire originated from an engine, the law presumes negligence, and he is entitled to recover unless railroad company proves that engine was provided with the best approved apparatus for arresting sparks, and was properly operated.—*Moose v. Missouri, K. & T. Ry. Co. of Texas*, 212 S. W. 645.

↪482(2) (Tex.Com.App.) Although it is necessary to trace fire to railroad, it is not necessary that evidence should exclude all possibility of another origin, but it is sufficient if all the facts and circumstances fairly warrant a conclusion that the fire did not originate from some other cause.—*Moose v. Missouri, K. & T. Ry. Co. of Texas*, 212 S. W. 645.

↪484(3) (Tex.Com.App.) In action against railroad for fire from locomotive involving issue of whether fire originated from locomotive spark, evidence *held* to require submission of case to jury.—*Moose v. Missouri, K. & T. Ry. Co. of Texas*, 212 S. W. 645.

↪485(7) (Ky.) In action against railroads for setting fire to plaintiff's house, instructions correctly submitting phase concerning liability for failure to equip locomotives with proper spark arresters *held* insufficient, as failing to predicate liability of roads on failure to keep right of way free from grass, weeds, etc., as required by statute.—*Terhune v. Louisville & N. R. Co.*, 212 S. W. 915.

## RAPE.

See Abduction, ↪9.

## II. PROSECUTION AND PUNISHMENT.

### (B) Evidence.

↪40(1) (Ky.) In prosecution for rape, it is competent for defendant to prove specific acts of lewd and lascivious character by the prosecutrix with third parties occurring shortly before the alleged rape as evidence for the consideration of the jury in determining whether prosecutrix consented to the intercourse with defendant.—*Gravitt v. Commonwealth*, 212 S. W. 430.

## REAL ACTIONS.

See Action, ↪50; Ejectment; Injunction, ↪36; Partition; Quietting Title; Trespass to Try Title.

## RECEIVERS.

See Corporations, ↪312; Courts, ↪231, 478; Railroads, ↪272; Waters and Water Courses, ↪232.

## IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

### (B) Supervision and Instructions of Court.

↪116 (Tex.Civ.App.) Contracts made by receivers under authority given by the court are in a substantial sense the contracts of the court, and cannot be annulled at the pleasure of the court.—*Mudge v. Hughes*, 212 S. W. 819.

## RECEIVING STOLEN GOODS.

See Burglary, ↪42; Criminal Law, ↪112; False Imprisonment, ↪39.

↪3 (Ky.) Receiving stolen property knowing it to be stolen is itself a complete offense; the gist of the offense consisting of the guilty knowledge of the property having been stolen.—*Klotz v. Cook*, 212 S. W. 917.

## RECOGNIZANCES.

See Bail, ↪64.

## RECORDS.

See Appeal and Error, ↪172, 501-707, 773, 901, 907, 1032, 1052; Chattel Mortgages, ↪157, 197; Constitutional Law, ↪43; Costs, ↪262; Criminal Law, ↪1060, 1086-1112, 1187; Deeds, ↪82; Evidence, ↪65; Executors and Administrators, ↪349; Judgment, ↪315; Limitation of Actions, ↪45; Partnership, ↪64; Schools and School Districts, ↪68; Taxation, ↪535; Vendor and Purchaser, ↪232.

## REFORMATION OF INSTRUMENTS.

See Appeal and Error, ↪1116, 1152; Judgment, ↪736.

## RELEASE.

See Appeal and Error, ↪1116; Equity, ↪57; Wills, ↪400.

### I. REQUISITES AND VALIDITY.

↪12(2) (Mo.App.) An employee's release of claim for injuries construed as a mere recital of a specific sum and not contractual in the legal sense so as to deprive him of his right to show want of consideration.—*Slinkard v. Lamb Const. Co.*, 212 S. W. 61.

↪24(2) (Mo.App.) An injured servant, seeking rescission of a release for fraud, must tender the consideration received within reasonable time after he knows that the employer is the one to whom tender is to be made.—*Reed v. John Gill & Sons Co.*, 212 S. W. 43.

Where one has executed a release of a claim



for injuries, knowing that it is such, he must, in order to maintain suit for the injuries, tender the consideration received before the suit is instituted, and a tender made six months after suit is properly refused.—Id.

A servant, seeking rescission of a release of the master's liability for injuries, is not relieved from tendering before suit the consideration received, because it was paid by an insurer having an interest in upholding the release, but not a party to the suit.—Id.

## II. CONSTRUCTION AND OPERATION.

⚡27 (Mo.App.) A servant is bound by a release of claim for personal injuries, though it was taken by a stranger, who paid the consideration, where the employer has adopted it as his own.—Reed v. John Gill & Sons Co., 212 S. W. 43.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡57(2) (Mo.App.) In a servant's action for injuries, in which he sought rescission of a release, evidence of fraud held insufficient for setting aside settlement.—Reed v. John Gill & Sons Co., 212 S. W. 43.

⚡58(2) (Mo.App.) Evidence in an action for personal injuries, held to present a question for the jury as to whether or not there was any consideration for a release of claim for injury.—Slinkard v. Lamb Const. Co., 212 S. W. 61.

## RELIGIOUS SOCIETIES.

See Damages, ⚡122; Perpetuities, ⚡4.

## REMAINDERS.

See Curtesy, ⚡12; Deeds, ⚡8, 129; Estates Tail, ⚡2; Judgment, ⚡243; Life Estates, ⚡8; Limitation of Actions, ⚡70; Wills, ⚡545, 598, 634, 853.

⚡5 (Ky.) The doctrine of acceleration of remainder proceeds on the theory that, though by its terms the ulterior devise does not take effect in possession until the decease of a prior devisee, if tenant for life, yet it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate.—Keeton v. Tipton, 212 S. W. 909.

Where a life tenant who has taken under a will and enjoyed the income for a number of years, renounces his interest, and asks the court that property be sold free from his claim, his act is not a destruction of the life estate accelerating a contingent remainder, but is merely a conveyance by estoppel which does not remove the life estate.—Id.

⚡14 (Ky.) Where children of a wife, who owned and leased coal lands, inherited their interest with the burden impressed on the land that the surviving husband as life tenant by curtesy was entitled to the royalties or rentals from the coal lease, a mining company by its purchase from the remaindermen took no greater interest than was owned by them, and its rights are subject to the life tenant husband's.—Caudil v. Wagoner, 212 S. W. 422.

⚡17(3) (Ky.) Suit to enjoin waste by those claiming through grantee of life tenant and to have plaintiffs adjudged to be owners of a certain interest in the remainder is not barred by limitation, where the life tenant is alive, since in such case the remaindermen have no right to possession, and neither the life tenant nor any one claiming through her can hold adversely to remaindermen.—Phillips v. Williamson, 212 S. W. 121.

## REPLEVIN.

See Appeal and Error, ⚡1068; Garnishment, ⚡108; Judgment, ⚡504; Sequestration, ⚡20.

## VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⚡125 (Tex.Civ.App.) Judgment against sureties on a replevin bond follows as a matter of law, without notice to them, after judgment against their principal, under Vernon's Sayles' Ann. Civ. St. 1914, art. 269.—Tripplett v. Hendricks, 212 S. W. 754.

## REST ROOM.

See Municipal Corporations, ⚡733.

## RETROSPECTIVE LAWS.

See Constitutional Law, ⚡188-189; Statutes, ⚡287.

## REVENUE.

See Taxation.

## REVIEW.

See Appeal and Error.

## RISK.

See Master and Servant, ⚡204-221.

## ROADS.

See Highways.

## SALES.

See Action, ⚡25; Appeal and Error, ⚡690, 1067, 1068, 1152, 1170; Chattel Mortgages, ⚡34, 40, 157, 197; Contracts, ⚡10, 42, 189; Corporations, ⚡244, 642; Criminal Law, ⚡517, 792; Damages, ⚡159; Estoppel, ⚡75; Evidence, ⚡208, 320; Exemptions, ⚡123; Fraud, ⚡20, 52; Frauds, Statute of, ⚡14; Fraudulent Conveyances, ⚡47, 132; Injunction, ⚡59, 118; Larceny, ⚡32; Limitation of Actions, ⚡23, 39; Pledges, ⚡56; Principal and Agent, ⚡124; Specific Performance, ⚡113; Taxation, ⚡624-658; Telegraphs and Telephones, ⚡66; Trusts, ⚡356; Vendor and Purchaser; Waters and Water Courses, ⚡230.

## I. REQUISITES AND VALIDITY OF CONTRACT.

⚡12 (Tex.Civ.App.) Where a tenant under a valid contract with owner agrees to pay a crop rent, and thereafter actually plants and cultivates the specified crop, the crop may be sold or mortgaged even though at the time of the sale or mortgage the crop has not actually been planted.—Sanger Bros. v. Hunsucker, 212 S. W. 514.

⚡38(4) (Tex.Civ.App.) The right of a buyer to urge want or failure of consideration when sued on promissory notes given for the price, or to urge misrepresentation concerning the character or kind of the goods inducing the purchase, when relied on, is not limited because the transaction took the form of a written contract.—Lee v. Baie, 212 S. W. 230.

## II. CONSTRUCTION OF CONTRACT.

⚡54 (Ark.) Contract for sale of manufactured products of a company by a local dealer, which contract was drawn upon blank forms of the company, should be construed most strongly against the company.—Weil v. Chicago Pneumatic Tool Co., 212 S. W. 313.

⚡85(1) (Tex.Civ.App.) Where the seller of cotton left the contract in the hands of the buyer's agent, who negotiated it, with the understanding by both parties that it should not become effective as a binding agreement until each party had made deposit of an agreed amount as security, the failure of either party to make the deposit released the other from the obligation of the contract.—Templeman v. Closs, 212 S. W. 187.



### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) By Agreement of Parties.

§89 (Tex.Civ.App.) If there was no agreement by the seller of cotton to accept a third person's guaranty in lieu of a deposit by the buyers, he was not required, to preserve his right to insist on the deposit, to reply to the letter of the buyers' agent inclosing a purported copy of the contract signed by the third person as guarantor, and the agent could not assume, from the seller's failure to reply to the letter, that he had accepted the guaranty in lieu of the deposit.—Templemen v. Closs, 212 S. W. 187.

### IV. PERFORMANCE OF CONTRACT.

#### (B) Bills of Sale.

§149 (Tex.Civ.App.) A bill of sale, which does not mention a motor sales company nor any member of that firm as grantor, but specifically states that the automobile sold was the property of H., and on its face purports to be made and executed by H., who warrants the title, although bearing the names of the company and H. in the place for signatures, construed as from H., and not from the company.—Rowe v. Guderian, 212 S. W. 960.

A third person, who prepared a bill of sale for an automobile, may not claim that a company whose name appears as signed thereto was a grantor, where the language of the instrument is not ambiguous, and designates the other signer as grantor.—Id.

#### (C) Delivery and Acceptance of Goods.

§172 (Tex.Civ.App.) In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, that defendant's plant was destroyed by fire after contract was made *held* no defense, even if contract did provide that defendant was not responsible for damages arising from causes beyond its control.—C. R. Garner & Co. v. Beaumont Cotton Oil Mill Co., 212 S. W. 690.

§179(1) (Ark.) Where a produce company bought a carload of apples from defendant, not knowing that defendant was acting only as a broker until the car arrived, and accepted the shipment only after being notified by an agent of the United States government that it must receive the apples in order to conserve food during the war with Germany, such acceptance did not entitle the owner to the proceeds of a draft paid by the produce company; the apples being rotten and of not sufficient value to pay the freight.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

#### (D) Payment of Price.

§193 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3969, where personal property lent by plaintiff had been in the possession of the borrower for more than two years, and the loan was not evidenced by an instrument in writing, a purchaser from the borrower, with or without notice, took absolute title, for title was conclusively presumed to be in the borrower, this being so though the borrower was yet liable for the conversion, limitations not having run against plaintiff's claim.—Williams v. Davenport, 212 S. W. 675.

### V. OPERATION AND EFFECT.

#### (A) Transfer of Title as Between Parties.

§199 (Tex.Civ.App.) Where the purchaser of an automobile turned in his old car for \$500 of the price of about \$2,000, telling the seller to keep the new car for him, the purchaser's agent, there was a complete sale passing despite the absence of change of possession and nonpayment of the balance of the intention of the parties that title pass being controlling.—John E. Morris v. Co. v. Murff, 212 S. W. 212.

#### (D) Bona Fide Purchasers.

§235(1) (Tex.Civ.App.) Where plaintiff drew a bill of sale of a car from H. to B. without reference to a company, except that its name appeared thereon above H.'s signature, and plaintiff took a mortgage upon the car from B., plaintiff may not claim that the company is estopped by the bill of sale, or that he is an innocent purchaser as against the company.—Rowe v. Guderian, 212 S. W. 960.

### VIII. REMEDIES OF BUYER.

#### (C) Actions for Breach of Contract.

§418(4) (Ark.) In an action by a consignee of apples, which consignee was required to take under orders of the government, the measure of plaintiff's damages was not the difference between the contract and the market price of the apples at the time they were delivered, where apples were not merchantable and did not have a market price; the correct measure of the damages being the difference between the contract price and the amount they brought when sold for the best price obtainable.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

§420 (Ark.) In an action by a buyer of apples for damages, whether or not the apples were frozen before they were loaded into the car for shipment a month before they were inspected by the buyer *held* for the jury.—C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305.

§420 (Tex.Civ.App.) In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake, whether there was a breach *held* for the jury.—C. R. Garner & Co. v. Beaumont Cotton Oil Mill Co., 212 S. W. 690.

In action for damages for claimed anticipatory breach of contract to deliver 500 tons of cotton seed cake whether plaintiff acted promptly in claiming the breach *held* for the jury.—Id.

#### (D) Actions and Counterclaims for Breach of Warranty.

§429 (Ky.) There being no provision in special warranty of boiler making it is imperative upon buyer to return it in case of breach of the warranty, he could either return it or retain it and recoup his damages for breach of the warranty in action by seller for the purchase price.—Nichols & Shepard Co. v. Duddar, 212 S. W. 923.

### IX. CONDITIONAL SALES.

§479(1) (Tex.Civ.App.) In a suit by the seller to recover the title and possession of picture machines, conditionally sold, and in the alternative to recover part of the purchase price with interest and foreclosure, the seller cannot recover both the machines and the purchase price.—Black v. Southern Film Service, 212 S. W. 295.

### SCHOOLS AND SCHOOL DISTRICTS.

See Appeal and Error, §173, 230; Estoppel, §68; Intoxicating Liquors, §45, 88; Public Lands, §173.

### II. PUBLIC SCHOOLS.

#### (B) Creation, Alteration, Existence, and Dissolution of Districts.

§38 (Mo.App.) Two separate propositions could not be submitted, but where the voters were voting only on proposition of consolidating school districts, other question submitted, as to location or selection of site for schoolhouse of district when consolidated, not being matter within jurisdiction of annual meetings of old district to pass on, but for voters of new district consolidation of districts was not invalidated by submission of the two separate propositions.—Critten v. New, 212 S. W. 46.

**(C) Government, Officers, and District Meetings.**

⚡50 (Mo.App.) First meeting of resident voters of newly created consolidated school district held not invalid, because 9 days' and not 15 days' notice was given; Rev. St. 1909, § 10,843, merely requiring the meeting to be held within 15 days after formation of the district, and the only notice required being reasonable notice.—Critten v. New, 212 S. W. 46.

Notice of first meeting of voters of consolidated school district held not invalid, because in one place one of the old districts was referred to as No. 65, instead of 68, a mere clerical error.—Id.

**(D) District Property, Contracts, and Liabilities.**

⚡68 (Mo.App.) Selection of site by voters for schoolhouse of consolidated district held not invalid for indefiniteness and uncertainty; the record of the meeting with reference to the site reading: "Voted for sites; the site on top of the hill on the N. W. forty acres of James Critten's farm carried."—Critten v. New, 212 S. W. 46.

⚡70 (Mo.) Laws 1913, p. 721, relating to consolidated school districts, Rev. St. 1909, § 10869, giving consolidated school districts power to "establish" high schools, and Rev. St. 1909, § 10833, relating to rental of school buildings, authorize consolidated school district directors to rent high school building, where district has refused to vote funds for erecting such building.—Kemper v. Long, 212 S. W. 871.

**(E) District Debt, Securities, and Taxation.**

⚡111 (Mo.App.) While Const. art. 10, § 12, providing that school district incurring indebtedness shall, "before or at the time of so doing," provide for collection of an annual tax, is mandatory, the instant case is not one where a school district is levying taxes on the residents year after year for an indebtedness which has not been incurred, and no bonds have been issued without just cause, in view of injunction suits, prohibiting issuance of bonds, pending nearly all of the time in question.—Wadlow v. Consolidated School Dist. No. 3, Tp. 30, R. 23, Greene County, 212 S. W. 904.

**SEALS.**

See Principal and Agent, ⚡145.

**SEARCHES AND SEIZURES.**

See Indians, ⚡35.

**SEDITION.**

See Criminal Law, ⚡1182; Habeas Corpus, ⚡30; Indictment and Information, ⚡125; War, ⚡4.

**SENTENCE.**

See Criminal Law, ⚡982.

**SEPARATE PROPERTY.**

See Husband and Wife, ⚡246-276.

**SEQUESTRATION.**

⚡16 (Tex.Civ.App.) The defendant and sureties in sequestration should have the privilege of returning the property, unless it is shown the property has been disposed of, or cannot be produced.—Tripplett v. Hendricks, 212 S. W. 754.

⚡20 (Tex.Civ.App.) In a replevin action, plaintiff was not limited to the value alleged; the market value at the time of trial being the measure of damages.—Tripplett v. Hendricks, 212 S. W. 754.

The court cannot render judgment against a surety on bond in replevin to secure possession

of sequestered property for the costs of the suit, but the judgment creditor is entitled to recover as against the surety such costs as may be incurred in proper proceedings to collect the judgment.—Id.

**SET-OFF AND COUNTERCLAIM.**

See Judgment, ⚡883; Pleading, ⚡110; Principal and Agent, ⚡124; Sales, ⚡429.

**SEWERS.**

See Drains.

**SHELLEY'S CASE.**

See Deeds, ⚡128; Wills, ⚡608.

**SHERIFFS AND CONSTABLES.**

See Appeal and Error, ⚡781; Attachment, ⚡331; Criminal Law, ⚡854; Taxation, ⚡658, 734, 750.

**II. COMPENSATION.**

⚡65 (Tex.Civ.App.) Under Code Cr. Proc. 1895, art. 1098, despite its amendments in 1909 and 1915, the sheriff of a county of less than 35,000 population is not liable for moneys paid to him during his term of office by authorization of the commissioners' court for hire of a deputy sheriff as a guard at the county jail, though there was only one deputy sheriff kept at the jail, so that the county contended he was the jailer and not a guard; the commissioners' court being unauthorized to pay the salary of a jailer.—Cooper v. Johnson County, 212 S. W. 528.

**IV. LIABILITIES ON OFFICIAL BONDS.**

⚡157(5) (Tex.Civ.App.) In a county's suit against its former sheriff and bondsmen to recover moneys illegally received by the sheriff during term of office, the bondsmen were not liable for the sums paid to the sheriff in good faith by order of the commissioners' court for hire of a guard at the county jail, even though the amounts paid were not authorized by law.—Cooper v. Johnson County, 212 S. W. 528.

**SHIPPING.**

See Appeal and Error, ⚡1050, 1052; Evidence, ⚡410, 472; Limitation of Actions, ⚡127.

**III. CHARTERS.**

⚡54 (Tex.Civ.App.) Where defendant took entire possession and control of plaintiff's barges under contract to use ordinary care to protect the barges, it was defendant's duty to compel the owners of a boat moored to them to cut loose in time of flood and danger if the tying up of the boat endangered the barges.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, 212 S. W. 287.

⚡58(2) (Tex.Civ.App.) A petition in action for loss of barges at wharf which, after charging several negligent omissions in protecting barge, contained clause "or otherwise protect said barges," is broad enough to let in proof of any negligent omission causing loss of barges.—Freeport Town-Site Co. v. S. H. Hudgins & Sons, 212 S. W. 287.

**SIGNATURES.**

See Appeal and Error, ⚡569; Deeds, ⚡26; Husband and Wife, ⚡198; Indictment and Information, ⚡51; Justices of the Peace, ⚡191; Sales, ⚡149.

**SLANDER.**

See Libel and Slander.

**SOLDIERS.**

See Insurance, ¶129; Intoxicating Liquors, ¶158, 236.

**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.**

See Army and Navy, ¶34.

**SPECIAL LAWS.**

See Statutes, ¶93.

**SPECIFIC PERFORMANCE.**

See Injunction, ¶118; Judgment, ¶18; Vendor and Purchaser, ¶172.

**II. CONTRACTS ENFORCEABLE.**

¶58 (Tex.Civ.App.) Where a contract between plaintiff and one of defendants provided that a \$200 check deposited therewith was placed as a forfeit on the land deal, defendant had the absolute right to arbitrarily refuse to carry out the sale and lose such amount, and plaintiff had no cause of action against such defendant; the deposit not being earnest or escrow money, but liquidated damages or forfeit.—Richardson v. Terry, 212 S. W. 523.

¶65 (Tex.Civ.App.) A contract to convey a homestead is not one for which specific performance may be decreed.—Richardson v. Terry, 212 S. W. 523.

**III. GOOD FAITH AND DILIGENCE.**

¶95 (Ky.) The general rule is that in a suit to obtain specific performance of a contract for the purchase of land, the vendor must show performance or ability, readiness, and willingness on his part, and be able to convey a good and indefeasible title.—Lowther-Kaufman Oil & Coal Co. v. Gunnell, 212 S. W. 593.

**IV. PROCEEDINGS AND RELIEF.**

¶113 (Tex.Civ.App.) Petition held to state cause of action for injunction to restrain removal of oil-drilling equipment and casing delivered to plaintiff under an executed contract, and not an action for specific performance of an executory contract to drill well.—Hinton v. D'Yarmett, 212 S. W. 518.

**SPIRITUALISTS.**

See Corporations, ¶80.

**STATES.**

See Boundaries, ¶35, 36, 37; Constitutional Law, ¶183; Courts, ¶231; Criminal Law, ¶429, 430; Injunction, ¶118; Limitation of Actions, ¶69, 131, 175; Master and Servant, ¶88, 101, 102; Statutes, ¶21.

**VI. ACTIONS.**

¶191(1) (Tex.Civ.App.) When the state makes a contract, it is bound as much as a citizen would be bound by a like contract, notwithstanding the state cannot be sued without permission.—State v. Elliott, 212 S. W. 695.

**STATE WIDE PROHIBITION ACT.**

See Statutes, ¶5, 47, 48.

**STATUTE OF FRAUDS.**

See Frauds, Statute of.

**STATUTE OF LIMITATIONS.**

See Limitation of Actions.

**STATUTES.**

See Constitutional Law.

For statutes relating to particular subjects, see the various specific topics.

**I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.**

¶5 (Tex.Civ.App.) Acts 35th Leg. (Fourth Called Sess.) cc. 24, 31, commonly called the "State-Wide Prohibition Act" and the "Transportation Act," were within the subjects or purposes of the governor's proclamation, authorizing Legislature to pass laws prohibiting any one from procuring for or delivering intoxicants to any person in the military or naval forces, and not in conflict with Const. art. 3, § 40, and article 4, § 8.—Gulf, C. & S. F. Ry. Co. v. State, 212 S. W. 845.

¶21 (Ark.) Const. art. 5, § 28, relating to appropriations, etc., means that Legislature cannot authorize payment of any claim against state unless a pre-existing law authorizes contract under which claim was incurred, except by bill passed by two-thirds of the members elected to each branch of General Assembly.—Oliver v. Southern Trust Co., 212 S. W. 77.

¶47 (Tex.Civ.App.) Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not indefinitely framed or of such doubtful construction that it cannot be understood from the language in which it is expressed.—Gulf, C. & S. F. Ry. Co. v. State, 212 S. W. 845.

¶48 (Tex.Civ.App.) There is no such repugnance or doubt as to the meaning of the provisions of Acts 35th Leg. (Fourth Called Sess.) c. 24, relating to transportation and receipt of intoxicating liquors as to render the same void.—Gulf, C. & S. F. Ry. Co. v. State, 212 S. W. 845.

¶64(1) (Ark.) That part of a statute is unconstitutional does not authorize the courts to declare the remainder void unless all the provisions are connected in the subject-matter or so dependent on each other that it cannot be presumed that Legislature would have passed the one without the other.—Oliver v. Southern Trust Co., 212 S. W. 77.

If, when the unconstitutional portion of a statute, or even of a section of a statute, is stricken out, the remainder is complete in itself, capable of being executed according to the apparent legislative intent wholly independent of that which was rejected, it must be sustained.—Id.

¶64(4) (Tex.Civ.App.) Though section 20 of Acts 29th Leg. c. 122, violates Const. art. 16, § 30, in that it fixes the term of office of the board of directors of irrigation districts at four years, the other provisions of the act are not so dependent on, or connected with, provision fixing the terms of office as to render them invalid.—White v. Fahring, 212 S. W. 193.

¶64(5) (Tex.Civ.App.) The presence in Acts 29th Leg. c. 122, of sections 34, 48, which are inoperative because they do not provide for any hearing for determination of benefits, to property within irrigation districts, does not render the whole act violative of the Constitution, since the main purpose of the act can be given effect without regard to the sections, and must be upheld, the subsequent acts of Legislature (Acts 33d Leg. c. 172, § 95 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5107-95]; Acts 35th Leg. c. 87, § 95 [Vernon's Ann. Civ. St. Supp. 1918, art. 5107-95]) having cured the defects.—White v. Fahring, 212 S. W. 193.

¶64(8) (Ark.) Acts 1915, p. 326, entitled an act to appropriate money for an exhibit of state resources at an exposition, passed after commission had received private donations and advances, with preamble reciting that legislative appropriation was proper means to defray expenses, sections 1, 2, 4, and 5 of which related to duties of commission, and by section 6 ap-

appropriating \$40,000 to commission, which appropriation was invalid because bill had not received affirmative vote required by Const. art. 5, § 30, was wholly invalid, as parts were interdependent, and not separable.—*Oliver v. Southern Trust Co.*, 212 S. W. 77.

## II. GENERAL AND SPECIAL OR LOCAL LAWS.

§93(3) (Tenn.) Priv. Laws 1917, c. 648, § 1, declaring a public nuisance the running at large of dogs not registered, in counties having a population between 29,946 and 29,975, according to the 1910 federal census, is not unconstitutional as partial; counties being properly subjected to the population classification basis.—*Ponder v. State*, 212 S. W. 417.

## III. SUBJECTS AND TITLES OF ACTS.

§121(1) (Tenn.) Priv. Laws 1917, c. 648, entitled "An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this state and to provide penalties for violations of this act," is not unconstitutional as being broader than its title, in that section 8 thereof, providing that balance of registration fees, if any, shall be credited to a "Dog and Stock" fund, is not germane to its general subject; the tax being but an incident to the object expressed.—*Ponder v. State*, 212 S. W. 417.

## IV. AMENDMENT, REVISION, AND CODIFICATION.

§141(2) (Ark.) Acts 1919, No. 166, to aid a designated levee district and increasing the benefits to the real estate therein at the rate of 6 per cent. per annum, such increase to be cumulative and to continue until the indebtedness is fully paid, although relating to the same subject-matter as Sp. & Priv. Acts 1911, p. 215, does not violate Const. art. 5, § 28, requiring the re-enactment and publication at length of laws which are revived, amended, extended, or conferred, since such act does not amend Sp. & Priv. Acts 1911, p. 215, but is an independent and inconsistent enactment.—*Skilern v. White River Levee Dist.*, 212 S. W. 90.

## V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§159 (Ark.) To the extent of any conflict between earlier and later statutes, the earlier must yield to the later.—*Dickerson v. Tri-County Drainage Dist.*, 212 S. W. 334.

## VI. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§188 (Mo.) Under Rev. St. 1909, § 8057, it is the duty of the court, unless the construction

be plainly repugnant to the intent of the Legislature, to construe words and phrases in their plain, ordinary, and usual sense, and in the order of grammatical arrangement in which they are used.—*Elsberry Drainage Dist. v. Winkelmeyer*, 212 S. W. 898.

§210 (Ark.) While the preamble of an act is not controlling in its construction, it is always proper to look to the preamble in determining its meaning.—*Oliver v. Southern Trust Co.*, 212 S. W. 77.

§211 (Ark.) While the title of an act is not controlling in its construction, it is always proper to look to the title in determining its meaning.—*Oliver v. Southern Trust Co.*, 212 S. W. 77.

§225¼ (Ky.) Statutes enacted by the Legislature at the same session, upon the same subject, must be construed together for the purpose of ascertaining the intention of the Legislature.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

§225¾ (Tex.Cr.App.) Where the language of a statute relating to a female juvenile under the age of 18 years is the same as that relating to male juveniles under 17 years of age which had been previously construed, it must be presumed that the construction of such former statute indicates the legislative intent in the latter.—*Slade v. State*, 212 S. W. 661.

### (C) Time of Taking Effect.

§256 (Ky.) Generally the law takes no account of fractions of days, and in the absence of anything to the contrary it can only be concluded that two statutes enacted upon the same day, and becoming effective as laws thereafter on the same day, became effective at the same time.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

### (D) Retroactive Operation.

§267(2) (Tex.Civ.App.) Ordinarily, a statutory amendment affecting admissibility of evidence or probative effect of pleadings, affidavits, etc., affects suits pending at time of amendment, as well as suits filed thereafter.—*Walker v. Alexander*, 212 S. W. 713.

Acts 35th Leg. c. 176 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1903), making a verified plea of privilege prima facie proof of defendant's right to change of venue, applies to pending actions, as well as those thereafter instituted.—*Id.*

Amendment of June 19, 1917 (Acts 35th Leg. c. 124), to Vernon's Sayles' Civ. St. 1914, art. 2308, subd. 4, providing that suits for labor performed may be "maintained" where such labor was performed, applies to cases pending then in county where services were performed, since "maintained" refers to cases already in existence.—*Id.*

## STATUTES CONSTRUED.

UNITED STATES.		COMPILED STATUTES	
CONSTITUTION.		1918.	
Amend. 14 .....	514	§ 3078¼c .....	55
Amend. 14, § 1 .....	248		
STATUTES AT LARGE.		ARKANSAS.	
1887, Feb. 4, ch. 104, § 20,		CONSTITUTION.	
24 Stat. 386. Amended		Art. 2, § 22 .....	334
by Act 1906, June 29, ch.		Art. 5, § 23 .....	90
3591, § 7(11), (12), 34		Art. 5, §§ 26, 30 .....	77
Stat. 595 .....	19, 208	Art. 9, § 7 .....	328
1906, June 29, ch. 3591, §		Art. 12, § 9 .....	334
7(11), (12), 34 Stat.		KIRBY'S DIGEST.	
595 .....	19, 208	§ 109 .....	325
1906, June 29, ch. 3591, §		213 .....	330
7(11), (12), 34 Stat. 595.		362, 372 .....	83
Amended by Act 1915,		965 .....	308
March 4, ch. 176, § 1, 38			
Stat. 1196 .....	208		
		REVISED STATUTES.	
		§ 2140 .....	5
		COMPILED STATUTES	
		1916 (or 1918).	
		§ 4141 .....	5
		§§ 8604a, 8604aa .....	19, 208
		§§ 8657-8665 .....	26
		§ 8739 .....	845

§ 1176 .....	87
§ 2419, 2423 .....	84
§ 3093 .....	325
§ 3095 .....	328
§ 4682 .....	83
§ 4923, 4924 .....	87
§ 5064 .....	84
§ 5207, 5227 .....	328
§ 6381 .....	87

### SPECIAL AND PRIVATE LAWS.

1911, p. 215 .....	90
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### LAWS.

1905, p. 143 .....	334
1909, p. 829 .....	334
1909, p. 956 .....	325
1911, p. 193 .....	334
1911, p. 193, § 1 .....	99
1911, p. 233 .....	317
1913, p. 738 .....	334
1915, p. 326 .....	77
1915, pp. 328, 329, 330-332, §§ 1, 2, 4-6 .....	77
1915, p. 684, § 1 .....	325
1917, p. 1243, § 8 .....	308
1919, No. 55 .....	333
1919, No. 55, § 8 .....	333
1919, No. 166 .....	90

### KENTUCKY.

### CIVIL CODE OF PRACTICE.

§ 128, subsecs. 1-3 .....	442
§ 340 .....	104
§ 341 .....	105
§ 513, subsec. 4 .....	421
§ 526 .....	579
§ 606 .....	469

### CRIMINAL CODE OF PRACTICE.

§ 36, 46 .....	917
§ 281, Amended by Laws 1910, ch. 92 .....	434
§ 335, 337 .....	434

### STATUTES 1909.

§ 4303 .....	579
--------------	-----

### STATUTES 1915.

§ 6 .....	130
§ 7 .....	119
§ 162 .....	580, 925
§ 199b .....	456
§ 659 .....	128
§ 1158 .....	430
§ 1550, subsecs. 27, 28 .....	573
§ 1596a, subsec. 12 .....	573
§ 2352 .....	121
§ 2380, subsecs. 30, 40 .....	108
§ 2516 .....	130
§ 3892 .....	583
§ 4153, 4150 .....	453
§ 4189a, 4189c, 4214a .....	925
§ 4281a, 4281m .....	437

### STATUTES SUPPLEMENT 1918.

§ 4019a9 .....	580
§ 4189c .....	145

### LAWS.

1904, ch. 102, § 52 .....	911
1906, ch. 22, art. 19 .....	437
1910, ch. 92 .....	434
1914, ch. 56 .....	437
1914, ch. 80 .....	579
1916, ch. 13 .....	573
1916, ch. 13, §§ 4, 11 .....	573

### MISSOURI.

### CONSTITUTION.

Art. 2, §§ 12, 22 .....	339
Art. 10, § 12 .....	904

### REVISED STATUTES 1909.

§ 197, 206 .....	399
§ 332 .....	859
§ 546 .....	353, 357
§ 964, 965 .....	369
§ 1754 .....	390
§ 1848, 1851 .....	399
§ 1979, 1980 .....	369
§ 2038 .....	883
§ 2081 .....	851
§ 2119, 2120 .....	399
§ 2156 .....	369
§ 2333 .....	869
§ 2522, 2529, 2531 .....	71
§ 2596, 2587 .....	883
§ 2773 .....	378
§ 2778 .....	887
§ 2783 .....	22, 49
§ 2861 .....	73
§ 2872 .....	343
§ 2881 .....	65
§ 2887 .....	73
§ 3150 .....	41
§ 4056 .....	399
§ 4200, 4448, 4450 .....	339
§ 4468 .....	853
§ 4557-4559 .....	1
§ 4570 .....	877
§ 5033, 5042, 5055, 5057, 5077, 5097, 5115 .....	339
§ 5231 .....	853
§ 5448 .....	563
§ 6354 .....	357
§ 6383 .....	411
§ 6945 .....	8
§ 7705 .....	30
§ 7883 .....	39
§ 8047 .....	348
§ 8057 .....	893
§ 8057, subsec. 4 .....	30
§ 9384, 9385 .....	38
§ 9988 .....	898
§ 10833 .....	871
§ 10843 .....	46
§ 10869 .....	871

### CITY CHARTERS.

St. Louis, art. 21, § 9 .....	864
-------------------------------	-----

### LAWS.

1913, pp. 238, 242, 243, 246, §§ 11, 18, 19, 23 .....	893
1913, p. 721 .....	871

### TENNESSEE.

### CONSTITUTION.

Art. 1, § 21 .....	417
Art. 2, § 28 .....	417

### PRIVATE LAWS.

1917, ch. 648 .....	417
1917, ch. 648, §§ 1, 6, 8, 12 .....	417

### LAWS.

1893, ch. 89, § 7 .....	101
1893, ch. 174, § 1 .....	101
1895 (2d Sess.) ch. 4 .....	101
1897, ch. 2 .....	101
1899, ch. 432, § 1 .....	101
1901, ch. 128 .....	101
1903, ch. 257 .....	101
1907, ch. 541 .....	101
1900, ch. 479 .....	101
1915, ch. 101 .....	101
1915, ch. 101, Amended by Laws 1917, ch. 70 .....	101
1915, ch. 120 .....	100
1917, ch. 70 .....	101

### TEXAS.

### CONSTITUTION.

Art. 1, § 16 .....	637
Art. 1, § 19 .....	248
Art. 1, § 26 .....	937
Art. 3, § 40 .....	845
Art. 3, § 52 .....	193
Art. 3, § 57 .....	695
Art. 4, § 8 .....	845
Art. 16, § 20 .....	845
Art. 16, § 30 .....	193
Art. 16, §§ 49-51 .....	212

### CODE OF CRIMINAL PROCEDURE 1895.

Art. 1098 .....	523
-----------------	-----

### CODE OF CRIMINAL PROCEDURE 1911.

Art. 206 .....	500
Art. 903 .....	954
Art. 1197, Amended by Laws 1918 (4th Called Sess.) ch. 26 .....	661

### PENAL CODE 1911.

Art. 79 .....	658
Art. 302 .....	304
Art. 1147 .....	663

### VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE 1916.

Arts. 865c-865e, 865g .....	173
-----------------------------	-----

### VERNON'S ANNOTATED PENAL CODE 1916.

Art. 2 .....	173
Art. 690 .....	499

### REVISED STATUTES 1879.

Art. 2854 .....	647
-----------------	-----

### REVISED STATUTES 1895.

Arts. 745, 746 .....	802
----------------------	-----

### REVISED STATUTES 1911.

Art. 347 .....	171
Arts. 1103, 1114, 1115 .....	792
Art. 1231 .....	147
Art. 1591 .....	637
Art. 1626 .....	470
Art. 1830 .....	673
Art. 1830, subd. 9 .....	980
Art. 1830, subds. 24, 29 .....	630, 931
Art. 1903 .....	931
Art. 1974, Amended by Laws 1917, ch. 177 .....	960
Art. 2061, Amended by Laws 1913, ch. 59 .....	155
Art. 2075 .....	674
Arts. 2132, 2133, 2137, 2146 .....	819
Art. 2178 .....	637
Art. 2308 .....	673
Art. 3208, § 5 .....	540
Arts. 3235, 3330-3349 .....	483
Art. 3424 .....	972
Arts. 3489, 3490 .....	489
Art. 3690 .....	723
Art. 3759 .....	647
Art. 3785, subd. 10 .....	212
Art. 3971 .....	979
Art. 4807 .....	931
Arts. 4948, 4951 .....	556
Art. 5229 .....	661
Arts. 5458, 5459 .....	742
Art. 5604 .....	502
Art. 6495 .....	762
Art. 6552 .....	535
Art. 6589 .....	703
Art. 6654, subsec. 12 .....	703
Art. 6693 .....	535, 703
Art. 6715 .....	535

Arts. 6863, 6864, 6866,  
6882 ..... 533

**VERNON'S SAYLES' AN-  
NOTATED CIVIL STAT-  
UTES 1914.**

Art. 289 ..... 754  
Art. 279 ..... 941  
Arts. 582, 584 ..... 740  
Arts. 709, 710 ..... 190  
Arts. 716, 731, 732 ..... 552  
Art. 1103 ..... 972  
Art. 1116 ..... 269  
Arts. 1283c, 1283d ..... 222  
Art. 1589, subsec. 3 ..... 713  
Art. 1612 ..... 523  
Art. 1903 ..... 713  
Art. 1885 ..... 671  
Art. 2015 ..... 983  
Art. 2061 ..... 155  
Art. 2104 ..... 526  
Art. 2308, subd. 4. Amend-  
ed by Laws 1917, ch.  
124 ..... 713  
Art. 3632 ..... 526  
Art. 3965 ..... 263  
Art. 3969 ..... 675  
Art. 4078, subd. 5 ..... 526  
Art. 4083, subd. 4 ..... 526  
Arts. 4621, 4622, 4624 ..... 253  
Art. 4643 ..... 518  
Art. 4647 ..... 941  
Art. 4830 ..... 559  
Art. 4978 ..... 713

Arts. 5107-72, 5107-95 193  
Arts. 5246h-5246zzzz .....  
68, 183, 758  
Art. 5595 ..... 680  
Art. 5655 ..... 219  
Art. 5713 ..... 559  
Art. 5714 ..... 243, 559  
Arts. 6745a-6745f ..... 695  
Arts. 7687a, 7688a ..... 292

**VERNON'S ANNOTATED  
CIVIL STATUTES SUPPLE-  
MENT 1918.**

Art. 1903 ..... 673  
Art. 1974 ..... 960  
Art. 5107-95 ..... 193  
Arts. 5246-25, 5246-33,  
5246-44, 5246-82 ..... 239  
Arts. 7314e, 7314g ..... 952

**CITY CHARTERS.**

Dallas, art. 14, § 11 ..... 633  
Houston, art. 9, § 11 ..... 796

**LAWS.**

1901, ch. 125 ..... 469  
1905, ch. 122 ..... 193  
1905, ch. 122, §§ 20, 34, 48,  
50 ..... 193  
1907, ch. 74 ..... 695  
1909 (2d Ex. Sess.) ch. 24 ..... 695  
1913, ch. 32 ..... 253  
1913, ch. 59 ..... 155, 742

1913, ch. 139 ..... 695  
1913, ch. 172, §§ 72, 95 ..... 193  
1913, ch. 173 ..... 932  
1913, ch. 179 ..... 183, 758  
1917, ch. 60 ..... 952  
1917, ch. 60, §§ 7, 9 ..... 952  
1917, ch. 87, § 95 ..... 193  
1917, ch. 103, pt. 1, §§  
12d, 15 ..... 239  
1917, ch. 103, pt. 2, §§ 5,  
5a ..... 239  
1917, ch. 103, pt. 4, § 1,  
subsec. 1 ..... 239  
1917, ch. 124 ..... 713  
1917, ch. 176 ..... 673, 713  
1917, ch. 177 ..... 960  
1918 (4th Called Sess.) ch.  
7 ..... 169  
1918 (4th Called Sess.) ch.  
8 ..... 504  
1918 (4th Called Sess.) ch.  
8, § 1 ..... 500, 501  
1918 (4th Called Sess.) ch.  
24 ..... 845  
1918 (4th Called Sess.) ch.  
24, § 3 ..... 845  
1918 (4th Called Sess.) ch.  
26 ..... 661  
1918 (4th Called Sess.) ch.  
27, § 4 ..... 750  
1918 (4th Called Sess.) ch.  
31 ..... 845  
1918 (4th Called Sess.)  
ch. 85 ..... 956

**STEAM.**

See Railroads, ¶282.

**STIPULATIONS.**

See Appearance, ¶23.

¶18(1) (Tex.Civ.App.) Where defendants stipulated as to the title and location of the land which plaintiffs claimed to have acquired by adverse possession, they cannot repudiate the stipulation and defeat recovery on the ground that the land was located elsewhere, etc.—*Stark v. Leonard*, 212 S. W. 677.

**STREET RAILROADS.**

See Appeal and Error, ¶1060; Carriers;  
Evidence, ¶271, 317, 477, 539½, 553.

**II. REGULATION AND OPERATION.**

¶81(5) (Mo.App.) Where motorman of street car knew, or by ordinary care could have known, of the presence of a wagon driven along the track, and negligently failed to maintain a reasonable lookout, directly resulting in overtaking and colliding with the wagon, the street railway was liable.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶85(3) (Mo.App.) One driving a horse-drawn vehicle has an equal right with a street railway to use the streets of a city.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶114(2) (Mo.App.) Evidence held to sustain a finding that failure to sound a warning was proximate cause of injury to one riding in a wagon struck by defendant's street car.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶114(7) (Mo.App.) In an action for injuries to one riding in a wagon struck by a street car, evidence held to sustain a finding that the motorman did not keep a lookout, and did not see plaintiff's peril as soon as he should.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶114(10) (Tex.Civ.App.) In an action by one injured while riding in an automobile which collided with a street car, evidence held to sus-

tain a finding that the street car was operated at a dangerous rate of speed.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

¶114(19) (Mo.App.) In an action for the death of a woman struck by defendant's car while walking on the track, evidence held to make out a prima facie case for plaintiff under the last clear chance doctrine.—*Buzan v. Kansas City Rys. Co.*, 212 S. W. 905.

¶117(10) (Mo.App.) In an action for injuries in collision, whether defendant's motorman gave warnings of car's approach held for the jury, although he testified positively that he rang the bell, and plaintiff only testified that he did not hear the bell.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶117(11) (Tex.Civ.App.) In an action by one injured while riding in an automobile which collided with a street car, whether the motorman saw the automobile in a position of danger in time to have slowed down and avoided the injury held for the jury.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

¶118(1) (Mo.App.) In an action for injuries to one riding in a wagon struck by street car, plaintiff was entitled to have his case submitted upon all charges of negligence which the evidence would support, notwithstanding there was a charge under the humanitarian doctrine in the petition.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

¶118(1) (Tex.Civ.App.) In an action by one injured while riding in an automobile which collided with a street car, an instruction submitting negligence of defendant held within the pleadings.—*Texas Electric Ry. Co. v. Crump*, 212 S. W. 827.

¶118(4) (Mo.App.) An instruction allowing recovery if defendant's motorman saw, or by ordinary care could have seen, plaintiff in a position of peril in time by ordinary care to have avoided collision, "either by stopping car or by slackening its speed," was not faulty, although it was uncontroverted that the speed was slackened, and that motorman did not see plaintiff in time; it appearing that the motorman did not see plaintiff as soon as he should have.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

**SUBROGATION.**

⌚23(6) (Tex.Com.App.) One who pays purchase price of homestead subject to vendor's lien, or part thereof, on behalf of purchaser under agreement with the purchaser that vendor's lien shall be retained as security for the money advanced, is entitled to be subrogated to vendor's rights to such lien, and where amount advanced is in excess of that secured by vendor's lien, he is subrogated to the extent of the amount of the lien.—*W. C. Belcher Land Mortgage Co. v. Taylor*, 212 S. W. 647.

⌚31(5) (Ark.) Where surety on a note pays judgment on the note against him and his principal, the law does not itself make assignment to the surety of the judgment, because the surety, on paying the judgment, might have procured the judgment creditor to assign it to him.—*Cooper v. Rush*, 212 S. W. 94.

⌚41(6) (Ark.) In action by surety on note, alleging that he paid judgment on the note against him and his principal, and that he had the judgment assigned to himself, and that therefore he should be subrogated to the rights and remedies of the judgment creditor, and that he is in fact a substituted judgment creditor, which allegations are denied by defendant, plaintiff has the burden of proving the assignment to himself of the judgment for the law does not itself make the assignment, because the plaintiff, on paying the judgment, might have procured the judgment creditor to assign it to him.—*Cooper v. Rush*, 212 S. W. 94.

**SUBSCRIPTIONS.**

See Corporations, ⌚80, 232, 244; Evidence, ⌚441.

⌚4 (Ark.) The acceptance of a subscription is ineffectual unless within the lifetime of the subscriber.—*Blanton v. Forrest City Mfg. Co.*, 212 S. W. 330.

**SUICIDE.**

See Insurance, ⌚455, 646.

**SUNDAY.**

See Injunction, ⌚102, 118.

**TAXATION.**

See Adverse Possession, ⌚94; Appeal and Error, ⌚1010; Brokers, ⌚86; Constitutional Law, ⌚290; Corporations, ⌚648; Courts, ⌚231; Drains, ⌚85; Estoppel, ⌚68; Evidence, ⌚83; Frauds, Statute of, ⌚129; Injunction, ⌚157, 171, 176; Levees, ⌚25; Life Estates, ⌚18; Mandamus, ⌚118; Municipal Corporations, ⌚443, 445, 446, 485, 513, 516, 522; Pleading, ⌚8; Quieting Title, ⌚7; Schools and School Districts, ⌚111; Waters and Water Courses, ⌚216, 231.

**II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.**

⌚40(1) (Ark.) There must be uniformity in laying taxes upon taxable property, and an assessor or assessment board cannot discriminate against one tract of land in favor of all other property of the same kind in the county.—*Doniphan Lumber Co. v. Cleburne County*, 212 S. W. 308.

⌚42(1) (Tenn.) Priv. Laws 1917, c. 648, as to registering dogs, does not violate Const. art. 1, § 21, in that it takes property without just compensation being made therefor, nor article 2, § 28, providing that no one species of taxable property shall be taxed higher than any other species of property of the same value.—*Ponder v. State*, 212 S. W. 417.

⌚47(1) (Ky.) A court would not be justified in construing a statute so as to impose double taxation, unless the terms of the statutes require it.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

**III. LIABILITY OF PERSONS AND PROPERTY.****(B) Corporations and Corporate Stock and Property.**

⌚117 (Ky.) Ky. St. § 4189a, requiring payment of franchise or license tax by corporations, but exempting corporations "which under existing laws are liable to pay a franchise or license tax," and section 4214a, imposing additional license tax on manufacturers of double stamp tax spirits, having become laws on the same day, plaintiff, a manufacturer of double stamp spirits, was bound for the payment of license tax provided by the latter section at the time when the former section became a law, and not liable for license tax provided by the former.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

**V. LEVY AND ASSESSMENT.****(B) Assessors and Proceedings for Assessment.**

⌚317(1) (Ark.) The only authority possessed by the Arkansas tax commission is that conferred upon it by statute in express terms or by necessary implication.—*State v. Mississippi, A. & W. Ry. Co.*, 212 S. W. 317.

⌚317(3) (Ark.) Where a lumber company organized a railroad company and built a road and operated it as such, but extended it over its property for some 12 miles, and used the extension wholly as a log or tram road in connection with the railroad owned and operated by the subsidiary company, such extension did not constitute a "railroad" within Acts 1911, p. 233, and was not assessable as such to the railroad company by the Arkansas tax commission, which has no authority to assess tram or log roads used for private purposes.—*State v. Mississippi, A. & W. Ry. Co.*, 212 S. W. 317.

**(E) Assessment Rolls or Books.**

⌚446 (Ark.) The findings and orders of the Arkansas tax commission are final except when attacked for fraud or want of jurisdiction.—*State v. Mississippi, A. & W. Ry. Co.*, 212 S. W. 317.

**(G) Review, Correction, or Setting Aside of Assessment.**

⌚499 (Ark.) In a proceeding under Acts 1917, p. 1243, § 8, to reduce an assessment and valuation of several tracts of land as discriminatory, the burden is on the petitioner to show by proof that the valuations placed upon the several tracts were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated.—*Doniphan Lumber Co. v. Cleburne County*, 212 S. W. 308.

In proceeding under Acts 1917, p. 1243, § 8, to reduce assessment and valuation of land, the costs are to be taxed against the petitioner, and not the county, although the assessment and valuation is found discriminatory and is reduced, Kirby's Dig. § 965, not being applicable to such proceeding, nor to any other special statutory proceedings; no authority existing in any such proceeding for taxing costs against the county, unless imposed by the act.—*Id.*

**VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.**

⌚535 (Ky.) Ky. St. § 162, does not authorize the return by the state auditor of a tax improperly assessed against or paid by an individual taxpayer; the primary object of the statute being to authorize the auditor to refund to officers who collected taxes due the state and paid more into the treasury than was in fact due from them.—*Greene v. Federal Coal Co.*, 212 S. W. 580.

The tax imposed by Ky. St. Supp. 1918, § 4019a9, for recording mortgages is a tax upon the indebtedness, and not the land, and the one



paying such a tax is not entitled to a refund on the ground that he did not have title to the land, and the mortgage was subsequently canceled, although such person really believed he owned the land at the time the mortgage was executed.—Id.

—538 (Ky.) Where one voluntarily pays taxes to the county clerk, who pays it to the state auditor, he cannot recover such money from the state auditor, although he paid such money under a mistake of law and fact, and although such money was not due.—*Greene v. Federal Coal Co.*, 212 S. W. 580.

—538 (Ky.) If the assessments can be collected by distraint, they were involuntarily paid and can be recovered, but if the taxes can only be collected by suit the taxpayer has the opportunity for a day in court, and if instead of resisting the payment he pays it, the payment is voluntary and cannot be recovered.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

—539 (Ky.) The general doctrine which prevails is, if the taxes were voluntarily paid, they cannot be recovered, although not due and paid under a mistake of law.—*Greene v. E. H. Taylor, Jr., & Sons*, 212 S. W. 925.

### VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

#### (B) Summary Remedies and Actions.

—586 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 7687a and 7688a, a suit for delinquent taxes for years between 1896 and 1910 cannot be maintained where the tax collector of the county did not mail to defendant or the record owner of the land a written notice showing the amount of taxes appearing delinquent prior to May 1, 1916.—*Barber v. State*, 212 S. W. 292.

—589 (Tex.Civ.App.) Under the express provisions of Vernon's Sayles' Ann. Civ. St. 1914, arts. 7687a and 7688a, relating to delinquent taxes, a suit for delinquent taxes for a period between 1896 and 1910 could not be maintained by the county attorney subsequent to January 1, 1918.—*Barber v. State*, 212 S. W. 292.

#### (C) Remedies for Wrongful Enforcement.

—608(2) (Ark.) Where the Arkansas tax commission in fixing the assessment of a railroad has considered and included elements of value of private property not owned or used by the road or by any one for it as public carrier, the action amounted to an illegal exaction or the taking of property without due process of law, and the railroad, though it has petitioned the commission to reduce the assessment, and requested inspection of its property, may have relief by injunction against an enforcement of the illegal assessment. While the state is bound by an assessment made by its officers and assessing boards unless otherwise provided by statute, individual taxpayers are entitled to injunctive relief against enforcement of illegal exactions or assessments.—*State v. Mississippi, A. & W. Ry. Co.*, 212 S. W. 317.

### IX. SALE OF LAND FOR NONPAYMENT OF TAX.

—624 (Ky.) The filing of an affidavit in the office of the county clerk showing that persons from whom taxes were due had no personal property out of which taxes could have been made is an essential step in proceeding to sell land for taxes.—*Miller v. Powers*, 212 S. W. 453.

—658(2) (Ky.) The mailing by the sheriff to a taxpayer of a post card 15 days before sale giving notice of time and place of sale of land for taxes is an essential step, which, if omitted, renders sale as well as tax deed ineffectual, except to impress property sold with a lien for amount of taxes, interest, penalty, and cost in favor of purchaser.—*Miller v. Powers*, 212 S. W. 453.

### XI. TAX TITLES.

#### (A) Title and Rights of Purchaser at Tax Sale.

—733 (Tex.Civ.App.) In the absence of a provision to the contrary in statute or judgment under which sale is made, the purchaser at a valid tax sale acquires title free from any lien for taxes assessed and delinquent for any years previous to that for which sale is made, and the state cannot recover state and county taxes antedating foreclosure sales.—*State v. Liles*, 212 S. W. 517.

—734(1) (Ky.) A tax deed does not confer title on the grantee, if the proceedings by the sheriff, clerk of the county court, or the purchaser which led up to the deed were irregular and essential steps were omitted, and it may be attacked at any time on the ground that it is void.—*Miller v. Powers*, 212 S. W. 453.

#### (B) Tax Deeds.

—750 (Ky.) Notice required by Ky. St. §§ 4153, 4156, must be given by a purchaser of land at a tax sale to the owner in order to entitle him to deed after expiration of redemption period, and where such notice is not given, sale is invalid, and sheriff's deed does not confer title.—*Miller v. Powers*, 212 S. W. 453.

### XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

—859(1) (Ky.) Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposing an inheritance tax upon personal property of a nonresident having a legal situs in the state, where the nonresident had no real property in the state, was valid.—*De Witt v. Commonwealth*, 212 S. W. 437.

—859(7) (Ky.) Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposing an inheritance tax on personal property of a nonresident not having a legal situs in the state, although the nonresident owned no real property in the state, was not rendered inoperative by reason of the failure of section 4281m, or other statutes, to provide a remedy for compelling the payment of the tax, and where a nonresident died before the passage of the act of 1914 (Laws 1914, c. 56), which provided a remedy and tribunal to enforce valuation and payment of the tax, the commonwealth can proceed under the latter statute to value the property and collect the tax at any time before distribution; although it results in giving the act a retroactive effect.—*De Witt v. Commonwealth*, 212 S. W. 437.

—862 (Tenn.) Although Acts 1893, c. 174, § 1, providing for collateral inheritance tax, was not enforceable for a time against property passing to an intestate's brother or sister in view of the revenue law, Acts 1893, c. 89, § 7, passed subsequently, which was held to repeal it by implication to the extent of its repugnance and the subsequent revenue acts, Acts 1895 (2d Sess.) c. 4, Acts 1897, c. 2, Acts 1899, c. 432, § 1, Acts 1901, c. 128, Acts 1903, c. 257, Acts 1907, c. 541, Acts 1909, c. 479, Acts 1915, c. 101, and Acts 1917, c. 70, amending Acts 1915, c. 101, and the language, "and acts amendatory thereof," in Acts 1901, c. 128, which refers to live amendatory acts only, does not have the effect of reinstating Acts 1893, c. 89, § 7, and shares of brothers and sisters are now subject to collateral inheritance tax.—*State v. Shepherd's Estate*, 212 S. W. 101.

—867(1) (Ky.) Laws 1906, c. 22, art. 19, now Ky. St. § 4281a, imposed an inheritance tax on personal property of a nonresident having a legal situs in the state, although he had no real property in the state.—*De Witt v. Commonwealth*, 212 S. W. 437.

—893 (Ky.) Before amendment of 1914 (Laws 1914, c. 56), neither the county nor circuit courts had jurisdiction, under Laws 1906, c. 22, art. 19, now Ky. St. § 4281m, or other statutes, to ascertain the value of personal property of a nonresident upon which Ky. St. § 4281a, im-



posed an inheritance tax, where the deceased had no real property in the state.—*De Witt v. Commonwealth*, 212 S. W. 437.

In the matter of an inheritance tax, the valuation can be made and the tax paid at any time prior to the distribution of an estate.—*Id.*

## TELEGRAPHS AND TELEPHONES.

See Appeal and Error, ⚡1050; Dedication, ⚡14; Evidence, ⚡5, 148.

### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⚡10(2) (Tex.) A corporation organized for the express purpose of operating a long distance telephone line has the power and may be treated as "created for the purpose of constructing and maintaining such line," within Rev. St. 1911, art. 1231, authorizing such companies to construct their poles and wires upon public roads or streets.—*Roaring Springs Town-Site Co. v. Paducah Telephone Co.*, 212 S. W. 147.

⚡10(3) (Tex.) Streets in a town site which have been dedicated to public use by the town-site company, which has reserved a right to grant the use of such streets to telephone companies, are subject to the operation of Rev. St. 1911, art. 1231, authorizing telephone companies to construct their poles and wires upon any public road or street.—*Roaring Springs Town-Site Co. v. Paducah Telephone Co.*, 212 S. W. 147.

### II. REGULATION AND OPERATION.

⚡54(4) (Tex.Civ.App.) A contract between a sender of a telegram and a telegraph company to the effect that the company shall not be liable for damages or statutory penalties where the claim is not presented in writing within 95 days after the cause of action shall have arisen is valid, and is binding on the parties thereto and their principals, unless procured by fraud, or unless unreasonable under the facts and circumstances of the particular case, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 5714*.—*Western Union Telegraph Co. v. Janko*, 212 S. W. 248.

⚡66(1) (Tex.Civ.App.) One dictating a message to a telegraph agent and then signing the message, and the sendee named in the message, are presumed to know the contents of a contract on the back of the blank.—*Western Union Telegraph Co. v. Janko*, 212 S. W. 243.

⚡66(1) (Tex.Civ.App.) A telegram received by a telegraph company over its telephone line, maintained for business purposes, was presumably received by an authorized person; a presumption becoming conclusive in the absence of contrary proof.—*Western Union Telegraph Co. v. Campbell*, 212 S. W. 720.

In action for delay in transmitting death message, the burden of proof is on the telegraph company, receiving messages by phone for transmission, to show that the person who answered the telephone and actually received the particular message was some person wholly unauthorized so to act.—*Id.*

⚡66(4) (Tex.Civ.App.) Evidence held insufficient to show that failure to promptly deliver telegram sent by a bank with which plaintiff had pledged stock to secure note to one who had agreed to advance money to pay off note and redeem stock notifying him that, if loan was not retired, collateral would be sold, was the proximate cause of the loss due to acquisition or sale of stock by the bank.—*Western Union Telegraph Co. v. Haynes*, 212 S. W. 260.

⚡66(4) (Tex.Civ.App.) In an action against a telegraph company for delay in transmission of a death message, evidence held to support conclusion that for the purpose of receiving telegrams during night hours the telegraph operator of a railway company in a yard office was an authorized agent of the telegraph com-

pany, for whose negligence it was responsible.—*Western Union Telegraph Co. v. Campbell*, 212 S. W. 720.

In an action against a telegraph company for delay in transmission of a death message, evidence held sufficient to sustain finding that the person who received the telegram by telephone from the person sending it to plaintiff was one for whose negligence the telegraph company was liable.—*Id.*

## TENANCY IN COMMON.

See Homestead, ⚡146.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡15(2) (Ky.) A cotenant, to establish the disseisin by adverse holding for 15 years, must show that he gave notice to his cotenants by express declaration that he was claiming the whole estate in severalty and denying their right therein, or he must have so used the premises as to give constructive notice to the cotenants, even where the life tenant in possession was also a cotenant.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

One who held the entire property under a deed in severalty of record from a tenant in common, who was also life tenant, for 15 years after the death of the grantor, acquired title by adverse possession, even though the cotenants did not have actual knowledge of the adverse holding.—*Id.*

⚡15(6) (Ky.) One joint tenant cannot acquire title by adverse possession against his cotenants by mere possession, no matter how long continued, for he has a right to occupy the premises.—*Miller v. Powers*, 212 S. W. 453.

⚡15(7,8) (Ky.) The sale and conveyance by a cotenant by recorded deeds of the whole or portions of an estate in fee, or the erection of permanent and lasting structures, are such acts as are reasonably calculated to apprise a fairly prudent cotenant of the fact that the claimant is holding adversely.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

⚡15(7,8) (Ky.) The statute of limitations will not begin to run in favor of a cotenant in possession of land until notice of his adverse possession is brought home to his co-owners by acts of such notoriety and conspicuousness as would be calculated to put ordinarily prudent persons on notice of his adverse holding.—*Miller v. Powers*, 212 S. W. 453.

⚡15(10) (Ky.) The burden is upon a cotenant, claiming in severalty, to establish the disseisin by adverse holding for the statutory period.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

⚡15(10) (Ky.) Possession of premises by tenant in common is presumed amicable, and not hostile to his cotenants.—*Miller v. Powers*, 212 S. W. 453.

The burden is upon a joint tenant claiming adversely to his co-owners to show a disseisin and notice to his co-owners of his hostile possession.—*Id.*

⚡37 (Ky.) One joint tenant is entitled to an accounting for rents and royalties arising from oil produced and marketed from the premises by his co-owners.—*Miller v. Powers*, 212 S. W. 453.

### III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

⚡45 (Tex.Com.App.) A deed from one tenant in common to a specific part of the common property will be recognized and the purchaser thereof protected by setting apart to him the specific part so conveyed, if this can be done without prejudice to the other owners.—*Lasater v. Ramirez*, 212 S. W. 935.

The right of a purchaser from one tenant in common to a specific tract conveyed to him does not depend upon the nonjoining tenants' assent to or recognition of the sale, nor is it

created through estoppel, but is conditioned solely upon whether its enforcement would prejudice the other owners.—Id.

Where one tenant in common has conveyed a specific part of the common property and there remains a sufficient estate out of which the interests of the nonjoining tenants can be satisfied, the remaining acreage being exactly the same in kind and value as the tract sold, the nonjoining tenants cannot be prejudiced, and the right of the purchaser should be enforced.—Id.

Since the right of a purchaser of a specific portion of lands held in common from one of the tenants does not depend upon their assent or upon estoppel, it is immaterial that a nonjoining tenant against whom it is sought to enforce the right is mentally incompetent, or that an estoppel cannot arise from his conduct, where his rights will not be prejudiced by the sale.—Id.

## TENDER.

See Execution, ¶172; Release, ¶24.

## TETANUS.

See Evidence, ¶13.

## THEATERS AND SHOWS.

See Municipal Corporations, ¶808, 814.

## THREATS.

See Criminal Law, ¶596; Homicide, ¶194, 309, 339; Witnesses, ¶177.

## TICK ERADICATION LAW.

See Animals, ¶29, 30, 34, 36; Criminal Law, ¶322, 400, 429, 430.

## TIME.

See Animals, ¶4, 36; Appeal and Error, ¶193, 230, 274, 845, 722, 1165, 1203; Assignments, ¶13; Brokers, ¶55, 56; Carriers, ¶177, 227, 228, 230; Chattel Mortgages, ¶157; Continuance, ¶20; Contracts, ¶10; Corporations, ¶482; Costs, ¶173; Criminal Law, ¶815, 1081, 1037, 1049; Death, ¶39; Drains, ¶85; Easements, ¶7, 36; Elections, ¶151; Eminent Domain, ¶230, 238; Equity, ¶57; Executions, ¶13; Evidence, ¶43, 123, 148, 320; Frauds, Statute of, ¶144; Garnishment, ¶89, 108, 162; Habeas Corpus, ¶99; Highways, ¶77; Homestead, ¶31, 96, 146; Homicide, ¶163, 181; Husband and Wife, ¶208, 276; Insurance, ¶73, 198, 300, 807; Interest, ¶53; Intoxicating Liquors, ¶223; Landlord and Tenant, ¶291; Larceny, ¶16, 17; Limitation of Actions, ¶55, 100, 127, 131; Logs and Logging, ¶3; Mandamus, ¶118; Master and Servant, ¶385; Mines and Minerals, ¶55, 75, 77, 78; Mortgages, ¶350; Municipal Corporations, ¶331, 516, 522, 741; Negligence, ¶56; Partnership, ¶49; Perpetuities, ¶4, 7; Pleading, ¶228; Pledges, ¶56; Public Lands, ¶173; Sales, ¶193; Schools and School Districts, ¶50; Statutes, ¶159, 256, 267; Subrogation, ¶4; Taxation, ¶586, 589, 658, 734, 859, 893; Telegraphs and Telephones, ¶54, 66; Trespass, ¶52; Trial, ¶251; Trusts, ¶61, 227; Wills, ¶165; Witnesses, ¶159.

¶10(9) (Mo.App.) Under Rev. St. 1909, §§ 7705, 8057, subd. 4, where judgment in unlawful detainer was rendered in justice court December 27, 1915, in order for the justice to have had the authority to grant appeal therefrom, the affidavit for appeal and appeal bond must have been filed with him on or before the 1st day of the following January, which was a Saturday.—Downing v. La Shot, 212 S. W. 30.

¶11 (Ky.) Generally the law takes no account of fractions of days.—Greene v. E. H. Taylor, Jr., & Sons, 212 S. W. 925.

## TOILETS.

See Municipal Corporations, ¶733.

## TORTS.

See Action, ¶25, 27; Contracts, ¶189; False Imprisonment, ¶39; Fraud, ¶11-65; Libel and Slander, ¶1-120; Municipal Corporations; Negligence, ¶1-141; Trespass, ¶19-62; Trover and Conversion.

¶12 (Tex.Civ.App.) A person interfering with a contract of sale of real estate is liable in damages in a proper case, although the contract was obnoxious to the statute of frauds, but not if the contract breached be one which the party may or may not perform at his option.—Richardson v. Terry, 212 S. W. 523.

## TOWNS.

See Dedication, ¶14; Telegraphs and Telephones, ¶10.

## TRANSPORTATION ACT.

See Statutes, ¶5, 47, 48.

## TREASON.

See Criminal Law, ¶1182; Habeas Corpus, ¶30; Indictment and Information, ¶125; War, ¶4.

## TREES.

See Pleading, ¶11.

## TRESPASS.

See Judgment, ¶736; Pleading, ¶11; Venue, ¶8.

## II. ACTIONS.

### (A) Right of Action and Defenses.

¶19(1) (Ky.) In action wherein defendants came to occupy position of plaintiff in action for trespass on realty, and plaintiff came to occupy position of defendants, title of defendants, as well as their possession and right to possession, being put in issue, they were under necessity to recover on strength and validity of their own title, and not because of any want of title in plaintiff.—Prewitt v. Wilborn, 212 S. W. 442.

### (B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

¶40(5) (Mo.App.) In action for destruction by defendant of ornamental shade tree upon plaintiff's premises, petition held sufficient to state cause of action for single damages for common-law trespass.—McKinsey v. Guthrie, 212 S. W. 563.

In action for destruction of shade tree, petition, which failed to state that defendant had no right or interest in the tree, was insufficient to support a judgment for treble damages, under Rev. St. 1909, § 5448.—Id.

### (D) Damages.

¶52 (Ky.) Owner's measure of damages for timber cut from his land is the reasonable fair market value of timber at the time and place it was cut.—Hendrix v. Lewis, 212 S. W. 569.

¶52 (Mo.App.) Owner's measure of damages for destruction of a shade or ornamental tree is the difference in the market value of the premises on which the tree is growing with or without the tree, being the value of the tree because of its peculiar place and location on the premises.—McKinsey v. Guthrie, 212 S. W. 563.

## TRESPASS TO TRY TITLE.

See Appeal and Error, ¶173, 230, 931, 1040, 1050; Boundaries, ¶37; Deeds, ¶53; Estoppel, ¶97; Evidence, ¶271, 317; Executors and Administrators, ¶439; Injunction, ¶136; Judgment, ¶712; Landlord and Tenant, ¶180; Limitation of Actions, ¶39; Public Lands, ¶173; Trespass to Try Title, ¶41; Trial, ¶53.

## I. RIGHT OF ACTION AND DEFENSES.

¶6(2) (Tex.Com.App.) While the plaintiffs in trespass to try title must have title at the commencement of the suit, and one without title cannot sue for the use of another in such action, a conveyance pendente lite by plaintiff does not affect the progress or determination of the suit, and grantee is bound by the judgment rendered, and a judgment for plaintiff inures to grantee's benefit, and such conveyance does not constitute an outstanding title.—*Heard v. Vineyard*, 212 S. W. 489.

¶10 (Tex.Com.App.) The assertion of an equitable title arising out of a contract to convey and payment of the purchase money is sufficient to support an action in trespass to try title.—*McBride v. Loomis*, 212 S. W. 480.

¶11 (Tex.Com.App.) Where one held land for years under a void administrator's deed, a quitclaim deed from the heirs of one who had owned the property at a time prior to the death of the administrator's deceased did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed.—*McBride v. Loomis*, 212 S. W. 480.

¶12 (Tex.Civ.App.) Proof of prior possession is sufficient to sustain an action of trespass to try title, when defendant is shown to be a mere naked trespasser.—*Allen v. Vineyard*, 212 S. W. 266.

¶18 (Tex.Com.App.) While it is not necessary for a defendant in trespass to try title to connect himself with an outstanding title, it is necessary that he establish the validity of such outstanding title.—*McBride v. Loomis*, 212 S. W. 480.

## II. PROCEEDINGS.

¶32 (Tex.Civ.App.) Petition in trespass to try title to deceased's homestead held to state cause of action.—*Clark v. Scott*, 212 S. W. 728.

¶38(2) (Tex.Com.App.) In trespass to try title, where there was evidence that both parties claimed under M., who was not shown to have had any title, as a common source of title, defendant also showing the acquisition by him of the interest of the heirs of a person admitted to have previously had title, burden is on defendant to show that M. had not acquired an equitable title from the former owner.—*McBride v. Loomis*, 212 S. W. 480.

¶41(2) (Tex.Com.App.) Evidence that defendant in trespass to try title claims under a common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims, and this necessarily involves the assumption that he had acquired the title of all previous owners.—*McBride v. Loomis*, 212 S. W. 480.

¶41(3) (Tex.Civ.App.) In trespass to try title, evidence held sufficient to support finding that the southwest corner of survey owned by defendant was on a river bank, so that land claimed by plaintiff as a survey of land lying between defendant's survey and the river was in fact in defendant's survey.—*Burkett v. Chestnutt*, 212 S. W. 271.

## TRIAL.

See Army and Navy, ¶34; Constitutional Law, ¶43; Continuance; Costs; Inal Law, ¶636-832; Evidence, ¶271; Jury; New Trial; Venue.

For trial of particular actions or proceedings see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

## IV. RECEPTION OF EVIDENCE.

### (A) Introduction, Offer, and Admission of Evidence in General.

¶53 (Tex.Com.App.) In trespass to try title, where defendant, relying on a deed, introduced the same in evidence, the recitals in the deed were available to the plaintiff in the establishment of his title, although defendant was also relying on a quitclaim deed from heirs of a former owner.—*McBride v. Loomis*, 212 S. W. 480.

¶54(1) (Mo.App.) In an action for personal injuries, a layman's testimony as to physical appearance of plaintiff and conversations with him, admitted only on the question of his ability to come into court to testify, was not objectionable.—*Slinkard v. Lamb Const. Co.*, 212 S. W. 61.

### (B) Order of Proof, Rebuttal, and Re-opening Case.

¶63(2) (Mo.) In a personal injury action, it was within the sound discretion of the trial court to admit the exhibition of plaintiff's injuries to the jury in rebuttal; it being a matter which should have been shown in chief.—*Shanahan v. City of St. Louis*, 212 S. W. 851.

### (C) Objections, Motions to Strike Out, and Exceptions.

¶85 (Tex.Civ.App.) There is no error in overruling general objection to evidence a portion of which is admissible.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

¶115(2) (Tex.Civ.App.) In an action for damages for breach of an employment contract, statement of plaintiff's counsel, "Remember, if you want the plaintiff to recover, answer the first question, 'No,'" held improper, since it ought not to be assumed that an impartial jury wanted to return a verdict for either party.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

¶121(2) (Tex.Civ.App.) In an action for breach of employment contract, the statement of defendant's counsel that the evidence would sustain a verdict for \$25,000, there being nothing inflammatory in its character, was not misconduct, counsel having the right to present to the jury his deductions from the evidence.—*Merchants' Life Ins. Co. v. Griswold*, 212 S. W. 807.

¶127 (Tex.Civ.App.) In action against defendant light company for injuries sustained by plaintiff, who, when walking along sidewalk, stepped upon a meter box lid, which lid gave way and caused her to fall into the opening, permitting introduction of evidence showing that defendant was insured in an indemnity company, held error and prejudicial to rights of defendant.—*Water, Light & Ice Co. v. Weatherford v. Barnett*, 212 S. W. 236.

¶132 (Mo.App.) In an action against a railroad company for damages from a flood caused by an embankment, the improper remark of plaintiff's counsel, "They think these corporations are above the law," was cured by court's direction to refrain from that line of argument and withdrawal of remarks by counsel.—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

¶133(1) (Tex.Civ.App.) In view of rules 39, 40, 41, for the district and county courts (142 S. W. xx), requiring that counsel confine their arguments strictly to the evidence and to the argument of opposing counsel, it is duty of district judge to keep counsel within the record, and not to jeopardize appellants' rights by inferentially sanctioning highly wrought and inflammatory argument.—*Houston Ice & Brewing Co. v. Harlan*, 212 S. W. 779.

⇒133(4) (Mo.App.) In an action against a railroad company for damages from a flood caused by an embankment, the improper remark of plaintiff's counsel, "They think these corporations are above the law," was cured by court's direction to refrain from that line of argument and withdrawal of remarks by counsel.—*Grace v. Missouri, K. & T. Ry. Co.*, 212 S. W. 41.

## VI. TAKING CASE OR QUESTION FROM JURY.

### (A) Questions of Law or of Fact in General.

⇒136(1) (Mo.App.) It is particularly the jury's function to pass upon what would meet the requirements or satisfy the mind of that theoretical, reasonable, ordinary person which the law gives to the jury as a standard by which to measure human conduct.—*Davis v. Geiger*, 212 S. W. 384.

### (B) Demurrer to Evidence.

⇒156(2) (Mo.App.) In determining whether defendant's demurrer to evidence should have been sustained, the court can consider only evidence which can be regarded as properly bearing on the issue raised by the petition.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒156(3) (Mo.App.) Demurrer to the evidence admits the truthfulness of every fact which the evidence tends to prove, as well as every reasonable inference deducible therefrom.—*Davis v. Greenlee*, 212 S. W. 22.

## VII. INSTRUCTIONS TO JURY.

### (A) Province of Court and Jury in General.

⇒191(6) (Ark.) Instruction directing the jury to find for plaintiff unless they found him guilty of contributory negligence held erroneous as assuming that defendant was guilty of negligence.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

⇒191(10) (Tex.Civ.App.) In a servant's action for injuries, a charge assuming decrease in the servant's earning capacity as a proven fact from statement of a physician that plaintiff would always have a weak arm was erroneous, since the weakened condition of the arm need not necessarily decrease plaintiff's earning capacity.—*Texas & Pacific Coal Co. v. Ervin*, 212 S. W. 234.

⇒191(11) (Tex.Civ.App.) In servant's action for injuries, a charge: "What damage, if any, has plaintiff sustained by reason of the injuries alleged by him? In answering state the amount, if any, in figures, in dollars, or in dollars and cents, just as you find"—was improper, in that it assumed the liability of the defendant.—*Texas & Pacific Coal Co. v. Sherbely*, 212 S. W. 758.

In servant's action for injuries, a charge that as a guide in answering special issue jury should assess plaintiff's damages, if any they find he has sustained, at such sum, etc., held improper as assuming negligence.—*Id.*

⇒192 (Mo.App.) An instruction is not erroneous in assuming facts to be true which are uncontradicted on the trial.—*Argeropoulos v. Kansas City Rys. Co.*, 212 S. W. 369.

⇒194(1) (Ark.) A requested instruction which would charge the jury on the weight of the evidence was properly refused.—*Free v. Maxwell*, 212 S. W. 325.

⇒194(15) (Tex.Civ.App.) Refusal of instruction requested by initial carrier in suit by shipper for shipment of cabbage damaged as to time of shipment required from S. in Texas to S. in Missouri was proper; such charge being directly upon the weight of the evidence, which was a matter for the jury.—*Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

⇒194(16) (Mo.App.) In action for injuries to pedestrian falling on slippery pavement, instruction that it was duty of city to construct and maintain pavement in reasonably smooth condition, and that by reason of pavement being smooth it may be slippery, is not negligence on part of city, held properly refused as substantially a demurrer to the evidence.—*Berry v. City of Sedalia*, 212 S. W. 34.

⇒194(17) (Ark.) In action for injuries to person working about cars, instruction that jury should find assumed risk if they found the facts as recited in the instruction held erroneous as invading province of jury.—*Missouri Pac. R. Co. v. Carey*, 212 S. W. 80.

⇒199 (Mo.App.) In suit by a company against its indemnity insurer for loss through damages from death of or injuries to a servant, instructions held properly refused as submitting questions of law.—*Hoagland Wagon Co. v. London Guarantee & Accident Co.*, 212 S. W. 393.

⇒199 (Mo.App.) In an action for personal injuries resulting from plaintiff's being struck by a motorcycle at a street crossing, an instruction that, if the jury found that the driver "was employed by defendant and acting for it in the scope of his employment," then the negligence of said operator was the negligence of the defendant, held not erroneous as submitting a mixed question of law and fact to the jury, where both plaintiff's and defendant's evidence showed that the operator was acting within the scope of his employment at the time of the collision.—*Woods v. Kansas City Light & Power Co.*, 212 S. W. 899.

### (B) Necessity and Subject-Matter.

⇒207 (Tex.Civ.App.) In an action for flooding lands by negligent construction of a railroad bridge, where testimony that lower bridges were similarly constructed was admitted over defendant's objection, it was error to refuse to charge that jury should not award any damages as having resulted from the condition of bridges below plaintiff's land.—*Ft. Worth & D. C. Ry. Co. v. Speer*, 212 S. W. 762.

⇒214 (Ky.) Where defendant pleaded and produced evidence to show that the damages complained of resulted, not by breach of contract to construct ditches specified in a right of way deed, but by water backing up through ditches from a pond into which plaintiff, the grantor, had drained land in accordance with such contract and for drainage of which pond defendant was not responsible, it was error not to submit that issue to the jury by instruction.—*Chicago, M. & G. R. Co. v. Stahr*, 212 S. W. 115.

### (C) Form, Requisites, and Sufficiency.

⇒240 (Tex.Civ.App.) A requested instruction, containing a correct proposition of law, but also containing matters strongly argumentative, and being a very partisan presentation of the issue, was properly refused.—*Hart-Parr Co. v. Krizan & Maler*, 212 S. W. 835.

### (D) Applicability to Pleadings and Evidence.

⇒251(2) (Mo.App.) Where shipper of station suing for his death caused by failure to transport as expeditiously as required by statute by his instructions not only broadened issues, but abandoned cause of action for failure to transport as expeditiously as required and substituted a cause of action based on railroad's common-law duty to transport without delay and within a reasonable time, there was error.—*Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

⇒251(8) (Tex.Civ.App.) In a servant's action against a master for personal injury, where the defense of assumed risk was not pleaded, the court was not in error in failing to submit that issue.—*Texas & Pacific Coal Co. v. Ervin*, 212 S. W. 234.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

↪251(8) (Tex.Civ.App.) In servant's action for injuries occasioned by the improper turning of a switch by another servant, in submitting the question of negligence as to turning a switch the charge should be confined to such single servant, and a charge, "Was defendant, through its employees or agents, guilty of 'negligence' \* \* \* in turning the switch in wrong manner, if it or they did so, and in failing to notify plaintiff as to how said switch was turned?" was improper.—Texas & Pacific Coal Co. v. Sherbley, 212 S. W. 758.

↪252(1) (Tex.Civ.App.) It is error for the trial court to submit to the jury an issue which is not supported by competent evidence.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

↪252(5) (Tex.Civ.App.) In railroad's condemnation proceedings the court properly refused a requested charge that the jury should not consider injuries, if any, which the owners sustained in common with the community in general, not peculiar to them, where there was no evidence that the community generally sustained injury.—Gulf & Interstate Ry. Co. of Texas v. Stephenson, 212 S. W. 215.

↪252(7) (Tex.Civ.App.) Refusal of instruction requested by initial carrier in suit by shipper as to the act of God in destroying the cabbage shipped was not error, where the decayed condition of the cabbage was not traced to low temperature, and there was no fact sustaining such a theory.—Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son, 212 S. W. 530.

In suit by a shipper for cabbage damaged, refusal of instruction asked by initial carrier as to the freezing of the cabbage was not error, where there was no evidence tending to show that the cabbage had frozen.—Id.

↪252(7) (Tex.Civ.App.) Instructions in a negligence case need not refer to contributory negligence, where there is no evidence raising the issue.—Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

↪253(4) (Ark.) Instruction on assumed risk which erroneously omitted the question of appreciation of danger held properly refused.—Missouri Pac. R. Co. v. Carey, 212 S. W. 80.

↪253(4) (Mo.App.) In an action for injuries to pedestrian falling on a slippery street crossing pavement alleged to have been constructed in its slippery condition and to have become slippery by wear, instructions confining plaintiff's right to recover to the pavement having been worn so smooth and slick that it was unsafe for pedestrians held properly refused.—Berry v. City of Sedalia, 212 S. W. 34.

#### (E) Requests or Prayers.

↪255(7) (Tex.Civ.App.) In father's habeas corpus proceeding to procure custody of children from maternal grandparents, who had adopted the children upon the mother's death, father should have requested instruction that adoption of children did not confer the right of custody, if he had desired such instruction.—State v. Jackson, 212 S. W. 718.

↪256(13) (Tex.Civ.App.) Where in a shipper's action against connecting carriers a proper instruction is not sufficiently clear that damages are to be assessed separately, a special charge to that effect must be requested.—Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero, 212 S. W. 981.

↪260(1). It was not error to refuse requested instruction covered by a given instruction.—(Ark.) C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 205;

(Mo.App.) Argeropoulos v. Kansas City Rys. Co., 212 S. W. 369;

(Tex.Civ.App.) Texas Electric Ry. Co. v. Crump, 212 S. W. 827.

↪260(8) (Ark.) In suit for personal injuries, there was no error in refusing to give an instruction requested by defendant defining culpable negligence, where another instruction

given by the court gave a complete definition of that term.—Missouri Pac. R. Co. v. Carey, 212 S. W. 80.

#### (G) Construction and Operation.

↪295(4) (Ky.) Where plaintiff's instruction is erroneous and misleading and the court has erroneously refused another instruction presenting an affirmative defense, such errors held not cured by defendant's instructions directing a verdict if specified facts are found under the rule that instructions will be considered as a whole.—Chicago, M. & G. R. Co. v. Stahr, 212 S. W. 115.

↪296(1) (Mo.App.) No reversible error can be predicated on obscurity in meaning of first instruction given for plaintiffs where obscurity was removed by plaintiffs' second instruction, and instructions on the part of defendant, plaintiffs' first instruction not leaving out any necessary element of their cause of action, and not containing any positive misdirection.—Davis v. Geiger, 212 S. W. 384.

↪296(2) (Mo.App.) In action between buyer and seller's judgment creditor, involving issue of whether sale had been fraudulent as to seller's creditors, instruction requiring seller's judgment creditor to prove sale was made with intent to defraud and delay creditors was not cured by a correct statement of the law in seller's judgment creditor's instructions, where buyer's instruction covered her entire case and directed a verdict for her.—Ward v. Stutzman, 212 S. W. 65.

### IX. VERDICT.

#### (B) Special Interrogatories and Findings.

↪350(1) (Tex.Civ.App.) Refusal to submit special issues which deal with immaterial matters is not error.—Burkett v. Chestnutt, 212 S. W. 271.

↪350(2) (Tex.Civ.App.) Refusal to submit special issues calling for evidentiary and not ultimate facts is not error.—Burkett v. Chestnutt, 212 S. W. 271.

↪350(6) (Tex.Civ.App.) In an action against a railroad company for damages from increased overflow caused by the negligent construction of a bridge, the refusal to submit the special issue, "were the overflows and damage complained of by plaintiff caused by heavy rains, such as would overflow and inundate plaintiff's said lands irrespective of the presence and condition of defendant's railroad track and bridge in question," held error, even though the matter was covered in a general way by the court's charge.—Ft. Worth & D. C. Ry. Co. v. Speer, 212 S. W. 762.

↪351(5) (Tex.Civ.App.) Refusal to submit special issues covered by those submitted is not error.—Burkett v. Chestnutt, 212 S. W. 271.

↪351(5) (Tex.Civ.App.) Refusal to give certain issues to the jury in a special charge is not error, where such issues were sufficiently given in the general charge.—Angelina & N. H. R. Co. v. Railroad Commission of Texas, 212 S. W. 703.

↪352(1) (Tex.Civ.App.) The submission of a special issue inquiring of the jury whether one C. filed notice with plaintiff's employer claiming that defendant had an assignment of plaintiff's wages was not erroneous as depriving defendant of the right to have the jury decide whether C. was the authorized agent of defendant, as it did not prevent defendant from requesting the court to submit the question of C.'s agency.—Evans v. McKay, 212 S. W. 680.

↪352(4) (Tex.Civ.App.) In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, where there was no evidence tending to show creation of station at such place otherwise than by designation of depot grounds,

court properly refused to submit issue of whether railroad established a siding or stopping place at such place or nearby stations.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

⚡352(4) (Tex.Civ.App.) Issues of railroad's liability for violation of Rev. St. art. 6495, by failure to provide necessary culverts and sluices, *held* not to conform with petition, which did not follow wording of statute.—*Ft. Worth & D. C. Ry. Co. v. Speer*, 212 S. W. 762.

⚡352(5) (Tex.Civ.App.) In action to enjoin enforcement of Railroad Commission's order requiring railroad to construct depot building at certain point, where special issue was whether railroad had designated depot grounds at such point, requested addition to issue that designation once made could not afterwards be changed by railroad was properly refused, since it would have been regarded as an intimation by court of abandonment, and since issue could not have been answered in negative upon ground of abandonment.—*Railroad Commission of Texas v. Pecos & N. T. Ry. Co.*, 212 S. W. 535.

⚡352(5) (Tex.Civ.App.) Financial injury and mental suffering are both elements of actual damages, the first being classified as special and the second as general damages, and hence a special issue inquiring of the jury whether plaintiff sustained "any financial injury or mental suffering" was not erroneous on ground that financial injury and mental suffering were distinct elements of damages and should have been separately submitted.—*Evans v. McKay*, 212 S. W. 680.

## **TROVER AND CONVERSION.**

See Appeal and Error, ⚡193; Principal and Agent, ⚡124; Sales, ⚡193.

## **I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.**

⚡2 (Mo.App.) Trover and conversion does not lie for the conversion of money collected on check and draft.—*Anderson Electric Car Co. v. Savings Trust Co.*, 212 S. W. 60.

## **II. ACTIONS.**

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

⚡32(1) (Mo.App.) Petition *held* not for the conversion of checks and a draft, but for the conversion of the money charged to have been collected on them, without its description or identity as a specific chattel, and petition therefore did not state a cause of action.—*Anderson Electric Car Co. v. Savings Trust Co.*, 212 S. W. 60.

## **TRUST DEEDS.**

See Mortgages.

## **TRUSTS.**

See Evidence, ⚡318, 383; Husband and Wife, ⚡49½; Mortgages, ⚡333, 372; Perpetuities, ⚡4, 7; Trusts, ⚡33, 61; Wills, ⚡552, 598, 634; Witnesses, ⚡76, 178.

## **I. CREATION, EXISTENCE, AND VALIDITY.**

(A) Express Trusts.

⚡33 (Tex.) Where a nephew deposited money with his uncle on the latter's proposal that he would place the money at interest or in the bank for him, the relation of debtor and creditor was not created, but the uncle's holding of the money was as an acknowledged trustee.—*Allen v. Pollard*, 212 S. W. 468.

⚡61(4) (Tex.Com.App.) Where a vendor of large parcel of land which was subdivided into lots and farms agreed to deposit \$50,000 with trustees to be paid by them as a bonus to the first railroad constructing line through the

property, *held* that the vendor was entitled to have the fund revert to him if the trust should terminate within a reasonable time without attainment of object.—*West Texas Bank & Trust Co. v. Matlock*, 212 S. W. 937.

## **II. CONSTRUCTION AND OPERATION.**

(B) Estate or Interest of Trustee and of Cestui Que Trust.

⚡153 (Tex.Com.App.) Where a vendor of land which was subdivided into many different parcels agreed to deposit \$50,000 with trustees to be paid as bonus to the first railroad coming through the land, *held* that under the agreement the vendor or his heirs were entitled to the interest on the fund during the time it was held by the trustees, before a railroad was constructed.—*West Texas Bank & Trust Co. v. Matlock*, 212 S. W. 937.

## **IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.**

⚡227 (Tex.Com.App.) Trustees should be allowed to pay out of trust fund expenses of litigation concerning such fund in event the litigation is forced on them; hence trustees of fund, deposited by vendor of large parcel of land to hold as a bonus to first railroad coming through, are entitled to pay attorney's fees out of trust fund, where it was sought by the executor of the vendor to recover the fund.—*West Texas Bank & Trust Co. v. Matlock*, 212 S. W. 937.

Where vendor of land deposited \$50,000 with trustees to be paid as a bonus to the first railroad coming through the land, *held* that, where the executors of vendor sought to recover the amount on the theory that a reasonable time had expired without the construction of a railroad, purchasers who because of their interest intervened are not entitled to have allowed attorney's fees out of the corpus of trust fund because the trustees represented them and persons similarly situated.—*Id.*

## **VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.**

⚡316(1) (Mo.) While commissions of trustees are usually based upon a percentage of the income as matter of convenience, the question is one, not of percentage, but of compensation for services performed and liability incurred; fair compensation being all that a trustee is entitled to.—*Kilpatrick v. Robert*, 212 S. W. 884.

⚡316(2) (Mo.) Upon a \$8,000,000 estate, originally well invested, involving no vexatious questions in its administration, reinvestments and sales being made through brokers paid for such work, and collection of rents and keeping of accounts being looked after by a paid book-keeper, a compensation to trustees of 5 per cent. of the gross income during the 18 years during which the trust ran, which was divided among the three trustees, could not be said to be inadequate as claimed by executors of a deceased trustee, particularly where such trustee, during his lifetime, received such compensation without suggestion of dissatisfaction.—*Kilpatrick v. Robert*, 212 S. W. 884.

⚡318 (Mo.) But one compensation can be allowed for the trusteeship, whether there be one or more than one trustee, and, if there be more than one trustee, since the work and responsibility are divided, the compensation is divided.—*Kilpatrick v. Robert*, 212 S. W. 884.

## **VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.**

(B) Right to Follow Trust Property or Proceeds Thereof.

⚡356(2) (Tex.Civ.App.) Where plaintiff advanced funds to enable the borrower to purchase 133 cattle, and in a letter inclosing a check to defendant the seller gave notice that plaintiff contemplated the purchase of such number of cattle, and defendant applied a portion of money to a debt due from the borrower

selling 98 cattle and accepting the borrower's explanation that he was to give a mortgage on 40 other cattle which he already owned, defendant is liable for sum applied on the debt; the same being a trust fund, and defendant appropriating it with knowledge of its character.—*Witherspoon-McMullen Live Stock Commission Co. v. North Texas Trust Co.*, 212 S. W. 278.

#### (C) Actions.

⚡373 (Tex. Civ. App.) In action to recover interest in land in which plaintiff relied on agreement of half-brother made on transfer of title to him by his mother that plaintiff would receive his share, evidence held sufficient to raise an issue for the jury.—*Bausas v. Bausas*, 212 S. W. 965.

### TURNPIKES AND TOLL ROADS.

See Municipal Corporations, ⚡407.

### UNITED STATES.

See Army and Navy; Courts, ⚡97; Indians, ⚡35.

### USURY.

See Judgment, ⚡741; Libel and Slander, ⚡81, 88; Principal and Agent, ⚡169.

### VENDOR AND PURCHASER.

See Acknowledgment, ⚡20; Appeal and Error, ⚡707, 1116; Brokers, ⚡55, 56, 86; Courts, ⚡475; Covenants, ⚡116; Damages, ⚡85; Deeds, ⚡8; Estoppel, ⚡38, 97; Evidence, ⚡142, 317, 318, 383, 462; Exchange of Property, ⚡8; Executors and Administrators, ⚡97, 121, 129; Fraud, ⚡11, 59, 65; Frauds, Statute of, ⚡117, 129, 158; Homestead, ⚡31, 57, 96, 146; Husband and Wife, ⚡49%; Injunction, ⚡163; Interest, ⚡18; Judgment, ⚡18, 21, 91, 251, 736; Landlord and Tenant, ⚡18, 180; Mandamus, ⚡151; Mines and Minerals, ⚡79; Mortgages, ⚡276, 277, 372; Perpetuities, ⚡7; Principal and Agent, ⚡103; Public Lands, ⚡173; Remainders, ⚡14; Sales; Specific Performance, ⚡58, 65; Subrogation, ⚡23; Tenancy in Common, ⚡15, 45; Torts, ⚡12; Trespass to Try Title, ⚡10; Trusts, ⚡61, 153, 227, 878; Vendor and Purchaser, ⚡46; Venue, ⚡7; Witnesses, ⚡76.

#### I. REQUISITES AND VALIDITY OF CONTRACT.

⚡16(1) (Ark.) Contract with city to sell land for stipulated price to any third party who desired to purchase land for manufacturing purposes, without consideration to support the contract, was not binding until the third party incurred some expense, loss, or legal obligation thereunder, being merely an offer without acceptance.—*Blanton v. Forrest City Mfg. Co.*, 212 S. W. 330.

⚡36(2) (Mo.) Missouri farmer, who has been induced to buy Texas land upon the representation that the land was in "one of the richest, most certain agricultural districts of the world," and that the "most splendid irrigation system that can be found" had been installed, and that the land had more advantages and fewer disadvantages than any other land on the American continent, may rescind sale upon discovery, after removal to Texas, that it was impossible to produce the crops that he had been told could be produced, and that the irrigation system was wholly insufficient to water land.—*Coughenour v. Hutchings*, 212 S. W. 875.

#### III. MODIFICATION OR RESCISSION OF CONTRACT.

##### (B) Rescission by Vendor.

⚡105(1) (Tex. Civ. App.) Where a contract for sale of land was not enforceable by reason of

the statute of frauds, it was terminated and annulled when vendor elected to rescind it and notified purchaser of such rescission, and purchaser's subsequent offer of payment for the land could not revive it.—*Simpson v. Green*, 212 S. W. 268.

#### IV. PERFORMANCE OF CONTRACT.

##### (D) Payment of Purchase Money.

⚡172 (Ky.) As a general rule, where a contract of sale is silent as to interest, it is not demandable so long as the purchaser is not in default.—*Lowther-Kaufman Oil & Coal Co. v. Gunnell*, 212 S. W. 593.

Where a purchaser refused to carry out the agreement, because third persons were asserting title to the land and claiming to be in possession, the vendor, who filed a petition for specific performance and made such third persons parties, is not entitled to interest from the date of the filing of the petition, even though his title was found good, but to interest only from the time the judgment in his favor against such third persons was affirmed by the highest appellate court, to which the case was appealed.—*Id.*

#### V. RIGHTS AND LIABILITIES OF PARTIES.

##### (C) *Bona Fide Purchasers.*

⚡228(1) (Tex. Com. App.) The purchaser of land, on whom a prior purchaser from the same party holding an unrecorded deed served an injunction petition that the prior purchaser and record lessee of the lands was owner of them, bought at his peril where he failed to make full and complete inquiry as to the basis of the claimed title of the other and prior purchaser and lessee.—*Kelly v. Blakeney*, 212 S. W. 651.

⚡229(1) (Ky.) Whatever is sufficient to put a purchaser of land upon inquiry as to the facts is equivalent to full notice of all the facts that such inquiry would have discovered to him.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

⚡230(1) (Ky.) Where language of exception in deed gave notice to grantees of fact there was land within description of boundary in their deed which had been disposed of to another, and with small diligence grantees could have definitely ascertained its location, if not already known to them, grantees could not accept deed without being chargeable with notice.—*Prewitt v. Wilborn*, 212 S. W. 442.

⚡231(3) (Ky.) The law charges a prospective purchaser with knowledge of the description of the land, its location, adjoining owners, character of estate, and every other material thing set out in the recorded deeds in the chain of title.—*May v. Chesapeake & O. Ry. Co.*, 212 S. W. 131.

⚡232(2) (Tex. Civ. App.) Regardless of what the recorded title would show as to the ownership of land, possession is also evidence of title, and notice to a prospective purchaser of such title as the possessor has.—*Cooper v. Hinman*, 212 S. W. 972.

#### VI. REMEDIES OF VENDOR.

##### (A) Lien and Recovery of Land.

⚡265(3) (Tex. Com. App.) A purchaser who does not assume payment of the prior vendor's lien is not personally liable for the debt.—*Allen v. Traylor*, 212 S. W. 945.

A grantee assuming payment of lien indebtedness for which his grantor is personally liable thereby becomes liable to and can be sued by the holder and owner of such indebtedness.—*Id.*

⚡265(5) (Tex. Com. App.) Where land was sold, resold to one who did not assume payment of the vendor's lien, and part of it again sold by him to defendant, who as part consideration assumed payment of the sum of \$4,784, with interest accrued and to accrue, representing part of the unpaid principal sum



due on the vendor's lien notes, assuming and agreeing to pay on the principal and interest of the notes and an amount equivalent to \$23 a lot on each lot conveyed to him, defendant was liable to the holder of the vendor's lien notes for the specific amount on the principal and interest thereof.—*Allen v. Traylor*, 212 S. W. 945.

☞285(4) (Tex.Com.App.) In suit to foreclose vendor's lien against vendee and one purchasing the land from him subject to the lien, but not assuming the lien, in which suit no apportionment of the costs between defendants was made by the decree, it was the right of such purchaser to have the costs satisfied out of the proceeds of the foreclosure sale before applying such proceeds to paying the lien, and the decree, being ambiguous in this respect, would be interpreted to accord such right.—*Gough v. Jones*, 212 S. W. 943.

☞292 (Tex.Com.App.) In suit to foreclose vendor's lien against vendee and one purchasing the land from him subject to the lien, but not assuming the lien, in which suit no apportionment of the costs between defendants was made by the decree, it was the right of such purchaser to have the costs satisfied out of the proceeds of the foreclosure sale before applying such proceeds to paying the lien.—*Gough v. Jones*, 212 S. W. 943.

☞294 (Tex.Com.App.) Where land was sold, resold to one who did not assume payment of the vendor's lien, and part of it again sold by him to defendant, who as part consideration assumed payment of the sum of \$4,784, with interest accrued and to accrue, representing part of the unpaid principal sum due on the vendor's lien notes, assuming and agreeing to pay on the principal and interest of the notes an amount equivalent to \$23 a lot on each lot conveyed to him, defendant was liable to the holder of the vendor's lien notes for the specific amount on the principal and interest thereof, but was not liable for attorney's fees.—*Allen v. Traylor*, 212 S. W. 945.

## VII. REMEDIES OF PURCHASER.

### (B) Actions for Breach of Contract.

☞343(2) (Tex.Com.App.) Where a purchaser of land, which is described in the deed as containing 100 acres more or less, upon having a survey made, discovered that there was a deficiency of 16 acres, which was not contemplated by either party, the mistake was a material one, and so gross as to entitle such purchaser to relief as a matter of law.—*Cox v. Barton*, 212 S. W. 652.

☞350 (Tex.Com.App.) Evidence held not to support findings of the jury, in an action by the purchaser of land against the vendor and her agent for damages for a deficiency in the acreage, that the purchaser was guilty of negligence in failing to ascertain quantity of land; he having a right to rely upon the estimate of the vendor's agent as being substantially correct.—*Cox v. Barton*, 212 S. W. 652.

☞352 (Tex.Com.App.) In an action by a purchaser of land against his vendor for damages for deficiency in acreage, findings by the jury on special issues submitted held not to be interpreted as findings that the vendor's agent made false representations as to acreage, or that there was fraud.—*Cox v. Barton*, 212 S. W. 652.

## VENEREAL DISEASE.

See Health, ☞24.

## VENUE.

See Abatement and Revival, ☞81; Appeal and Error, ☞843, 1175; Appearance, ☞23; Corporations, ☞503; Criminal Law, ☞112; Insurance, ☞618; Judgment, ☞206; Landlord and Tenant, ☞226; Pleading, ☞104, 248; Statutes, ☞267.

## I. NATURE OR SUBJECT OF ACTION.

☞7 (Tex.Civ.App.) *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2308, subd. 4, as amended June 19, 1917 (Acts 35th Leg. c. 124), fixing venue of suits to recover for "labor" actually performed, applies to suit seeking recovery of commissions for selling real estate.—*Walker v. Alexander*, 212 S. W. 713.

☞8 (Tex.Civ.App.) Under Rev. St. 1911, art. 1830, subd. 9, providing that where the foundation of a suit "is some crime or offense or trespass" for which a civil action lies it may be brought in the county where committed or where defendant is domiciled, suit may be brought in the county where a person is run over and killed by an automobile, negligently driven by the owner's agent acting within the scope of his authority "trespass" being "some wrongful act committed, and not merely a tort resulting from the negligent omission to perform a duty."—*Campbell v. Wylie*, 212 S. W. 980.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

☞70 (Tex.Civ.App.) Under Acts 35th Leg. c. 176 (Vernon's Ann. Civ. St. Supp. 1918, art. 1903), defendants' plea of privilege, alleging they all resided in Kinney county, a subsequent portion of which alleged the two on whom citation was served resided in Kinney county and that some of the other defendants resided in Uvalde county, also that none of the exceptions to exclusive venue in the county of the defendants' residence, mentioned in Rev. St. 1911, arts. 1830, 2308, existed, held prima facie proof of right to change of venue from Burnett county to Kinney county, despite a superfluous statement characterized by clerical error, so that, in the absence of plaintiff's controverting affidavit, the cause must be transferred.—*E. L. Witt & Sons v. Stith*, 212 S. W. 673.

## VERDICT.

See Criminal Law, ☞874-882; Trial, ☞350-352.

## WAR.

See Carriers, ☞18; Criminal Law, ☞1182; Habeas Corpus, ☞30; Indictment and Information, ☞125; Insurance, ☞129, 392, 493; Intoxicating Liquors, ☞158, 236; Sales, ☞179.

☞4 (Tex.Cr.App.) To constitute an offense under Disloyalty Act 35th Leg. (Fourth Called Sess.) c. 8, § 1, prohibiting the use of language which "is disloyal \* \* \* or is of such a nature as to be reasonably calculated to provoke a breach of the peace, if said in the presence and hearing of a citizen of the United States," the language complained of must be both disloyal and calculated to provoke breach of the peace, and must have been said in the hearing of a citizen of the United States.—*Ex parte Acker*, 212 S. W. 500.

☞4 (Tex.Cr.App.) The word "or" in Disloyalty Act, § 1, forbidding the use in language disloyal to the United States of America, etc., "or as of such nature as to be reasonably calculated to be proved a breach of the peace," etc., was intended to be and should be read "and."—*Fromme v. State*, 212 S. W. 501.

## WAREHOUSEMEN.

See Carriers, ☞139.

## WASTE.

See Executors and Administrators, ☞334; Judgment, ☞243; Remainders, ☞17.

## WATERS AND WATER COURSES.

See Courts, ☞478; Damages, ☞40, 103; Deeds, ☞118; Drains; Eminent Domain,



For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

103, 203; Evidence, 83, 118; Limitation of Actions, 55; Navigable Waters; Property, 4; Railroads, 72, 114; Statutes, 64; Trial, 132, 133, 207, 214, 350, 352; Vendor and Purchaser, 36.

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

178(2) (Tex. Civ. App.) Where it is shown that plaintiff's land would have been flooded by natural causes, but that the defendant's negligent construction of a bridge has increased the loss, the measure of damages is the increase of loss.—Ft. Worth & D. C. Ry. Co. v. Speer, 212 S. W. 762.

179(4) (Tex. Civ. App.) In an action for damages for the increase of an overflow by negligent construction of a railroad bridge, testimony showing overflow more extensive than those before construction, but not showing extent of increase or the amount of damage caused by such increase, is insufficient.—Ft. Worth & D. C. Ry. Co. v. Speer, 212 S. W. 762.

In an action against a railroad company for damages from overflow of land and crops resulting from negligent construction of a bridge, defendant was not liable for such damage as would have resulted from overflow had no bridge been constructed, and where the evidence was insufficient for the jury to determine what portion of the damage was caused by the increased overflow due to the bridge, they had no basis for determination of the amount of plaintiff's recovery.—Id.

179(5) (Tex. Civ. App.) In an action against a railroad company for damages from flooding of lands resulting from defendant's negligent construction of a bridge, evidence held not sufficient to require an instruction on plaintiff's contributory negligence in failing to remove obstructions consisting of trees and drift from the channel of a creek.—Ft. Worth & D. C. Ry. Co. v. Speer, 212 S. W. 762.

## IX. PUBLIC WATER SUPPLY.

### (B) Irrigation and Other Agricultural Purposes.

216 (Tex. Civ. App.) Acts 29th Leg. c. 122, §§ 34, 48, providing for assessments in irrigation districts organized under the act, in addition to bonds that may be issued, cannot be held invalid simply because limitations under Const. art. 3, § 52, as to amount of obligations that district may assume, are not stated in the sections, the constitutional limitations being binding, though not stated.—White v. Fahring, 212 S. W. 193.

The \$2,000 indebtedness for organization purposes of irrigation districts authorized by Acts 29th Leg. c. 122, § 50, is to be paid out of assessments which can only be made after being authorized by two-thirds of the voters of the district, and the section, when so construed, is not in violation of Const. art. 3, § 52, as to two-thirds vote being required to lend credit of district.—Id.

The Legislature having by timely enactment (Acts 38d Leg. c. 172, § 72 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5107-72]) remedied the defect in Acts 29th Leg. c. 122, § 20, fixing terms of office of members of board of directors of irrigation districts at four years, contrary to Const. art. 16, § 30, before any of the directors of district in question had served two years, and having in express terms validated districts created under the act of 1905, and the acts of the directors and officers of such districts, no one can complain of section 20.—Id.

Const. art. 3, § 52, authorizing the of credit by the district for the construction and maintenance of pools, lakes, reservoirs, dams, canals, and waterways for the purpose of irrigation, authorizes an act of the Legislature (Acts 29th Leg. c. 122) permitting irrigation districts to issue bonds for the purpose of constructing irrigation works, and

the necessary property and rights therefor, and for the operation of an irrigation plant.—Id.

225 (Tex. Civ. App.) Evidence held to show due diligence on the part of an irrigation district organized under Acts 29th Leg. c. 122, to carry out the purpose of its organization, so that its legal existence had not been forfeited on that account.—White v. Fahring, 212 S. W. 193.

230(3) (Tex. Civ. App.) A taxpayer cannot maintain a suit to cancel bonds of an irrigation district without alleging and proving that the board of directors of the district has refused to institute such suit.—White v. Fahring, 212 S. W. 193.

230(4) (Tex. Civ. App.) Where sale of \$40,000 of bonds of irrigation district for 90 per cent. of their face value was properly advertised and conducted, and the purchaser did not know that the statute prohibited sale for less than face value, the court did not err in validating the title to purchaser to \$36,000 par value of said bonds, and requiring surrender of the \$4,000 par value.—White v. Fahring, 212 S. W. 193.

231 (Tex. Civ. App.) Acts 29th Leg. c. 122, §§ 34, 48, providing for assessments in irrigation districts organized under the act in addition to bonds that may be issued, were not intended to authorize additional taxation within the constitutional sense of that term, but to authorize assessments based on property benefits, and are ineffectual in that they do not provide for any hearing for determination of benefits accruing to property upon which assessments are made.—White v. Fahring, 212 S. W. 193.

232 (Tex. Civ. App.) When court, appointing receiver for irrigation company, took into its custody the property of the company, it took the water flowing into the canals as a part thereof.—Mudge v. Hughes, 212 S. W. 819.

249 (Tex. Civ. App.) Water in canals for irrigation purposes is real estate, and landowner's right to the use of a portion thereof is a servitude upon such real estate.—Mudge v. Hughes, 212 S. W. 819.

## WEAPONS.

See Criminal Law, 449; Homicide, 146, 163, 268, 300.

## WEBB-KENYON ACT.

See Commerce, 14.

## WEIGHTS AND MEASURES.

See Evidence, 320.

## WILLS.

See Adoption, 17; Deeds, 8; Descent and Distribution; Evidence, 291, 471; Executors and Administrators; Perpetuities, 4; Remainders, 5; Witnesses, 55, 159, 177, 178.

## II. TESTAMENTARY CAPACITY.

50 (Ky.) Testatrix, to have capacity to make will, must have sufficient mental capacity to take a survey of her property, to know its value, to know the objects of her bounty and her duty to them, and to dispose of her property according to a fixed purpose of her own.—Bailey v. Bailey, 212 S. W. 595.

55(1) (Ky.) Evidence held insufficient to show mental incapacity on part of the testator.—Bailey v. Waddy, 212 S. W. 459.

55(5) (Ky.) In contest of will executed by testatrix after having for several years suffered from tuberculosis, evidence as to mental incapacity held unconvincing.—Bailey v. Bailey, 212 S. W. 595.

#### IV. REQUISITES AND VALIDITY.

##### (A) Nature and Essentials of Testamentary Dispositions.

⚭81 (Ky.) Property may be disposed of by testator according to his desire, and the opinion of a jury as to what might be a just and proper division will not be substituted therefor.—Bailey v. Bailey, 212 S. W. 595.

##### (F) Mistake, Undue Influence, and Fraud.

⚭155(1) (Ky.) Undue influence is that which obtains dominion over mind of the testator and destroys free agency on his part.—Bailey v. Waddy, 212 S. W. 459.

⚭155(1) (Ky.) Undue influence is that which destroys testator's free agency and constrains him to do what he would otherwise refuse to do.—Huff v. Woosley, 212 S. W. 597.

General and reasonable influence over the testator is not sufficient to invalidate a will.—Id.

⚭155(2) (Ky.) Advice or suggestions appealing to the understanding and not destroying free agency do not constitute undue influence.—Bailey v. Bailey, 212 S. W. 595.

⚭155(4) (Ky.) Acts of kindness, attention, or appeals to the feelings, or understanding, not destroying free agency, do not constitute undue influence.—Bailey v. Bailey, 212 S. W. 595.

⚭158 (Ky.) Undue influence is such influence as destroys free agency and constrains testatrix to do against her will what she would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated at the time of the execution of the will.—Bailey v. Bailey, 212 S. W. 595.

⚭163(1) (Ky.) Undue influence on the testator cannot be presumed.—Bailey v. Waddy, 212 S. W. 459.

⚭163(2) (Tex.Civ.App.) The burden is on contestant to prove undue influence was exercised by a husband over his wife at the time she executed her will in his favor.—Jennings v. Jennings, 212 S. W. 772.

⚭164(1) (Tex.Civ.App.) On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony of a son that he did not know of existence of the will was inadmissible.—Jennings v. Jennings, 212 S. W. 772.

⚭164(5) (Tex.Civ.App.) On the issue of undue influence exerted on testatrix by her husband, evidence that he had whipped her and used abusive language toward her, and was otherwise guilty of unkind treatment, was admissible.—Jennings v. Jennings, 212 S. W. 772.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony that on the morning after her father's death proponent demanded his wife's share of the estate, was irrelevant.—Id.

On the issue of undue influence exerted on testatrix by her husband, the proponent, testimony with reference to proponent getting a stranger to prepare will, instead of a kinsman of wife's family, held irrelevant.—Id.

⚭165(1) (Tex.Civ.App.) Evidence of declarations made by testatrix concerning the will and the acts of the proponent should be limited to the state and conditions of the mind of the testatrix, and, unless there is a prima facie showing of undue influence or fraud, cannot be considered on those issues.—Marshall v. Campbell, 212 S. W. 723.

⚭165(2) (Tex.Civ.App.) On the issue of undue influence exerted on testatrix by her husband, the proponent, evidence of a conversation 12 years before the execution of will, with reference to what part of her father's estate testatrix wanted, was irrelevant.—Jennings v. Jennings, 212 S. W. 772.

⚭166(2) (Tex.Civ.App.) A wife's will in favor of her husband cannot be set aside upon evidence that upon one occasion during the 36 years of married life he objected to the pur-

chase of some clothing.—Jennings v. Jennings, 212 S. W. 772.

Evidence held insufficient to show undue influence over testatrix by her husband.—Id.

⚭166(7) (Ky.) That there was opportunity to influence testator is insufficient to sustain a charge of undue influence.—Bailey v. Waddy, 212 S. W. 459.

⚭166(7) (Ky.) To set aside a will for undue influence, it is not sufficient to show that there was an opportunity to exercise undue influence, but evidence must be adduced to show that such influence was in fact exercised.—Bailey v. Bailey, 212 S. W. 595.

#### V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

##### (I) Hearing or Trial.

⚭324(8) (Ky.) Evidence held insufficient to authorize a submission to the jury of the issue of undue influence over testator.—Huff v. Woosley, 212 S. W. 597.

##### (K) Review.

⚭400 (Tex.Civ.App.) In a will contest, admission of testimony by defendant, the proponent of the will showing her intimacy with the testatrix and opportunity to exercise undue influence, held harmless, though such testimony was inadmissible, under Rev. St. 1911, art. 3690, relating to testimony as to transactions with persons since deceased.—Marshall v. Campbell, 212 S. W. 723.

Testimony by proponent, the defendant in a will contest proceeding, that she had addressed post cards for her mother, the testatrix, etc., held of a trivial nature, so that the admission of such testimony, if improper, did not warrant reversal.—Id.

In a will contest proceeding, an instruction on the use of evidence of the testatrix's declarations held, under the facts, harmless, if erroneous.—Id.

In a will contest, where it appeared that contestants had entered into a written agreement with their mother relating to the estate, the submission to the jury of the question whether contestants had released all their rights held harmless, if erroneous, where the jury answered the question in the way the contract should have been construed by the court, if a question for it.—Id.

#### VI. CONSTRUCTION.

##### (A) General Rules.

⚭438 (Ky.) In construing a will, the intent of testator must govern unless contrary to law.—Spacey v. Close, 212 S. W. 127.

⚭439 (Ky.) The intention of a testator must be applied, provided it does not conflict with any established public policy, or is not otherwise prohibited by law.—Phelps v. Stoner's Adm'r, 212 S. W. 423.

The rule that the intention of a testator must be given effect is an absolute one, and imposes upon the courts an imperative duty.—Id.

⚭440 (Ky.) The intention of testator must be effectuated, if it can be gathered from the language of the instrument, when there are no latent ambiguities.—Sauer v. Taylor's Ex'r, 212 S. W. 583.

⚭441 (Ky.) Where a clause or a term in a will is ambiguous, the motives reasonably supposed to have actuated the testator, the purpose of the will, the relations between testator and devisees and the nature and extent of the property may be called in to assist the language in ascertaining the intent.—Sauer v. Taylor's Ex'r, 212 S. W. 583.

⚭442 (Mo.) The lawful intent of testator will be given effect.—Gillilan v. Gillilan, 212 S. W. 348.

⚭448 (Mo.) Testator who makes will dealing with his entire estate will be presumed to have intended to die testate.—Gillilan v. Gillilan, 212 S. W. 348.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⚡449 (Ky.) It will be presumed that a testator intends to dispose of his entire property, and not merely to change, from that provided by law in case of intestacy, the devolution of a small portion of it.—*Phelps v. Stoner's Adm'r*, 212 S. W. 423.

⚡450 (Ky.) In construing a will, each item should be upheld, if consistent with testator's fair intention.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

⚡461 (Ky.) When it is necessary to effectuate testator's intention words may be substituted for words used, and so, where it clearly appears that he has used the word "administrator" in the sense of "executor," the court will so construe the will.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

⚡470 (Ky.) In ascertaining the intention of a testator, the entire will may be looked to, and every part of it read and considered with the whole.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

⚡476 (Ky.) A will and a codicil must be construed together.—*Spacey v. Close*, 212 S. W. 127.

⚡476 (Ky.) In arriving at testator's intention, all parts of the will and codicils thereto must be looked to.—*Phelps v. Stoner's Adm'r*, 212 S. W. 423.

⚡488 (Ky.) Where a will is in plain and unambiguous language, parol evidence is not admissible to show an intention different from that expressed.—*Sauer v. Taylor's Ex'r*, 212 S. W. 583.

#### (B) Designation of Devisees, and Legatees and Their Respective Shares.

⚡492 (Ky.) In construing will to ascertain intended beneficiary, testator's intention will control.—*Hughes v. Cleveland Jewish Orphan Asylum*, 212 S. W. 428.

⚡493 (Ky.) If language employed to designate beneficiary is sufficient to enable court, from face of will, or in view of the circumstances, to ascertain who was intended, the devise will not fail, and the one so ascertained to be the intended devisee will take the property.—*Hughes v. Cleveland Jewish Orphan Asylum*, 212 S. W. 428.

⚡502 (Mo.) Prior to Rev. St. 1909, § 546, a devise to one's "relations" and "relatives" included only the next of kin of the testator who would otherwise take as heirs at his death, provided nothing to the contrary appeared in the context of the will.—*Rauch v. Metz*, 212 S. W. 353.

⚡506(4) (Mo.) Devise to son and to his "heirs hereafter born to him" and to the "heirs of his body" construed not to refer to his children so as to give him a defeasible fee.—*Gillilan v. Gillilan*, 212 S. W. 348.

The word "heirs" will be construed as meaning "children," and vice versa, if justice or reason requires it, and if such construction will carry into effect manifest intention of testator.—Id.

⚡506(5) (Mo.) An adopted child of testator's sister had a right to participate equally with the sister's son in a residuary legacy bequeathed to the "heirs" of the sister, as by the terms of the statute relating to the distribution of estate, and right of adopted children to participate therein, she is within the meaning of that word. Per Blair, Woodson, and Williams, JJ.—*Rauch v. Metz*, 212 S. W. 357.

⚡515 (Ky.) A devise to the "Cleveland Orphan Asylum of Cleveland, Ohio, an orphan asylum for Jewish orphans," was a devise to the Cleveland Jewish Orphan Asylum, where the orphanage was the only Jewish orphan asylum in Cleveland, which fact was known to testator, who at time of making will did not know name thereof.—*Hughes v. Cleveland Orphan Asylum*, 212 S. W. 428.

⚡535 (Ky.) A clause in a will, "It is my desire that F. shall never have a dollar of my estate," cannot deprive F. of his inheritance.

less in addition there is a disposition made of the property by the will, or one provided for therein.—*Phelps v. Stoner's Adm'r*, 212 S. W. 423.

⚡535 (Tex.Civ.App.) A will in which the testator provided that "each heir" should take an undivided interest in certain land, and after some intervening language, which does not establish any rule, states, "Their is one exception to this rule," and then recites that his afflicted daughter's husband and grown sons, who had not cared for her, should not have any interest in his land, held not to exclude such afflicted child from an interest in such land; no other provision being made for her.—*Michaelis v. Haupt*, 212 S. W. 274.

#### (C) Survivorship, Representation, and Substitution.

⚡545(2) (Ky.) Where devise is to one for life, with remainder to a class, and in the event of death of one or more of the class without issue or without children, then to the survivors of that class, the provision regarding the death of the remaindermen means such death before the termination of the particular estate, unless will shows that the testator intended a death at any time in which it might occur.—*Spacey v. Close*, 212 S. W. 127.

Under a will devising land to one for life, remainder to his children, and a codicil providing that, in case a remainderman died childless, then his share should go to survivors or their descendants, each remainderman, after testator's death, had a defeasible fee in remainder, in an equal moiety of the land, subject to be defeated by death of the remainderman without children living at the termination of the life estate, and each remainderman had a contingent interest in the portion of the others until termination of life estate, at which time the interest of those living became a fee, and each of them could convey his interest.—Id.

⚡552(3) (Mo.) Under a will executed when a son and his three children were testator's only living descendants, and when there was one living sister and seven children of two deceased sisters, bequeathing to such sister a money legacy, and an equal thirteenth share in income and distribution of a trust fund, and that share to her, and on her death to "her heirs," in proceeds of residue, the legacies did not lapse on sister's death before testator, and under Rev. St. 1909, § 546, her lineal descendants at testator's death took same as she would have done had she survived him.—*Rauch v. Metz*, 212 S. W. 353.

⚡552(3) (Mo.) Under a will bequeathing a legacy in a certain amount to testator's sister, and bequeathing to her a share in the income and distribution of a trust fund, and where the sister predeceased the testator her adopted child did not take as a "lineal descendant" of the legatee, within that term as used in Rev. St. 1909, § 546. Per Blair and Woodson, JJ.—*Rauch v. Metz*, 212 S. W. 357.

Under a will bequeathing a legacy in a certain amount to testator's sister, and bequeathing to her a share in the income and distribution of a trust fund, and where she predeceased the testator her adopted child was a "lineal descendant," within Rev. St. 1909, § 546, who would take what the legatee would have taken had she survived testator. Per Williams, J.—Id.

#### (E) Nature of Estates and Interests Created.

⚡598 (Ky.) A clause devising land to trustee for the use of one for life, remainder to his children, is a devise of a life estate in the land, and each of the children upon the death of testator take a vested remainder, which becomes a fee on life tenant's death.—*Spacey v. Close*, 212 S. W. 127.

⚡607(2) (Mo.) Will drawn by experienced lawyer devising land to a son and to his heirs

hereafter born to him and to said son "and the heirs of his body hereafter born" created estate tail special which by R. S. 1909, § 2372, abolishing entails, became a life tenure in the son with contingent remainder in fee in his direct descendants born after the making of the will.—Gillilan v. Gillilan, 212 S. W. 348.

⚡608(1) (Mo.) The rule in Shelley's Case does not exist either in deeds or wills in Missouri.—Gillilan v. Gillilan, 212 S. W. 348.

⚡614(5) (Ky.) A will giving property to a certain person, and a codicil in which testator attempted to dispose of the entire property left to such person after her death, held to create only life estate in the person to whom the property was first given.—Phelps v. Stoner's Adm'r, 212 S. W. 423.

⚡616(1) (Ky.) Where a life estate only is given, with power of disposition, a limitation over in a will will be upheld.—Phelps v. Stoner's Adm'r, 212 S. W. 423.

⚡616(9) (Ky.) A codicil, providing that a certain person could keep a farm during his life if he desired, "and leave it so some of my family can own it," held not to revoke a clause in the will to the effect that the farm should be sold preferably to one of the family, but only to postpone the sale until the person who was allowed to keep it should withdraw his desire to further occupy, or should die.—Phelps v. Stoner's Adm'r, 212 S. W. 423.

#### (F) Vested or Contingent Estates and Interests.

⚡634(10) (Ky.) Where a trustee, to whom testator's estate was devised with directions to pay the income to his two brothers for life, was directed upon the death of survivor to convert estate into cash, and pay over the same to the then living descendants of one of them per stirpes, the remainder was contingent.—Keeton v. Tipton, 212 S. W. 909.

### VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

#### (H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

⚡853 (Ky.) The fact that a remainder is contingent is not always conclusive against the right of acceleration, and the rule will not be applied where it will defeat the testator's intention.—Keeton v. Tipton, 212 S. W. 909.

⚡858(4) (Mo.) Where testator left will dealing with his entire estate and providing for all his children and made devise to his "son G. and his heirs hereafter born," the estate remaining in testator upon defeat of the devise for lack of heirs thereafter born to G. passed under residuary clause of will, and not to testator's heirs at law, as in case of intestacy.—Gillilan v. Gillilan, 212 S. W. 348.

### WITNESSES.

See Appeal and Error, ⚡966, 994; Continuance, ⚡25, 26, 35; Criminal Law, 596, 656, 666, 915, 1159, 1170½; Depositions; Elections, ⚡295; Evidence; New Trial, ⚡105.

### II. COMPETENCY.

#### (A) Capacity and Qualifications in General.

⚡48(5) (Mo.App.) Under Rev. St. 1909, § 6383, that a witness has been convicted of felony goes, not to his competency, but to his credibility.—Foeger v. Woestendiek, 212 S. W. 411.

⚡55 (Ky.) In a will contest case, where one of the contestants testified, the husband of such contestant is incompetent under Civ. Code Prac. § 606, and his testimony cannot be received on the theory that it was competent for him to testify for the other contestants for the interest of all contestants was the same, and separate judgments could not be

rendered as to each.—Bailey v. Waddy, 212 S. W. 459.

⚡76(3) (Ark.) In action by deceased wife's heirs against husband to recover wife's money and have trust declared in their favor upon land purchased therewith by husband, husband was properly permitted to testify that wife gave him the money, notwithstanding Kirby's Dig. § 3095, prohibiting testimony between husband and wife, where deceased wife's heirs developed such testimony on their original examination of husband as a witness as well as in answers made by husband to interrogatories propounded in complaint.—Evans v. Wells, 212 S. W. 328.

#### (C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⚡126 (Mo.) Rev. St. 1909, § 6354, making persons interested in a suit competent witnesses, is purely remedial in its nature, and was intended to remove the disability theretofore existing at common law, and is a qualifying, and not a disqualifying, statute, and the proviso as to testimony as to transactions with deceased parties, etc., creates no disability, but only limits the operation of the enabling part. Per Blair, Woodson, and Williams, JJ.—Rauch v. Metz, 212 S. W. 357.

⚡128 (Ark.) Kirby's Dig. § 3093, relating to transactions with deceased persons, applies in all civil actions, special as well as ordinary proceedings.—Free v. Maxwell, 212 S. W. 325.

⚡158 (Ark.) Kirby's Dig. § 3093, relating to transactions with deceased persons, applies in all civil actions, special as well as ordinary proceedings, and prevents a wife, in a proceeding in the probate court against her husband's estate, from testifying as to transactions with him, but does not prevent her from testifying that she had money of her own when she married, and that after marriage she taught school for a certain number of months at a certain rate of pay and received warrants in payment of such services.—Free v. Maxwell, 212 S. W. 325.

⚡159(3) (Tex.Civ.App.) Testimony by proponent and defendant in a will contest proceeding that she stayed with her mother, the testatrix, during a period of time in which she accompanied her mother to gospel missions, and on return found the house burglarized, etc., does not fall within the prohibition of Rev. St. 1911, art. 3690, relating to testimony as to transactions with persons since deceased.—Marshall v. Campbell, 212 S. W. 723.

⚡177 (Tex.Civ.App.) Where contestants introduced evidence of statements of testatrix as to proponent's cruelty to, demands upon, and threats communicated to testatrix, proponent may, notwithstanding Rev. St. 1911, art. 3690, forbidding a litigant to testify as to transactions with a person since deceased, deny the evidence introduced.—Marshall v. Campbell, 212 S. W. 723.

Where contestant was a daughter of testatrix, who was also the mother of proponent, testified that proponent stated that if the mother did not give her more money she would become an immoral woman, proponent is entitled to deny the statement.—Id.

⚡178(1) (Mo.) In a suit by executors for construction of a will, to determine rights of certain defendants, the successful defendant, by the examination of the appealing defendant in his own behalf, adopted her as his own witness, and could not thereafter be heard to object to her competency to testify to transactions with a decedent as whose adopted child she was claiming. Per Blair, Woodson, and Williams, JJ.—Rauch v. Metz, 212 S. W. 357.

⚡178(4) (Tex.) Where a nephew, suing his uncle's executor to recover a deposit with the uncle as trustee, had his ex parte deposition taken by the executor, but it was not offered

in evidence, the nephew was "called to testify" by the adverse party within the meaning of the statute, and became competent to give evidence in his own behalf in relation to his transaction with his uncle, deceased.—*Allen v. Pollard*, 212 S. W. 468.

### III. EXAMINATION.

#### (C) Privilege of Witness.

§240(1) (Tex. Cr. App.) Action of trial court in refusing to permit the counsel of accused to ask, and the only eyewitness, who was tendered to both the state and accused by the court, to answer leading questions in a prosecution for murder, was error.—*Berrian v. State*, 212 S. W. 509.

§266 (Tex. Cr. App.) Action of trial court in refusing to permit the counsel of accused to ask, and the only eyewitness, who was tendered to both the state and accused by the court, to answer leading questions in a prosecution for murder, was error and when such witness was examined by the state, accused should be accorded the same liberty of cross-examination of such witness as any other witness for the state.—*Berrian v. State*, 212 S. W. 509.

### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

#### (B) Character and Conduct of Witness.

§344(1) (Tex. Cr. App.) It was not permissible to impugn the character of a witness by testimony reflecting upon the character of the house he was keeping and his sister-in-law who was living in his house and had given birth to three illegitimate children.—*Burkhalter v. State*, 212 S. W. 163.

§345(1) (Mo. App.) Under Rev. St. 1909, § 6383, that a witness has been convicted of felony goes, not to his competency, but to his credibility.—*Foege v. Woestendiek*, 212 S. W. 411.

§349 (Ark.) In a prosecution for illegally disposing of alcoholic liquor, the prosecuting attorney was properly permitted on cross-examination to ask defendant if he had not tried to escape, and had not brought some saws into the jail and given them to other persons, etc., since a witness may be cross-examined as to his particular acts relevant to the impeachment of his character for truth, though disconnected with the charge.—*Webb v. State*, 212 S. W. 567.

§350 (Ark.) Where the defendant, being prosecuted for selling intoxicating liquors, took the stand as a witness, it was proper on cross-examination for the prosecuting attorney to ask the defendant concerning the commission of other offenses, for the purpose of reflecting upon his credibility.—*Nelson v. State*, 212 S. W. 95.

§352 (Tex. Civ. App.) It was improper to allow a witness for plaintiff to testify that a witness for defendant in a personal injury suit told him that a doctor had said that his (defendant's) witness' testimony was worth \$1,500; such testimony having no tendency to impeach the witness, nor prove any fact pertinent to the issue.—*Texas & Pacific Coal Co. v. Sherbley*, 212 S. W. 758.

§358 (Tex. Cr. App.) In a prosecution for burglary, where defense was alibi and state relied on testimony of an alleged accomplice, it was not proper to allow accomplice who on cross-examination admitted he had been indicted for other offenses, all but one of which were committed on the night of the one involved, but denied that his father-in-law, whom defendant claimed participated in those offenses, was present, to testify on redirect that he was assisted in the commission of such offenses, and to go into the circumstances attending the other cases.—*Payne v. State*, 212 S. W. 161.

### WORDS AND PHRASES.

"About."—*Cavender v. B. Johnson & Son (Mo. App.)* 212 S. W. 53.

"Accident."—*Scales v. National Life & Accident Ins. Co. (Mo.)* 212 S. W. 8; *Independent Order of Puritans v. Lockhart (Tex. Civ. App.)* 212 S. W. 559.

"Accomplice."—*Benavides v. State (Tex. Cr. App.)* 212 S. W. 658.

"Beneficiaries."—*American Indemnity Co. v. Zyloni (Tex. Civ. App.)* 212 S. W. 188.

"Business transacted."—*P. Lorillard Co. v. Scott (Ky.)* 212 S. W. 145.

"Called to testify."—*Allen v. Pollard (Tex.)* 212 S. W. 468.

"Children."—*Gillilan v. Gillilan (Mo.)* 212 S. W. 348.

"Consideration."—*First Nat Bank of Navasota v. Todd (Tex. Civ. App.)* 212 S. W. 219.

"Damages of any kind."—*City of Dallas v. Shows (Tex. Com. App.)* 212 S. W. 633.

"During term."—*Downing v. La Shot (Mo. App.)* 212 S. W. 30.

"Endowed."—*Fish v. Fish (Ky.)* 212 S. W. 586.

"Establish."—*Kemper v. Long (Mo.)* 212 S. W. 871.

"Evidence."—*Walker v. State (Ark.)* 212 S. W. 818.

"Exception."—*Prewitt v. Wilborn (Ky.)* 212 S. W. 442.

"Exemplary damages."—*Evans v. McKay (Tex. Civ. App.)* 212 S. W. 680.

"General damages."—*Evans v. McKay (Tex. Civ. App.)* 212 S. W. 680.

"General manager."—*Hinton v. D'Yarmett (Tex. Civ. App.)* 212 S. W. 518.

"General relief."—*Texas Co-op. Inv. Co. v. Clark (Tex. Civ. App.)* 212 S. W. 245.

"Head of family."—*John E. Morrison & Co. v. Murf (Tex. Civ. App.)* 212 S. W. 212.

"Heirs."—*Meisberg v. Bryant (Ky.)* 212 S. W. 600; *Gillilan v. Gillilan (Mo.)* 212 S. W. 348; *Rauch v. Metz (Mo.)* 212 S. W. 357.

"Homicide."—*State v. Barnes (Tenn.)* 212 S. W. 100.

"Involuntarily."—*Greene v. El. H. Taylor, Jr., & Sons (Ky.)* 212 S. W. 925.

"Labor."—*Walker v. Alexander (Tex. Civ. App.)* 212 S. W. 713.

"Licensee."—*Hicks v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.)* 212 S. W. 840.

"Lineal descendant."—*Rauch v. Metz (Mo.)* 212 S. W. 357.

"Loss."—*Hoagland Wagon Co. v. London Guarantee & Accident Co. (Mo. App.)* 212 S. W. 893.

"Maintained."—*Walker v. Alexander (Tex. Civ. App.)* 212 S. W. 713.

"Malice in fact."—*Evans v. McKay (Tex. Civ. App.)* 212 S. W. 680.

"Malice in law."—*Evans v. McKay (Tex. Civ. App.)* 212 S. W. 680.

"Malicious."—*Evans v. McKay (Tex. Civ. App.)* 212 S. W. 680.

"Merchant."—*Teich v. McAuley (Tex. Civ. App.)* 212 S. W. 979.

"Mineral."—*Texas Pacific Coal & Oil Co. v. Howard (Tex. Civ. App.)* 212 S. W. 735.

"Near the river bank."—*Burkett v. Chestnutt (Tex. Civ. App.)* 212 S. W. 271.

"Negligence."—*Collins v. Pecos & N. T. Ry. Co. (Tex. Com. App.)* 212 S. W. 477.

"On the river bank."—*Burkett v. Chestnutt (Tex. Civ. App.)* 212 S. W. 271.

"Open account."—*Walker v. Alexander (Tex. Civ. App.)* 212 S. W. 713.

"Or."—*Fromme v. State (Tex. Cr. App.)* 212 S. W. 501.

"Perpetuity."—*West Texas Bank & Trust Co. v. Matlock (Tex. Com. App.)* 212 S. W. 937.

"Person."—*Devine Independent School Dist. v. Koehler (Tex. Civ. App.)* 212 S. W. 238.

"Person injured."—*City of Dallas v. Shows (Tex. Com. App.)* 212 S. W. 633.

"Poles."—Stemmons v. Dallas Power & Light Co. (Tex. Civ. App.) 212 S. W. 222.  
 "Probable consequences"—Collins v. Pecos & N. T. Ry. Co. (Tex. Com. App.) 212 S. W. 477.  
 "Proof."—Walker v. State (Ark.) 212 S. W. 319.  
 "Provided."—Stevens v. Galveston H. & S. A. Ry. Co. (Tex. Com. App.) 212 S. W. 639.  
 "Proviso"—Stevens v. Galveston, H. & S. A. Ry. Co. (Tex. Com. App.) 212 S. W. 639.  
 "Proximate cause."—Nunan v. Bennett (Ky.) 212 S. W. 570; Collins v. Pecos & N. T. Ry. Co. (Tex. Com. App.) 212 S. W. 477.  
 "Railroad."—State v. Mississippi A. & W. R. Co. (Ark.) 212 S. W. 317.  
 "Ratification."—Evans v. McKay (Tex. Civ. App.) 212 S. W. 680.  
 "Relations."—Rauch v. Metz (Mo.) 212 S. W. 353.  
 "Relatives."—Rauch v. Metz (Mo.) 212 S. W. 353.  
 "Rent."—McClintic v. Brown (Tex. Civ. App.) 212 S. W. 540.  
 "Repay."—Walker v. Wilmore (Tex. Com. App.) 212 S. W. 655.  
 "Res gestæ."—Walker v. State (Ark.) 212 S. W. 319.  
 "Res judicata."—Evans v. McKay (Tex. Civ. App.) 212 S. W. 680.  
 "Service in army or navy."—Miller v. Illinois Bankers' Life Ass'n (Ark.) 212 S. W. 310.

"Station."—Railroad Commission of Texas v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 212 S. W. 535.  
 "Surveyed land."—Sibley v. Robison (Tex.) 212 S. W. 932.  
 "Thence down the river."—Burkett v. Chestnutt (Tex. Civ. App.) 212 S. W. 271.  
 "Trader."—Teich v. McAuley (Tex. Civ. App.) 212 S. W. 979.  
 "Trespass."—Campbell v. Wylie (Tex. Civ. App.) 212 S. W. 980.  
 "Undue influence."—Bailey v. Waddy (Ky.) 212 S. W. 459; Bailey v. Bailey (Ky.) 212 S. W. 595; Huff v. Woosley, Id. 597.  
 "Vacation."—Downing v. La Shot (Mo. App.) 212 S. W. 30.  
 "Voluntarily."—Greene v. E. H. Taylor, Jr., & Sons (Ky.) 212 S. W. 925.

## WORKMEN'S COMPENSATION ACT.

See Master and Servant, §=385-417.

## WRIT OF ERROR.

See Appeal and Error.

## WRITS.

See Attachment; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Prohibition; Replevin; Sequestration.

# TABLES OF SOUTHWESTERN CASES

IN

## STATE REPORTS

### VOL. 133, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	202	39	133	202	31	196	202	233	327	202	229	441	202	836	544
16	201	1107	144	201	1106	197	202	33	334	202	227	448	202	845	547
30	201	812	149	201	811	202	202	820	336	202	468	456	202	838	554
35	201	832	154	202	27	206	202	691	341	202	709	473	202	822	559
64	201	808	157	202	26	216	202	819	348	202	20	477	203	25	560
68	201	794	180	202	35	220	202	231	357	202	23	491	202	831	567
72	201	809	183	202	34	224	202	239	356	201	801	498	202	834	570
76	202	236	166	202	28	239	202	225	373	198	122	505	202	849	574
85	201	845	169	202	43	247	202	235	380	200	501	513	202	823	579
90	202	37	173	202	474	250	202	244	392	200	987	516	202	826	584
93	201	805	176	202	475	261	202	49	396	201	108	520	202	817	589
97	201	815	178	202	717	277	202	712	401	202	685	523	202	686	593
105	201	830	181	202	817	294	202	478	406	202	476	527	202	721	599
113	201	292	184	202	232	302	185	474	411	202	698	531	202	707	599
118	201	797	188	202	228	314	198	101	417	202	705	536	202	703	599
126	202	45	191	202	29	321	202	683	422	202	862	540	202	702	599

### VOL. 133, ARKANSAS REPORTS

	Page		Page
Abbott v. Kennedy (201 S. W. 830).....	105	Davis v. Branch (202 S. W. 705).....	417
Ætna Life Ins. Co. v. Wepfer (202 S. W. 475) .....	176	Davis v. Cramer (202 S. W. 239).....	224
Alcorn v. Bliss-Cook Oak Co. (201 S. W. 797) .....	118	Dickinson v. Brummett (201 S. W. 812)..	30
Altman v. Asbury & Sullivan (203 S. W. 1182) .....	*600	Ellis v. State (202 S. W. 702).....	540
American Life & Accident Ass'n v. Walton (202 S. W. 20).....	348	Enix v. State (199 S. W. 78).....	*600
Atkinson v. State (202 S. W. 709).....	341	E. O. Barnett Bros. v. Henry (202 S. W. 707) .....	531
Banks v. State (202 S. W. 43).....	169	Estes v. Lucky (201 S. W. 815).....	97
Barnett Bros. v. Henry (202 S. W. 707)..	531	Export Cooperage Co. v. Ramsey (202 S. W. 468) .....	336
Barnett Bros. Mercantile Co. v. Jarrett (202 S. W. 474).....	173	Farris v. State (203 S. W. 4).....	*599
Beal v. Bayne (203 S. W. 1182).....	*600	Fenolio v. Sebastian Bridge Dist. (200 S. W. 501).....	380
Bickle v. Turner (202 S. W. 703).....	536	Ferguson v. Wolchansky (202 S. W. 826)	516
Board of Water & Light Improvement Dist. of Sulphur Springs v. Galbraith (185 S. W. 474).....	302	Fillips v. G. B. Mixon & Co. (202 S. W. 701) .....	*599
Bocquin v. Theurer (202 S. W. 845).....	448	Flowers v. Huff (202 S. W. 31).....	138
Bogle & Sharp v. Walker (202 S. W. 478)	294	Forehand v. Higbee (202 S. W. 29).....	191
Bond v. Sykes (202 S. W. 718).....	*599	Galloway v. Battaglia (202 S. W. 836)....	441
Brashears v. Garland School Dist. No. 4 (202 S. W. 234).....	*599	Gould v. Davis (202 S. W. 37).....	90
Britt v. Berry (202 S. W. 830).....	589	Hankins v. State (201 S. W. 832).....	38
Brooks v. Turner (201 S. W. 809).....	72	Harrah v. Ayres (202 S. W. 823).....	513
Brown v. People's Bank of Searcy (202 S. W. 717).....	178	Harris v. Smith (202 S. W. 244).....	250
Camden Fire Ins. Ass'n v. Grubbs (202 S. W. 820).....	202	Harrison v. Interstate Business Men's Accident Ass'n of Des Moines, Iowa (202 S. W. 34).....	168
Carr v. Hahn & Carter (202 S. W. 685)...	401	Healey v. Cockrill (202 S. W. 229).....	327
Chicago, R. I. & P. R. Co. v. Brummett (201 S. W. 812).....	30	Hegwood v. Hegwood (202 S. W. 35)...	160
City of Little Rock v. Jeuryens (202 S. W. 45).....	126	Heim v. Brock (202 S. W. 36).....	593
Clemens v. Southwestern Bell Tel. Co. (203 S. W. 16).....	574	Hermitage Special School Dist. v. Ingalls Special School Dist. (202 S. W. 26).....	157
Coffman v. McKee (200 S. W. 987).....	392	Hinson v. State (201 S. W. 811).....	149
Collier v. Hopper (202 S. W. 687).....	*599	Horn v. Brand (203 S. W. 5).....	567
Cunningham v. State (202 S. W. 27).....	154	Inland Const. Co. v. Rector (202 S. W. 712) .....	277
		Jackson v. State (202 S. W. 683).....	321

\* Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

133 ARK.—Continued.		Page			Page
James v. McDuffy (202 S. W. 821).....	*599	Rawleigh Medical Co. v. Rose (202 S. W. 849).....			505
Jonesboro Trust Co. v. Beaty (199 S. W. 73).....	*599	Rayder v. Warrick (202 S. W. 831).....			491
J. R. Watkins Medical Co. v. Horne (203 S. W. 24).....	570	Reed v. Frauenthal (202 S. W. 700).....			544
Kansas City Southern R. Co. v. Oglesby (199 S. W. 98).....	560	Rivard v. State (202 S. W. 39).....			1
Keck v. Daniels (202 S. W. 825).....	*599	Rogers v. State (201 S. W. 845).....			85
Kelley v. State (202 S. W. 49).....	261	Schaap v. Robinson (201 S. W. 292).....			113
Koontz v. La Dow (202 S. W. 686).....	523	Shaw v. State (202 S. W. 704).....			*599
Lanier v. Shonyo (201 S. W. 108).....	396	Sheptine v. State (202 S. W. 225).....			239
Lasater v. State (198 S. W. 122).....	373	Shugart v. Sorrells (202 S. W. 817).....			520
Lilly v. Verser (203 S. W. 31).....	547	Smith v. Jackson (202 S. W. 227).....			334
Little Rock, City of, v. Jeuryens (202 S. W. 45).....	126	Southern Surety Co. v. Barham (202 S. W. 231).....			220
Lockridge v. Stokes (199 S. W. 89).....	559	Sovereign Camp Woodmen of the World v. Anderson (202 S. W. 698).....			411
Luttrell v. State (203 S. W. 1183).....	*600	Spivey v. State (198 S. W. 101).....			314
McCune v. McCune (203 S. W. 1183).....	*600	State v. Bank of Commerce (202 S. W. 834).....			498
McGowan v. Freeberry (202 S. W. 848).....	579	State v. Blumenthal (203 S. W. 36).....			584
Madison, Town of, v. Bond (202 S. W. 721).....	527	Sublett v. Sublett (202 S. W. 233).....			196
Marshall v. Baugh (201 S. W. 808).....	64	Swain v. Beakley (202 S. W. 476).....			406
Mell v. State (202 S. W. 33).....	197	Terry v. Klein (201 S. W. 801).....			366
Mewes v. Home Bank of De Witt (201 S. W. 1106).....	144	Town of Madison v. Bond (202 S. W. 721).....			527
Meyer v. Feibelman (203 S. W. 1183).....	*600	Triplett v. Attwood (202 S. W. 817).....			181
Moore v. Ellis (201 S. W. 794).....	68	Troxler v. Wilson (202 S. W. 819).....			216
Morgan v. Center (202 S. W. 235).....	247	Turley v. Gorman (202 S. W. 822).....			473
Morgan v. Kankey (202 S. W. 844).....	*599	Watkins Medical Co. v. Horne (203 S. W. 24).....			570
Nashville Lumber Co. v. Graysonia-McLeod Lumber Co. (202 S. W. 694).....	*599	Wells Fargo & Co. Exp. v. Alexander (199 S. W. 84).....			*600
National Life & Accident Ins. Co. v. Henderson (202 S. W. 689).....	*599	Western Union Tel. Co. v. Caldwell (202 S. W. 232).....			184
Nattee v. Huff (202 S. W. 31).....	138	Wilhelm v. Collison (202 S. W. 28).....			166
Newald v. Valley Farming Co. (202 S. W. 838).....	456	Wilkins v. Boyce (203 S. W. 1183).....			*600
Pace v. Richardson (202 S. W. 852).....	422	Williams v. Longan (199 S. W. 79).....			554
Pekin Cooperage Co. v. Love (202 S. W. 824).....	*599	Williams v. Memphis, D. & G. R. Co. (202 S. W. 228).....			188
Pine Bluff Spoke Co. v. Taylor (203 S. W. 1183).....	*600	Wilson v. Southern Lumber Co. (199 S. W. 100).....			*599
Powell v. State (203 S. W. 25).....	477	Winfrey v. State (202 S. W. 23).....			357
Quilling v. Cunningham (202 S. W. 472).....	*599	Wright v. State (201 S. W. 1107).....			16
Ramsey v. Nevills (201 S. W. 805).....	93	Wright v. State (202 S. W. 236).....			76
		W. T. Rawleigh Medical Co. v. Rose (202 S. W. 849).....			505
		Yellow Rose Mining Co. v. Strait (202 S. W. 691).....			206

## VOL. 134, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	203	1	109	203	276	218	203	581	311	103	701	396	205	111	499
10	203	20	117	203	266	227	203	577	315	203	696	404	203	1030	505
15	203	10	121	203	260	231	203	580	320	203	1013	407	204	426	511
23	203	6	132	203	263	236	203	267	328	204	420	411	204	104	514
30	203	22	136	203	274	241	203	584	333	203	849	415	204	628	519
36	203	38	142	203	284	245	203	698	337	203	847	420	204	622	528
42	203	698	147	202	36	254	203	1044	340	203	692	430	204	101	536
52	203	279	152	203	844	265	203	588	345	203	836	432	204	101	539
61	203	258	161	203	1042	268	203	842	351	203	1021	435	204	968	543
68	203	13	167	203	683	273	203	1036	358	203	1008	443	204	308	548
71	203	17	175	203	696	276	203	1015	361	204	220	447	203	704	564
76	203	19	183	208	1034	280	204	211	366	203	1038	458	203	576	560
80	203	286	190	203	1039	284	203	1047	368	203	1026	463	205	296	564
92	203	586	197	203	1019	292	204	630	374	203	1024	481	204	219	571
96	203	257	202	203	841	300	203	1032	380	203	1009	484	204	311	575
100	203	264	207	203	589	303	203	703	386	204	1140	491	204	310	580
106	203	273	211	203	269	307	203	1028	392	204	103	495	204	306	588

## VOL. 134, ARKANSAS REPORTS

Abbott v. Norman (204 S. W. 303).....	535	Baker-Matthews Mfg. Co. v. Grayling Lumber Co. (203 S. W. 1021).....	351
A. J. Neimeyer Lumber Co. v. Watson (204 S. W. 310).....	491	Barnett Brothers v. Porter (203 S. W. 842).....	268
Arkansas Short Leaf Lumber Co. v. McInturf (203 S. W. 1047).....	284	Barr v. Vaughan & Hulse (203 S. W. 589).....	207

\* Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.



134 ARK.—Continued.		Page			Page
Berard v. Fitzpatrick (203 S. W. 1039) ..	190		King v. Harris (203 S. W. 847).....	387	
Bixler Co. v. J. K. Hall Lumber Co. (203 S. W. 257) .....	96		La Cost v. Chicago, R. I. & P. R. Co. (203 S. W. 586).....	92	
Blumenthal v. State (204 S. W. 602).....	*605		Lancaster v. Kaler (204 S. W. 854).....	*605	
Bonner v. Cross County Rice Co. (203 S. W. 282) .....	564		Lee v. Bandimere (204 S. W. 307).....	*605	
Bradley v. Holliman (202 S. W. 469).....	588		Lincoln Reserve Life Ins. Co. v. Smith (203 S. W. 698).....	245	
Branscum v. State (203 S. W. 13) .....	66		Lisko v. Uhren (204 S. W. 101).....	430	
Brazil v. State (204 S. W. 622) .....	420		McDaniel v. Conlan (204 S. W. 850)....	519	
Brown v. Brown (203 S. W. 1009) .....	380		Mauney v. Millar (203 S. W. 10).....	15	
Brown v. State (203 S. W. 1031) .....	597		Middleton v. Miller County (204 S. W. 421)	514	
Brunson v. Cromwell (204 S. W. 303).....	*605		Miles F. Bixler Co. v. J. K. Hall Lumber Co. (203 S. W. 257).....	96	
Brunson v. Reinberger & Collier (203 S. W. 269) .....	211		Miller County v. Kosminsky (204 S. W. 421)	514	
Bunch v. Crowe (203 S. W. 584) .....	241		Miller County Highway & Bridge Dist. v. Cook (204 S. W. 420).....	328	
Burke v. Napoleon Hill Cotton Co. (202 S. W. 827) .....	580		Missouri Pac. R. Co. v. Conway County Bridge Dist. (204 S. W. 630).....	292	
Burrus v. Board of Sewer Imp. Dist. No. 1 of Argenta (203 S. W. 20) .....	10		Missouri Pac. R. Co. v. Fields Bros. (203 S. W. 1036).....	273	
Bush v. Alexander (203 S. W. 1028).....	307		Missouri Pac. R. Co. v. Waterworks Imp. Dist. No. 1 of Tillar (203 S. W. 696)...	315	
Catherina v. Porter (203 S. W. 683).....	167		Mogk v. King (203 S. W. 577).....	227	
Chess & Wymond Co. v. Wallis (203 S. W. 274) .....	136		Monroe County v. Clark (203 S. W. 264)...	100	
Chicago, R. I. & P. R. Co. v. Ball & Philpot (203 S. W. 284) .....	142		Moore v. State (203 S. W. 835).....	*605	
Citizens' Bank v. Moore (204 S. W. 619)...	554		Moorehead v. Dial (204 S. W. 424).....	548	
Coats v. Milner (203 S. W. 701) .....	311		Myers v. Linebarger (203 S. W. 580).....	231	
Coffman v. Road Imp. Dist. No. 6 of Lawrence County (204 S. W. 104) .....	411		Neimeyer Lumber Co. v. Watson (204 S. W. 310).....	491	
Combs v. State (206 S. W. 990) .....	606		O'Leary v. Keith (203 S. W. 38).....	36	
Connecticut Fire Ins. Co. v. Wigginton (203 S. W. 844) .....	152		Oxford Telephone Mfg. Co. v. Arkansas Nat. Bank (204 S. W. 1140).....	386	
Cravens & Boren v. Barr (204 S. W. 618) *605			Page v. Andrews (203 S. W. 273).....	106	
Dale v. Dale (203 S. W. 258) .....	61		Parish v. Smith (204 S. W. 415).....	511	
Dial v. Trice (204 S. W. 219) .....	481		Pemberton v. Barker (203 S. W. 9).....	571	
Downey v. Johnson (206 S. W. 990) .....	606		Peters v. Priest (203 S. W. 1042).....	161	
Edgar v. Brown (204 S. W. 598).....	*605		Phoenix Cotton Oil Co. v. Pettus & Buford (203 S. W. 19).....	76	
Edwards v. Locke (203 S. W. 286).....	80		Polk v. United States Fidelity & Guaranty Co. (206 S. W. 990).....	606	
Edwards v. St. Louis Southwestern R. Co. (203 S. W. 588) .....	265		Raybourn v. Kirk (204 S. W. 611).....	*605	
Evans v. Ragsdale (206 S. W. 990).....	606		Raymond v. Raymond (204 S. W. 311)...	484	
Farrell v. Steward (204 S. W. 423) ....	*605		Rector v. Strauss (203 S. W. 1024).....	374	
Faver v. Wayne (203 S. W. 22) .....	30		Reed v. Rogers (204 S. W. 973).....	528	
First Nat. Bank of Leslie v. Stokes (203 S. W. 1026) .....	368		Rice-Brown Lumber Co. v. Fleetwood (203 S. W. 692).....	340	
Furst v. Sanders (204 S. W. 426) .....	407		Rowland v. Taylor (203 S. W. 1034).....	183	
Gainer & Garvey v. Caudell (206 S. W. 990) .....	606		Russell v. Van Pelt (203 S. W. 267).....	236	
Georgia Home Ins. Co. v. Bennett (203 S. W. 279) .....	52		Sallee v. Bank of Corning (203 S. W. 276)	109	
Grayling Lumber Co. v. Ebbitt (203 S. W. 686) .....	175		Schiffin v. Smith (203 S. W. 849).....	333	
Hall, State ex rel., v. Canal Const. Co. (203 S. W. 704) .....	447		Schmidt-Blakely Coal Co. v. Hembree (205 S. W. 111).....	396	
Harbottle v. Central Coal & Coke Co. (203 S. W. 1044) .....	254		Shelby v. Leavy (204 S. W. 975).....	*605	
Harkrider v. Howard (203 S. W. 14).....	575		Shoffner v. Vann (206 S. W. 991).....	606	
Hartsell v. Longino (206 S. W. 990).....	606		Simpson v. Smith (203 S. W. 266).....	117	
Heim v. Brock (202 S. W. 36) .....	147		Sloan v. Lawrence County (203 S. W. 260)	121	
Hendrix v. Morris (203 S. W. 1008) .....	358		Smith v. Headrick (206 S. W. 991).....	606	
Hogg v. Nichols (204 S. W. 211) .....	280		Smith v. Wright (206 S. W. 991).....	606	
Hollabaugh v. Taylor (204 S. W. 628)...	415		Snead v. State (203 S. W. 703).....	303	
Hope v. McElroy (206 S. W. 990) .....	605		Southern Cotton Oil Co. v. East (203 S. W. 1030) .....	404	
Huff v. Iowa City State Bank (204 S. W. 306) .....	495		Southern Surety Co. v. Perdue (203 S. W. 576) .....	458	
Hutton v. Jones (205 S. W. 296) .....	463		Strum v. Slankard (203 S. W. 688).....	42	
Hutton v. King (205 S. W. 296) .....	463		State v. Doughty (204 S. W. 968).....	435	
Indiana Silo Co. v. Harris (203 S. W. 581)	218		State v. Hunter (204 S. W. 308).....	443	
Jenkins v. Midland Valley R. Co. (203 S. W. 1) .....	1		State v. Lane (203 S. W. 17).....	71	
Jeter v. State (206 S. W. 990).....	606		State v. Martin & Lipe (204 S. W. 622)...	420	
Johnson v. Inman (203 S. W. 836).....	345		State ex rel. Hall v. Canal Const. Co. (203 S. W. 704).....	447	
Jones v. Epstein (204 S. W. 217) .....	505		State Nat. Bank v. Lark (204 S. W. 101)...	432	
Jonesboro Hardware Co. v. Western Tie & Timber Co. (204 S. W. 418).....	543		Steel v. St. Louis, I. M. & S. R. Co. (206 S. W. 991).....	605	
Jonesboro, L. C. & E. R. Co. v. Kirksey. (204 S. W. 208).....	*605		Swift & Co. v. Bernard (206 S. W. 991)...	606	

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

134 ARK.—Continued.		Page			Page
Texas Motor Co. v. Buffington (203 S. W. 1013) .....		320	Wells Fargo & Co. Express v. Townsend & Freeman Co. (204 S. W. 417) .....		560
Thompson v. Buchanan (203 S. W. 1015) ..		276	Wesco Supply Co. v. Smith (203 S. W. 6) ..		23
Thompson v. Butcher (206 S. W. 991) ..		605	Westbrook Grain & Milling Co. v. Johnson (203 S. W. 1032) .....		300
Title Guaranty & Surety Co. v. Burke (204 S. W. 215) .....		499	Whipple v. Keith (203 S. W. 841) .....		202
United States Automobile Co. v. Deshong (204 S. W. 103) .....		392	Wilkinson v. Hudspeth (203 S. W. 263) ..		132
Van Pelt v. Russell (203 S. W. 267) .....		236	Willard v. Willard (203 S. W. 1019) .....		197
Welbourn v. Kee (204 S. W. 220) .....		361	Williams v. Missouri Pac. R. Co. (203 S. W. 1038) .....		366
			Young v. Cowan (204 S. W. 304) .....		539

## VOL. 135, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	204	416	112	204	599	201	204	1145	308	204	615	412	205
5	204	606	117	205	302	206	205	113	315	204	843	420	205
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86	205	450	179	204	626	291	205	646	393	205	667	494	205
98	204	621	187	204	846	293	205	651	400	205	807	496	205
102	204	600	193	204	845	298	205	711	404	205	805	499	205
105	204	753	196	204	840	301	205	709	407	205	812		

## VOL. 135, ARKANSAS REPORTS

American Surety Co. v. Vann (205 S. W. 646) .....	291	Davies, & Davies v. Patterson (205 S. W. 118) .....	22
Athletic Mining & Smelting Co. v. Sharp (205 S. W. 695) .....	330	Davis v. Sparks (205 S. W. 803) .....	412
Baker v. Mosaic Templars of America (204 S. W. 612) .....	65	DeQueen & E. R. Co. v. Pigue (205 S. W. 888) .....	499
Barker v. State (205 S. W. 805) .....	404	Dickinson v. Muse (204 S. W. 609) .....	76
Beach v. Eureka Traction Co. (203 S. W. 834) .....	542	El. L. Bruce Co. v. Yax (199 S. W. 535) ..	480
Blackburn v. State (205 S. W. 654) .....	388	Farrell v. Steward (204 S. W. 423) ....	*617
Bluthenthal v. State (204 S. W. 602) .....	*617	Gibson v. State (205 S. W. 898) .....	520
Bottrell v. Hollipeter (204 S. W. 843) .....	315	Gramlich v. State (204 S. W. 848) .....	243
Bowman v. Sims (205 S. W. 820) .....	450	Greene County v. Clay County (205 S. W. 709) .....	301
Breckenridge & Brashears v. Hearne Timber Co. (204 S. W. 981) .....	31	Hall v. Harris (206 S. W. 36) .....	586
Bruce Co. v. Yax (199 S. W. 535) .....	480	Halliburton v. Brinkley (204 S. W. 213) ..	592
Brunson v. Cromwell (204 S. W. 303) .....	*617	Hargis v. Lawrence (204 S. W. 755) .....	321
Burton v. State (203 S. W. 1023) .....	164	Hawthorne v. State (204 S. W. 841) .....	247
Burton v. State (206 S. W. 51) .....	612	Heldman Clothing Co. v. Oates (204 S. W. 1142) .....	252
Burton v. Wilson (205 S. W. 655) .....	269	Hine v. Brown (205 S. W. 657) .....	393
Bush v. Bush (205 S. W. 895) .....	512	Holland v. Duke (205 S. W. 648) .....	372
Cady v. Pack (205 S. W. 819) .....	445	Holloway v. Eagle (205 S. W. 113) .....	206
Cain v. Collier (205 S. W. 651) .....	293	Holmes v. State (204 S. W. 846) .....	187
Campbell-Thorpe Grocer Co. v. Watkins (205 S. W. 826) .....	433	Hout v. Harvey (204 S. W. 600) .....	102
Carty v. State (204 S. W. 207) .....	169	Hughes v. Special School Dist. No. H. of Haynes (205 S. W. 824) .....	454
Case Threshing Mach. Co. v. Southwestern Veneer Co. (205 S. W. 978) .....	607	J. I. Case Threshing Mach. Co. v. Southwestern Veneer Co. (205 S. W. 978) ..	607
Causey v. Wolfe (204 S. W. 977) .....	9	Johnson v. State (205 S. W. 646) .....	377
Chicago, R. I. & P. R. Co. v. White (206 S. W. 990) .....	618	Jones v. Phillippe (206 S. W. 40) .....	578
Chipman v. Perdue (205 S. W. 892) .....	559	Jonesboro, L. C. & E. R. Co. v. Kirksey (204 S. W. 208) .....	*617
Clark v. State (205 S. W. 975) .....	569	J. W. Wheeler & Co. v. Fitzpatrick (205 S. W. 302) .....	117
Cravens & Boren v. Barr (204 S. W. 618) ..	*617	Kable v. Carey (204 S. W. 748) .....	137
Dalton v. Bradley Lumber Co. (205 S. W. 695) .....	392	Kindricks v. Machin (205 S. W. 815) ....	459
Daniel v. Doyle (204 S. W. 210) .....	547		

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

135 ARK.—Continued.		Page		Page
Lacey v. State (205 S. W. 814).....	470	Rix v. Peters (204 S. W. 845).....	198	
Lamb v. State (205 S. W. 653).....	275	Roach v. A. D. Malone Mercantile Co.		
Lancaster v. Kaler (204 S. W. 854).....	*617	(204 S. W. 971).....	69	
Lane v. Cook (205 S. W. 887).....	528	Robinson v. Citizens' Bank of Pettigrew		
Lane v. Jackson (205 S. W. 650).....	384	(204 S. W. 615).....	308	
Laramore v. Radford (205 S. W. 884).....	494	Rushing v. Horner (204 S. W. 1145).....	201	
Ledwidge v. Arkansas Nat. Bank (205 S.				
W. 808).....	420	St. Louis, I. M. & S. R. Co. v. Road Im-		
Lee v. Bondimer (204 S. W. 307).....	*617	provement Dist. No. 1 of Jackson Coun-		
Local Union No. 313, Hotel & Restaurant		ty (204 S. W. 602).....	132	
Employees International Alliance v. Sta-		St. Louis Southwestern R. Co. v. Compton		
thakis (205 S. W. 450).....	86	(205 S. W. 884).....	563	
Lowery v. State (203 S. W. 838).....	159	St. Louis Southwestern R. Co. v. Owings		
		(204 S. W. 1146).....	56	
McClain v. McFarlane (206 S. W. 38)....	602	Schirmer v. Hallman (204 S. W. 606)....	5	
McLain v. Keel (205 S. W. 894).....	496	Sisemore v. State (204 S. W. 626).....	179	
McMahan v. Ruble (204 S. W. 746).....	83	Smith v. Glover (205 S. W. 891).....	531	
Marker v. East Arkansas Lumber Co. (205		Smith v. Spillman (205 S. W. 107).....	279	
S. W. 818).....	435	Spadra Creek Coal Co. v. Callahan (206		
May v. State (205 S. W. 807).....	400	S. W. 991).....	617	
Mobley v. State (205 S. W. 827).....	475	Stanley v. Smith (205 S. W. 889).....	502	
Monteith v. Honey (205 S. W. 812).....	407	State v. Brown (204 S. W. 209).....	166	
Moore v. First Nat. Bank of Jonesboro		State v. Embrey (204 S. W. 1139).....	262	
(205 S. W. 902).....	369	State v. Esmond (204 S. W. 210).....	168	
Moore v. State (203 S. W. 835).....	*617	State v. Taylor (205 S. W. 104).....	232	
Murrey v. Little Rock Chamber of Com-		Stone v. Mayo (204 S. W. 751).....	127	
merce (204 S. W. 604).....	38			
Mustin v. Brain (204 S. W. 621).....	98	Taylor v. King (204 S. W. 614).....	43	
		Thompson v. Mayo (204 S. W. 747).....	143	
N. M. Uri & Co. v. McCroskey (205 S. W.		Turner v. State (205 S. W. 659).....	381	
976).....	537			
Oakes v. State (205 S. W. 305).....	221	United States Fidelity & Casualty Co. v.		
Oates v. Cypress Creek Drainage Dist.		St. Louis, I. M. & S. R. Co. (204 S. W.		
(205 S. W. 293).....	149	416).....	1	
		Uri & Co. v. McCroskey (205 S. W. 976)	537	
Patrick v. State (204 S. W. 852).....	173			
Patterson v. Collison (204 S. W. 753)....	105	Wallace v. Hill (205 S. W. 699).....	353	
Porter v. City of Stuttgart (204 S. W. 607)	48	Wapponocca Outing Club v. Road Imp.		
Price v. Hartzell (205 S. W. 829).....	440	Dist. No. 3 (204 S. W. 840).....	196	
Puckett v. Glendenning (205 S. W. 454)	551	Ward v. State (204 S. W. 971).....	259	
		Wells v. Shepard (205 S. W. 806).....	466	
Raymond v. Boyd (205 S. W. 708).....	265	Wheeler & Co. v. Fitzpatrick (205 S. W.		
Raybourn v. Kirk (204 S. W. 611).....	*617	302).....	117	
Ribelin v. Wilks (205 S. W. 977).....	599	Whorton v. Hawkins (205 S. W. 901)....	507	
Rice Belt Tel. Co. v. Malcomb (206 S. W.		Wilks v. Mutual Aid Union (204 S. W. 599)	112	
990).....	618	Wolf v. State (206 S. W. 39).....	574	
Rickman v. State (205 S. W. 711).....	298	Zinn & Cheney v. State (205 S. W. 704)	842	

\* Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

## VOL. 184, KENTUCKY REPORTS

Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	210	793	94	211	420	193	211	562	312	212	145	437	212	437	573
2	211	136	97	211	567	200	211	761	315	211	584	443	211	758	582
9	210	947	105	211	412	207	211	566	319	211	747	447	212	117	587
11	211	185	106	211	582	209	211	735	331	211	756	451	212	459	581
14	211	190	109	211	561	211	211	580	334	211	756	455	212	595	598
17	211	189	112	211	570	215	211	736	335	211	849	461	212	423	600
20	211	198	114	211	421	221	211	748	342	212	113	466	212	423	605
25	211	196	119	211	425	227	211	738	348	211	874	477	212	119	609
30	211	200	126	211	556	237	211	577	354	212	142	481	212	679	615
36	211	192	130	211	419	244	211	765	359	212	123	484	210	667	638
38	211	413	131	211	557	254	211	571	367	212	104	487	210	960	653
49	211	407	133	211	553	255	210	945	375	212	106	493	212	131	664
54	211	193	139	211	572	260	211	867	370	211	872	517	212	110	670
58	211	203	150	211	403	263	211	866	381	212	422	523	212	127	674
70	211	409	155	209	848	268	211	869	384	211	773	529	212	115	679
74	211	411	161	211	855	274	211	734	396	212	121	533	212	130	684
77	211	195	164	211	405	277	211	770	400	214	791	536	213	546	689
79	211	423	168	211	428	284	211	746	411	212	456	540	212	434	694
83	211	208	182	211	560	287	211	868	417	212	453	548	212	573	700
89	211	208	185	211	558	292	211	852	424	212	108	559	212	587	704
91	211	418	189	211	759	300	211	860	429	212	430	571	212	421	706

## VOL. 184, KENTUCKY REPORTS

	Page		Page
Adams Exp. Co. v. Young (211 S. W. 407).....	49	Edmonson County Board of Sup'rs v. Parsley (211 S. W. 195).....	77
Alexander v. Lewis (212 S. W. 440).....	679	Edmonson County Board of Sup'rs v. Vincent (211 S. W. 195).....	77
Anderson v. Van Rensselaer (211 S. W. 553).....	133	Eubanks v. Commonwealth (211 S. W. 556).....	126
Axton v. Axton (213 S. W. 548).....	615		
Bailey v. Bailey (212 S. W. 595).....	455	Faulkner's Adm'r v. Louisville & N. R. Co. (212 S. W. 130).....	533
Bailey v. Waddy (212 S. W. 459).....	451	Fish v. Fish (212 S. W. 586).....	700
Baker v. Commonwealth (211 S. W. 566).....	207	Fletcher v. Johnson (212 S. W. 573).....	548
Bard v. Batsell (211 S. W. 185).....	11	Frey v. Soper (213 S. W. 546).....	536
Bickel v. Henry Bickel Co. (212 S. W. 602).....	582		
Brown's Ex'x v. Greene (211 S. W. 860).....	300	Galion Iron Works & Mfg. Co. v. Bullitt County (213 S. W. 200).....	805
Burton v. Burton (211 S. W. 869).....	268	Gardner v. Commercial Sec. Co. (211 S. W. 405).....	184
		Girdler v. Girdler (211 S. W. 857).....	260
Cain's Adm'r v. Hubble (211 S. W. 413).....	38	Golden v. Riverside Coal & Timber Co. (211 S. W. 761).....	200
Caudil v. Wagoner (212 S. W. 422).....	381	Goodan v. Goodan (211 S. W. 423).....	79
Central Trust Co. of Owensboro v. Creel (211 S. W. 421).....	114	Gravitt v. Commonwealth (212 S. W. 430).....	429
Chesapeake & O. R. Co. v. Coleman (210 S. W. 947).....	9	Gray v. Louisville R. Co. (211 S. W. 560).....	182
Chesapeake & O. R. Co. v. Commonwealth (210 S. W. 793).....	1	Greene v. E. H. Taylor, Jr., & Sons (212 S. W. 925).....	739
Chicago, M. & G. R. Co. v. Stahr (212 S. W. 115).....	529	Greene v. Federal Coal Co. (212 S. W. 580).....	664
Christen v. Christen (213 S. W. 189).....	822	Greene v. Louisville R. Co. (211 S. W. 418).....	91
Cincinnati, N. O. & T. P. R. Co. v. Burton (211 S. W. 186).....	2	Greenwell v. Whitehead (211 S. W. 411).....	74
Clarke v. Blue Licks Springs Co. (213 S. W. 222).....	827		
Clore v. Clore (211 S. W. 208).....	83	Hampton v. Rider (211 S. W. 756).....	334
Clore v. Clore (211 S. W. 208).....	89	Hardin v. Horn (212 S. W. 573).....	548
Coleman v. McIntosh (211 S. W. 872).....	370	Harkins v. Brown (211 S. W. 584).....	315
Colson v. Hillman Land & Iron Co. (211 S. W. 189).....	17	Harrison v. Perry (212 S. W. 911).....	722
Commonwealth v. Cannut (211 S. W. 570).....	112	Hartford Accident & Indemnity Co. v. Davis (210 S. W. 950).....	487
Commonwealth v. Metcalfe (212 S. W. 434).....	540	Hauger v. International Trading Co. (214 S. W. 438).....	794
Conrad v. Poole (211 S. W. 874).....	348	Hendrix v. Lewis (212 S. W. 569).....	727
Consolidated Coal Co. v. Spradlin (211 S. W. 735).....	209	Higgins v. Utterback (211 S. W. 412).....	105
Continental Nat. Bank of Louisville v. McCampbell (213 S. W. 193).....	658	Hoefflin v. Wilkerson (210 S. W. 667).....	484
Copley v. Commonwealth (211 S. W. 558).....	185	Holt v. Rudolph (211 S. W. 855).....	161
Crawford v. Staples (212 S. W. 119).....	477	Holton v. Jackson (212 S. W. 587).....	559
Cumberland Grocery Co. v. Harwood-Barley Mfg. Co. (211 S. W. 409).....	70	Horn v. Adams (212 S. W. 108).....	424
Cumberland R. Co. v. Girdner (212 S. W. 105).....	375	Howard v. Stearns Coal & Lumber Co. (212 S. W. 463).....	598
		Huff v. Woosley (212 S. W. 597).....	605
Daniel v. Shaver (212 S. W. 913).....	674	Hughes v. Cleveland Jewish Orphan Asylum (212 S. W. 428).....	461
Dempsey v. Cassady (212 S. W. 573).....	548	Hunter v. Keightley (213 S. W. 201).....	835
De Witt v. Commonwealth (212 S. W. 437).....	437	Hurst v. Southern R. Co. (212 S. W. 461).....	684
Edmonson County Board of Sup'rs v. Logan (211 S. W. 195).....	77	Inter-Southern Life Ins. Co. v. Duff (211 S. W. 738).....	227

184 KY.—Continued.		Page		Page
Johnson v. Johnson (211 S. W. 557).....	131		Phillips v. Williamson (212 S. W. 121)...	396
Justice v. Justice (211 S. W. 419).....	130		P. Lorrillard Co. v. Scott (212 S. W. 145)...	312
Keeton v. Tipton (212 S. W. 909).....	704		Prewitt v. Wilborn (212 S. W. 442).....	638
Kentucky Coal & Timber Development Co. v. Conley (211 S. W. 734).....	274		Prudential Ins. Co. of America v. Ragan (212 S. W. 123).....	359
Kentucky Fluorspar Co. v. Pierce's Ex'rs (213 S. W. 542).....	573		Ratliffe's Adm'r v. Chesapeake & O. R. Co. (211 S. W. 420).....	94
Kentucky Lumber & Mill Work Co. v. Ken- tucky Title Sav. Bank & Trust Co. (211 S. W. 765).....	244		Rau v. Rowe (213 S. W. 226).....	841
Kirkpatrick v. Lebus (211 S. W. 572)....	139		Ray v. Commonwealth (212 S. W. 908)...	800
Klotz v. Cook (212 S. W. 917).....	735		Ray v. Commonwealth Life Ins. Co. (211 S. W. 736).....	215
Klotz v. Fidelity & Deposit Co. of Mary- land (212 S. W. 917).....	735		Reichert v. Ellis Ferry Co. (211 S. W. 403)	150
Krypton Coal Co. v. Eversole (212 S. W. 421) .....	571		Rice v. Thomas (211 S. W. 428).....	168
Lamberg v. Central Consumers' Co. (211 S. W. 746).....	284		Roark v. Bank of Fountain Run (211 S. W. 561).....	109
Larue v. Barbee (212 S. W. 142).....	354		Robertson v. Mechanics' Trust & Savings Bank (211 S. W. 858).....	287
Leigh Banana Case Co. v. Paducah Spoke Co. (211 S. W. 192).....	36		Rosen v. Galizio (212 S. W. 104).....	367
Lexington & E. R. Co. v. Napier (211 S. W. 756).....	331		Rudd v. Rudd (214 S. W. 791).....	400
Long Fork R. Co. v. Sizemore (211 S. W. 183).....	54		Samuels v. City of Clinton (211 S. W. 567)	97
Lorrillard Co. v. Scott (212 S. W. 145)...	312		Sanders v. Sanders (211 S. W. 425).....	119
Louisville Property Co. v. Rose (211 S. W. 743).....	221		Sauer v. Taylor's Ex'r (212 S. W. 583)...	609
Louisville & N. R. Co. v. City of Covington (213 S. W. 568).....	811		Schmidt v. City of Newport (212 S. W. 113) .....	342
Louisville & N. R. Co. v. Scott's Adm'r (211 S. W. 747).....	319		Security Life Ins. Co. of America v. Dun- can's Adm'r (211 S. W. 758).....	443
Louisville & N. R. Co. v. Staebler (212 S. W. 919).....	730		Simon v. Webster (211 S. W. 866).....	262
Lowther-Kaufman Oil & Coal Co. v. Gun- nell (212 S. W. 593).....	587		Spacey v. Close (212 S. W. 127).....	523
McCormick v. Security Trust Co. of Lex- ington (211 S. W. 196).....	25		Standard Accident Ins. Co. v. Smith (209 S. W. 848).....	155
McGowan v. Wells' Trustee (213 S. W. 573).....	772		Standifer v. Combs (212 S. W. 921).....	708
Martin v. Mathis (211 S. W. 193).....	20		Stanley v. Commonwealth (211 S. W. 577)	237
May v. Chesapeake & O. R. Co. (212 S. W. 131).....	493		State Text-Book Commission v. Weathers (213 S. W. 207).....	748
Meeke v. Ward (211 S. W. 200).....	30		Stokes v. Watts (213 S. W. 188).....	803
Meisberg v. Bryant (212 S. W. 600).....	600		Superior Coal Co. v. Runyon (210 S. W. 945) .....	255
Miller v. Powers (212 S. W. 453).....	417		Tartar v. Skaggs (211 S. W. 203).....	58
Millett's Ex'r v. Commonwealth (211 S. W. 562).....	193		Terhune v. Louisville & N. R. Co. (212 S. W. 915).....	670
Milliken v. Equitable Life Ins. Co. (212 S. W. 605).....	694		Thompson v. Taylor (211 S. W. 582).....	106
Milliken v. Haner (212 S. W. 605).....	694		Town of Whitley v. Stephens (211 S. W. 770) .....	277
Milliken v. Metropolitan Life Ins. Co. (212 S. W. 605).....	694		Transylvania Casualty Ins. Co. v. Paritz (213 S. W. 195).....	807
Neutzel v. Ryans (211 S. W. 852).....	292		Tutt v. Smith (212 S. W. 920).....	732
Nichols v. Logan (213 S. W. 181).....	711		United States Fidelity & Guaranty Co. v. Davis (210 S. W. 950).....	487
Nichols & Shepard Co. v. Dudderar (212 S. W. 923).....	689		Utterback v. Houser (213 S. W. 191).....	789
Nix v. Commonwealth (Stanley v. Common- wealth, 211 S. W. 577).....	237		Venters v. Potter (212 S. W. 117).....	447
Nunan v. Bennett (212 S. W. 570).....	591		Warner v. Commonwealth (211 S. W. 759)	189
Ohio Valley Oil & Gas Co. v. Irvin Develop- ment Co. (212 S. W. 110).....	517		Warren Oil & Gas Co. v. Gardner (212 S. W. 456).....	411
Phelps v. Stoner's Adm'r (212 S. W. 423)..	466		Weaver v. Commonwealth (211 S. W. 570)	112
			Wells v. Derrickson (211 S. W. 773).....	384
			West Kentucky Coal Co. v. Smithers (211 S. W. 580).....	211
			White v. Nichols (211 S. W. 849).....	335
			White v. Tisdale's Ex'r (211 S. W. 571)...	254
			Wickliffe v. First Nat. Bank of Central City (213 S. W. 581).....	783
			Wolfe v. Bailey (212 S. W. 579).....	481
			Wylie v. Commonwealth (211 S. W. 190)	14

## VOL. 200, MISSOURI APPEAL REPORTS

Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	204	966	150	202	624	233	204	735	344	206	261	436	200	74	526
7	204	957	159	202	589	238	204	730	363	206	244	442	207	883	533
29	197	850	162	204	34	243	204	1125	372	208	250	450	207	840	541
33	206	278	169	204	1119	255	206	411	383	207	74	452	207	290	560
60	206	529	180	205	96	269	206	405	387	207	76	460	207	281	568
66	206	266	192	204	821	279	206	393	392	208	494	468	207	241	585
87	206	286	199	204	553	284	206	422	397	207	78	477	207	249	583
109	206	419	206	204	408	282	206	253	405	206	904	482	207	283	599
117	201	1150	209	204	962	303	206	237	422	208	638	496	207	245	603
127	203	825	218	204	919	317	206	257	427	208	497	506	207	852	607
140	202	1067	226	204	1123	333	206	247	433	208	479				

## VOL. 200, MISSOURI APPEAL REPORTS

	Page		Page
American Automobile Ins. Co. v. United Rys. Co. of St. Louis (206 S. W. 257)	317	Kansas City v. Mullins (209 S. W. 558) ..	639
Bank of Seneca v. Morrison (204 S. W. 1119) ..	169	Kearse v. Seyb (209 S. W. 635) ..	645
Beaty v. Cruce (204 S. W. 553) ..	199	Keleher v. Johnson (206 S. W. 261) ..	344
Bequette v. Pittsburgh Plate Glass Co. (207 S. W. 852) ..	506	Kemper v. Adams (208 S. W. 632) ..	607
Blanchon v. Kellerstrass Distilling Corporation (208 S. W. 484) ..	610	Kirn v. Harvey (208 S. W. 479) ..	433
Bock v. Rinderknecht (207 S. W. 245) ..	496	Levering Inv. Co. v. Lewis (208 S. W. 874) ..	679
Bracht v. San Antonio & A. P. R. Co. (209 S. W. 579) ..	655	Lillard v. Lierley (202 S. W. 1057) ..	140
Briscoe v. Chicago & A. R. Co. (208 S. W. 885) ..	691	Locher v. New York Life Ins. Co. (208 S. W. 862) ..	659
Cedarland v. Thompson (209 S. W. 554) ..	618	Luck Const. Co. v. Chicago & A. R. Co. (207 S. W. 840) ..	450
Cheek v. National Life Ins. Co. of United States of America (207 S. W. 882) ..	533	Luther v. Kinion (202 S. W. 589) ..	159
Christopher & Simpson Architectural Iron & Foundry Co. v. E. A. Steininger Const. Co. (205 S. W. 278) ..	33	McAlister v. Graham (206 S. W. 393) ..	279
Cook v. Smith (204 S. W. 919) ..	218	McGolderick v. Wabash R. Co. (200 S. W. 74) ..	436
Cotton Lumber Co. v. La Crosse Lumber Co. (204 S. W. 957) ..	7	Mendell v. Howard (208 S. W. 497) ..	427
Deibel v. Jefferson Bank (207 S. W. 869) ..	541	Milster v. Milster (209 S. W. 620) ..	603
Dickensheet v. Chouteau Mining Co. (202 S. W. 624) ..	150	Mitchell v. Joplin Nat. Bank (204 S. W. 1125) ..	243
East St. Louis Cotton Oil Co. v. Bank of Steele (206 S. W. 96) ..	180	O'Hara v. Lamb Const. Co. (206 S. W. 253) ..	292
Farley v. Aetna Life Ins. Co. (207 S. W. 281) ..	460	Peter Hauptmann Tobacco Co. v. Unverferth (207 S. W. 283) ..	482
Freeland v. Burdick (204 S. W. 1123) ..	226	Peters v. Lusk (206 S. W. 250) ..	372
Green v. United Rys. Co. of St. Louis (206 S. W. 237) ..	303	Picotte v. Mills (203 S. W. 825) ..	127
Griffith v. Mutual Protective League (206 S. W. 286) ..	87	Poplin v. Brown (205 S. W. 411) ..	255
Gutweller v. Lundquist (207 S. W. 838) ..	526	Probst v. St. Louis Basket & Box Co. (207 S. W. 891) ..	568
Haffner v. Tainter (204 S. W. 966) ..	1	Quirk v. Metropolitan St. R. Co. (210 S. W. 103) ..	585
Harnden v. Southern Surety Co. (204 S. W. 34) ..	162	Quirk v. Metropolitan St. R. Co. (210 S. W. 106) ..	593
Harris v. Millikan (203 S. W. 633) ..	599	Redd v. American Cent. Life Ins. Co. (207 S. W. 74) ..	383
Hauptmann Tobacco Co. v. Unverferth (207 S. W. 283) ..	482	Reinert Bros. Const. Co. v. Tootle (206 S. W. 422) ..	284
Hereford v. Mystic Workers of the World (207 S. W. 76) ..	387	Riffe v. Wabash R. Co. (207 S. W. 78) ..	397
Horne v. People's Sewer Co. (204 S. W. 735) ..	233	St. Louis Police Relief Ass'n v. Houlehin (207 S. W. 880) ..	560
Hull v. Chicago, B. & Q. R. Co. (208 S. W. 494) ..	392	Shoemaker v. Johnson (204 S. W. 962) ..	209
Independent Breweries Co. v. Lawton (204 S. W. 730) ..	238	Smith v. Bailey (209 S. W. 945) ..	627
Inter-State Grocer Co. v. Taylor (204 S. W. 408) ..	205	Smith-Mann Grain Co. v. Bailey (209 S. W. 945) ..	627
		Speer v. Home Bank of Forest City (206 S. W. 405) ..	269
		State v. Chicago, M. & St. P. R. R. (206 S. W. 419) ..	109
		State v. Turlington (204 S. W. 821) ..	192
		State ex rel. Bates v. Mackin (208 S. W. 638) ..	422
		State ex rel. Christine v. Taylor (206 S. W. 247) ..	333
		State ex rel. Mosberg v. Owens (207 S. W. 241) ..	468

200 MO. APP.—Continued.		Page			Page
State ex rel. Pollard v. Brasher (201 S. W. 1150).....		117	Thompson v. American Cent. Life Ins. Co. (207 S. W. 74).....		383
State ex rel. Reifsnider v. Goldstein (205 S. W. 529).....		60	Warren v. Crawford Wilson Coal Co. (207 S. W. 883).....		442
State ex rel. Short v. Hardy (206 S. W. 904).....		405	Warren v. Ray County Coal Co. (207 S. W. 883).....		442
Stauffer v. Stauffer (207 S. W. 240).....		477	Webers, In re (197 S. W. 850).....		29
Stevens v. Kansas City Light & Power Co. (208 S. W. 630).....		651	Webers, In re (206 S. W. 244).....		368
Strong v. Sperling (205 S. W. 266).....		66	Wehrenbrecht v. Wehrenbrecht (207 S. W. 290).....		452

## VOL. 275, MISSOURI REPORTS

Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	204	267	60	204	385	169	204	914	282	205	49	412	205
4	204	185	67	204	386	185	204	501	298	204	806	451	205
5	204	187	72	204	531	196	204	802	325	204	897	459	205
17	204	516	84	204	399	201	204	497	339	205	196	476	204
35	204	257	95	204	1090	212	204	910	380	204	723	483	205
41	204	269	108	204	385	227	204	1076	384	204	723	501	204
47	204	513	113	204	1093	249	204	508	391	204	721	509	204
59	204	500	128	204	1100	268	204	506	397	205	32	514	205
												16	590

## VOL. 275, MISSOURI REPORTS

		Page			Page
Audrain County, State ex rel., v. Hackmann (205 S. W. 12).....		584	H. D. Williams Cooperage Co. v. Quercus Lumber Co. (204 S. W. 185).....		4
Barber v. Nunn (205 S. W. 14).....		565	Hiemenz v. Harper (204 S. W. 723).....		380
Bell v. George (204 S. W. 516).....		17	Inter-River Drainage Dist. v. Ham (204 S. W. 723).....		384
Burke v. Dromey (205 S. W. 32).....		397	John G. Kupferle Foundry Co. v. St. Louis Merchants' Bridge Terminal R. Co. (205 S. W. 57).....		451
Burke v. Murphy (205 S. W. 32).....		397	Kansas City Bolt & Nut Co. v. Kansas City Light & Power Co. (204 S. W. 1074).....		529
Burton v. Chicago & A. R. Co. (204 S. W. 501).....		185	Kelly, State ex rel., v. Hackmann (205 S. W. 161).....		636
Bush, State ex rel., v. Public Service Commission (204 S. W. 395).....		60	Koehler v. Rowland (205 S. W. 217).....		573
Carter v. Metropolitan Life Ins. Co. (204 S. W. 399).....		84	Kupferle Foundry Co. v. St. Louis Merchants' Bridge Terminal R. Co. (205 S. W. 57).....		451
Chicago & A. R. Co., State ex rel., v. Public Service Commission (204 S. W. 531).....		72	Lamkin, State ex rel., v. Hackmann (204 S. W. 513).....		47
City of Fulton v. Public Service Commission (204 S. W. 386).....		67	Laughlin v. Kansas City Southern R. Co. (205 S. W. 3).....		450
City of St. Louis v. Allen (204 S. W. 1083).....		501	Lawson v. Cunningham (204 S. W. 1100).....		128
City of Sedalia, State ex rel., v. Public Service Commission (204 S. W. 497).....		201	Lawson v. Lipscomb (204 S. W. 1100).....		128
City of University City v. Coyle's Estate (205 S. W. 631).....		667	Lige v. Chicago, B. & Q. R. Co. (204 S. W. 508).....		249
City of University City v. Schall (205 S. W. 631).....		667	Ludlow-Saylor Wire Co. v. Wollbrinck (205 S. W. 196).....		339
Cone v. Donovan (204 S. W. 1073).....		557	McAllister, State ex inf., v. Consolidated School Dist. No. 2 of Platte County (204 S. W. 1098).....		522
Cone v. Donovan's Estate (204 S. W. 1073).....		557	McClintock, State ex rel., v. Guinotte (204 S. W. 806).....		298
Critzer, Matter of (205 S. W. 16).....		514	McMillan & Parker v. Ball & Gunning Milling Co. (204 S. W. 257).....		1
Danciger & Co., State ex rel., v. Public Service Commission (205 S. W. 36).....		483	Miller v. Bifton (204 S. W. 257).....		35
Dunklin County, State ex rel., v. Blakemore (205 S. W. 626).....		695	Miller v. Lloyd (204 S. W. 257).....		35
Electric Co. of Missouri, State ex rel., v. Atkinson (204 S. W. 897).....		325	Mills, State ex rel., v. Fleming (204 S. W. 1085).....		509
Ennis v. Dromey (Burke v. Murphy, 205 S. W. 32).....		397	Missouri Pac. R. Co., State ex rel., v. Public Service Commission (204 S. W. 395).....		60
Ennis v. Murphy (205 S. W. 32).....		397			
Fulton, City of, v. Public Service Commission (204 S. W. 386).....		67			

275 MO.—Continued.		Page		Page
M. O. Danciger & Co., State ex rel., v. Public Service Commission (205 S. W. 36).....	483		State ex rel. Mills v. Fleming (204 S. W. 1085) .....	509
Murphy v. Barron (205 S. W. 49).....	282		State ex rel. Missouri Pac. R. Co. v. Public Service Commission (204 S. W. 395)....	60
Oakley v. Richards (204 S. W. 505).....	266		State ex rel. M. O. Danciger & Co. v. Public Service Commission (205 S. W. 36) .....	483
Perkins, State ex rel., v. Long (204 S. W. 914) .....	169		State ex rel. Perkins v. Long (204 S. W. 914) .....	169
Ridgeway's Estate v. Metropolitan Life Ins. Co. (204 S. W. 399).....	84		State ex rel. Smalley v. Reynolds (204 S. W. 1093).....	113
Rose v. Springfield & Brookline Special Road Dist. (205 S. W. 54).....	590		State ex rel. Smalley v. Sterns Tire & Tube Co. (State ex rel. Wurdeman v. Reynolds, 204 S. W. 1093).....	113
Rottink v. Nagle (204 S. W. 802).....	196		State ex rel. Waterworth v. Clark (204 S. W. 1090).....	95
St. Charles Savings Bank v. Denker (205 S. W. 208).....	607		State ex rel. Waterworth v. Harty (204 S. W. 500).....	59
St. Louis, City of, v. Allen (204 S. W. 1083).....	501		State ex rel. Watts Engineering Co. v. Public Service Commission (204 S. W. 385) .....	108
Saunders v. Hackley & Hume Co. (204 S. W. 269).....	41		State ex rel. Wurdeman v. Reynolds (204 S. W. 1093).....	113
Sedalia, City of, State ex rel., v. Public Service Commission (204 S. W. 497)....	201		State ex rel. Wurdeman v. Sterns Tire & Tube Co. (204 S. W. 1093).....	113
Shanklin v. Boyce (204 S. W. 187).....	5		Townsend v. Schaden (204 S. W. 1076)....	227
Shields v. Cunningham (204 S. W. 1100)...	128		Townsend v. Townsend's Estate (204 S. W. 1076) .....	227
Shields v. Lipscomb (Lawson v. Cunningham, 204 S. W. 1100).....	128		University City v. Coyle's Estate (205 S. W. 631).....	667
Smalley, State ex rel., v. Reynolds (204 S. W. 1093).....	113		University City v. Schall (205 S. W. 631)...	667
Smalley, State ex rel., v. Sterns Tire & Tube Co. (State ex rel. Wurdeman v. Reynolds, 204 S. W. 1093).....	113		Waterworth, State ex rel., v. Clark (204 S. W. 1090).....	95
State v. Allen (204 S. W. 721).....	391		Waterworth, State ex rel., v. Harty (204 S. W. 500).....	59
State v. Koontz (204 S. W. 1086).....	475		Watts Engineering Co., State ex rel., v. Public Service Commission (204 S. W. 385) .....	108
State v. Stemmons (205 S. W. 8).....	544		Webers, In re (205 S. W. 620).....	677
State ex inf. McAllister v. Consolidated School Dist. No. 2 of Platte County (204 S. W. 1098).....	522		White v. Herminghausen (205 S. W. 624).....	687
State ex rel. Audrain County v. Hackmann (205 S. W. 12).....	534		Wigginton v. Rule (205 S. W. 168).....	412
State ex rel. Bush v. Public Service Commission (204 S. W. 395).....	60		Williams Cooperage Co. v. Quercus Lumber Co. (204 S. W. 185).....	4
State ex rel. Chicago & A. R. Co. v. Public Service Commission (204 S. W. 531)....	72		Wright v. City of Joplin (204 S. W. 910)...	212
State ex rel. City of Sedalia v. Public Service Commission (204 S. W. 497).....	201		Wurdeman, State ex rel., v. Reynolds (204 S. W. 1093).....	113
State ex rel. Dunklin County v. Blake-more (205 S. W. 626).....	695		Wurdeman, State ex rel., v. Sterns Tire & Tube Co. (204 S. W. 1093).....	113
State ex rel. Electric Co. of Missouri v. Atkinson (204 S. W. 897).....	325		Zinke v. Knights of Maccabees of the World (205 S. W. 1).....	660
State ex rel. Kelly v. Hackmann (205 S. W. 161).....	636			
State ex rel. Lamkin v. Hackmann (204 S. W. 513).....	47			
State ex rel. McClintock v. Guinotte (204 S. W. 806).....	298			





